IALS 2013 Annual Meeting Papers

Law Schools as Contributors to Public Policy on Human Rights

Abstracts

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- Alfredo Vitolo - Universidad de Buenos Aires, Argentina
- Diego Werneck – Getulio Vargas Foundation Rio de Janeiro, Brazil

Marcelo Alegre – Universidad de Buenos Aires, Argentina
A human rights institution is one devoted to respect and promote the value of human rights. Can Law Schools become human rights institution? Would that be good? Or, in other words, wouldn't being a human rights institution compromise the core academic values of Law Schools?

Aishah Bidin – National University of Malaysia, Malaysia
The United National Declaration on Human Rights represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights. Within this framework, Law schools that specializes in training and producing potential lawyers can play a pivotal role in their function to advance the norms of international human rights law through research, advocacy and public education. Various aspects of issues on human rights that can be integrated in the curriculum included among others the following: Regional Human Rights, Democracy, Racism, and Women's Rights, Rights of Indigenous People, Internet and Child Rights. Clinical programs such as Klinik Guaman in UKM in which students and faculty members are created to conduct on ground investigations of basics issues and complaints of the local community. This paper will also review the current approach and role of the Faculty of Law of University Kebangsaan Malaysia in promoting and advocating public policy on human rights among law students and the public. This is done by way of integration of various subjects at undergraduate and postgraduate level such as international humanitarian law, nuclear law and others. In

addition UKM also strive to promote and disseminate public policy matters via way of linkages with NGOs by research, advocacy and public education.

Mary Anne Bobinski & Kari Streelasky - University of British Columbia, Canada
Law schools have complex missions encompassing at least three important goals: (1) providing students with knowledge about law that is relevant to their future roles as lawyers, judges, and leaders in society; (2) fostering research into law and the role of law in society; and (3) facilitating public understanding and engagement with legal issues and law reform. See, e.g., UBC Law Strategic Plan, available at: http://www.law.ubc.ca/strategic_plan/index.html. Law schools can promote human rights, domestically and internationally, in each of these three roles. In this brief paper, we will outline some law school programs related to the promotion of human rights in Canada and the U.S. We also describe some of the benefits and risks of law school efforts in these areas. Finally, the paper will briefly highlight questions or issues that law schools interested in enhancing their engagement with human rights issues might consider in relation to implementing similar programs.

Thiago Bottino do Amaral – Getulio Vargas Foundation Rio de Janeiro, Brazil
The Brazilian debate on human rights is highly judicialized. Unlike other countries, major advances in public policy on human rights were obtained through lawsuits filed before the Supreme Court. The Brazilian constitution brought many rights that have not been implemented by the Executive and Legislative branches. Upon the initiative of NGOs, political parties and an independent Attorney General, the Supreme Court was urged to act on behalf of human rights. FGV DIREITO RIO has been following and studying the judicial prominence in public policies. And has also participated actively. FGV DIREITO RIO is the first Law School in the country that offered qualified legal services to NGOs, allowing them to participate as amicus curiae before the Supreme Court. Since 2008, have been advocates of various NGOs on issues of press freedom, gay rights, political rights, prisons to obtain confessions, individual liberties and wiretapping. Our intention is to share experiences and discuss the mistakes and successes of this new model of contribution to public policy on human rights.

Deon Erasmus - Nelson Mandela Metropolitan University, South Africa
Ensuring the basic human rights of the poor: Ethics management training in local government by Law Schools. Delivering of services to poor communities is one of the most important constitutional imperatives of local government. These services aim to provide the poor with basic human rights, such as water, housing and basic health care. Vast amounts of money are made available to supply these services. Due to widespread corruption these funds are stolen or mismanaged. Corruption has a devastating effect on service delivery, with the result that the poor do not benefit from government spending. Although an arsenal of legislation and policies exist to combat corruption, we are losing the fight against corruption. There is a dire need for Law Schools to provide ethics management training to local government officials and councilors in order to combat corruption. During a recent project in the Western Cape Province of South Africa anti-corruption and ethics management programs were presented to local authorities. It became evident that most local authorities have anti-corruption policies in place, but that ethics committees are not operating at all. Law Schools make a vast contribution to public policy regulating the provision of services to the poor. In this way the ideal of human rights for all can become a reality.

Sergio Antonio Silva Guerra - Getulio Vargas Foundation Rio de Janeiro, Brazil
The government has taken numerous forms over the years, with an ever increasing rate of change over time. Clearly, the liberal government of the 18th century differed significantly

from the economic and social interventionist government of the 20th century. Over the past centuries these forms of government have taken on new significance, structures and ways of relating with civil society.

Lawrence Hellman – Oklahoma City University Law School, United States
The essential functions of a law school are teaching, scholarship, and service. Through the normal course of performing these functions, law schools possess the capacity to contribute to the formation of public policy on human rights. This paper provides examples of how law schools can utilize this capacity for the benefit of society.

Tanel Kerikmäe – Tallinn Law School, Estonia
The joint operation of TLS and HRC is a solid sample of balancing ambitions of academia and cultivating social policy. The unique but pragmatic relationship allows HRC to use TLS resources (library, rooms, scholars, self-financing when needed for international funding). The linkage between these two units is intense as the lecturers of TLS also act as experts of human rights at HRC. The law school can benefit of being inspired by real societal problems by using results of monitoring of the human rights situation by HRC that often leads to academic analysis that can be presented to the Government. Yearly report, delivered in three languages and prepared in mutual cooperation is directly influencing societal debates and, therefore public policy. The refugee clinic is an important part of curricula for students (future decision-makers), research on reflection of human rights in media has been clear basis in shaping the attitude of journalists.

Stephanie Macuiba – Southern Illinois University, United States
On September 11, 2001, terrorists attacked and killed thousands of Americans. In the wake of these events, the United States declared a war on terror. Unlike previous terror attacks, the government decided to wage a war instead of try the acts in a traditional criminal manor. Those suspected of being involved with the enemy were rounded up and detained, many indefinitely. Indefinite detention of terrorism suspects is contrary to human rights and against the intent of the law of war. When constructing a solution to indefinite detention at Guantanamo a four point plan should be kept in mind. The United States needs to i) charge those that are chargeable, ii) release those that cannot be charged, iii) change government procedures regarding collection of evidence at time of capture and finally iv) the world should rework the Geneva Conventions in light of new armed conflicts.

Kara Mae Muga Noveda – University of Cebu College of Law, Philippines
The Philippines has yet to sign into a law an act criminalizing acts violating the human right against enforced disappearance. Likewise, the same country has yet to sign the International Convention for the Protection of All Persons from Enforced Disappearance. Nonetheless, the Convention has, no doubt, propelled the awareness of human rights issues in the locale. This study will exemplify this effect and also delve in the local legislative efforts reinforcing this right. To be examined are the provisions of the anti-disappearance bill and its effects on substantive national law. The discussion of this bill comes at the heels of the on-going reconstruction of the criminal law code in the Philippines. This research will be done with the juxtaposition of the recent spate of unresolved high-profile cases concerning violations of the said right.

Caitlin Mulholland – Pontifica Universidad Rio de Janeiro, Brazil
The purpose of this paper is to show how the issue of human rights – and more specifically protection of the human person's dignity – is today considered a valorizing factor in Brazil's constitutional civil system, one that actually prioritizes existential as opposed to patrimonial relations. This conceptual twist is of the utmost importance for the teaching of contemporary civil law, since the disciplines included in the sphere of private-law relations,

specifically those that involve property and contracts, have traditionally been taught as an area exempt from any influences or interests whatsoever, whether humanitarian or existential. For example, in the 19th and much of the 20th century, the disciplines of contracts and property were a fertile field for the full development of individualism and individual liberalism. The perception that a private relation could have its effects limited on account of some solidary interest aimed at protecting the dignity and humanity of one of the parties of that relation is the consequence of the development of a doctrine that we call constitutional civil law.

Adrian Popovici – McGill University, Canada
I am specifically interested in the private law effects of Human Rights when there are recognized in a Charter. What is called the horizontal effect or Drittwirkung. The Quebec experience may be of great interest.

Anna Williams Shavers - University of Nebraska, United States
An interest in human rights can lead to situations where a law professor can have research, teaching and service experiences that contribute to the development of public policy on human rights. This has been my experience with respect to human trafficking. My teaching and research interest in immigration and U.S. Gender Issues led me to develop a teaching and research interest in the convergence of these two areas. This resulted in the development of an International Gender Issues (IGI) course and research in this area. One particular area of concentration has been human trafficking. Along with the many areas in which women are discriminated against that are covered in the IGI course, I cover human trafficking.

Jakub Stelina – Gdansk University, Faculty of Law, Poland
In the countries in transition process, like in Poland, law schools play a very important role as a contributor to Public Policy on Human Rights. First of all throughout the period of communism it was the universities (with the law faculties operating within them) that served as a kind of depositaries for the human right ideas, reminding of the fundamental freedoms each human being is vested in. And still, as the experience from the planting of the democratic system in Poland shows, the law schools are faced with the job of spreading the legal culture based on the human rights idea.

Rebecca Takavadiyi – University of Zimbabwe, Zimbabwe
This essay seeks to explore from a human rights perspective the implications of expanding the African Court's jurisdiction. The analysis looks at whether granting the court criminal jurisdiction will strengthen or weaken human rights on the continent .This discussion will be done in the context of issues of violation of the state's and individual access to justice; the principle of complementarity; right to fair and impartial trial; the principle of state and diplomatic sovereignty and the doctrine of effectiveness. The question will be asked, whether African leaders are genuinely ready to end impunity on the continent or this is a disguise meant to shield their own from international scrutiny? Should we erode human rights in a bid to increase opportunities for justice in Africa or should the African Court complement the International Criminal Court in preventing impunity in international crimes?

Alfredo Vitolo - Universidad de Buenos Aires, Argentina
Should law schools teach human rights? The question is a tricky one. We should first determine what is to be understood by the phrase "teaching human rights" in order to provide a proper answer to the question. In an ideal world, we believe that the teaching of the basic concept of human rights, their scope and contents, the very idea that they are inherent to human nature, the importance of them be respected, etc. should be left mainly outside of law schools, since apprehending those matters are essential to the education of

every individual from childhood. Paraphrasing Georges Clemenceau, that once said that war is much too serious a matter to be entrusted to the military, we can say that human rights are much too serious matters to be entrusted exclusively to lawyers.

Diego Werneck – Getulio Vargas Foundation Rio de Janeiro, Brazil
"From resistance to dialogue: new challenges for clinical human rights education in developing countries." As developing countries move towards more democratic political systems, law schools which are committed to teaching, discussing and promoting human rights face a new set of challenges. In many countries which moved from authoritarian to democratic governments, like Brazil, human rights lawyering can typically play an important role during the transition to democracy by protecting political dissidents from arbitrary state repression. This role is mainly one of resistance, of erecting limits to state action. But such a mindset is not necessarily the only one - or even the best one - for teaching human rights to law students in democratic systems. By using Brazil as an example, this brief paper argues that, as democracy consolidates and arbitrary uses of state power tend to diminish, clinical human rights education faces challenges that require not resistance against state action, but dialogue and fine tuning of public policies. Although these two categories are ideal types (resistance and dialogue), I hope they will be useful for singling out different modes of clinical legal education, each with its own sets of requirements, advantages and limitations

Papers

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Law Schools as Human Rights Institutions

Draft

Marcelo Alegre
Universidad de Buenos Aires, Argentina

A human rights institution is one devoted to respect and promote the value of human rights. Can Law Schools become human rights institution? Would that be good? Or, in other words, wouldn't being a human rights institution compromise the core academic values of Law Schools?

There are different types of HHRR institutions. Some are exclusively HHRR oriented institutions, like NGOs working against death penalty, female mutilation, torture or socioeconomic injustice. Some public intitutions, like the public defense, also belong in this category. Others are mainly HHRR oriented, which means that they are supposed to pursue HHRR values among others, though given their intrinsic weight, HHRR values may often trump other aims. An example is the judiciary, where human rights considerations are combined with other considerations, like formalistic requirements or arguments of efficiency. In mainly HHRR-oriented institutions, human rights are not the exclusive aim, but they are the prevailing ones.

Law Schools are strong candidates to be considered as HHRR institutions in the second sense. A growing part of their curriculum is directly related to human rights. In particular, HHRR standards have been positivized in the last decades at an increasing rate, and therefore considered without resistance a proper subject of study. HHRR courts, commissions and bodies, and their decisions and recommendations, are also the subject of a great deal of contemporary legal education. Through legal clinics, Law Schools get involved directly in the HHRR dynamics, representing vulnerable groups, forging alliances, taking part in litigation on behalf of victims of HHRR violations.

Much of what law schools do as HHRR institutions is just part of their classic aim: producing knowledge and teaching professional skills. And in the intersection of its classic aims and its HHRR aims we can see the unique contribution law schools can make to strengthen a culture of respect and promotion of human rights. Academic research in the area of human rights illuminates public debate and public policies, and help to shape the judicial responses to human rights challenges. Law schools, working at their best, educate lawyers to work with 24-hours a day HHRR. Their graduates in their professional life deem human rights respect and protection a non-negotiable requirement--a requirement that justifies losing clients, cases and deals.

A human rights perspective transforms the law schools in a particular way, favoring a more profound consciousness about how a University can foster or erode the egalitarian ethos that makes human rights possible. Law schools, accordingly, should advance faculty and student diversity, eliminate all discriminatory practices, and encourage students work in favor of the under privileged.

If law schools are to be deemed human rights institutions, this entails that there are additional reasons to value them. Law schools are now not only valuable for their contribution to educate future lawyers, but also for their contribution to the respect of human rights. And because the contribution of law schools to human rights is unique (there are no other institutions providing the type of contribution law schools make) a society with weak or flawed law schools is probably at risk of suffering human rights deficits (via

insufficient education about rights, or a lack of well-trained legal professionals, or a lack of adequate fora to discuss human rights issues).

There are some possible sources of concern in this understanding of law schools as HHRR institutions. The classic aims of the university may conflict with some expectations of the HHRR community (HHRR lawyers, NGOs, victims, experts, members of international bodies' personnel). Universities are places where truths are routinely questioned and ideas that often sound eccentric are subject to analysis. Thus some courses of action, strategies, discourses, which are part and parcel of HHRR dynamics, may not be sufficiently well suited for an academic institution. Conversely, human rights activists, on the one hand, legitimately advance their agendas building coalitions, supporting candidates and parties, mobilizing in the streets, etc. Law schools, on the other hand, have good reasons to work to preserve a climate of collegiality and to avoid, when possible and does not create a great moral cost, polarization and division among its community. The resulting ambiguity may enhance the contribution law schools can make to a culture of human rights.

Law Schools as Contributors to Public Policy on Human Rights

Aishah Bidin
National University of Malaysia, Malaysia

The United National Declaration on Human Rights represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights. Within this framework, Law schools that specializes in training and producing potential lawyers can play a pivotal role in their function to advance the norms of international human rights law through research, advocacy and public education. Various aspects of issues on human rights that can be integrated in the curriculum included among others the following: Regional Human Rights, Democracy, Racism, Women's Rights, Rights of Indigenous People, Internet and Child Rights. Clinical programs such as Klinik Guaman in UKM in which students and faculty members are created to conduct on ground investigations of basics issues and complaints of the local community. This paper will also review the current approach and role of the Faculty of Law of Universiti Kebangsaan Malaysia in promoting and advocating public policy on human rights among law students and the public. This is done by way of integration of various subjects at undergraduate and postgraduate level such as international humanitarian law, nuclear law and others. In addition UKM also strive to promote and disseminate public policy matters via way of linkages with NGOs by research, advocacy and public education.

The development of the human rights framework

The history of human rights has been shaped by all major world events and by the struggle for dignity, freedom and equality everywhere. Yet it was only with the establishment of the United Nations that human rights finally achieved formal, universal recognition. The turmoil and atrocities of the Second World War and the growing struggle of colonial nations for independence prompted the countries of the world to create a forum to deal with some of the war's consequences and, in particular, to prevent the recurrence of such appalling events. This forum was the United Nations.

When the United Nations was founded in 1945, it reaffirmed the faith in human rights of all the peoples taking part. Human rights were cited in the founding Charter as central to their concerns and have remained so ever since. One of the first major achievements of the newly formed United Nations was the Universal Declaration of Human Rights(UDHR), adopted by the United Nations General Assembly on 10 December 1948. This powerful instrument continues to exert an enormous impact on people's lives all over the world. It was the first time in history that a document considered to have universal value was adopted by an international organization. It was also the first time that human rights and fundamental freedoms were set forth in such detail. There was broad-based international support for the Declaration when it was adopted.

Although the fifty-eight Member States that constituted the United Nations at that time varied in terms of their ideology, political system, religious and cultural background, and patterns of socio-economic development, the Universal Declaration of Human Rights represented a common statement of shared goals and aspirations – a vision of the world as the international community would like it to be. The Declaration recognizes that the "inherent dignity … of all members of the human family is the foundation of freedom.*ti*

The United Nations Decade for Human Rights Education (1995-2004)

Not least of these activities to promote human rights is human rights education. Since the adoption of the Universal Declaration, the General Assembly has called on Member States and all segments of society to disseminate this fundamental document and educate people about its content. The 1993 World Conference on Human Rights also reaffirmed the importance of education, training and public information. In response to the appeal by the World Conference, the General Assembly, in 1994, proclaimed the period 1995 to 2004 the United Nations Decade for Human Rights Education. The Assembly affirmed that "human rights education should involve more than the provision of information and should constitute a comprehensive life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies".

The Plan of Action for the Decade provides a definition of the concept of human rights education as agreed by the international community namely based on the provisions of international human rights instruments. In accordance with those provisions, human rights education may be defined as "training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes and directed to:

a. The strengthening of respect for human rights and fundamental freedoms;
b. The full development of the human personality and the sense of its dignity;
c. The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic and religion;*es*
d. The enabling of all persons to participate effectively in a free society;
e. The furtherance of the activities of the United Nations for the maintenance of peace."

The Decade's Plan of Action provides a strategy for furthering human rights education through the assessment of needs and the formulation of effective strategies; the building and strengthening of programmes and capacities at the international, regional, national and local levels; the coordinated development of materials; the strengthening of the role of the mass media; and the global dissemination of the Universal Declaration of Human Rights.

The process of human rights education in the Law Schools

A sustainable (in the long term), comprehensive and effective national strategy for infusing human rights education into educational systems may include various courses of action, such as:

- The incorporation of human rights education in national legislation regulating education in schools;
- The revision of curricula and textbooks;
- Preservice and inservice training for lecturers to include training on human rights and human rights education methodologies;
- The organization of extracurricular activities, both based on schools and reaching out to the family and the community;
- The development of educational materials;
- The establishment of support networks of lecturers and other professionals (from human rights groups, academic unions, non-governmental organizations or professional associations) and so on.

The concrete way in which this process takes place in each country depends on local educational systems which differ widely, not least in the degree of discretion of the lecturers may exercise in setting their own teaching goals and objectives.

The lecturer will always be the key person, however, in getting new initiatives to work. The teacher therefore carries a great responsibility for communication of the human rights message. Opportunities to do this may vary: human rights themes may be infused into existing law subjects, such as international law, family law, land law and conveyancing and other or may have a specific course allocated to them; human rights education may also be pursued through less formal education arenas within and outside law schools such as extra curriculum activities, clubs and youth forums.

Ideally, a human rights culture should be built into the whole curriculum (yet in practice, particularly at secondary level, it is usually treated piecemeal, as part of the established curriculum in the social and economic sciences and the humanities). In the classroom, human rights education should be developed with due attention to the developmental stage of children and their social and cultural contexts in order to make human rights principles meaningful to them. For example, human rights education for earlier years for law program could emphasize the development of self-esteem and empathy and a classroom culture supportive of human rights principles. Although law students are able to grasp the underlying principles of basic human rights instruments, the more complex content of human rights documents may be more appropriate to senior students with better developed capacities for concept development and analytical reasoning.

Teaching and preaching: action speaks louder than words

The fact that the Universal Declaration of Human Rights and the Convention on the Rights of the Child have virtual global validity and applicability is very important for teachers. By promoting universal human rights standards, the lecturers can honestly say that he or she is not preaching. Lecturers have a second challenge, however: to teach in such a way as to respect human rights in the classroom and the school environment itself. For learning to have practical benefit, students need not only to learn about human rights but to learn in an environment that models them.

This means avoiding any hypocrisy. At its simplest, hypocrisy refers to situations where what a teacher is teaching is clearly at odds with how he or she is teaching it. For example: "Today we are going to talk about freedom of expression – shut up in the back row!" In such circumstances, students will learn mostly about power, and considerably less about human rights. As students spend a good deal of time studying lecturers and can develop a good understanding of their lecturers' beliefs, a lecturer who behaves unjustly or abusively will have little positive effect. Often, because of a desire to please, students may try to mirror a lecturer's personal views without thinking for themselves. This may be a reason, at the beginning at least, for lecturers not to express their own ideas. At its most complex, hypocrisy raises profound questions about how to protect and promote the human dignity of both lecturer's and students in a classroom, in a school and within society at large.

The "human rights climate" within lecture rooms and seminars should rest on reciprocal respect between all the actors involved. Accordingly, the way in which decision-making processes take place, methods for resolving conflicts and administering discipline, and the relationship within and among all actors constitute key contributing factors.

Ultimately lecturers need to explore ways to involve not only students, administrators, education authorities and parents in human rights education but also the whole community.

In this way teaching for human rights can reach from the classroom into the community to the benefit of both. All concerned will be able to discuss universal values and their relation to reality and to recognize that schools can be part of the solution to basic human rights problems.

As far as the students are concerned, negotiating a set of classroom rules and responsibilities is a long-tested and most effective way to begin .Teaching practices that are compatible with basic human rights provide a consistent model. Sometimes controversial and sensitive subjects come up when students begin to examine human rights. Lecturers need to remain constantly alert to student discomfort and potential disagreement. Lecturers should acknowledge that human rights necessarily involve conflicts of values and that students will benefit from understanding these conflicts and seeking to resolve them. Sometimes lecturers meet resistance to human rights education on the ground that it imposes non-native principles that contradict and threaten local values and customs. Lecturers concerned about resistance from administrators should meet with them in advance, share goals and plans for the class, and explain about the United Nations human rights framework and related educational initiatives (such as the United Nations Decade for Human Rights Education). Encourage administrators to visit a class – they may themselves benefit from human rights education!

Role of Law schools in dissemination of human rights values.
Law schools having the manpower, expertise of the law professors and the linkages with the relevant and stakeholders such as the Bar Council , the Attorney General Chambers the Judiciary the other professional bodies and the nongovernmental organizations can play an active role in promoting public policies and principles of human rights. This can be implemented in the form of lectures, roundtables discussions, a workshop in law and finance, a colloquium series, an alumni breakfast program, panels and symposium, in which academics, government officials, and members of the bar, business community and professional bodies can participate.

Human Rights subjects in Faculty of Law UKM

The Faculty of Law was established on 1st. February 1984 with the intake of 36 students; all being enrolled to the Law Matriculation programme. In 1986/87 session, the Faculty started its undergraduate academic year when all those 36 students were admitted to Year 1 of the LLB (Hons) programme. In 1989, the Faculty received the official recognition from the Qualifying Board established under the Legal Profession Act 1976. The first batch of students graduated in 1990. Since then, intake of students to the Faculty have kept on increasing each year, and in 2005/2006 session, the number of intake reached 120 students. In 1996, the Faculty obtained the approval from the Ministry of Education to initiate its Master of Laws and Ph.D programmes. The first batch of postgraduate students was admitted in the first semester of the 1997/98 academic sessions.

The Faculty of Law has taken the initiative to offer executive programmes with the co-operation of the Centre for Educational Advancement. These efforts came into effect with the inception of the Master's Executive Program in Intellectual Property in the second semester of the 2004/2005 session and the Master's Executive Program in Business Law in the 2006/2007 session.

The Faculty of Law is committed to be the leading faculty in legal fields and to build a new dimension which fulfills the thrust of national development by 2015.

Mission

To develop and educate legal professionals who are knowledgeable, competitive, and who possess an excellent personality in line with the national culture.

Objectives

- To have professional academicians who are highly distinguished in teaching, research and consultation.
- To produce graduates who are well trained and capable in various legal fields and practices including *Syariah* Law.
- To strengthen and enhance the Faculty's image at national and international levels.

The Faculty of Law of Universiti Kebangsaan Malaysia also play a role in in promoting and advocating public policy on human rights among law students and the public. This is done by way of integration of various subjects at undergraduate and postgraduate level such as international humanitarian law, nuclear law and others. In addition UKM also strive to promote and disseminate public policy matters via way of linkages with NGOs by research, advocacy and public education.
In addition to that the Legal Clinic of the Faculty was established in June 2012 comprising of a team of lecturers and students who are involved in giving free legal advice to the community. Cases that have been under the purview of the clinic include family cases, contract disputes, high purchase, consumer issues, labour disputes, bankruptcy case and matters related to *Syariah*. The faculty members and the students activities are also deeply involved in outreach program with the community. This has include in the past program affiliation with the Malaysian Bar Council on the understanding of the Malaysian constitution which was a program by the Asian Law Students Association UKM Student Chapter and the targeted groups were the public at large .

Constraints and challenges

Lecturers also struggle with administrative constraints and a lack of human rights related resources. Yet there are a variety of institutional impediments that can hamper the availability of human rights courses at the faculty. Further in some situations, despite strong student and faculty interest, many lecturers are simply unaware of the need for a course. This problem may be related to matters of terminology, scope of courses and/or lack of a proper textbook or a standard curriculum. Even within a specific school, faculty, students, and administrators may have radically divergent perceptions of the need for human rights offerings. Some lecturers says that human rights should not be covered more thoroughly because of a lack of student interest. On the other hand a lecturer characterized as an "expert" in international human rights perceives strong demand by students and believes that the subject should be covered more thoroughly.

There are also human resource barriers. Even among strong faculty and institutional support, lecturers can only teach a limited number of classes per semester. Standard "bar courses" take precedence over specialized courses with small enrolment. Language courses and University courses are also compulsory courses that students are required to take. Some IHL courses are oversubscribed, and the school does not have enough faculty on staff to address the demand. Further the syllabus and curriculum are more likely to be constrained by traditional offerings and limited faculty Institutions with strong faculty and

administrative support also face hurdles locating and funding qualified adjunct professors who can teach IHL.

Lecturers also might feel that they need more and better resources to foster the teaching of IHL. They complained of the lack of recognized, "concise basic materials" to teach from, the difficulty of wading through the overabundance of information to compile an "ad-hoc syllabus," and the lack of a good IHL textbook. Additionally, lecturers also yearn for training opportunities, networks of others interested in the teaching of IHL, and greater institutional support.

The unavailability of a standard IHL textbook is also a detriment to teachers and students alike. Recognizing that there is misunderstanding over what human rights entails and a lack of complete agreement as to what should be in a human course, many lecturers have found it difficult to "pitch" a human right course to the administration without standard materials. Due to the lack of a casebook, or perhaps in spite of the lack of a casebook, lecturers have turned to the vast body of information regarding IHL to compile their own course materials which will be time consuming.

Law Schools and the Promotion of Human Rights

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I. Introduction

Law schools have complex missions encompassing at least three important goals: (1) providing students with knowledge about law that is relevant to their future roles as lawyers, judges, and leaders in society; (2) fostering research into law and the role of law in society; and (3) facilitating public understanding and engagement with legal issues and law reform. See, e.g., UBC Law Strategic Plan, available at: http://www.law.ubc.ca/strategic_plan/index.html. Law schools can promote human rights, domestically and internationally, in each of these three roles.

In this brief paper, we will outline some law school programs related to the promotion of human rights in Canada and the U.S. We also describe some of the benefits and risks of law school efforts in these areas. Finally, the paper will briefly highlight questions or issues that law schools interested in enhancing their engagement with human rights issues might consider in relation to implementing similar programs.

II. Law Schools and the Promotion of Human Rights

A. Promoting Human Rights through the Curriculum

Law schools prepare students for entry into the legal profession and the various roles law school graduates serve in business, government, and the community. The law school curriculum typically includes mandatory and elective components. Depending on the jurisdiction, a law school's curriculum may be more or less established by bar admission authorities. One important question for law schools that are able to control curricular design involves the extent to which the mandatory curriculum will include exposure to human rights law.

Law schools in Canada and the United States are governed by accreditation standards and bar admission requirements that together promote the inclusion of a constitutional law course in the mandatory curriculum. See, e.g., American Bar Association, 2012-2013 ABA Standards and Rules of Procedure for Approval of Law Schools, available at: http://www.americanbar.org/groups/legal_education/resources/standards.html; National Conference of Bar Examiners, Multi-State Bar Exam, available at: http://www.ncbex.org/multistate-tests/mbe/. Constitutional law typically involves extensive discussion of the development of human rights within the constitutional framework as well as the challenges associated with conflicts between competing rights. However there remains significant flexibility in terms of the number of course credits devoted to the subject and the degree to which the course will focus on one or more human rights.

Canada's new law school accreditation standards for common law degree programs include the requirement that law schools provide coverage of Aboriginal rights. Federation of Law Societies, Task Force on the Canadian Common Law Degree (2009), available at: http://www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf. The standard leaves law schools with considerable flexibility in determining an implementation strategy. Some Canadian law schools are meeting the requirement within existing courses. UBC Law chose to develop and implement a new mandatory course specifically focusing on Aboriginal rights in the Canadian Constitution. See, e.g., Heather Gardiner, UBC Making Aboriginal Rights

Course Mandatory, Canadian Lawyer, Sept. 3, 2012, available at: http://www.canadianlawyermag.com/4315/ubc-making-aboriginal-law-course-mandatory.html.

Law schools can also include courses focused on human rights in the elective curriculum. Law students in the United States and Canada often are able to select 50% or more of their courses. Whether required to do so or not, most students enroll in a significant number of courses that are deemed to be "core" or closely related to practice, such as business law, evidence and tax. Depending on a particular jurisdiction's requirements, human rights courses may be critically important to society and yet not considered to be within the "core" of legal education. Law schools nonetheless offer a wide range of courses touching more directly upon human rights, including courses focusing on domestic content (such as Civil Rights Law, Gender and the Law, Prisoners' Rights Law), comparative courses (such as Comparative Constitutional Law, Comparative Health Law), and courses focusing on international law or the law of other countries (such as International Human Rights, International Criminal Law, Human Rights in Asia). See, e.g., UBC Law Academic Calendar Course Descriptions, available at: http://www.calendar.ubc.ca/vancouver/courses.cfm?page=name&institution=12&code=LAW; Osgoode Hall, York University, Syllabus (listing human rights courses), available at: https://apps.osgoode.yorku.ca/myosgood2.nsf/0/E33820D0907F18A485257A17006D1FBE/$FILE/2012_Osgoode_SyllabusV2-Oct25.pdf; A Survey of Law School Curricula [U.S.], 2002-2010 (Catherine L. Carpenter, ed. 2012).

There are also opportunities to highlight the human rights curriculum. Some law schools provide students with the ability to focus on human rights topics through completion of concentrations or specializations. See, e.g., UBC Law, Social Justice Concentration, http://www.law.ubc.ca/files/pdf/programs_centres/Law_and_Social_Justice_Specialization.pdf. Law schools can also offer graduate program opportunities for LL.M., Ph.D. or S.J.D. students to focus on human rights. See, London School of Economics, LL.M. Specialization in Human Rights Law, http://www.lse.ac.uk/collections/law/programmes/llm/llm-human.htm.

Law schools in the United States and Canada are facing significant new demands from students, the legal profession, and regulators. See, e.g., Brian Z. Tamanaha, Failing Law Schools (2012); Ethan Bronner, A Call for Drastic Changes in Educating New Lawyers, New York Times, February 10, 2013. Among other things, critics contend that law schools must provide students with more opportunities to learn legal skills and to appreciate the special ethical obligations of lawyers. See, e.g., William M. Sullivan, et al., Educating Lawyers: Preparation for the Profession of Law (2007)(a.k.a "the Carnegie Report"), an executive summary is available at: http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf).

These commentaries emphasize the importance of providing students with clinical or experiential learning opportunities focused on human rights. Law schools in the U.S. and Canada have introduced programs that give students the opportunity to participate in human rights-related litigation on behalf of individual clients and groups. See, e.g., American University Washington College of Law, Disability Human Rights Clinic, http://www.wcl.american.edu/clinical/disability.cfm; Harvard Law School International Human Rights Clinic, http://www.law.harvard.edu/programs/hrp/ihrc.html; UBC Law First Nations/Indigenous Community Legal Clinic, http://www.law.ubc.ca/fnations/clinic.html; UBC Law Innocence Project, http://www.innocenceproject.law.ubc.ca.

The ratio of instructors to students in "live client" clinics is much lower than the ratio in other forms of learning because of the need for direct supervision of client matters. These

programs therefore are significantly more expensive than traditional classroom teaching. Experiential learning can also be accomplished through internships with human rights organizations, so long as the law school retains sufficient control over the educational quality of the internship experience and puts in place parallel opportunities for classroom reflection and learning. There is extensive literature on the development and implementation of clinical programs. The Clinical Legal Education Association provides useful resources at http://www.cleaweb.org. See also, American Bar Association, 2012-2013 ABA Standards and Rules of Procedure for Approval of Law Schools, *supra*.

UBC Law's Indigenous Community Legal Clinic is an example of a program that provides students with the opportunity to represent clients who otherwise might go without legal representation. Students earn a term of academic credit for participating in the clinic and a related class. The clinic is located away from the law school, near a courthouse in downtown Vancouver, to ensure that the services are accessible to individual clients. The clinic also has been involved in policy-oriented and precedent setting litigation on behalf of Indigenous persons and organizations.

It is important to recognize that law school programs relating to new or emerging human rights claims can be controversial, in part because the law school is viewed as providing subsidized legal support for groups or positions that may be unpopular in society. Clinics working on human rights matters may bring legal claims against governments or powerful private interests. Some clinical programs have attracted significant controversy, particularly in the United States. See Adam Babich, Controversy, Conflicts and Law School Clinics, 17 Clinical L. Rev. 469 (2011). Law schools have an opportunity to communicate with stakeholders about the importance of human rights and clinical education for law students and society.

Law schools have both an opportunity and the responsibility to ensure that law students are exposed to basic human right principles in their own legal systems. The benefits of basic legal education are clear and relatively uncontroversial. More advanced law school courses can provide students with exposure to emerging human rights concerns that they may encounter as lawyers and leaders. Clinical programs provide representation to individuals or groups whose claims otherwise might not be heard and prepare students to accept roles in human rights matters moving forward. The costs of these programs can be significant, both in terms of dollars spent per student and political controversy, but the benefits to students and society are important and enduring.

B. Faculty Research and Human Rights

Law schools provide more than legal education. They are also centres for legal research. Faculty members at law schools in the United States and Canada focus to a significant degree on research and publication. This research benefits society in several ways. First, faculty members are able to pursue fields of research and lines of inquiry without the constraints on time and perspective often experienced by lawyers, who must serve clients' interests, or judges, who must ensure impartiality in resolving future disputes. Second, faculty research can be subjected to a peer review process that rigorously tests assumptions, analysis, conclusions, and empirical evidence or sources of authority. Third, faculty research can be disseminated broadly in society to achieve impact through scholarly publications, conferences, law reform movements and public outreach events.

Faculty research can take many forms, from individual scholarly works to collaborative research projects across schools and countries. Faculty members at UBC have focused on a range of topics, including Indigenous rights, women's rights, combatting human trafficking,

and new legal approaches to reducing atrocities during armed conflict. See UBC Law Faculty, at http://www.law.ubc.ca/faculty/faculty.html. Researchers have also secured funding for major, collaborative research projects that bring together scholars from around the world. The Asian Pacific Dispute Resolution Project is a multi-million dollar collaborative research project based at UBC Law, led by Professor Pitman Potter, and involving partners in Canada, China, Japan, and Indonesia. See http://ubcapro.hk/faculties-and-schools/faculty-of-law/. The project, titled "Understanding Coordinated Compliance with International Trade and Human Rights Standards in Comparative Perspectives," provides important insights about the relationship between trade and human rights in various domains.

Faculty research brings obvious benefits to the law school and broader society. Faculty members are able to bring advanced expertise in current issues to their classroom teaching. Students may also be involved as research assistants. Faculty research can enhance or alter academic debate, guide the approaches adopted by law firms or businesses, and affect the development of the law in the courts or legislature. For example, in recent years researchers at UBC Law have had a significant impact on the development of Aboriginal rights law, on efforts to combat human trafficking, and on Canada's approach to international human rights issues.

At the same time, faculty research can be controversial. Critics sometimes argue that the exercise of certain human rights, such as labour rights or Indigenous rights, can create barriers to economic development. Efforts to incorporate human rights norms into corporate conduct through, e.g. corporate social responsibility and socially responsible investment policies, can be critiqued by human rights activists as ineffective and by businesses as inefficient. Law schools sometimes support engagement with stakeholders to ensure both the dissemination of research and open debate about the impact of research findings. See, e.g., UBC Law, Socially Responsible Investment and Extractive Industries, http://www.law.ubc.ca/files/pdf/ncbl/2011/SRI_and_Extractive_Industries.pdf.

C. Special Programs and Partnerships

Finally, law schools can promote human rights through special projects and collaboration with external partners. Law schools are uniquely positioned to connect stakeholders in the legal system and to create a neutral forum for debate about issues that may be controversial. Law schools also have an opportunity to affirmatively support efforts to enhance human rights around the world.

Beyond the projects and activities noted above, UBC Law has supported two specific projects. First, the Faculty provides a home for the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), see http://www.icclr.law.ubc.ca. The ICCLR is one of two inter-regional institutes in the United Nations Crime Prevention and Criminal Justice Programme Network of Institutes. The ICCLR's ambitious mission "is to improve the quality of justice through reform of criminal law, policy, and practice." The Centre recognizes that achieving this objective requires promotion of "democratic principles, the rule of law and respect for human rights in criminal law and the administration of criminal justice, domestically, regionally and globally." See http://www.icclr.law.ubc.ca. The location of the Centre within the law school promotes faculty and student involvement in the Centre's projects and initiatives.

Second, UBC Law secured significant support from alumnus Peter Allard, Q.C. for the creation of the Allard Prize for International Integrity, see http://www.allardprize.org. The

Allard Prize "will be awarded to an individual, movement or organization that has demonstrated exceptional courage and leadership in combating corruption, especially through promoting transparency, accountability and the rule of law." The Prize includes an award valued at $100,000 (Canadian). The Prize will provide an opportunity to highlight and promote the fight against corruption worldwide. In addition, the Prize competition can reveal inspirational stories and models for individuals and organizations interested in exploring successful approaches to fighting corruption and to establishing the rule of law and protections for human rights. The award program will also bring human rights leaders, scholars and activists to Vancouver to participate in a major international conference or other event focused on human rights and the rule of law.

III. Conclusion

Law schools play important roles in society though education, faculty research and community engagement. Law schools are therefore responsible for ensuring that students are exposed to legal aspects of human rights and the relevant conflicts and debates about the nature and scope of those rights. Human rights issues will likely occupy at least a portion of a school's mandatory curriculum but there are also opportunities to enhance coverage through electives focusing on domestic, comparative and international approaches, as well as to provide experiential learning through clinics and internships. Law schools may also promote research and law reform related to human rights through faculty research, community partnerships, and special initiatives.

Law schools' involvement in the promotion of human rights therefore no doubt varies considerably around the world. This brief paper has focused on law schools in Canada and the United States. Many law schools outside this region may have adopted even more intensive educational programs for human rights in the law school curriculum. Faculty researchers or law school research programs involving human rights have played central roles in the development and implementation of human rights protections within different societies. Yet law schools in other jurisdictions may face very different constraints. The curriculum in the law school may be largely determined by governmental or bar admission requirements. Faculty members may have only limited time for research and may face constraints with respect to subject areas. Community partnerships may not be feasible or may present significant funding challenges. We hope that this brief report and description of some selected initiatives provides useful examples of a range of possible approaches for law schools seeking to promote human rights within the context of their own regulatory structure and societal constraints.

QUALIFIED LEGAL PRACTICE AND SOCIAL TRANSFORMATION: The amicus curiae brief experience within the ambit Clinical and Pro Bono legal assistance of FGV Law School.

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Introduction

When I decided to submit an abstract for the panel "Law Schools as Contributors to Public Policy on Human Rights" in the IALS Annual Meeting, I immediately thought about reporting my experience as the Coordinator of Clinical and Pro Bono legal assistance program of FGV Law School, especially concerning the preparation of amici curiae briefs presented before the Brazilian Supreme Court.

However, for a couple of weeks, each written paragraphs, was erased. And, worst, the longer I stayed sitting in front of the computer, the longer was the waste of time, for no word survived my PC white screen. Until when I was re-reading my received e-mails and suddenly came across the following message:

> "Dear Thiago, I want to thank the unique opportunity afforded by FGV Law School to offer the clinical work to "Projeto Afeto"
> (Project Affection), what, today, after this great victory, makes me feel sure that the struggle for our civil rights is the most beautiful and the only thing we have to offer our society. Now I can look at my undergraduate studies and be proud of having made part of a distinct, path-breaking, daring and transformative project.
> Actually, I've spent a period of my life a little bit lost not knowing which way to choose, paralyzing my professional life. But, now, I am up for it. I want and I know I am able to contribute to develop and to improve civil rights defense. I hope and I know that with perseverance a door can be open for me. These days I've heard about a job opportunity in NGO Conectas, and I am willing so much to go to São Paulo for personal reasons and I confess I am myself a fan of Conectas's activities. So, today, I will send them all necessary documents for me to apply for this vacancy. They request two contact references and as I already have Andressa (Global Justice Director) and I wonder if you could recommend me for the position. I'm looking forward to your reply. Kisses. I.B."

I received this e-mail on May 6, 2011, the day after of Supreme Court decision concerning the claim, filed by the Governor of the State of Rio de Janeiro, in 2008. This motion pleaded that stable unions of gay couples should receive the same legal treatment of stable unions of straight couples.

The e-mail was sent by a former undergraduate student of FGV Law School who participated in "Projeto Afeto" (Project Affection), in 2008. She was one of the students that prepared the amicus curiae on behalf of "Grupo Arco-Íris" (Rainbow Group), a nongovernmental organization assisted by our in-house clinic, in 2008.

And, then, I remembered...I remembered a conversation I had with Professor José Ricardo Cunha back in 2006, about such innovative project when I started teaching at the FGV Law School. I also remembered the reasons that led me to accept, at the end of 2007, the invitation of Professor Joaquim Falcão to leave my own law firm to become a full time professor and take on the task of creating the Clinical and Pro Bono Programs of FGV Law School. I remembered the conversations I had with my colleague Professor

Gabriel Lacerda, the first person with whom I discussed the proposal I had to submit to the Law School Direction, as part of my selection process.

And, more important, I remembered the pathway all of us (students, faculty and staff) have followed, over the last five years, towards a transformation of the FGV Law School, of teaching methodology and of Brazilian society, as a whole. So, finally, I started writing up what legal practice is about; about how legal practice activities are traditionally carried out in Brazilian law schools; about the proposal of a pioneering legal practice program to be performed in FGV Law School and decided to report some of the cases in which we have already acted.

1 – What is the legal practice:

Legal practice is a mandatory curricular activity held in Brazilian Law schools during undergraduate courses. It is a program in which students shall develop professional skills by real-world experience. Each Law School regulates legal practice independently and may, in part, make agreements with public or private agencies; however, the program evaluation is a duty to be done exclusively by the Law School sponsoring the program.
The activities of legal practice are broad, but they have a common nature: legal assistance to clients and resolving concrete legal problems, including lawsuits preparation, procedural routines, representation in court hearings, and rendering of all types of legal services.
The great majority of Law Schools in Brazil provide their practice in the form of in- house clinics meeting both the educational standards of the government and the professional standards of the Brazilian Bar Association. Generally, the traditional Law Schools in-house clinics limit their work field to Civil Law, Criminal Law and Labor Law. Within those in-house clinics style students learn how to practice law serving poor people, who usually live in the poor communities located in the same neighborhood or close to the Law School facilities.
Such traditional model is obsolete and outdated. Students are not satisfied or motivated to perform such kind of legal practice activities because:

1) they are not integrated into the academic courses, nor in the profile the School intends its undergraduate students have;
2) practice of the globalized legal market/
3) on the contrary, students realize that such training is conducted in a bureaucratic way with the sole purpose of meeting educational legislation requirements and the Brazilian Bar Association rulings;
4) they reproduce welfare practices, overlap similar activities already undertaken by the Public Defenders' Office and do not collaborate on projects that will change students' communities or the Brazilian society.

2- The legal practice in FGV DIREITO RIO (FGV Law School)

Given this diagnosis of Law Schools' legal practice performance, it became clear that our challenge was to build a new model, compatible with our School original design. FGV Law School envisages law as a tremendous resource of citizenship, being it a privileged main responsible tool for institutional alternatives formulation for our democracy and teaching methodologies, as well, and also being devoted to encouraging students' analytical, critical and propositional way of thinking about law, focusing on concrete legal problems solving.

Thus, different from the legal practice activities developed in traditional Law Schools, ours should be substantially committed to transform the in-house clinics into a space in which our students would be trained to perform qualified legal intervention in Brazilian professional legal scenario under an unparalleled path-breaking clinical program.

To adapt practical formation to FGV Law School undergraduate student profile, the clinical activities were linked to FGV Law School programs of study: Judicial System and Business Law. The development of the activities related to business law sought, at first, meeting the market need of hiring qualified professionals in this field. It was not, however, simply a matter of meeting the demands of companies' legal departments or of law firms specialized in corporate law (which now need to invest in training of their own interns), but further to form a distinct lawyer profile, being able to think criticallystructures for achieving domestic economic development.

In turn, the Judicial System aspect of the clinics would have (as it effectively has) the emphasis on qualified intervention in national legal scenario with the preparation of pleadings impacting on Brazilian law core and current issues, exploring the constitutionalization movement of various fields of law, the use of legal arguments in the construction of innovative thesis and the judicial growing role in public policy debate. Indeed, it is undeniable the growing importance of legal interpretation in Brazilian legal scenario, with great impact on the creation and modification of law by the Supreme Court considering the legislative paving way of a new constitutional order (since we had a constitutional change in 1988).

Another important finding in this process was the consciousness of the judicialization of politic, the diffuse rights expansion and in the growing role of principles in judicial decision-making reasoning. That is why, the in-house clinical work area dedicated to public advocacy and to judicial system, we elected as its focus the issues related to constitutional law, contributing to the strengthening of institutions and to domestic development, especially fundamental rights related topics.

Be it in the specialized area of business law or in the specialized areas of public advocacy and judicial system, we decided to focus on the assistance to organizations, companies and groups instead of individuals, as it occurs traditionally.

Maybe those were the two great innovations of the proposal submitted to the Dean of FGV Law School in November of 2007: to abandon the perspective of legal aid for the promotion of access to justice by legal defense of relevant collective social demands.

3 – The legal representation of NGOs before the Supreme Court in constitutional lawsuits as a way of promoting fundamental rights.

The specialization in Public Advocacy and Judicial System prepares undergraduates to act as public attorneys (federal or state attorneys, tax attorneys, public defenders, means enabling them to defend collective interests, diffuse rights and issues of great social importance, promoting citizenship rights by acting in collective demands. In this context, in Brazil, the legal instruments through which such skills and competencies are required are the constitutionality concentrated control actions, such as: Direct Action of Unconstitutionality (ADIn), Declaratory Action of Constitutionality (ADC), and Allegation of Breach of Fundamental Precept (ADPF), all of them having the same purpose, namely to ensure the supremacy of the Constitution in face of any conflict that may exist between the higher law and any other kind of rule or judicial act.

However, only a very small number of people[1] may fill those kinds of lawsuits before the Supreme Court. And, obviously, all of those legitimated actors have material conditions to be represented in court. That is why we elected as the clinical acting methodology to provide pro-bono legal aid to groups and to social organizations which combine nationwide representativeness and thematic pertinence through the preparation of amicus curiae brief.

Our goal was to make possible the expansion of public debate, since those kinds of law suits have erga omnes effects, tying all other minor courts and judges of the country. Once discussed and decided by the Supreme Court, the theme will no longer be subject to any questioning. Therefore, the intervention at this point of the discussion is extremely important for, otherwise, the debate would be restricted to a small number of stakeholders, with a particularly narrow view of the question.

The amicus curiae (expression meaning "friend of the court") is someone (usually groups, associations or institutions) who is interested in contributing voluntarily with information or a new perspective about a particular legal argument to assist the court decision. From a procedural standpoint, it is a peculiar kind of third party intervention in processes in order to qualify the decision. The briefs submitted by amici curiae usually add data, information or distinct viewpoints on difficult or controversial matters.

The admission of an amicus curiae brief in constitutional matters is not easy, nor simple. Although the Brazlian Supreme Court has been widening the admission criteria (chasing the pluralization of constitutional debate), it is still an very qualified kind of petition. Furthermore, to be admitted as amicus curiae the petitioner must show that he possesses representativeness and some connection with the theme under discussion.

On the other hand, we firmly believe that the introduction of the figure of amicus curiae in Brazlian Law (in 1999) had a very clear purpose: to democratize those constitutional trials, opening the Supreme Court's doors for civil society, to whom decisions are addressed. Society may bring arguments to the Court and also highlight relevant issues allowing trial to be comprehensive, ensuring the analysis of all involved dimensions and consequences that it might bring to society.

The acceptance of the manifestation of citizenship brings the explicit idea that constitutional interpretation must be open and plural. This effort to democratize the constitutional interpretation is extremely important in our current context, as much as it decreases the risk of questioning the democratic legitimacy of the Supreme Court and the Court therefore effectively becomes a forum for discussion of public reason.

However, for those non-governmental organizations being heard by the judiciary there was a need for qualified legal assistance able to understand their point of view and turn it into a petition. But not a simple petition. A petition that could be considered by the justices of the highest court of the country.[2]

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[1] They are: I-the President of the Republic; II-the Board of the Senate; III-the Board of the House of Representatives; IV-the Board of the States Chamber of Representatives or Federal District; V-the Governors of the States or Federal District; VI-the Attorney General; VII-the Federal Council of Brazilian Bar Association; VIII - a political party with representation in Congress; or, XI- a union confederation or nationwide class entity (Article 103 of the Constitution of Brazil).

[2] Would our students be up to the challenge? I still remember I told Professor Joaquim Falcão when assuming the clinic (NPJ) Coordination, that in less than one year we would file two amici curiae briefs before the Supreme Court of Brazil (STF). After a few seconds watching me, I felt like he really believed that students would be able to accomplish this task and "blessed" the project just saying: "Ball forward!".

The participation of civil society in these actions is strategic. Since the early 1990s, Brazil has witnessed the expansion of Judicial Branch assuming the functions that are proper of the Executive and Legislative Branches of Government, leaving aside its traditional passive role and making modifications in Brazilian socio-economic organization[3].

Undoubtedly, the most important factor that powers Brazilian judicial activism is the text of the Constitution of the Federative Republic of Brazil by itself. The 1988 Constitution re-founded in our State the postulate of human dignity and traced as primary objectives of the Federative Republic of Brazil the construction of a free, fair and solidarity society to promote the welfare of all, irrespective of origin, race, sex, color, age or any of the other existing forms of discrimination whatsoever.

It is not to be forgotten that in a democracy the making of laws is directly linked to public debate among citizens, which is represented by discussions held within the Legislative Branch. But it is also true that in a constitutional democracy, as it is the Brazilian case, the choices of the Legislative Branch are not considered adequate only because of whom holds these rights, but also concerning how, when and why such powers are exercised.

This means that certain choices were made at the time of the foundation of a new Brazilian State what prevents the Legislative Branch from making decisions that may be inconsistent with those choices. Similarly, the absence of decisions of the Legislative Branch is indifferent to the legal validity of certain choices that were actually made by the original constituent power. It is the Judicial Branch's duty to ensure the affirmation of these choices, values around which the Brazilian people re-founded their State, the fundamental rights that citizens are entitled to.

By ensuring these choices, the Supreme Court, acts as guardian of the promises made at the time of promulgation of the Constitution. As we are reminded of and are forced to comply with such commitments, the Supreme Court promotes the fundamental rights pedagogy and reaffirms the values that characterize Brazil as a Democratic State of Law.

Given the profile of the FGV Law School undergraduates (able to think critically about their social performance and promote important changes in the legal necessary structures for national socio-economic development), it is also a function of the in-house clinics of FGV Law School to contribute to the pedagogy of the fundamental rights, namely to stimulate the students' thinking about the most important values of a Democratic State of Law and the prospect of collective or diffuse interests and the prospective contribution that law professionals can provide for the construction of a free, fair and solidarity society.

In addition to provide the students enrolled in FGV Law School in-house clinics a technical legal training, this initiative seeks to stimulate in the future law professional a culture of defense and of appreciation of the fundamental rights, as the essential element to construct

[3] "I believe, gentlemen, that this year, as much as in the past few years, we could observe a growing of judicial role acting, in this Court, or whenever, apart from the specific technical issues, the control over the constitutionality became an appellate instance of political struggle, too. Several times we have examined the prolonged political dispute with Congress concerning legislative drafting. Even in some cases, the Direct Action was used as an instrument for political parties' positions gaining greater visibility. We also had the use of Direct Action by political parties seeking constitutional debate. Finally, judicial dispute immense growth as a continuation of political dispute brought Supreme Court and judicial structures to the center of national political debate. There was also, during this period, especially from the 90's on, a progressive judicialization of mass lesions and mass debates. There was an increase in the functions of the judiciary precisely because the judiciary has joined the national agenda as a locus for debate on major national issues." Speech held by Supreme Court Chief Justice, Justice Nelson Jobim, in the opening of the judicial year of 2005.

the Brazilian society, whose foundations are made of sovereignty, citizenship, human dignity and political pluralism.

4 - The amicus curiae briefs as qualified legal practice – the FGV Law School experience

4.1 - "Press Project" – Allegation of Breach of Fundamental Precept (ADPF n.130)
On February 25, 2008, the Democratic Labor Party filed a lawsuit before the Supreme Court claiming the declaration of unconstitutionality - and subsequent withdrawal - of the full text of Law n. 5.250/1967 (known as the Press Act) and, in case that request is not met, the repeal of more than twenty articles. This action would lead the Supreme Court to decide among three possible scenarios: (i) full repeal of the law, (ii) partial repeal of the law providing which are the repealed provisions; (iii) full application of the law.

Then, we were approached by the President of the Brazilian Press Association (ABI), an organization whose history has been linked with the Brazilian history for the last hundred years related to the struggles in defense of press freedom and democracy.

ABI was proud of never having bowed down before intolerance and violence of dictatorial governments throughout its history. Even in the most troubled periods of national political history, the Brazilian Press Association has always been committed to defend the rights of journalists, of press freedom and of the restoration of democracy. Over the years, the ABI has established itself as an institution in the service of intellectual, social, political and economic progress of Brazil.

The Brazilian Press Association also had a prominent role in the impeachment of former President Fernando Collor de Mello. Barbosa Lima Sobrinho, president of the organization at that time, along with the then President of the Brazilian Bar Association, filed the request for impeachment before the House of Representatives.

There was no doubt that the ABI had a very important role in this debate and therefore a legitimate interest in participating in this trial as amicus curiae. But, actually, the ABI had never served as amicus curiae and that possibility had not even been considered. Until then, the ABI has always had a great dialogue with the legislative and the executive branches of the government but had never acted in the judicial branch to advance a cause. They did not have in-house legal counsel or the legal expertise for such a complex task.

The partnership between ABI and FGV offered the structure of the FGV Law School (human and material resources) and, in return, ABI would talk with the students who would participate in the preparation of the brief for them to hear from the journalists the importance of a press free from censoring of any kind.

Then, it was decided that the in-house clinic of FGV Law School would form a group of undergraduate students, coordinated by a School Professor, to prepare a brief of amicus curiae arguments to be presented before the Supreme Court. In turn, the ABI proposed to receive the students from FGV Law School and to constitute, within the ambit of its

Advisory Board, a working group that would work together with the FGV Law School team.

The work was carried out by eleven students (Carlos Humberto Borborema, Isabella Gama, Marcos Vinicius Araújo, Thutia Bernardo, Isabela Ferreira, Julia Braga, Ciro Rangel, Jayme Figueiredo, Pablo Domingues, Renata Cruz and Renato Knibel), advised by two (Professors

Rafael Koatz and Thiago Bottino). At the end, the text was submitted to the Advisory Board of the ABI, being approved. The amicus curiae brief was filed on December 15, 2008.

It was a historical judgment, not only because of the theme, but also because it was the first time the Supreme Court declared unconstitutional the entire content of a law "by extension," i.e., recognizing that this "Press Act" ended a logical system, that intended to regulate freedom of expression, of thought and of information, and being it "pruned" by almost a third of its provisions, it lost its character of a system, it got unbalanced as a legal framing structure and crumbled like a house of cards.

The trial took place on April 1st, 2009, by the Supreme Court, and in the occasion I could present the oral arguments on behalf of the ABI before the Supreme Court.

4.2 – "Affection Project" – Allegation of Breach of Fundamental Precept – (ADPF n. 132)

On February 25, 2008, the Governor of the State of Rio de Janeiro filed an Allegation of Breach of Fundamental Precept - ADPF pleading the Supreme Court that stable unions of gay couples shall receive the same treatment of stable unions of straight couples. Such recognition would be founded on the direct application of the fundamental precepts of equality, freedom, human dignity and legal safety. So deciding, the Supreme Court would declare that judicial decisions that deny legal equality would be violating constitutional fundamental precepts.

This time we were approached by the President of the "Rainbow Group", an NGO founded on May 21, 1993 with the mission of working to improve the quality of life for gays, lesbians, bisexuals and transgender in the promotion of human rights, whether through actions to raise awareness and promote self-esteem of gay people, or through participation in the formulation of public policies.

For its career in the defense and promotion of the rights of vulnerable groups over the past fifteen years, "Rainbow Group" stood out as an important society interlocutor with government concerning the formulation of public policy with the strategy to create a favorable social environment for Lesbian, Gay, Bisexual, Transgender themes and human rights. This gave legitimacy to the Rainbow Group representation in its postulation of participating as amicus curiae in trial, offering subsidies to the Supreme Court trial. Again, the FGV Law School in-house clinic was open to civil society organizations to promote legal assistance to their initiatives.

The methodology was the same as of the Press Project: seven students (Ana Luiza Nascimento, Lívia Ferreira, Camila Noronha, Luisa Gonçalves, Isabela Bueno, Rachel Sá and Roger Sganzerla) advised by two Professors (Ivanilda Figueiredo and Thiago Bottino). The brief of amicus curiae, on behalf of the GAI, was filed on December 19, 2008, but trial took place only on May 5, 2011

Again, the undergraduate students of FGV Law School attended a historical judgment, whose impact was beyond Brazilian borders becoming news around the world. And the impact of that work was so great that the brief delivered to the Justices of the Supreme Court came to be used as part of the teaching material of constitutional law courses.

Two facts show the achievement of that commitment made in 2007 upon assuming the creation of in-house clinics of FGV Law School. The first is the e-mail written at the very beginning of this text. It is the proof that we are able to transform people, to create new

professionals committed to the values of equality ans freedom that are ideals guiding lines of Brazilian Democratic State. It is the evidence that a legal practice activity can arouse the interest and stimulate young law students and can empower them to change the social reality of communities and the world.

The second fact, proof that we are able to prepare students for a qualified performance and for highly complex legal work carrying out, was the quote, by the Dean of the Supreme Court, Justice Celso de Mello, of excerpts from the brief prepared by undergraduate students of FGV Law School.

4.3 – Project Temporary Prison (ADI 4109)

The Projects "Imprensa" (Press) and "Afeto" (Affection) took place in 2008. Since then, more three amici curiae briefs have been prepared to be addressed to the Supreme Court.

In 2009, ten undergraduate students (Ana Luiza Pinto, Anelise Jordão, Bernardo Costa, Bernardo Barbosa, Cristal Celano, Eduardo Oliveira, Eric Trotte, Fernanda Fábregas, Fernando Menezes and Rogério Sganzerla), advised by Professor Thiago Bottino, prepared a brief on behalf of the Grupo Tortura Nunca Mais- GTNM (Group Torture Never More), a NGO committed to fight torture in Brazil.

Throughout almost 25 years of existence, this NGO became an important reference in national scenario and assumed an important role in society, due to its permanent action in defense of human rights. The partnership between GTNM and FGV Law School in- house clinic was due to the interest of this NGO to participate in the process in which the constitutionality of the temporary prison is being challenged.

In the view of GTNM, it is an imprisonment aiming to collect the testimonies of the accused and the investigated in the course of a police investigation. And just like the old imprisonment to investigate of military rule time, the individual is held up by the police to be compelled to cooperate in every way with the investigation. After all, the psychological pressure over somebody subjected in a situation of prison is a mechanism to break him/her. This is a clear is a violation of the privilege against self-incrimination, harming his/her individual freedom through fear and weakness

The brief was approved by the Board of GTNM / RJ, being filed on May 6, 2010, and the case remains pending.

4.4 –The Projects "National Justice Council Powers" (ADI 4145) and "Congressmen Police Clean Record" (ADC 30)

Conducted in 2010 and 2011, respectively, the projects "National Justice Council Powers" and "Clean Record" are the result of a successful partnership between the FGV Law School and the IAB (Brazilian Lawyers Institute).

Founded in 1843, just after Brazilian Declaration of Independence in 1822, the Brazilian Lawyers Institute has always been involved with the foundation and development of the design of legal institutions of Brazil. One of its first major missions was the creation of the Brazilian Bar Association.

Known for its nationwide expression and great tradition, the Brazilian Lawyers Institute has also worked, under Portuguese Empire ruling era, as a governing body consulted by then

Emperor and his Cabinet, assisting with their opinions about the most important judicial decisions to be taken, as well as collaborated, through its members, in making the laws that effectively governed the country at that time. Much more than a body of lawyers, the Brazilian Lawyers Institute has always struggled and contributed to the formation and development of the project of a Brazilian State

The Brazilian Lawyers Institute was responsible for the preparation of the first Republican Constitution of Brazil (1891), a fact that highlights its commitment with the building the Brazilian institutional design and its political development. Throughout its existence, the Brazilian Lawyers Institute has contributed to the deepening of legal sciences to enrich the debate and progress of Brazilian law and the democratic institutions of our country.

However, the Brazilian Lawyers Institute had never participated in the actions of concentrated control of constitutionality! And this opportunity to work in favor of the Rule of Law came when the Attorney General filed an Direct Action of Unconstitutionality (ADIn), contesting the powers of the recently created National Council of Justice (CNJ) to expedite resolutions regulating judges administrative activities.

The National Council of Justice was created by a Constitutional Amendment in 2004 with the clear purpose of seeking legitimate means to control the administrative and financial operations of the Judicial System, among other important tasks aimed at institutional improvement of this Branch.

Composed of professionals who were not part of the judiciary, the National Council of Justice has the mission to develop the Judicial activity, through a transparent, accessible, efficient and legitimate judiciary.

With the assistance provided from the in-house clinic of FGV Law School, the Brazilian Lawyers Institute showed up, for the first time, as amicus curiae before the Supreme Court. The brief was prepared by fourteen undergraduate students (Ana Luiza Pinto, Anelise Jordão, Fernanda Cardoso, Isadora Ruiz, João Paulo Ribeiro, Laura Couto, Maria Pereira, Marina Souza, Mariana Montenegro, Nathalia Parente, Paloma Caneca, Rafael Montarroyos, Rinuccia Faria and Thiago Corrêa) advised by two Professors (André Cyrino and Thiago Bottino).

The brief was approved by the Board of Brazilian Lawyers Institute, being filed on March 16, 2011, and the case remains pending.

The partnership with the Brazilian Lawyers Institute earned a second project. During the year of 2011, nine students (Antonia Lima, Felipe Godoy, Fernanda Pinto, Gabriel Sauer, Guilherme Leta, Luiz Felipe Cardoso, Maria Helena Queiroz, Pedro Aquino and Rafael Montarroyos), again advised by the Professors André Rodrigues Cyrino and Thiago Bottino, prepared a amicus curiae brief on behalf of the Brazilian Lawyers Institute to be presented to the Supreme Court.

This work is currently under review by the Board of the Institute for approval and has as one of its main foundations the belief that the enactment of the "Clean Record Act" does not constitute a rupture with the political-legal system in order to subvert or destroy the concept of democratic state of law. It is quite the opposite, indeed. It constitutes a mechanism of improvement of the democratic order; it is an instrument of control and governance of political powers by the Brazilian people and, therefore, deserves to be

understood by the Judicial Branch of Brazil as a legitimate political and constitutional decision.

The affirmation of the Constitutionality of the Clean Record Act by the Supreme Court strengthens the role of the Constitutional Court as the guardian of the political process, while it protects the constitutional text itself and its role as guarantor of fundamental limits.

Conclusion

The in-house clinic is where FGV Law School undergraduate courses supervised curricular practice takes place. The aim is to form professionals with a distinct profile, able to think critically through their social performance and who will promote important changes in domestic legal structures to achieve national economic and social development.

One way to achieve these goals is through training the undergraduate students in the preparation of amicus curiae brief in actions of concentrated control of constitutionality which deal with fundamental rights defense. Allowing a student to participate in this process helps improving his/her skills in writing procedural qualified legal arguments and expanding his/her notion of citizenship and rights, giving him/her the opportunity to grow as a person and as a professional, as well.

Besides technical legal skilling, this activity contributes to the teaching of the fundamental rights. Pedagogy is the science and art of education that studies, arranges, systematizes and thinks over the learning process. And the fundamental rights pedagogy promoted by FGV Law School in-house clinics consists in stimulating undergraduates to think through the Democratic State of Law most important values, offering a particular perspective on the legal system prospect of collective and diffuse interests advocacy and giving students a picture of potential contribution that legal career professionals can provide for the construction of a free, fair and solidarity society.

Ensuring the basic human rights of the poor: Ethics management training in local government by Law Schools

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1. INTRODUCTION

In many developing countries, governments and both national and international aid agencies engage in programmes to improve the standard of living of the poor. Governments spend vast amounts of money on social upliftment programmes, such as payment of social grants, providing housing, infrastructure and work creation programmes. Aid agencies contribute huge amounts of money earmarked inter alia for educational and feeding programmes.

As a result of widespread corruption and mismanagement, these funds are either stolen or maladministered. Corruption has a devastating effect on service delivery, with the result that the poor do not benefit from government spending and aid efforts. Most jurisdictions have legislative instruments and law enforcement agencies in place to address corruption. Despite these measures, corruption seems to flourish and general opinion is that the fight against corruption is being lost. In fact, political corruption has become entrenched in our societies.

In the case of South African Association of Personal Injury Lawyers v Heath and Others Chaskalson P made the following comments regarding corruption and the rule of law:

"Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."

In this paper it will be argued that a more effective approach to fight corruption would be to concentrate on an effective ethics management strategy, especially in the local government sphere, where basic services are provided to the poor. It will be argued that there is a dire need for Law Schools to provide ethics management training to local government officials and councillors in order to combat corruption.

This paper will focus on a recent project undertaken by the Nelson Mandela Metropolitan University (Faculty of Law) in the Western Cape Province of South Africa, during which anti-corruption and ethics management programs were presented to local authorities. It became evident that although most local authorities have anti-corruption policies in place, effective ethics management programmes were not operative or ineffective.

It will be argued that Law Schools can make a vast contribution to public policy regulating the provision of services to the poor. If the implementation of anti-corruption policies is properly managed, corruption will be curbed more effectively. In this way the ideal of human rights for all can become a reality.

2. THE STATE OF CORRUPTION IN SOUTH AFRICAN LOCAL GOVERNMENT

Shortly after the first democratic elections in 1994, the South African government launched a Reconstruction and Development Programme, aimed at redressing the imbalances in society, brought about by the policy of Apartheid. In South Africa about 17 million people live below the poverty level. Eleven million of these people live in rural areas. In 1990 there was a shortage of about 1.3 million homes. Each year about 200 000 new households seek a home, but in 1992 only 50 000 homes were built. This backlog and demand translated into the need to build 250 000 dwelling units a year in the last years of the 20th century, or roughly 1 000 units per working day; however, only about one-tenth of that number—25 000 dwelling units— were built each year, leaving the country with a serious housing shortage.

About 12 million people have no reasonable access to water and about 21 million do not have adequate sanitation. There is spare electricity in South Africa, but only 36% of households are electrified. About three million homes do not have electricity. 19 000 schools (86% of the total) and 4 000 clinics have no electricity.

The RDP is an integrated, coherent socio-economic policy framework. It seeks to mobilize all resources of the people of South Africa, and that of the country toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future. As a result of this policy, vast amounts of money are being spent on social upliftment, such as the building of houses, schools and hospitals. This policy is in line with some of the basic rights in the Constitution, which includes the right to housing, education, health care, food, water and social security.

Government spending in this area, has however created a fertile field for corruption to flourish. South Africa has lost 675 billion rand ($80 billion) due to corruption since 1994. About 20% of all government procurements ($3.8 billion) go missing each year. The Special Investigative Unit of the Asset Forfeiture Unit is at present investigating 900 questionable contracts and conflicts of interest, valued at $635 million. Only 5% (13) of South Africa's 283 municipalities managed to obtain a clean audit in the 2012 Auditor-General's Report. This figure is an increase from last year, but from a low base of 7. Audit reports not concluded on time shot up from 9 in 2009/11 financial years to 40. R3.5 billion of municipal procurement could not be audited in 2010/11 financial year, as the required documentation was not available. 91% of municipalities handed in reports with serious errors or material misstatements. Officials in key positions at more than 70% of the auditees did not have the minimum competencies and skills required to perform their jobs.

Municipalities around the country are in crisis. National government has declared that 136 out of 284 municipalities are unable to fulfill their basic functions. The extent of fraud and corruption in the state procurement process is estimated to be between R25 to R30 billion per year.

3. PERSEPTIONS REGARDING CORRUPTION AND THE LEGISLATIVE ARSENAL TO FIGHT CORRUPTION

The 2012 Transparency International Corruption Perceptions Index assigned South Africa an index of 4.3, ranking South Africa 69th out of 176 countries (tied with Brazil and Macedonia).

In terms of the South African Corruption Assessment Report of 2003 it was established that:

- South African citizens appear to view the most common areas of corruption in relation to seeking employment and the provision of utilities such as water, electricity, and housing.

- Public service managers also identified nepotism in job seeking, promotions and in the provision of entitlements.

- The business community identified clearance of goods through customs, procurement of goods for government, police investigation and obtaining of business licenses and permits, work and resident permits as the most corruption prone activities.

- Public servants most associated with corruption both for the citizens and the businesses appear to be the police. All surveys indicate that police officers are the most vulnerable to corruption, followed by customs, local government, home affairs and court officials. To this list, businesses added the managers and/or employees from companies other than their own.

- The majority of those surveyed felt that government was not doing enough to combat corruption. However, this perception is not uniform across ethnic groups and is held mainly by specific communities.

South Africa has a sizable arsenal of legislative instruments, aimed at fighting corruption. The most important instruments are:

- The Protected Disclosures Act (26 of 2000);
- The Promotion of Administrative Justice Act (2 of 2000);
- The Prevention and Combating of Corrupt Activities Act;
- The Municipal Finance Management Act;
- The Public Finance Management Act;
- The Local Government Anti-corruption Strategy;
- Codes of Conduct for Councillors and officials in terms of the Municipal Systems Act.

The question thus remains: why are there still such a high level of corruption present in South Africa, despite the legislative instruments?

4. APPROACHES TO ETHICS MANAGEMENT

Traditionally there are three approaches to ethics management. The three approaches can be summarized as follows:

- Compliance based approach: A regulated environment (policies, systems and procedures) that meet national and international best practice is in place. Clear guidelines with checks and balances, roles and responsibilities are available.
- Value based approach: In terms of this approach, employees are afforded the necessary tools and competencies to make sound ethical decisions. This system leaves a lot of discretion to employees and compliance will largely be based on the level of commitment of employees within the organization.

- Organizational integrity approach: This approach is a combination of the above two approaches. The policy framework to manage ethics is based on a value framework. Values are at the centre of all the activities of the organization.

South Africa follows the compliancy approach, hence the arsenal of legislative instruments. This approach is however not effective, as the following figures clearly indicate that little prosecutions flow from the breach of ethical codes or instances of fraud and corruption.

The South African Public Service Commission Report for 2012 reveals that:

- Only 50% of government departments had data bases to monitor corruption;
- In only 20% of instances of corruption criminal action was instituted.
- Between 17% and 20% of senior managers in various departments had interests in private companies;
- Some civil servants had interests in more than 5 companies contracting with the State.

It is submitted that South Africa should move away from the compliance approach to the organizational integrity approach. In the programme presented by the NMMU in the Western Cape Province, a move towards the organizational integrity approach was advocated.

5. THE WESTERN CAPE ANTI-CORRUPTION TRAINING PROJECT

The Western Cape Provincial Government instructed GAB Consulting to conduct an Anti-corruption and Fraud Survey during 2011. The aim of this survey was to determine the presence of anti-corruption and fraud prevention measures, as well as employee awareness of these measures, in the Western Cape Province. The main findings of the survey was that the majority of the 29 municipalities surveyed either did not have anti-corruption policies in place, or if they had, no ethics committees were operative. The report revealed a very low awareness amongst employees of such measures. On average 7% of staff knew about the existence of anti-corruption committees and 2% of staff members knew who the members of the committees were, as well as the functions of the committees.

The NMMU was requested to present anti-corruption and ethics management workshops to local authorities. In total 15 workshops were presented, attended by approximately 300 municipal employees and councilors. The training involved the identification of corrupt activities and areas where corruption is most likely to occur. Further aspects covered included action to be taken on corrupt activities. A second, more focused set of workshops dealt with the drafting and implementation of an ethics code, as well as the establishment and proper functioning of an ethics or anti-corruption committee. This part of the training included the implementation of strategies to ensure the viability of ethics management programmes.

Feedback on both workshops was very positive. Two district municipalities informed that they have adopted ethics codes and implemented anti-corruption committees.

6. THE ROLE OF UNIVERSITY LAW SCHOOLS AS CONTRIBUTORS TO PUBLIC POLICY ON HUMAN RIGHTS

Universities have an important role to play when it comes to influencing public policy, especially in changing societies. This political role of the university might be more

important after change has already taken place when people, networks and ideas are formed in the 'protected space' of the university.

These ideas will then spread into the wider society and provide the human resources to fill new political leadership roles in society and its institutions. The same report observes that the role that universities have played in undertaking policy research for new regimes, in providing personnel for the governing and administrative apparatus, and consultancy services to both government and enterprises took place in South Africa and elsewhere. It found that especially in Africa university personnel were active in the work of NGO's.

It is however advanced that universities and law schools should go further and train more than future personnel for the governing and administrative apparatus of the state. It is indeed the current employees of municipalities and the current councilors who will have to fight corruption and manage ethics within the municipal environment. The community at large is also a stakeholder in ethics management. Public participation forums could be used to involve the community in ethics management. In South Africa the ward committee system could be used as such a forum.

Universities could also assist in conducting surveys on ethics management and develop sector specific training programmes where it is necessary to present such training programmes. This work can be done in conjunction with governmental departments and NGO's.

Training programmes, such as the one delivered by the NMMU Faculty of Law to municipalities in the Western Cape is an example of such a programme. Through the funding by an NGO, the NMMU was able to provide a much needed service to municipalities. If ethics are managed effectively within municipalities, instances of corruption will be more easily detected and prosecuted. Measures will also be put in place to monitor government spending and curb instances of corruption. This will ensure that upliftment programmes will be successful, as the money made available for these programmes, will in fact reach the poor it was intended for. In this way, the basic human rights of the poor will be safeguarded.

7. CONCLUSION

South Africa's first democratically elected President, Nelson Mandela said: "Our hope for the future depends on our resolution as a nation in dealing with scourge of corruption."

Corruption is a danger to South Africa's democracy. Poverty needs to be addressed. In the case of Government of the Republic of South Africa and Others v Grootboom and Others the Constitutional Court of South Africa warned that unless the plight of poor communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The court commented that this case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream.

It is apt to conclude with the words of the Constitutional Court of South Africa:

"[C]orruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence…When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn the stability and security of society is put at risk."

CHALLENGES AND TRENDS IN BRAZILIAN ADMINISTRATIVE LAW

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The government has taken numerous forms over the years, with an ever increasing rate of change over time. Clearly, the liberal government of the 18th century differed significantly from the economic and social interventionist government of the 20th century. Over the past centuries these forms of government have taken on new significance, structures and ways of relating with civil society.

The rapid rate of change at the end of the 20th century and the current century has lead to more than faster modifications in the form of government and the manner in which it develops and needs to develop. Nowadays, shifts in society, politics and the economy that present new challenges for the State occur over the course of just a few years. These challenges range from administrative questions related to reforming the state apparatus to regulating public services, competition, the environment, the financial system, etc. Thus, it is of utmost importance to examine the present and future of the State.

There is much discussion of how Brazil's public administration should function in today's dynamic social, political and economic climate. There seems to be consensus around the idea that any actions must take into account both the overarching and specific societal issues and demands, and the that administration must make sure it is flexible, efficient and able to address the everyday needs of the population.

But why has discussion and debate on the topic of public administration intensified recently? One related fact is of utmost importance to Brazilians: letters published in 1988 in The Federal Constitutional outlined a new, solidly democratic design for the state of law. The letters highlighted the need for an overhaul of the social order with a focus on employment, well-being and social justice, as well as the need for the economic order to foster free enterprise and recognize the value of the labor force. It was up to the State to maintain social and economic order while overseeing and **regulating** the daily functioning of society on which social and economic order is based.

If the State should ideally generate public policy that aims to regulate market competition and promote society's well-being (the means), the focus and principal objective is then the creation of instruments that foster and protect the dignity of the citizens (the end). Whereas one individual affecting the dignity of others was previously thought to be inappropriate, this notion came to be considered an integral part of the relationship between the State and society. The result of this shift is a substantial revision of assumptions about the role of the State in the general functioning of society, politics and the economy.

Books and other writings on a range of contemporary topics related to the State, including the financial system, competition, the environment and oil in Brazil reflect the new, systematic way of thinking that has taken hold in the country. With this new vision comes the recognition that the law and its stakeholders are part of a network of knowledge, information, logic and standards of behavior that can only be understood through an interdisciplinary, practical perspective based in the social, economic and political condition of the country.

Brazil, known for the extreme economic interventionist policies of its executive branch, particularly during the 1960s, '70s and '80s, has seen increased State regulatory actions.

These actions must generate new solutions that address the complex social issues that impact the welfare of the people.

One of the principal features of the current situation of Brazilian society is that State actions, to a certain extent in the social context, tend to impact one another and even have an effect individual rights. Given the extensive range of opposing interests and the diversity of constituents and stakeholders in the country, the implementation of public policy often fails to meet the needs and expectations of the population.

To address these challenges, which are exacerbated by the complexity and taxes stipulated by the 1988 Federal Constitution, the government must act with the utmost efficiency and proper use of funds. This adds to the already problematic situation engendered by the traditional discretionary spending.

Nowadays the State must be extremely efficient in providing services to the public, as well as on the domestic and international level. Specifically, the State must be an instrument for national development while being accountable for its actions. However, public policy for distribution of wealth, food, employment, safety, investments in education, access to the legal system, improvements in healthcare and programs for housing and basic sanitation infrastructure have become the main focus of State planning. It is worth noting that in Brazil this is not a response to situational needs, but rather a stipulation of the constitutional system. However, the planning and proper implementation of public policy in these realms, essential for the development of society, remain somewhat "opaque".

Thus, if the Brazilian State takes on a regulatory role with very clear objectives to respect basic rights and allocate certain economic activities to the private sector, society will need governance geared specifically toward transparency of results of government activities.

These results should, whenever possible, must be presented objectively, with indicators of achievement, metrics and induces that exclude randomness and translate the consequences of political action and public choices into improved living conditions for the population.

What's more, the State has taken on a regulatory role and public policymakers in isolation are unable plan, finance and execute all the strategic investments necessary for the development of the country. The solution involves the formation of consortia and partnerships among federal, state and city governments, independent agencies, international organizations, non-governmental organizations and private companies. Only in this way can the government properly implement programs based on public policy.

In fact, the federal government has considered altering the way in which it implements some actions in strategic areas. Federally administrated agencies would function under a new format: the Managerial Public Administration. The goal of this agency is to promote a new mentality and a new culture of management, modeled after other organizations already addressing the challenges of modernization, in the Brazilian public administration.

Among other actions, as part of the privatization process, independent regulatory agencies — connected, but not subordinate to the central government-- were created or restructured. These agencies were part of the so-called decentralized or indirect administration. In addition, a model for social organization was created to transfer some of the responsibilities in the social realm to philanthropic and not-for-profit organizations through the use of incentives.

The creation of regulatory entities follows an international trend of government reform through the creation of new management, legal, financial and technical tools. Various types of independent regulatory agencies have been established in many countries around the world. Some examples include independent regulatory commissions in the United States, France's autorités administratives indépendantes, autorità indipendenti in Italy, the administraciones independientes in Spain, the Canadian régies, the ambetswerk in Switzerland and Finland, and the ministerialfreien Raums of Germany.

It is important to stress that with the process of European unification it has become crucial that the activities of the various regulatory agencies be coordinated in order to promote efficiency and transparency. Indeed, a number of institutions have been created with this objective.
In fact, the Brazilian regulatory commissions have been particularly successful in this area. In addition, new regulatory models have been implemented in the Conselho Administrativo de Defesa da Concorrência, CADE (the Anti-trust Council) and the Comissão de Valores Mobiliários, CVM (the equivalent of the US Securities and Exchange Comission), among others.

Clearly, the government sought to apply new theories during the 1990s. The model applied at that time, from the classic bureaucratic point of view, put the agencies in a position of less influence relative to government interests. The regulatory agencies, on the other hand, were connected solely to the central government and focused on the continued implementation of public policy that sought to separate the creation and execution of public policy.
Within the historical context politics, subject to the electoral cycle and governmental limitations, could impact the adoption of practices that required continuity and reliability of the legal system. Thus, the regulatory system favors and promotes the development of practices on the State, rather than on the government level.

This paper set out to present the complex nature of the regulatory system in Brazil by explaining the environment imposed by the Brazilian constitution, identifying the theoretical bases of the organization of the government and exploring the role of the new, functionally autonomous regulatory agencies. It is a question of actions, strategies, programs and policies aimed at improving the country on an institutional level under the guises of the State as a regulatory agency, as well as to strengthen the democracy and promote human dignity.

HOW LAW SCHOOLS CAN CONTRIBUTE TO PUBLIC POLICY ON HUMAN RIGHTS

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The essential functions of a law school are teaching, scholarship, and service. Public policy on human rights should inform a law school's activities in carrying out each of these functions.

Teaching

The Universal Declaration of Human Rights[4] is one of the most important documents created in human history. Though intended to be primarily aspirational in nature,[5] "there can be no question that . . . [it] constitutes at least significant evidence of customary international law,"[6] and some consider it to have become a part of binding customary international law.[7] Its principles are given life – to greater or lesser extent – in member nations' constitutional structure, legislative enactments, law enforcement activities, criminal and civil justice systems, as well as through many international treaties.[8] At law schools all around the world, core law school courses focusing on each of these subject areas are taught – and often required. The Universal Declaration of Human Rights is relevant to the study of each of them.[9] Law schools thus have an opportunity pervasively[10] to integrate consideration of the Universal Declaration of Human Rights into the study of domestic law. What are the costs and benefits of doing so?

First, the benefits. Law school graduates disproportionately become leaders in society. In many countries, they are broadly represented among local, regional, and national legislatures; heads of state; government officials charged with administration of the criminal and civil justice systems; and leaders of large organizations such as business corporations, health care providers, and NGOs. Persons in these roles possess significant opportunity – and power – to influence the advancement of human rights policy as it is formed and implemented at national, regional, and local levels of society. Of course, many more law school graduates become lawyers. Regardless of the type of clients a lawyer routinely represents – individuals, organizations, or governmental entities – he or she has both the opportunity and the responsibility[11] to counsel and represent those clients in ways that can influence the formation of human rights policy within the legal/social/political

[4] Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), available at http://www.un.org/en/documents/udhr/ (last accessed January 26, 2013).
[5] Hurst Hanum, *The Status of the Universal Declaration of Human Rights in National and International Law,* 25 GA. J. INT'L. AND COMP. LAW 287,317-18 (1995).
[6] *Id*. at 319. *See generally*, *id*. at 317-339.
[7] *Id*. at 319 (citing **LOUIS HENKIN, THE AGE OF RIGHTS** 19 (1990).
[8] *Id*. at 292-316.
[9] For example, courses on contract law and labor law might quite naturally consider Article 24 of the Declaration, recognizing a universal right to rest, leisure, reasonable working hours, and paid holidays.
[10] *Cf*. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Ed. 31 (1992) (proposing that professional responsibility (legal ethics) issues should be integrated into all law school courses), and **DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1998) (**providing teaching materials materials to enable professors who do not specialize in the field professional responsibility to easily integrate professional responsibility issues into their course).
[11] *Cf*. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 & cmts. 2, 3, & 5 (2013), accessible at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (last accessed January 26, 2013).

environments in which those clients operate. Therefore, by encouraging law student to critically consider human rights issues as they arise in every course, law schools can enhance the likelihood that their graduates will be equipped and inclined to make constructive contributions to the promotion of human rights policy in ways both small and large. By preparing the human resources that they are creating and nurturing to be mindfully and actively attentive to human rights policy, the law schools will enhance the value those human resources hold for the benefit of society.

The costs[12] associated with more purposely incorporating consideration of human rights policy into a law school's curriculum are modest. True enough, some resources must be invested in workshops designed to create in professors a basic understanding of human rights policy and documents and how these sources of law effectively can be incorporated into courses throughout the curriculum. Such workshops usually could be conducted using in-house faculty expertise or a guest lecturer. Having created the ability of professors to attend to human rights policy in their courses, institutional leadership could create incentives for professors to utilize this ability Such incentives would not necessarily require additional resources. A dean simply might announce that a professor's efforts with respect to infusing consideration of human rights policy into courses will be a not insignificant factor in performance evaluations and compensation decisions. Such a program would facilitate a law school to realize its full potential for contributing to human rights policy through its teaching function.

Scholarship

While some in the United States have questioned whether legal scholarship has any significant real world impact,[13] there is no such skepticism in countries employing civil law systems. Even in America, however, there is reason to believe that published scholarship constructively impacts human rights policy as it is enunciated by courts, legislatures, and the executive branch of governments.

It is not uncommon for decisions of the United States Supreme Court (as well as lower federal courts and state courts) to be influenced by legal scholarship produced in law schools. Notable examples of such influence can be found in Miranda v. Arizona,[14] prohibiting police officers from conducting custodial interrogations of suspects in criminal investigations without first advising the suspects that they have a right to remain silent and to engage counsel (or to have counsel appointed to advise them) before they respond to the interrogation; Lawrence v. Texas,[15] holding unconstitutional a Texas statute making it a crime for two adults of the same sex to engage in certain intimate sexual conduct; and Crawford v. Washington,[16] establishing that defendants in criminal proceedings must have a meaningful opportunity directly to confront, in open court and with the assistance of counsel, those whose testimony or research is sought to be introduced as evidence against them. Each of these decisions directly impacted human rights policy in the United States, and each relied in part on published legal scholarship.[17]

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[12] Some might worry about the "cost" of class time that would be lost if time that otherwise would have been devoted to the core subject matter of a course is devoted to human rights issues. This problem can be managed. A little time goes a long way toward achieving the desired objective, and it may be sufficient to motivate more students to enroll in courses that focus exclusively on human rights than would otherwise have been the case. To the extent that a finite amount of class time will be "lost" on account of attention that is given to human rights issues, a school responsibly could conclude that this institutional "cost" is exceeded by the institution benefit of prioritizing human rights discourse.

[13] *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L.REV. 34, 42-57 (1992).

[14] Miranda v. Arizona, 384 U.S. 436 (1966).

[15] Lawrence v. Texas, 539 U.S. 558 (2003).

[16] Crawford v. Washington, 541 U.S. 36 (2004).

[17] Miranda v. Arizona*, supra* note 11, at n. 2; Lawrence v. Texas, *supra* note 12, at 572; Crawford v. Washington, *supra* note 13, at 61, 63; *see also*, *id.* at 69 & nn. 1-2 (Rehnquist, C.J and O'Connor concurring).

With institutional encouragement, law professors in many countries have an impressive record of producing legal scholarship addressing human rights policy and thus creating a body of thought worthy of consideration in the formation of public policy. Human rights incites propounded in legal scholarship are often brought to the attention of decision makers through the briefs and arguments of lawyer-advocates and *amici*. As is true for courts, there is no doubt that legislators and officers of the executive and administrative branches of government often are influenced by legal scholarship produced in the law schools in forming their decisions that affect human rights policy.

Besides influencing policy makers, professors' production of legal scholarship also informs their own teaching. Therefore, legal scholarship contributes to the formation of public policy on human rights through the teaching function, as well.

Service

Law schools provide service to society through the individual efforts of their faculty members and through institutional efforts. As individuals, law school professors sometimes take leaves of absence from their academic positions to serve in government posts where they can directly affect public policy on human rights. Law professors are capable of providing such service because they have worked in law school environments where highly educated and concerned individuals facilitate the development of well-informed insights regarding human rights policy. By creating these environments, law schools help to develop intellectual capacity that can be particularly valuable in assisting governments as they create and implement human rights policy. A flexible leave policy will allow this capacity to benefit society.

Institutionally, law schools can influence public policy on human rights through educational clinical programs[18] and multi-disciplinary conferences. Dozens of law school clinics throughout the world represent clients seeking to assert or protect their own human rights or those of others.[19] By pursuing judicial recognition of human rights, legislation, or administrative actions on behalf of clients, the legal services offered by law school clinics directly impact human rights policy through the advocacy of the student/lawyers and their faculty supervisors. Further, law school clinical programs provide an incomparably impactful educational experience for law students, who stand to be more knowledgeably and actively engaged than they otherwise would be in the shaping of human rights policy throughout their post-graduate careers. Thus, clinics contribute to public policy on human rights through both the law schools' service function and their teaching function.[20]

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[18] For examples of robust clinical programs addressing human rights issues, see http://www.law.northwestern.edu/legalclinic/ (last accessed January 27, 2013), http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/index.cfm (last accessed January 27, 2013), http://www.law.nyu.edu/academics/clinics/year/index.htm (last accessed January 27, 2013), and http://www.law.stanford.edu/clinics (last accessed on January 27, 2013).

[19] Law school clinical programs address disputes involving religious liberty; citizens' needs for health care, shelter, and food; the plight of refugees and asylum seekers; those yearning for a safe and healthy environment; persons who are victims of domestic abuse; and many other human rights claims.

[20] Clinical legal education programs are better developed and more widely available in some countries than they are in others.. There are ongoing efforts by governments and NGOs to broaden the availability of law school clinics because of the valuable services and teaching that they provide. *See, e.g.*, Zaza Namura, *U.N. Enacts Global Standards on Access to Legal Aid,* Open Society Foundations (Dec. 12, 2012) (available at https://snt002.mail.live.com/default.aspx?id=64855#!/mail/InboxLight.aspx?n=1355786509&fid=1!n=1828898018&fid=1&pdir=NextPage&paid=a548fe4f-62b6-11e2-9812-00237de49bb6&pad=2013-01-20T04%3A05%3A48.677Z&pidx=2&mid=8d98cb79-5b95-11e2-ad4d-00215ad7f73c&fv=1 (last accessed January 26, 2013). These efforts should be encouraged to continue.

Finally, law schools, particularly those that are university-based, are well situated to organize conferences and symposia on topics and issues that implicate human rights policy. By bringing together academics and policy-makers from a variety of relevant disciplines and viewpoints, law schools can stimulate scholarly and public discourse on human rights policy. This discourse, in turn, contributes to reform of human rights policy.[21]

[21] *See, e.g., Symposium: Examining Shaken Baby Syndrome Convictions in Light of New Medical Scientific Research,* 37 **OKLA. CITY U. LAW REV. 219 (2012).**

Unique cooperation between Law School (TLS) and Estonian Human Rights Centre (EHRC) in Estonia

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1. Introduction

The deep and unique cooperation between TLS and EHRC has been mutually beneficial and allowed to achieve results which would not have been possible separately; in this situation cooperation has resulted in significant benefits for both parties.

Tallinn Law School (TLS) has human rights in its DNA. The law school is uniquely international as it has been always oriented towards international and European law, of which human rights form a significant part. TLS thus has faculty members that are interested in and work on issues related to human rights, as well as academic contacts in the area. Both Bachelor and Master programmes include at least one required course on human rights, which means that TLS students and graduates are more into human rights as well. The new international master program on technology and law takes into account the human rights issues (privacy, intellectal property, security related issues). There is considerable expertise and interest in human rights at TLS, but there is a lack of practical channels to put the expertise and interest to practice in Estonia.

Estonian Human Rights Centre (EHRC) was founded in 2010 by two lecturers at Tallinn Law School in order to engage in human rights advocacy and create a central non-governmental human rights organisation in Estonia. It was based partially on activities that were undertaken in the Human Rights Centre of **Tallinn University of Technology** (TUT), which had been operating since 2007. The EHRC has focused on three main areas in its current activities: equal treatment, refugees and human rights education. It also publishes a yearly human rights report and monitors and reports on human rights in Estonia in general. The EHRC has achieved considerable visibility and good links with different NGOs, however, it has not yet developed international contacts, also there is a constant need for outside expertise and support.

EHRC is a member of the EU Fundamental Rights Platform, which is a network of NGO cooperation under the auspices of the EU Fundamental Rights Agency and a member of the Estonian Roundtable for Development Cooperation. EHRC also belongs to the Network of Estonian Nonprofit Organizations. EHRC has also recently joined European Council of Refugees and Exiles (ECRE). The mission of EHRC is to actively promote respect for human rights in Estonia. EHRC advocates the improvement of policy and law concerning human rights through awareness-raising, public debate, advice, lobbying and strategic litigation. EHRC is an independent, reliable and professional partner to individuals, government, local governments, companies and non-governmental organisations both inside and outside of Estonia.

The vision of EHRC is to become a comprehensive, effective and sustainable national non-governmental human rights advocacy organisation. It will be a contact-point both inside as well as outside Estonia in human rights issues concerning primarily Estonia. EHRC develops its activities according to thematic programmes depending on needs of the society. These thematic programmes and main activities within them currently are:

- Equal treatment and non-discrimination programme, advocating for betterment of Estonian equal treatment laws and practice, including providing regular legal advice to individuals, delivering trainings, conducting thematic studies, lobbying and engaging in strategic litigation when necessary;
- Refugee programme, including legal clinic providing legal aid and representation in court during asylum proceedings with the aim of improving the procedures for asylum seekers as well as participating in and initiating topical public debates as a tool of advocacy;
- Human rights education programme, including Human Rights Week in November/December annually since 2007, providing trainings and human rights courses at Tallinn University of Technology, cooperation with UNESCO Associated Schools Project Network (ASPnet).
- Access to justice programme will be developed in 2012 to monitor and advocate better access to justice, including state legal aid, length of proceedings and provide information and advice on access to justice in the Russian language.

The activities so far have also included the following cross-cutting actions:

- Monitoring the situation of human rights in Estonia - eg. publication of annual human rights report on Estonia, which is a useful tool for advocacy. First one covered 2007, next 2008-2009 and third one 2010,1 the report on 2011 is expected to be published in March 2012. Studies on specific topics of fundamental rights (such as homophobia, child trafficking, data protection, racial discrimination, return of irregular immigrants) for the EU Fundamental Rights Agency2 and participation in ELDIA (European Language Diversity for All) project on minority languages;
- Exchange of information among different stakeholders - eg. EHRC commenting on the drafts of state reports for UN and Council of Europe, EHRC participating in consultative bodies, EHRC cooperating with different Estonian and international organisations acting on specific areas of human rights;
- Topical advocacy activities - eg. participating in public discussions with human rights aspects, supporting or initiating actions such as legal regulation of same-sex partnerships, compiling shadow reports to state reports where necessary and otherwise providing information on the situation of human rights to international organisations and other states;
- Thus there are unique benefits to be had for both TLS and EHRC. These unique benefits allow for deep and wide cooperation in numerous areas, many of which result in influencing public policy on human rights. Both institutions are able to reinforce each other in terms of contribution to human rights policy as well as providing a common platform for discussion of topics related to human rights situation in Estonia.

For TLS, partnering with EHRC adds significant value:

- TLS faculty gets visibility and academic work results in practical output;
- TLS is able to develop strong links with society;
- TLS students are able to get internships in the human rights field at EHRC;
- TLS grows its research and development activities in addition to teaching (important due to higher education reform in Estonia).

For EHRC, partnering with TLS gives similarly benefits:

- EHRC gets access to TLS academic contacts and resources (TUT library);

- EHRC is able to rely on the pool of faculty members active in human rights research in order to get input for its activities (such as the human rights report);
- EHRC as a newcomer is able to use the reputation of TUT and TLS in order to get better credibility for its activities;
- EHRC is able to engage volunteers and find new talent among TLS students.

There are also risks and issues, for example as the competition between universities is harsh, other (regional) universities are less interested in cooperating with EHRC. Similarly, for TLS, there is a risk that it gets too involved in grassroots activism (such as campaigns), which does not go together with an academic reputation. However, those risks are minimal and have not resulted in problems.

To cooperation is structured using a framework cooperation agreement, which is supplemented by concrete agreements for specific activities. The agreement sets out the responsibilities of parties as well as principles of cooperation. Some of the staff of EHRC is also employed by TLS to give lectures on human rights and European law. Additionally, there are members of TLS faculty at the Council of EHRC, which is the highest decision making body of the institution.

Specific activities in which TLS and EHRC cooperation has been especially effective are highlighted further.

2. Situation of human rights in Estonia

The human rights situation in Estonia can be characterised as uneven. In some areas the developments have been faster than in others. In some areas examples can be provided as to how Estonia is going further than minimum international standards in the protection of human rights and in a few areas, even minimal level has not been achieved. The protection of human rights is divided by areas of activity between various ministries and institutions. Uniform and co-ordinated approach is lacking, in fact, there is little cooperation between the different institutions that in one way or other affects human rights of individuals.

The main government agencies which have central role of protection of human rights include:

Chancellor of Justice (*Õiguskantsler*), which combines the role of an ombudsman with the protector of the constitution (including constitutional rights). While the Chancellor has been effective in highlighting issues, its role and capacity is constrained as he remains mainly reactive in dealing with human rights abuses. Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*) is a new institution established from January 2009 dealing with discrimination cases. While the Commissioner has the legal powers to engage in awareness-raising, its financial and human resources are extremely limited. Its function to respond individual applications has remained politically marginal. Estonian Data Protection Inspectorate (*Andmekaitse inspektsioon*) is tasked with both ensuring implementation of data protection rules as well as handling complaints regarding information required to be published or made available by public bodies. But its scope of activity is limited to data protection and access issues only.

There is no accredited or non-accredited National Human Rights Institution in Estonia.

The Ministry of Justice, Ministry of Social Affairs, Ministry of Culture and Ministry of Education and Research have mandates that deal with specific aspects of human rights, such as for example non-discrimination. The Ministry of Foreign Affairs has a bureau of

human rights, which is mostly preparing reports on behalf of the Estonian government, whereas the Ministry of Culture deals with integration and cultural diversity.

There is no authoritative human rights advocate NGO, having the capacity and clout to have a meaningful impact in the society. In the NGO sector, there are currently three general human rights organisations active in Estonia: Estonian Institute of Human Rights (MTÜ *Inimõiguste Instituut*), Legal Information Centre for Human Rights (MTÜ *Inimõiguste Teabekeskus*) and the EHRC. The Estonian Institute of Human Rights (EIHR) is the oldest, but has limited resources and capacity, therefore the impact of its activities has so far been minimal. It has recently been reorganized. The Legal Information Centre for Human Rights (LICHR) is mainly focused on the protection of interests of the Russian ethnic minority.

Besides the above three, other human rights organisations are more specialised (e.g. protection of the rights of the child, of the disabled, patient's rights, LGBT persons etc) with no interest in developing human rights in general. Due to fragmentation and lack of cooperation and specialist knowledge within the NGO sector, these organisations have a limited impact on improvement of the overall situation. The NGOs sometimes lack legal expertise and advocacy skills, while their awareness raising capacities can be somewhat better. The EHRC has already established contacts with most of these specialised NGOs, cooperating with them on different activities, such as the Human Rights Week and annual human rights report.

As regards specific areas of human rights, the situation is the following (based on the three annual reports Human Rights in Estonia 2007, 2008-2009, 2010).

Estonia lacks a general strategy for the better protection and promotion of human rights. The state mainly deals with human rights topics reactively, as a consequence of the application of EU or international legal norms. This can be exemplified with the adoption of the Equal Treatment Act, referred to earlier, which was adopted on 2008 solely with the purpose to avoid infringement procedure by the European Commission.

The reports underline the considerable differences in the treatment of men and women. Estonia's pay gap of 33% is the largest in the European Union. There are also significant differences in the treatment of men and women in recruitment and conditions at work. However, activities related to gender inequality continue to be under-financed and not sufficient to have any notable effect on society. The state continues to lack a systematic plan of action to promote gender equality. The Commissioner's continuously low budget shows the lack of interest from the part of the Government to deal with the issue in any meaningful way.

In recent years, emphasis in Estonia has been on nationality-based discrimination. National minorities have the opportunity to form cultural autonomies but, unfortunately, this opportunity is not widely used due to the complexity of the regulation and difficulty to fulfil the requirements for their establishment. The situation of Russian minority in Estonia is worrisome since a large number of them are still stateless. The latest human rights report on 2010 also demonstrated the high level of unemployment and low self-esteem that is prevalent in Russian-language community. This community also has a very low knowledge of their legal rights and recourses available to them when their rights are violated.

Compared to other fields of activity, discrimination based on sexual orientation received the least attention in Estonia until last year. In 2010, Tallinn University of Technology in cooperation with EHRC launched a campaign Diversity Enriches, which continued in 2011 and tackles homophobia among other topics. The situation is problematic primarily due to

the prejudicial views of homosexuality and stereotyping in Estonia. Currently the central issue is the lack of opportunity for same-sex couples to register their partnerships and thus receive the privileges and rights attached to such registration. The LGBT organisations are still in the first stages and their ability to advocate for the respective issues independently is still developing.

Shared problem throughout the whole non-discrimination field is the apparent low impact of equal treatment legislation. Although the Gender Equality Act has existed since 2004 and the Equal Treatment Act since 2008, there have never been any cases in court based on these acts. This either shows lack of awareness of these acts or their lack of trust in the functioning of these acts. Another shared problem is the regulation of hate crime, which generally is considered to be ineffective due to the high threshold required by the Penal Code. There have been no cases under the current regulation and although an amendment (lowering the threshold) has been drafted by the Ministry of Justice, there is a lack of political will on the part of the politicians to process it in the parliament.
The availability of high-quality legal assistance to all people continues to be problematic in the area of the administration of justice. The current legal aid system does not guarantee the best possible protection and it should be reviewed in order to provide better access to courts. Additional problematic areas pointed out by the Chancellor of Justice and the Supreme Court are legal fees that are too high and court procedures that are too long. There government has announced that the situation will be improved.

The number of asylum seekers in Estonia has been relatively low compared to other EU member states. It has increased in the past three years: In 2009 the number of asylum seekers in 2009 was 40, in 2010 it was 33 and by October 2011 it is already 62. Therefore new situations, questions and challenges arise every day. According to studies carried out in Estonia the awareness among public is very low and the topic is not a priority at the Government level. In Estonia there are 5 NGOs dealing with refugee matters directly. These NGOs mainly work project-based depending on the funding from the European Refugee Fund and/or the Ministry of Interior Affairs, which limits the work and possibilities and, moreover, the rules are set by the funding organisation.

Human rights have been in the public opinion generally thought of as a requirement of EU and NATO accession and a matter of reputation of the state. The concept of human rights as inalienable birth rights of every person has not been clearly communicated. The political and opinion leaders fail to understand the nature of human rights and the necessity of the protection of human rights for the balanced development of the Estonian society. Human rights organisations have, in this regard, a substantial work to be done, which includes raising awareness of not only the general public but also of public servants and politicians.

3. Annual human rights report[22]

TLS provides links with academia, which are able to contribute to activities of EHRC, which are directed towards reporting and monitoring. In a small country in which there are few specialists of human rights, TLS is providing academic quality supervision.

The cooperation in the framework of the human rights report is a good example of synergy between human rights activism and scholarly efforts: the report (first issued on 2007) gives information on and analyses the human rights situation in Estonia. It deals with Estonia's

[22] http://humanrights.ee/en/activities/monitoring/annual-human-rights-report/
The latest, is available as pdf: http://humanrights.ee/wp-content/uploads/2011/09/EIKaruanne2011.eng_.pdf

development in nearly all rights contained in the European Convention on Human Rights. The authors enjoy academic freedom although the facts and style of the contributions are carefully peer-reviewed. The selection of the authors is discussed with the Board of the Centre and law school scholars have been active in contributing.

As it is stated by Human Rights Centre: "Developments that took place in the field of human rights in Estonia are described, analysed, illustrated by positive and negative examples as well as criticised, but not only that – specific recommendations for eliminating the shortcomings are also provided. Although each chapter has an author or authors, the report aims to provide a coherent overview of developments in human rights in Estonia as a whole".

The report is published in Estonian, English and Russian (biggest minority in Estonia) languages and are available also as PDF files at the website of the EHRC. The report is widely disseminated and received also criticism of being too harsh or critical. The human rights report is one of the tools through which it is possible to influence public policy on human rights. Concrete examples include analysing the situation of the right to education, especially concerning as well as freedom of speech issues. The arguments that contain in the reports are often used by TLS academic staff when dealing with human rights issues. For example, belonging to Legal Policy Committee of the largest professional association – Estonian Lawyers Union, the comments related to access to education have been used; as well as some of the arguments in evaluating Estonian European Union Strategy.

EHRC is conducting also monitoring of the human rights situation, some of them were provided in cooperation with TLS. One example is a media monitoring on how human rights topics are covered in media. The period monitored was for three months. Based on the monitoring, the experts compiled a report analysing media's understanding of human rights and its handling of human rights problems. The aim of this specific monitoring was to clarify how, in what scope and how balanced is the coverage of Estonian (incl Russian language) news media regarding issues of human rights protection. Monitoring covered all major news media publications on paper as well as on web, including not only Estonian language media but also Russian language media

4. "Diversity Enriches" campaign

For three years, EHRC and TLS have cooperated in projects funded by European Commission and Estonian Ministy of Social Affairs in order to promote equal treatment and fight discrimination and intolerance. This has been the most prominent activity in the area in Estonia, creating a lot of discussion and resonance in the society.

The campaign has included many activities in which TLS and EHRC have joined forces:

- Newspaper inserts (circulation ca 40 000 copies) on LGBT, Disability, Age;
- Film programmes with Black Nights Film Festival and tARTuFF (in 2010 and 2011);
- Diversity enriches weeks in Tallinn and Tartu in 2012 (film programme, concert and activites);
- Conferences on equal treatment in general (2010), LGBT (2011) and Diversity in business (2012);
- Studies on attitudes towards LGBT, older aged persons;
- Compilation and publication of handbook on Equal Treatment Act;

- Exhibitions on LGBT: Untold Stories at Tallinn Art House, new version of Berlin-Yogyakarta (translated to Estonian and Russian[23]);
- TV programme in 2011 and radio programme in 2012;
- Facebook page with 4047 "Likes";
- Launch of the Diversity Charter in Estonia in November 2012 and accompanying actions;
- Outdoor campaigns on (racism and homophobia in 2010, LGBT and disability in 2011, Business Case for Diversity 2012).

In all of the above activities, which formed the equal treatment advancement in Estonia, partnership between TLS, EHRC as well as Ministry of Social Affairs was one of the factors, which allowed the campaign to be so successful.

In 2011, the campaign involved during implementation five additional partners. The active partners were:
Eesti Puuetega Inimeste Koda (Estonian Chamber of Disabled People, ECDP) – They were responsible for organising the shared experience seminars for disabled persons as well as the teaching kit for kindergartens. They also provided valuable inputs in developing both the newspaper insert and outdoor campaign on social status of disabled persons. In addition they cooperated helping to make the film festival more accessible.
MTÜ *Kollaboratoorium* – They were responsible for the international exhibition "Untold Stories". It was successfully implemented and there were no problems with reporting or publicity.
MTÜ *Pimedate Ööde Filmifestival* (NGO Black Nights Film Festival, PÖFF) – PÖFF was responsible for the Tartuff film festival and human rights subprogramme of the 15th Black Nights Film Festival. During the action they developed and active interest in furthering accessibility for disabled persons to their events, which will last also after the end of the action.
MTÜ *Tegusad Eesti Noored* (TEN) – TEN was responsible for the two youth oriented sessions, which they successfully implemented.
MTÜ *Eesti Gei Noored* (EGN) – EGN was responsible for the organisation of the cultural day for LGBT people. They were also involved in other areas of the project, participated at seminars and provided useful feedback.

As a stakeholder, Estonian Ministry of Social Affairs was involved in the activities. The were contributing to the development of various activities (such as study). The communication and cooperation could have, however, been better. In addition the Gender Equality and Equal Treatment Commissioner took part in and contributed to several activities. The British Embassy in Estonia also provided useful support with contacts from the UK for the conference and other activities (such as TV show).

The most important outcomes are the improvement of awareness of equal treatment, increase in visibility of non-discrimination topics (especially in the focus areas of LGBT and persons with disabilities).

An important lesson learned from the action is that maximum impact can be achieved when involving professional specialist organisations and by building partnerships. This action was implemented by a public university with the close involvement NGOs as partners as well as several more in other roles and the government through the Ministry of Social Affairs. However, one should be aware that such partnerships take long time to develop and a lot of focus should be put on communication between partners.

[23] also available online at http://www.erinevusrikastab.ee/berlin-yogyakarta

Implications for policy-makers and opinion-makers include the possibility to discuss equal treatment issues more openly and in a more substantial level. For NGOs the action has meant being able to be a part of an action that elevates the discussion and provides enhances knowledge sharing and contacts. It is the bringing together of different NGOs where awareness grows (such as NGOs specialising in areas of disability and LGBT issues). It is also important that non-discrimination issues are dealt with and communicated from a position of authority. This cooperation between the European Commission, Ministry of Social Affairs, Tallinn University of Technology, Estonian Human Rights Centre and several NGOs means that there is a far greater chance for high and sustainable impact than it would be if the action was implemented by one actor only.

It is also important to include the academia in practical actions such as these. Research-based advocacy for equal treatment can be far more effective than general measures, which have no backing from academia or policy analysis.

The impact of the campaign was also analysed. In June 2012 TLS conducted a poll on attitudes towards LGBT people. There was also a question about the impact of the outdoor campaigns. The result of the poll was that the campaign reached 18% ± 2,4% of 15-74 population aged between 15-74, so ca 165 – 214 thousand inhabitants in Estonia (total population 1,3 million). Therefore it can be said that the unique partnership between TLS and EHRC was a big part of this.

5. Legal clinic for asylum seekers

The legal clinic for assisting asylum[24] seekers coming to Estonia was founded at EHRC in 2011 and is currently the only place for free legal aid for any asylum seekers coming here. It is funded by the European Refugee Fund and Estonian Ministry of Interior Affairs. The establishment of the legal clinic and its successful operation was made possible due to cooperation with TLS and UNHCR.

There used to be a legal clinic for refugees operating previously at the predecessor of TLS, Concordia International University Estonia Law School (the later mergers led to the current TLS). However, ca 10 years ago the clinic stopped as the people left to do other things and there were also very few people applying for asylum in Estonia. The demand for legal aid had reappeared by 2011 as there were more and more asylum seekers coming to Estonia. Therefore it was decided to establish the legal clinic at EHRC. However, while establishing the clinic, lessons from the previous legal clinic were taken into account. Also, people who were involved with the clinic previously were consulted and some of them also contributed to current activities.

The legal clinic relies on volunteer law students, professional outside lawyers and in-house legal experts to provide free legal assistance to asylum seekers. The TLS law students are therefore a key ingredient in the success of the legal clinic. TLS is the only law school in Estonia which has courses on international refugee law, and due to its focus on international and European law, there is a large number of potential students who can be involved in the work of the legal clinic. The resources of TUT library are also utilized when researching specific cases.

The legal clinic has already achieved impact on asylum procedure, both through raising awareness as well as through litigation.

6. Research, publishing

The fact that there is an interaction between two institutions also in academic level, resulted by several joint cooperation. Some of the international level academic researches include:

- Käsper, K. Kerikmäe, T (2012). Access to Higher Education in the EU: Evolving Case Law of the CJEU. European Journal of Law Reform;
- Roots, L. (2012). European Union Citizenship or Status of Long-Term Resident: A Dilemma for Third-Country Nationals in Estonia. . Baltic Journal of European Studies,2(1), 61 - 75.
- Kerikmäe, T.; Nyman-Metcalf, K.; Roots, L.; Meiorg, M.; Popov, A. (2012). Estonian Report: Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions. Laffranque, J. (Toim.). Reports of The XXV FIDE Congress Tallinn 2012 (389 - 422). Tartu
- Tsybulenko, E.; Amorosa, P. (2012). National minorities in Estonia: 20 years of citizenship policies . L'Europe unie/United Europe, 6/2012, 85 - 90.
- Kerikmäe, T.; Nyman-Metcalf, K. (2012). Less is more or more is more? Revisiting universality of human rights. International and Comparative Law Review, 12(1), 35 - 51.
- Nyman-Metcalf, K. (2010). Incitement or Free Speech? Legal Limits to Freedom of Expression. Proceedings of the Institute for European Studies, Journal of Tallinn University of Technology, 8, 165 - 177.
- Kerikmäe, T; Käsper, (2008) European Charter of Fundamental Rights. Lexis Nexis Expert Commentaries 2008

There are hundreds of media articles, online publications, commentaries of topical issues, radio interviews, TV interviews and presentations provided by the EHRC staff. The members of the Council that are permanent academic figures at the TLS are also, inspired by the activities of the EHRC, are expected to publish regularly their opinions and esseys in media (beside of their academic publications at academic journals). For example, professors of TLS published an essey on theoretical background and contemporary developments of human rights. TLS employees are often outsourced as independent experts in giving their opinion on EU directives, legal acts – consulting with EHRC has been advantage when the area of expertise has been human rights related.

It is quite usual to consult each other and offer a cooperation to secure that both institutions would keep their position as opinion leaders in their fields. It is important to mention that there is an absolute freedom of speech and the opinions of the experts of EHRC and TLS may vary or even contradict sometimes. There have been some cases where experts disagree with each other, for example in the framework of the question of national minorities. However, justified and well argumented differencies in expert's opinions are seen as a source of pluralism. The censorship can be purely technical, related to the editorial work such as formatting of the human rights annual report or composing the academic article.

Nowadays, it is more and more important to raise the funding of the academic institutions that are not dependent of tuition-fees and State support. Therefore the cooperation between EHRC and TLS are expressed also by the EU funded projects, such as:

- Combating discrimination and promoting tolerance and equality in Estonia;
- Raising awareness on equal treatment and combating intolerance in Estonia, focusing on LGBT and disability issues;

- Raising awareness on equal treatment in Estonia, focusing on benefits for diversity in business, LGBT rights and social status of elderly people

It is also common that the institutions are sharing the experts and self-financing. It is an advantage for the EHRC mainly because of the large university opportunities to co-finance the projects. At the same time, academic projects are taken into account when electing candidates to the academic positions – therefore, joint projects with EHRC are direct advantages for TLS employees who are involved to the projects as experts. Accordingly, EHRC employees are invited to the projects of the TLS that have human rights dimension. Currently, the joint group of authors is preparing a book for Springer Verlag on EU Charter, some of the EHRC people are involved to the Jean Monnet grants (funded by the EU Commission) on EU law and legal system.

The international trainings such as of TLS (USAID funded and TLS provided course on intellectual property in Palestina), International summer schools (in Tallinn and in Lucerne) are having international human rights dimension due to the tight cooperation between EHCR and TLS.

One example of combining domestic and international dimension is a recent letter to Estonian Government in relation of Estonia becoming a member of United Nations Human Rights Council.

7. Networking, International training projects

EHRC is a member of the EU Fundamental Rights Platform, which is a network of NGO cooperation under the auspices of the EU Fundamental Rights Agency and a member of the Estonian Roundtable for Development Cooperation. EHRC also belongs to the Network of Estonian Nonprofit Organizations. This would give a chance to find speakers and lecturers needed to TLS curricula on specific topics related to human rights. TLS, at the same time (as conducting studies and research in english) is a member of several professional networks (Jean Monnet, Erasmus, several concortia for academic grants) that enables to find sepcialists for certain areas of human rights.

As a member of the EHRC Council but also a professor of TLS, the main author of this paper has been involved to several democracy building projects funded by the EU, such as Support to Judicial Reform in Kyrgyzstan (Central-Asia) 2009-2010. This project has been a good example of how the knowledge and training material elaborated through the cooperation of EHCR and TLS has been used to train non-EU citizens Training sessions such as "European standards of human rights in relation to the work of Bailiffs", (Osh), "European Human Rights Standards and the Prisoners Rights" at international conference "Modern Prison Management", (Issyk-Kyl).

Although, EHRC is not aiming to provide training and disseminate knowledge on human rights to abroad, there are projects of TLS that are often directly or undirectly related to the issue. Cooperation projects with EHRC gives the lecturers and professors a solid background to elaborate teaching materials for international target groups in cases they are involved to the projects abroad. One good example is also project called "LawTalk", conducted in Cambodia ("importing European values, including international human rights ideology to the local law schools). There are also many other events and conferences, related to humanitarian law in Armenia), competition law (Moldavia), prohibition of human trafficking and forced prostitution where the TLS employees contributed as leading experts, having possibility to be consulted by the EHRC.

8. Joint supervision of thesis

It is more and more common to have TLS human rights related final papers (both bachelor and masters) supervised or co-supervised by experts that are either contracted or linked to EHRC. The range of topics can be very wide. The following is just a example of the recent issues that have been sucsessfully defended by TLS students (the following list contains theses written in english, mostly by foreign students):

- Access to Higher Education and Social Benefits for Migrant Students within the European Union;
- Influence of European Standards on Development of Legal Framework of the Freedom of Peaceful Assembly in Georgia;
- Naturalisation and Legal Protection of National Minorities in Estonia;
- The Rights of Persons with Disabilities: Accessibility;
- Accountability of Armed forces for extraterritorial actions under the ECHR. Examples of Iraq and Afghanistan;
- Past and Future of Gender Equality in Estonia;
- Right to Environment – A New Right Protected under the European Union Law?;
- Entering Labour Market: Equal Opportunities for All;
- Cultural and Linguistic Human Rights in Multicultural Society;
- The Protection of Human Rights in the New Criminal Procedure Code of Lithuania

The benefit here is that the EHCR can recommend the topics according to the societal needs for research. TLS, at the same time, tries to combine the State needs for expertise with the interests of students through cooperation with several state agencies such as Ministry of Foreign Affairs. The close cooperation between TLS and EHRC would then avoid unnecessary overlaps, guarantee that research is conducted in accordance of up-to-date information and includes practical approach. Some of the best papers have modified and published at academic journals. The papers are available for interest groups and are often written by a student who is already working (or planning to work) in the field related to human rights issues or problems. The papers often contain reccomendations for State agencies and policy-makers.

It is common that TLS is ordering new human rights textbooks and journals to the university library after prior consulatation of EHRC employees (that can be freely used by EHRC experts) and makes it possible to the supervisors not contracted by TLS to use the databasis such as HeinOnline and LexisNexis. In case the supervisor is not an employee of the EHRC, he or she can still act as a second reader of the thesis or participate at the public defence.

9. Balancing the interests

One of the evident problem nowadays is overload of information and lack of time. Also workload of both human rights experts in EHRC and the academic employees at TLS tends to be higher every coming year. There are websites of both institutions that refer to each other; a facebook of TLS that reflects the achievements and events of EHRC; a monthly newsletter of the ECHR that describes also the activities of TLS. However, the meetings of the Council – main forums to discuss joint projects of both institutions should become more regular and informative. The interrelationship of EHRC and TLS may also seem complicated due to the fact that members of the ECHR are regularly or time-to-time contracted by TLS (elected lecturers or experts to the joint projects). Clear and transparent information between institutions and to public general is more important than ever.

Different profiles of the institutions is not an obstacle but an advantage and should be taken into account in case of applying for project financing and later implementation. As diversity enriches, both institutions should still keep their "own face" to be useful to each other. Accordingly, the visibility of TLS should be balanced when conducting joint research. As human rights institution, EHRC should not become dependent of the university that has own strategies, priorities. Also, TLS should not always intervene to the field activities of EHRC or be more specific in its role as academic advisor.

One of the relevant factors is being conservative but open minded. TLS as academic institution should guarantee that the theoretical basis of human rights protection would not be disturbed by political, economic or other aspects that may unbalance the approach to the universal human rights. EHRC should, at the same time be involved to the societal problems to see the accute problems. The universality of human rights requires respect for the diversity of faiths and cultures. Achieving universal acceptance of international human rights norms should be taken as a process. TLS has, beside of students from many different nationalities, also teaching and research staff from Estonia, Ukraine, Sweden, Bosnia, Moldova, India, United States etc. Members of our academic community are post-graduates of British, Italian, Swedish, German, Finnish and other universities. That all gives EHRC a good basis to review and discuss human rights issues internationally, although in regional context.

10. Conclusion

We are not living in ideal world and there is a lot to do in the field of human rights. Combining academic and more practice oriented approach, the result can be more efficient. Having balance between theory and a fieldwork, human rights NGO's would get more reliability as often accused to be groundlessly critical; academic institutions would gain more up-to-date info, inspiration for research needed, and a "playground" for implementing theoretical ideas with the practice.

In conclusion it can be said that partnering with EHRC has provided TLS with effective means of contributing to public policy of human rights in Estonia. This has been possible in many different ways and on many different levels, both in specific issues such as asylum procedures, and also in more general areas like human rights monitoring and equal treatment promotion.

In the future, in addition to current activities, it is foreseen that human rights education area provides several opportunities for cooperation in order to influence the way human rights is taught in all areas of education, but most specifically in higher education.

Indefinite Detention at Guantanamo: A Time for Change

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"Protecting the rights of even the least individual among us is basically the only excuse the government has for even existing." -Ronald Regan

I. Introduction

On September 11, 2001, terrorists attacked and killed thousands of Americans.[25] In the wake of these events, the United States declared a war on terror. Unlike previous terror attacks, the government decided to wage a war instead of try the acts in a traditional criminal manor.[26] This was a new kind of war declared on a common noun instead of the traditional war on a proper noun.[27] Questions arose. Under the laws of war, how can a common noun surrender in the same way a nation-state is able to? How do you treat prisoners in such a war? Bush declared that the war against terror begins with al Qaeda, "but it does not end there, it will not end until every terrorist of global reach has been found, stopped and defeated."[28]

As expected, the United States was stuck applying laws and tactics that arguably were not developed for this type of warfare of indefinite duration. Part of the U.S. tactic was to detain suspected terrorists at the United States Naval base in Guantanamo Bay starting in 2002.[29] While the number of detainees in Guantanamo has dropped to 166,[30] the facility still contains 46[31] individuals that the US government has marked as indefinite detainees.

Indefinite detention of terrorism suspects is contrary to human rights and against the intent of the law of war. When constructing a solution to indefinite detention at Guantanamo a four point plan should be kept in mind. The United States needs to i) charge those that are chargable, ii) relase those that cannot be charged, iii) change government procedures regarding collection of evidence at time of capture and finally iv) the world should rework the Geneva Conventions in light of new armed conflicts. To support the thesis this paper will introduce general principles of the laws of war regarding indefinite detention, move to the U.S. application of the laws of war, then outline the issues arises from indefinite detention and finally suggest a four point solution for the U.S. government.

I. General Principles

Generally, when engaged in an armed conflict the laws of war apply. Modern laws of war are based on the Geneva Conventions and apply to all international armed conflicts which may arise between "High Contracting Parties."[32] Human rights law still exists in cases where the law of war applies but instead may affect the interpretation, contrary to the US' argument in front of the Inter-American Commission of Human Rights.[33] As a result, the basic human right of freedom from arbitrary detention[34] shall be applicable to detainees during armed conflict regardless of their classification under the Geneva Convention.

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[25] *September 11, 2001: Basic Facts*, U.S. DEPT. OF STATE, http://2001-2009.state.gov/coalition/cr/fs/12701.htm.
[26] Alberto Gonzales, *Waging War Within the Constitution,* 42 TEX. TECH. REV. 843, 845 (2010).
[27] The concept of explaining the war on terror as a war on a common noun was borrowed from a presentation by Ambassador Ronald McMullen at Southern Illinois University School of Law on Nov. 12, 2012.
[28] President George W. Bush, Sept. 20, 2001 (available at http://www.youtube.com/watch?v=_CSPbzitPL8).
[29] *Guantanamo Bay Timeline*, THE WASHINGTON POST, http://projects.washingtonpost.com/guantanamo/timeline/.
[30] *By the numbers*, Miami Herald, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last visited Nov. 15, 2012).
[31] *Id.*
[32] Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, *done* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
[33] BETH VAN SCHAACK AND RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 215 (2010).
[34] Universal Declaration of Human Rights Art. 9, *adopted* Dec. 10, 1948, G.A. Res. 217 A (III).

a. Lawful Detention defined internationally

As stated at Nuremberg, "[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."[35] This idea is a universally accepted principle as evidenced in the Geneva Conventions which declares that detention may not last longer than the armed conflict.[36] In order to receive the privileges associated with Art. III, it is generally accepted that one must qualify as a "privileged combatant"[37] under the Hague Convention.[38]

If an individual is not a privileged combatant, they may be a civilian. The confinement of civilians can constitute a war crime as civilians are entitled to rights under Geneva Convention IV.[39] However, confinement of civilians is permitted in certain situation and as a last resort.[40] One exception exists "where the person is definitely suspected of or engaged in activities hostile to the security of the State."[41] The ICTY warns that this classification must be made on a case by case basis and can never be collectively applied.[42] For example, the ICTY held that the arbitrary imprisonment of Bosnian Muslims was not justified and the defense of "security reasons" (protection against espionage and sabotage) was without foundation.[43]

Like detention of combatants mentioned above, detained civilians "shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."[44] As mentioned before, this is a war that has been raging for over 10 years with no end in sight. When, if ever, will the U.S. government decide that the detained individuals at Guantanamo no longer pose a threat?

b. Conclusion

Every person is entitled to basic rights whether under international human rights or the law of war. If one is detained as an enemy combatant he or she has rights under the Hague Convention and Geneva Convention III. If an individual is a civilian he or she has the right from freedom of detention and minimum due process also under the Geneva Convention IV. But what if someone does not "neatly" fall into any of these categories? What protects that individual (if anything)? This predicament has troubled the U.S. and its treatment of al Qaeda and the terrorists associated with the "war on terror."

II. The U.S. application

Reflecting International standards the U.S. believes that in war times "the purpose of detention is to prevent captured individuals from returning to the field of battle and taking

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[35] *Hamdi v. Rumsfeld,* 542 U.S. 507, 518 (2004) (quoting Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)).
[36] *see* Geneva Convention Relative to the Treatment of Prisoners of War, Art. 118, *done* Aug. 12, 1949, T.I.A.S. 3364, 6 U.S.T. 3316.
[37] a combatant is a member of an army, militia or volunteer corps and fulfil the following requirements: i) commanded by a person responsible for his subordinates, ii) have a fixed distinctive emblem recognizable at a distance iii)carry arms openly and iv) conduct their operations in accordance with the laws and customs of war, Convention With Respect to the Laws and Customs or War on Land, Art. 1, 36 Stat. 2277, 2295-2296.
[38] BETH VAN SCHAACK AND RONALD C. SLYE, *Supra* note 9 at 311.
[39] *Id.* at 302.
[40] Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001) reprinted in BETH VAN SCHAACK AND RONALD C. SLYE, *supra* note 9 at 302.
[41] *Id.* at 303
[42] *Id.*
[43] *Id* at 308-309.
[44] Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 132, *done* Aug. 12, 1949, T.I.A.S. 3364, 6 U.S.T. 3316.

up arms once again."[45] However, who is to be prevented from returning to the battle and for how long have been tough topics for the U.S.

a. Guantanamo practices

In 2002, with the first wave of detainees arriving at Guantanamo, the Administration began to form its detention policy regarding the war on terror. Originally, the U.S. claimed that the Geneva Conventions did not apply to this conflict and that members of al Qaeda were not entitled to prisoner of war protection.[46] Instead, the U.S. has adopted the practice of detaining individuals who did not directly participate in hostilities.[47] The U.S. definition of combatant includes individuals who merely support al Qaeda or the Taliban.[48]

In 2010, the Guantanamo Task Force[49] identified 48 detainees that were determined to be too dangerous for release but not feasible for prosecution.[50] To date, there are 46 captives that are currently being held that likely will be held indefinitely without a charge or trial.[51]

The Task Force Final Report lists two main reasons that some detainees cannot be charged in federal court or by military commission. First, when many of the detainees were first captured, the main priority was to extract intelligence.[52] Therefore, evidence was not gathered in anticipation of prosecution and as a result much would be inadmissible.[53] Second, many of the detainees cannot be prosecuted due to jurisdictional limits.[54] In many cases, there is enough evidence supporting the detainee's participation in a terrorist organization but these charges are quite limited.[55] Evidence supporting the detainee's participation in a specific terrorist plot is missing and crucial to support prosecution.[56]

b. Supreme Court holdings

In *Hamdi v. Rumsfield*, the Supreme Court recognized that detaining individuals captured while fighting against the United States in Afghanistan for the duration of the conflict is a fundamental and accented incident to war.[57] In light of *Hamdi*, the Combatant Status Review Tribunals were set up to make certain that all those being "indefinitely" detained at Guantanamo were in fact "enemy combatants" and therefore able to be detained indefinitely.[58]

Under Executive Order in March of 2011, President Obama approved the continued detention of "law of war" prisoners being held in Guantanamo.[59] The Order defines "Law of

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[45] *Hamdi v. Rumsfeld,* 542 U.S. 507, 518 (2004).
[46] Alberto Gonzales, *supra* note *2 at* 843.
[47] Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 60 (2009).
[48] *Id.* at 62.
[49] On January 22, 2009 President Obama set up a Guantanamo Task Force as one of his first acts as president. The Task Force's purpose was to "review the status of all individuals currently held at Guantanamo." The Task Force included professionals from multiple agencies, including the Department of Defense, Department of Justice, the State Department, Department of Homeland Security, CIA, FBI and others. The professionals evaluated information available across the government to best analysis the status of the detained.
[50] GUANTANAMO TASK FORCE, FINAL REPORT 2 (January 22, 2010) (available at http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf).
[51] *By the numbers,* MIAMI HERALD, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html.
[52] GUANTANAMO TASK FORCE, supra note 26 at 22.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Boumediene v. Bush,* 553 U.S. 723, 723 (2008). The U.S. Government's original position involved capturing individuals on the "battlefields" and never subjecting them to any status review, in violation of Art. 5 of the Third Geneva Convention, BETH VAN SCHAACK AND RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 315 (2010).
[58] *Id.*
[59] PERIODIC REVIEW OF INDIVIDUALS DETAINED AT GUANTANAMO BAY NAVAL STATION PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE, 76 FR 13277 (2011).

War Detention" as detention authorized by the Congress under the AUMF[60], as informed by the laws of war.[61]

III. Problem and Possible Solutions

It is easy to say that the US is violating international law by indefinitely detaining individuals at Guantanamo in the war on terror but it is much harder to come up with a workable solution to this problem. Some detainees are actually bad actors that will no doubt return to their work against the United States and its allies. Despite this real predicament the US needs to commit to human rights while the World needs to reworks laws relating to terrorism and detention. This article introduces a four point plan, i) charge the chargeable, ii) release the rest, iii) change evidence collection procedures at the point of capture and iv) rework international law and the Geneva Conventions.

a. Charge the Chargeable

So far seven Guantanamo detainees have been convicted[62] and seven more are currently being tried.[63] The Guantanamo Task Force only listed 46 that could not be tried and therefore were subject to indefinite detention. The US should stop dragging its feet and bring the rest of Guantanamo to justice.

b. Release as a Solution

The most obvious and possibly best solution to this predicament is to release all those individuals that are being detained that cannot be charged with war crimes or other offenses against the United States. However, release has many options.

i. Complete release

Other countries have proven willing to take in former detainees. To date, 17 countries have resettled cleared detainees who are not their citizens: Albania, Belgium, Bermuda, Bulgaria, Cape Verde, El Salvador, France, Georgia, Germany, Hungary, Ireland, Latvia, Palau, Portugal, Slovakia, Spain, Switzerland.[64] In an idealistic mind, one hopes these former detainees can start a new life in a new country and not be tempted to continue or start up with the conflict against America.

Resettlement is a definite option and more swift action is needed. Thirteen individuals that have been cleared through their habeas corpus claim are still detained at Guantanamo.[65]

ii. **Parole**[66]

Parole is an important aspect of the US criminal justice system. It relieves the state of the burden of continued custody of an individual yet allows for continued supervision. Parole in the international law sense consists of releasing a prisoner of war (PW) in return for a pledge not to bear arms.[67] The Geneva Convention speaks on parole and says,

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[60] Authorization for the Use of Military Force, 50 U.S.C.A. § 1541 (2012).
[61] PERIODIC REVIEW OF INDIVIDUALS DETAINED AT GUANTANAMO BAY NAVAL STATION PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE, 76 FR 13277 (2011).
[62] *By the numbers*, Miami Herald, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last visited Sept. 28, 2012).
[63] *Military Commissions Charges Active/ Pending*, Military Commissions, http://www.mc.mil/CASES/MilitaryCommissions.aspx , (last visited Sept. 28, 2012).
[64] *By the numbers*, MIAMI HERALD, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last visited Sept. 20, 2012).
[65] Center for Constitutional Rights, Guantanamo Habeas Scorecard (available at http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf)
[66] see Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200 (1998).
[67] *Id*. at 200.

"prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend."[68]

Today, a parolee could be monitored using advanced technological means.[69] Parolees could be monitored using visual and electronic means in addition to the cooperation of the host government.[70]

This will no doubt bring up privacy issues that can possibly be overcome by defenses including national security.

iii. Transfer

Transferring individuals to appropriate authorities of their nation of origin has also been a practice of the US. Transferring individuals takes the burden of human rights violations off the US but also has obvious possible dangers. The country of origin may not have an effective government, like Afghanistan during much of the surge.

For example, many prisoners were released in Egypt and Libya during the Arab Spring. Soon after the October 2012 attack on the U.S. Consulate in Libya rumors circulated that the mastermind of the attack was a former Guantanamo detainee.

c. Change evidence collection methods at time of capture

As previously mentioned, the Guantanamo Task Force found that many detainees cannot be charged because evidence was not gathered in anticipation of prosecution and as a result much would be inadmissible.[71] The government needs to learn from its previous mistakes and reform its procedures regarding the collection of evidence at the time of capture. Indefinite detention can be prevented in the future with forward looking evidence collection procedures starting with the battlefield.

d. Rework the Geneva Conventions

"The Geneva Conventions are failing to provide necessary protection because they lack clarity and are out of date."[72] This is not our grandparent's war. This is a war of indefinite duration made even more indefinite by the lack of traditional organization and command structure of al Qaeda.

First, the Geneva Convention should be amended to include all armed conflict. Not just armed conflict between "high-contracting parties" or nation-states. This addition would regulate armed conflict with not only al Qaeda, but with other paramilitaries that are becoming an ever-present force in today's conflicts.

This is not as daunting and absurd as it may seem at first blush. Two Additional Protocols were added to the Geneva Conventions in 1977 in response to the changing nature of armed conflict.[73]

IV. Conclusion

The application of the laws of war to the war on terror has resulted in human rights abuses of indefinitely detained individuals at Guantanamo. In the grand scheme of the worldwide war on terror 46 indefinitely detained individuals may seem miniscule and not worth altering an entire system. However, as stated before "protecting the rights of even

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[68] Geneva Convention Relative to the Treatment of Prisoners of War, Art. 21, *done* Aug. 12, 1949, T.I.A.S. 3364, 6 U.S.T. 3316.
[69] Chris Jenks and Eric Talbot Jensen, *Indefinite Detention under the Laws of War*, 22 STAN. L. & POL'Y REV. 41, 89 (1998).
[70] *Id.*
[71] GUANTANAMO TASK FORCE, supra note 26 at 22.
[72] Foreign Affairs Committee, Visit to Guantanamo Bay, 2006-7, H.C. 44, at 27.
[73] BETH VAN SCHAACK AND RONALD C. SLYE, *Supra note 9 at* 215.

the least individual among us is basically the only excuse the government has for even existing."[74]

The United States is a worldwide leader and its actions are placed under a microscope and then mimicked by others. The U.S. needs to correct current violations and prevent future violations of human rights by reforming its indefinite detention policy and practice.

Human rights law aside, each Guantanamo detainee is costing the U.S. $800,000[75] per year to detain. Indefinite detention has now entered the deficit discussion.

[74] Ronald Regan.

[75] *By the numbers,* MIAMI HERALD, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html.

The Developing Status of the Right Against Involuntary Disappearances in the Philippines

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The Philippines has yet to be a signatory of the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), which was adopted by the United Nations (UN) General Assembly in 2006.

But in terms of domestic legislation, the Philippines has fared better. [76]*While the affiliation to the said Convention is still being looked into by the government's delegation, the country's legislators are a step shy from having the "Involuntary Disappearance Act of 2012", or more popularly known as the "Desaparecidos Bill", enacted.*

Ratified by the House of Representatives and the Senate last October 16, 2012, President Benigno Aquino III only needs to sign the anti-disappearance bill into a law. In the absence of the president's signature and the exercise of his veto power, the enrolled bill automatically takes legal effect, thirty days after the executive's receipt of the same bill.[77] *As of the completion of this study, no reported objections from Pres. Aquino's end have been reported although the actual date of president's receipt of the same bill is unclear.*

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I. *Desaparecidos,* From the Marcos Regime Onwards

The Martial Law regime (1972-1981) under President Ferdinand Marcos remains to be considered by many, if not all of the fact-finding initiatives, as the peak of state-attributed human rights violations.[78] Created in 1985, amid a climate of heightened political killings, the Families of Victims of Involuntary Disappearances (FIND) has documented 878 victims during the Marcos regime. 127 of them have been confirmed dead; another 613 of which have remained missing. It must be heavily noted that while the incidents of forced disappearances shot up between 1983 up to 1989—Pres. Marcos's political regime spans to more than two decades.

The number of *desaparecidos* did not wane with the so-called restoration of democracy. Trailing behind Marcos is the six-year term of Pres. Cory Aquino, the mother of the current Philippine president, which led the "total war" policy versus the insurgents. As a result thereof, 825 more victims have been reported by the FIND. This staggering number

[76] Ribaya, Rose (October 17, 2012). "House ratifies bill v. enforced disappearances." Retrieved November 1, 2012, from http://ph.news.yahoo.com/house-ratifies-bill-vs--enforced-disappearances.html.
[77] 1987 *Philippine Constitution,* Art. VI, § 27, Par. 1.
[78] FIND (n.d.). "Overall Results FIND's Search and Documentation Work (November 1985 to June 2012)." Retrieved October 29, 2012 from http://www.find.org.ph/images/pdf/find.org.ph-statistics-june-2012.pdf.

of the reported disappeared in a period much shorter than its dictator-predecessor ironically came at a time when the transitioning government (Cory Aquino's) focused on rebuilding the country's democratic institutions.

The continuing spate of the number of disappeared can be baffling, given the reactionary measures positioned by the 'revolutionary' government replacing the Marcos regime.

In response to the iron-clad Marcos dictatorship, the 1987 Philippine Constitution was created by the (Cory) Aquino administration. The new Constitution has laid down protective measures against any probable abuse by the state. [79]Before any declaration of martial law or suspension of the writ of *habeas corpus* can be made, the same Constitution and other special laws have in place specific safeguards which must be observed first by the president. Other clauses embedded in the Constitution and other laws which block any repetition of the former dictatorship include but are not limited to the following: [80]the prohibition against the appointment of the president's spouse to any government post (a reaction to Imelda Marcos's flagrant accrual of influential positions) and against the president's ownership of any company doing business with the government; [81]the duty of the president to inform the public if he should become seriously ill (again, a reaction to the late public discovery of Pres. Marcos's terminal illness); [82]the bar against the abolishment of congress, in the event of a presidentially-declared martial law.

Specifically addressing the rise of the *desaparecidos* in the regime that was, the [83]Commission on Human Rights (CHR) became another creature of the 1987 Constitution. Generally, the CHR is mandated to appropriate legal measures for the protection of human rights (political and civil rights included) and to act on complaints for violations thereof.

In spite of the above efforts, the total number of *desaparecidos*, as of June 2012, now tolls to 1,333 cases. [84]The country's own military forces, the Armed Forces of the Philippines (consisting of the Army, Navy/Marines and the Air Force) is alleged by the families of 1,091 victims as the perpetrators for the latter's unceremonious disappearances. The second largest class of perpetrators is the Philippine National Police (PNP) or formerly called the Philippine Constabulary during the Marcos regime. The latter is attributed for another 239 disappearance cases.

2006 saw the spike of disappearance cases. Under Pres. Gloria Macapagal-Arroyo's direction, OPLAN *Bantay Laya* (translation: "Freedom Watch") was said to have been launched, as confirmed by military insiders. [85]The said military strategy is claimed to have dramatically reduced the estimated population of 12,000 New People's Army (NPA) fighters to 5,700. At that time, the AFP initiative was criticized by political analysts and human rights workers/groups such as Herbet Docena, Nyma Simbulan (of the Philippine Human Rights Information Center), and Amnesty International, as a danger to unarmed leftists or activists. This blurred distinction between an NPA fighter and an unarmed social activist, as time would tell, led to many reported abuses thereafter.

Not surprisingly, the implementation of this national security blueprint coincided with the renewed increase of disappearance cases. [86]Under the Pres. Arroyo administration, according to FIND's findings, some 339 cases have been reported. Of this sum, only 107 surfaced, 17 have been found dead, and 58 are still missing.

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[79] Carpio, J., March 20, 2012, Dissenting Opinion-Philip Fortun and Albert Angeles v. Gloria Macapagal Arroyo, G.R. No. 190293.
[80] R.A. No. 6713, § 7, par. a-b.
[81] 1987 *Philippine Constitution,* Art. VII, § 12.
[82] 1987 *Philippine Constitution,* Art. VII, § 18, par. 4.
[83] 1987 *Philippine Constitution,* Art. XIII, § 17.
[84] FIND (n.d.). "Overall Results FIND's Search and Documentation Work (November 1985 to June 2012)." Retrieved October 29, 2012 from http://www.find.org.ph/images/pdf/find.org.ph-statistics-june-2012.pdf.
[85] Francis Isaac for AFAD (2008). *Reclaiming Stolen Lives*. Quezon City, Philippines.
[86] FIND (n.d.). "Overall Results FIND's Search and Documentation Work (November 1985 to June 2012)." Retrieved October 29, 2012 from http://www.find.org.ph/images/pdf/find.org.ph-statistics-june-2012.pdf.

[87]No suspected assailant has been put behind bars in any of the thousands of cases. [88]The landmark decision of the Supreme Court, dated May 31, 2011, tackling the disappearance of two university activists, Erlinda Cadapan and Concepcion Empeno in 2006, only ventured as far as ordering the concerned military officers to immediately release the victims which have been proven in court to have been abducted by them. Neither of the victims has resurfaced. Neither of the responsible military officials has subsequently been charged for their inactions.

A much less but still significant portion of the cases of involuntary disappearances is reportedly blamed on the private armies of well-endowed politicians and landowners. [89]The country's notoriety for (unresolved) political deaths and disappearances caught the world's attention with the Maguindanao massacre wherein the death toll reached 57 in a single killing spree in November 2009. The massacre led the International Federation of Journalists (IFJ) to brand the Philippines as "the most dangerous place for press workers, next to Iraq." This was due to the fact that the 32 of the 57 victims were media personnel. The massive abduction and eventual killing were allegedly orchestrated by the Ampatuan political clan (the accused namely, Andal Ampatuan Jr. and five other members of the same family) in their effort to quell their political rival family, Mangudadatus. [90]Alarmingly, three years after the case has been pending in court, six witness of the massacre have been killed in unique incidents. Again, the suspects for the latest witness murders connected with the Maguindanao massacre were never ascertained so that proper charges in court were never brought to light.

Suffice it to say, these unaccounted deaths and disappearances collectively contribute to a climate of impunity and self-enforced repression in a country that supposedly prides itself in being among the first to succeed in organizing a "[91]nonviolent revolution" to topple down a dictatorship. [92]This chilling effect from forced disappearances can be likened to the forced disappearances committed by the Nazis in a larger scale that amply served the purpose of sowing terror and mitigating dissent from the population.

As historical examples have shown, the road to justice or prosecution, at the very least, for what is considered as the global offense of forced disappearances is long and circuitous.

II. The Need to Criminalize the Offense of Forced Disappearance

Under the current body of law, the victims, or their families, have to rely on the provisions of the 82-year old Revised Penal Code (RPC) of the Philippines. To possibly prosecute the perpetrators, the common crime charges of "murder," "kidnapping," "abduction," "unlawful detention," among others, must be separately filed by the families' victims. Prosecutors are therefore dogged with varying legal requirements or elements of the crime for each charge. [93]This is in line with the older view that enforced disappearance

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[87] Human Rights Watch (2012). "World Report 2012: Philippines" Retrieved October 29, 2012 from http://www.hrw.org/world-report-2012/world-report-2012-philippines.

[88] May 31, 2011, Lt. Col. Rogelio Boac, et. al. v. Cadapan and Empeno, G.R. Nos. 184461-62.

[89] LBG (August 24, 2012), "Intl group: PHL press freedom dire with continued killings, refusal to pass FOI law." Retrieved November 1, 2012 from http://www.gmanetwork.com/news/story/270999/news/nation/intl-group-phl-press-freedom-dire-with-continued-killings-refusal-to-pass-foi-law&ei=406kUIazKY-hiAex84H4AQ&usg=AFQjCNFm_nAbWmgttobl7i0zpPUCd949dw&sig2=5Jb__HUzxLrviLl5s9WEdg

[90] Kate McGeown (June 28, 2012), "Sixth Philippine massacre witness killed." Retrieved November 2, 2012 from http://www.bbc.co.uk/news/world-asia-18621705.

[91] (March 2011) "Nonviolent Revolution." Retrieved November 1, 2012 from http://en.wikipedia.org/wiki/Nonviolent_revolution.

[92] See Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10: Nuremberg, 19 October 1946 – 1 April 1949 (1951) vol 3, 75.

[93] Kirsten Anderson (n.d.) in *"How Effective is the International Convenntion for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?"* for the Melbourne Journal for International Law, Vol. 7; Commission on Human Rights, Working

has been touted as a 'multiple human rights violation.' Obviously, one enforced disappearance is a summation of violations of several rights contained in the International Covenant on Civil and Political Rights, or its regional counterparts.

But regional initiatives such as the Asian Federation Against Involuntary Disappearances (AFAD) are pushing for legal reformations that aim to call a spade a spade. Involuntary Disappearance under the *Desaparecidos* Bill which they have long lobbied for passage is a crime by itself. Amid the timely reconstruction of the RPC, the AFAD maintains that the special law will be the better vehicle in upholding the universal right not to disappear.

In a personal interview, Darwin Mendiola of the AFAD shared: "Amending the RPC is limited only to the purpose of criminalizing a certain offense. But if the (*Desaparecidos*) Bill becomes a law, it does not only fulfill the purpose of defining and penalizing enforced disappearance but it will also provide preventive mechanisms and recognition of the rights of victims and their families."

1. Enforced Disappearance: A Class of its Own

[94]True enough, under the pending bill, the special circumstances, namely: 1) deprivation of liberty of any forms, 2) as committed by state/agents of the state or persons in authority, and 3) the concealment of the fate and whereabouts of the victims by the former agents, would be constitutive of enforced disappearance. [95]The same definition falls at par with the universally-accepted definition, that enforced or involuntary disappearance pertains to an offense which typicalley involves the abduction, arrest or detention of an individual — usually a perceived political opponent — by members of a state-sponsored military group, and a deliberate denial by authorities of any knowledge of the victim's arrest, whereabouts, or condition: the individual effectively vanishes.

The classification of involuntary disappearance as a stand-alone offense, should the bill turn into a law, is an early fulfillment of the obligation espoused in Article 1 of the ICCPED (a convention which the Philippines has not yet ratified) which provides for the absolute prohibition of enforced disappearance. [96]It is told that states parties must ensure that their national law absolutely prohibits enforced disappearance. Likewise, the same prohibition should stand, regardless of a state of war or a threat of war, internal political instability or any other public emergency.

The co-author of the bill is Rep. Edcel Lagman, whose brother, Hermon, was among those activists who disappeared at the apex of the protest versus the Marcos dictatorship. [97]Rep. Lagman is quoted to have justified the urgency for the passing of the bill in saying: "Enforced disappearance was an atrocious tool to silence protesters and human rights advocates and continues to be employed by subsequent administrations."

2. Direct Liability of Military/State Superiors

Group January 2002 Report, above n 8, 4. The UN Working Group has stated that 'a reading of the Universal Declaration of Human Rights … shows that to a greater or lesser degree practically all basic human rights' of a victim of enforced disappearance are violated: UN Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearance, UN ESCOR, 39th sess, Agenda Item 10(b), UN Doc E/CN.4/1983/14 (21 January 1983) [133] ('Working Group 1983 Report').

[94] 2010 House Bill No. 98, § 3, par. a.

[95] Federico Andreu-Guzmán (September 2001*). "The Review of the ICJ - Impunity, crimes against humanity and forced disappearance, Nº 62 – 63, Geneva."*

[96] Amnesty International (2011). *"No Impunity for Enforced Disappearances,"* p. 4.

[97] Ribaya, Rose (October 17, 2012). "House ratifies bill v. enforced disappearances." Retrieved November 1, 2012, from http://ph.news.yahoo.com/house-ratifies-bill-vs--enforced-disappearances.html.

Under the pending bill, [98]the state or its agents will be sanctioned as the principal of an enforced disappearance should they have led, assisted, abetted, allowed or merely have knowledge of the commission of such an offense.

But the said law is not only reactive for when enforced disappearances may occur. Preventive measures, which can only be specified by virtue of a special law (as opposed to an ordinary inclusion in the Revised Penal Code, in the alternative), have also been stationed in place. [99]Concerned government agencies will be endowed with the responsibility of producing an up-to-date register containing the names and other vital information of all the persons detained or confined. The same transparency is required of from the law enforcement agencies who are also required to name all of its detention facilities.

[100]The "order of battle" or a military memo prompting the infliction of an enforced disappearance upon a person is outright outlawed by the same law. Furthermore, it is clearly stated that the existence of such an order will never become a justifying circumstance for a military personnel to carry out the same order.

3. Protective Status of the Disappeared

'Deprivation of liberty' and 'denial or concealment of information' regarding the circumstances of a victim are widely-accepted elements of the offense of enforced disappearance. Apart from these, a lot of legal definitions have pointed to another element, which arguably, may also be a mere consequence from an enforced disappearance; to be specific, this other element is when this person is subtracted from (or placed outside of) the protection of the law. [101] Under such an interpretation, a disappeared person is said to have lost his enjoyment of the protection of the law, which is, supposedly, a protection afforded to all persons, under any circumstances.

But the preamble of the *Desaparecidos* Bill ensures otherwise. Outlined in the early portion of the law is the state policy of the Philippines which guarantees the full protective mantle on human rights and absolute upholding of such even in the event of a disappearance. Any actions/inactions which should violate the said policy are considered to acts which diminish the effective protection of a person; or in effect, acts sanctioned by the same law.

III. Conclusion

The pending domestic legislation reinforcing one's right against involuntary disappearances should be heralded as a giant leap towards changing the climate of fear and impunity which has long enveloped the Philippines, from one administration to another.

Once legally effective, it should act as a deterrent for state agents to take matters into their own hands and enforce disappearances on civilians; thereby also sparing would-be affected families from suffering from the uncertainty of the fates of the victims. After all, a single incident of forced disappearance dangerously looms like a Damocles's sword over a democracy. This is why such an assault on human rights must not be tolerated; not by any country, not by the international community.

It is equally important for the Philippines to participate in a congregation of nations that frowns on involuntary disappearances. The crafting of a specific, binding instrument allows the international community to tie the loose ends in terms of the criminalization of this global offense. In criminalizing involuntary disappearances *per se*, individuals in power,

[98] 2010 House Bill No. 98, § 12.
[99] 2010 House Bill No. 98, § 9.
[100] 2010 House Bill No. 98, § 17.
[101] Aim for Human Rights, a Dutch human rights organization (2009), "Practical Guide for Relatives of Disappeared Persons and NGOs," p.17.

who have committed or assisted to the commission of the crime *per se* will be directly held accountable for the same.

There is no stronger showing of intolerance than by providing the legal mechanisms for the prevention of these disappearances and the accountability of the perpetrators. [102]As one of the more troubled countries in the region, in terms of compliance with the universal standards of human rights, it is only befitting that the Philippines is on its way to being the first country in Asia to have adopted an anti-disappearance law.

Understandably, building a legislative framework is one thing but enforcement is another milestone yet to be seen.

Protecting human rights in inter-private relations

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Introduction. Justification.

The purpose of this paper is to show how the issue of human rights – and more specifically protection of the human person's dignity – is today considered a valorizing factor in Brazil's constitutional civil system, one that actually prioritizes existential as opposed to patrimonial relations.

This conceptual twist is of the utmost importance for the teaching of contemporary civil law, since the disciplines included in the sphere of private-law relations, specifically those that involve property and contracts, have traditionally been taught as an area exempt from any influences or interests whatsoever, whether humanitarian or existential. For example, in the 19th and much of the 20th century, the disciplines of contracts and property were a fertile field for the full development of individualism and individual liberalism. The perception that a private relation could have its effects limited on account of some solidary interest aimed at protecting the dignity and humanity of one of the parties of that relation is the consequence of the development of a doctrine that we call constitutional civil law.

This doctrine or methodology embraces the following premises: 1) the juridical system is unique, systematic and obeys a hierarchical structure; 2) the supreme standard norm of this organization is the Federal Constitution of the Republic; 3) the Federal Constitution has a contemporary function that goes beyond that of organizing the political powers, namely that of a central core of values for the community that it represents; 4) one of the pillars of the Democratic State of Law is protection of human rights by means of the general clause of guardianship of the human person (*the dignity of the human person*); 5) private-law relations should always not only be evaluated by the rules concerning contracts and the like contained in civil laws to which they refer, but also referenced to the general clause of protection of human beings, as a way of safeguarding their dignity and humanity.

With regard to the general clause of protection of the dignity of the human person – herein referred to as the general clause of protection of human rights in private relations – we can consider its premises to be as follows: 1) protection of substantial equality in private relations; 2) protection of psycho-physical integrity when faced with situations potentially harmful to existential interests of the human person; 3) protection of social solidarity in private relations when collective preponderates over individual interest; and finally, 4)

[102] Andrea Calonzo (October 17, 2012). "Bill vs enforced disappearances awaits PNoy's approval." Retrieved on November 14, 2012 from http://www.gmanetwork.com/news/story/278583/news/nation/bill-vs-enforced-disappearances-awaits-pnoys-approval.

protection of freedom when individual choice considers the possibility of protecting difference as a form of recognition and self-determination.

Background and the Federal Constitution.

Historically speaking, much has been said about the crisis that civil law and its systematics, as well as the loss of the notion of the Civil Code as the valorizing core of our private juridical structure. The breaking of the public right/private-law dichotomy; the de-codification movement through proliferation of various laws (some of which actually constitute micro-systems); State interventionism in private relations ("publicization" of private law, what Josserand calls contractual State control); and the realization that classic civil law was incapable of protecting the new juridical relations in an equalitarian, fair manner – these are some of the elements that together support this notion of crisis.

The understanding that the juridical system, being unique and hence systematic and hierarchically structured, could no longer be analyzed and interpreted in set and separate blocs, led to the conclusion that, when faced with a system based on a superior standard norm – the Constitution – the principles and values that emanate from it must be respected, otherwise the whole sense of a legal system comes undone. And in this way the system of the Civil Code as a repository of the values that control private relations becomes the responsibility of the Constitution, which remains the source of the fundamental principles of the juridical system.
The Civil Code thus loses its role as the "constitution" of private life and is replaced as the unifier of the system of private law by the Federal Constitution and its higher principles, norms and values, which serve as the foundations of the whole juridical system for a new Social State. One such value, considered to be central to the conception of the new Social State, is the dignity of the human person, which gains the status of a pillar of the Republic in article 1, III of the Federal Constitution.

Dignity is an absolute value that is intrinsic to the essence of human beings, who are unique in possessing an innate sense of valorizing which is priceless and has no equivalent substitute. Such values will serve as a guide in interpreting and applying juridical norms and will always be taken into account in protecting and guarding the rights of the personality of men and women and in their juridical relations in order to provide the bases for achieving the objectives of the democratic State of law.

In synthesis, these objectives, set forth in article 3 of the Federal Constitution aim at building a fair and free society based on solidarity by eradicating social inequalities and promoting the powers of the State through distributive justice and substantial equality. In this way, the notion of unlimited autonomy granted to individuals in the liberal systems is countered by the idea of social solidarity: if the 19th century was marked by the reign of individualism, the 20th century, with its revaluation of human beings and their dignity, is the era of development of social justice.

Examples.

Following this line of reasoning, we consider not only that each and every inter-private relation should be analyzed by taking into account the interests of the parties who have committed themselves by contract, but also and especially that the finality of protecting the interests of the persons in an inter-private relation is to safeguard the dignity and existence of those who have joined this relationship. This is why in so many concrete situations judges are called to decide on cases where, if the law is strictly interpreted, the

result of the case would be different from that derived from an interpretation that takes into account the need to protect the dignity of the human person. For example:

1) By the law of unleviability of family property, only the property that serves as the family residence can be considered unleviable. In the concrete case in question, it was considered that despite the property not being used as the family residence, it was rented out and the value of the rent was used for the family's subsistence;
2) In a contract for financing the purchase of a piece of property, the buyer had already paid 48 of the 50 installments, but was unable the pay the two remaining ones. According to the contract, the seller was entitled to rescind same and claim back the property. The judge felt that this clause in the contract was abusive and that the contract had been substantially respected, leaving it to the seller to simply charge the remaining debt without breaking the contract.
3) Clauses in a health-plan contract are held to be abusive when they impose limits on the number of days spent in an intensive-care unit.
4) Although the Public Registers law does not allow changing a transsexual's sexual status and name before transgenitalization surgery procedures have been performed, one judge permitted such change alleging constitutionally guaranteed protection of the dignity of the human person.

Conclusion.

In conclusion, there are numerous hypothetical private relations where magistrates apply the criterion of protection of human rights using the general clause of safeguarding the human person primordially for the purpose of protecting the interests of one party against the patrimonial interests of the other. The question gains even more importance when one realizes that this methodology is becoming increasingly more adopted as doctrine in undergraduate Law courses and that Law graduates, at least in the leading schools in Rio de Janeiro, have had some experience with this sort of training, which lends priority to the practice of Law by preferentially considering the protection of human beings and their existential interest, even when this interest involves a relation which in principle is of a strictly patrimonial nature, as in the case of contracts and property.

Course Development as the Nexus for Contributing to Human Rights

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An interest in human rights can lead to situations where a law professor can have research, teaching and service experiences that contribute to the development of public policy on human rights. This has been my experience with respect to human trafficking.

My teaching and research interest in immigration and U.S. Gender Issues led me to develop a teaching and research interest in the convergence of these two areas. This resulted in the development of an International Gender Issues (IGI) course and research in this area. One particular area of concentration has been human trafficking. Along with the many areas in which women are discriminated against that are covered in the IGI course, I cover human trafficking.

Human trafficking exists where social and economic conditions are facilitated by practices that discriminate against women and other vulnerable people, ignore human suffering, and diminish human dignity. Vulnerable persons are denied basic rights to freedom and self-determination. In the course, I focus both on the actions of the traffickers and the victims as a way of guiding the students through an examination of the Rule of Law principles and various human rights and refugee international treaties. With respect to the traffickers, we explore the fact that they are profiting from the sweat and drudgery of others forced into or forced to take substandard wages in mines, farm fields, and factories, performing sex work in hotels, strip clubs, brothels, mansions, and bars. It is emphasized that the complex structure of these modern day slavery practices include actions by those that benefit directly from the exploitation of the vulnerable, but also come that those that benefit indirectly may also be a part of the problem.[103] With respect to the victims, we explore the institutional and systemic influences that may place women in other vulnerable persons in situations that can lead to their exploitation.

More generally, we examine the meaning of the Rule of Law and how its existence or failure of existence can influence public policy on human trafficking issues. A helpful definition that we have used for the Rule of Law comes from the Harvard Kennedy School, Carr Center for Human Rights Policy:

> Rule of law: equality before the law; laws that are applied consistently (socially, economically, and politically); laws that spell out consequences for illegal activity; laws that serve a conception of order and regulation; laws that serve and inform institutions of society that preserve order and "fairness."[104]

[103] These thoughts are more fully explored in a forthcoming article, HUMAN TRAFFICKING, THE RULE OF LAW AND CORPORATE SOCIAL RESPONSIBILITY.

[104] CARR CTR. FOR HUMAN RIGHTS POLICY, IMPLEMENTING THE RULE OF LAW AND HUMAN RIGHTS IN STABILITY OPERATIONS 2 (2006).

As one scholar has noted, one goal of those that focus on the Rule of Law is to "emphasize the ends that the rule of law is intended to serve within society."[105] I use this goal to lead to discussions in class on the five desirable ends that this scholar has identified and the process by which these ends might be achieved. These desirable ends are: "(1) a government bound by law, (2) equality before the law, (3) [the establishment of] law and order, (4) predictable and efficient [justice], and (5) human rights protections."[106]

After focusing on the general concepts behind the Rule of Law, we examine particular treaties and conventions as assess their effectiveness in protecting rights of the vulnerable populations. These include the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Public policy discussions revolve around the fact that the U.S. has ratified the ICCPR but not ICESCR and CEDAW and whether it is desirable to try and influence public policy to have these instruments ratified.

This examination in the course triggers the exploration by some students of possible ways to address human trafficking issues in their required research papers as well as their future careers. One Law College graduate who was in my very first IGI course has been working on human trafficking with a non-governmental organization (NGO) in India.

Our University has an annual interdisciplinary conference that brings researchers from academia, government, and NGOs to discover ways to address human trafficking issues around the world, I currently serve as the law college representative. The work of individuals on this team was helpful in getting new human trafficking legislation adopted in the state of Nebraska. Students have been able to participate in the conference, write research papers and experience related internships. We are developing a program to provide more internships for students with NGOs. We intend to maintain contacts with the students who secure employment after graduation with government agencies or NGOs.

My teaching, research and collaboration have allowed me to fully participate in the development of policy on human trafficking on a statewide as well as nationwide basis. Whenever possible, we work toward providing opportunities for students. One of these opportunities is the awarding of a grant from the Microsoft Corporation to explore the issues surrounding the use of technology with child trafficking victims. The grant was written so that research and learning opportunities are provided for graduate and law students. Another such opportunity includes my appointment to the state task force on human trafficking. The task force work allows me to provide research opportunities for students. This has also led to collaborative efforts with organizations that can have a nationwide effect. These include a research project to determine the extinct of human trafficking in a particular industry and the invitation to participate in a national conference to have cross dialogues on human trafficking that incorporate perspectives of researchers, practitioners, and survivors.

All of these opportunities are available because of the support of my law school. These activities by me and my students ultimately can have an effect on policies established at local and national levels on how to address human trafficking issues.

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[105] Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, 3 (Carnegie Endowment for Int'l Peace, Paper No. 52005), *available at* http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf.

[106] Id.

One area that is of particular interest to human trafficking researchers is how to document the extent of human trafficking in various locations, industries and populations. It is estimated by the United States that 2 million to 4 million people are trafficked each year worldwide,[107] and the United Nations estimates that worldwide as many as 12.3 million adults and children may currently be victims of trafficking.[108] However, it is recognized that methods for identifying trafficking victims are unreliable.[109] The result is that there are varying numbers reported for trafficking victims. For example, Free the Slaves, an NGO, estimates that there are 27 million "slaves" in the world today.[110] A slave is defined as a "person held against his or her will and controlled physically or psychologically by violence or its threat for the purpose of appropriating their labor."[111] The International Labour Organization (ILO) estimates that human trafficking generates profits in excess of $32 billion a year, making it the third most lucrative criminal activity in the world.[112] These statistics reflect illegal activity, as well as the use of products of forced labor by legitimate employers. Assessing the effectiveness of anti-trafficking legislation is another area in which law schools can take an active role. Collaborations with researchers in other disciplines and gaining access to government lawyers may help with this effort. Although the U.S. Department of Justice has reported that trafficking in persons cases charged by the Department of Justice has increased from only two in 1998 before the U.S. enacted the Trafficking Victims Protection Act,[113] to fifty-two in 2010[114] there remains uncertainty about the number of potential trafficking cases that are charged as another type of violation because it may be easier to obtain a conviction. Relief provided to victims is another area of research in which law schools can help develop public policy.

Law schools are in a unique position to influence public policy on a number of issues, including human rights. It is not unusual for law professors to receive request from national and local legislatures as well as international organizations to provide advice on various issues. These opportunities along with course development in doctrinal as well as clinical courses can facilitate opportunities for students.

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[107] ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 3 (2012), *available at* http://digital.library.unt.edu/ark:/67531/metadc87335/; *see also* U.N. Global Initiative to Fight Human Trafficking [UN.GIFT], *Human Trafficking: Everybody's Business* (2006) [hereinafter UN.GIFT*, Human Trafficking: Everybody's Business*] (citing United Nations Office on Drugs and Crime, Trafficking in Persons: Global Patterns (2006)), *available at* http://www.ungift.org/docs/ungift/pdf/reports/Story_Survey.pdf.

[108] PATRICK BELSER ET AL., INT'L LABOUR ORG., ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 1 (2005).

[109] *Id*. at 33–35.

[110] KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 8-9 (Univ. Cal. Press rev. ed. 2012).

[111] *Glossary*, FREE THE SLAVES (Nov. 28, 2012), https://www.freetheslaves.net/SSLPage.aspx?pid=305.

[112] *See* ILO Director-General, 98th Session of the International Labour Conference, Geneva, Switz., June 3–19, 2009, *The Cost of Coercion: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 1 (May 12, 2009)[hereinafter *ILO 2009*], *available at* http://www.ungift.org/docs/ungift/Steering-committee/ILO_Report_2009.pdf.

[113] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scatter sections of 18, 22 U.S.C.). The Act was thereafter supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

[114] U.S. Dep't of State, Trafficking in Persons Report 2012, *available at* http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm.

Law schools as depositaries of the idea of human rights – from totalitarianism to young democracy (as exemplified by Poland)

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1. The idea of human rights is a legal philosophical concept stating that every human being has certain fundamental and inalienable rights stemming from the natural human dignity. The said means that a catalogue of human rights is inherent in every human being at least since the moment of his/her birth. The rights in question are inviolable and universal. They are recognized by the international community and protected – besides moral and ethical standards – also (if only at times) by the institutional and legal sanctions (like those administered by European Human Rights Tribunal or the right to humanitarian intervention, as provided for by the Charter of the United Nations). And thus breaking the rights in question may not be justified by the political sovereignty of the state, much less the ideology governing the latter. Consequently, it can never get legalised. Viewed from the legal dogmatic perspective, human rights are supported by the effective international agreements, and – in a majority of states of the globe – by the positive law (most often by constitutions) or the customary law. No consensus has been struck by the legal scholars, though, as to the human right sources in the philosophic meaning of the word; the clashing ideas range from the concepts of the natural law to the will of the positive legislator, i.e. the international community.

2. As revealed by the above said, human rights have objective and universal nature, no act of a specific political power being needed to recognize their binding force. In fact, the political powers are expected to protect human rights regardless of the political system of the state and the legal regulations being in force there. Hardly does it mean that the concept of human rights is welcomed by each and every state. The political practice greatly varies in that respect and it should be noted in passing that the concept of human rights as the inalienable basic rights each human being is vested in is best reflected in social and legal systems axiologically based on the idea of liberty. There is no doubt then that the origins of the institution, in its modern shape, can be traced back to the Great French Revolution and its flagship document - the Universal Declaration of the Rights of Man and of the Citizen, proclaimed in 1789. Expressed by the Declaration were so-called fundamental and inviolable citizen rights, such as the freedom of citizens, the right to property, equality before the law and court or personal inviolability. Not that the idea of certain fundamental rights people are vested in was not raised in previous historical epochs. Among the legal documents whereby selected freedoms and liberties had been guaranteed the English *Magna Charta Libertatum* of 1215 and Habeas Corpus Act of 1679 (the personal inviolability guarantee) or Poland's Warsaw Confederation Act of 1573 (securing the religious freedom) can be named. But it was only in the 20th century that the idea of human rights got its momentum. Major acts of international law from the field include, among others, the Universal Declaration of Human Rights adopted by the UN General Assembly on 10th December, 1948 and the European Convention on Human Rights of 4th November, 1950.

3. During World War II (1939-1945) Poland remained under the German occupation, the operation of any of the country's public institutions, including higher education institutes, being forbidden. In 1945 a new, communist political regime took over. Soon it turned out that the new authorities' only legitimization was the support provided by the Soviet Union whose sphere of influence was, after WWII, victorious to the Soviets, extended onto the

entire Central Europe. The forged elections of 1947 gave the new regime a formal legitimization. Actually, it continued to be based on violence, as exercised by the powerful state apparatus. A majority of political freedoms were abolished and the idea of human rights, so dynamic in the post-war world, remained a mere declaration. The legal acts, including the Constitution of 1952, guaranteed the citizens all kinds of fundamental political and social rights, it is true, but most of the rights existed on paper only. A typical communist practice was followed in that respect, consisting either in formal recognition of international standards in the human right sphere (e.g. by ratification of the relevant international conventions) but with no intent to observe them, or by guarantees of specific rights being provided by the constitution, with reference made, however, to ordinary laws distorting the general constitutional provision as a rule. And thus, for instance, all citizens were guaranteed personal inviolability by the communist constitution, an ordinary law allowing the authorities to detain the person for 48 hours in case of emergency, after which time the citizen was to be either presented charges or released. The rules were, in fact, scrupulously observed, but after the release of the person he/she was again detained for another period of 48 hours. Such a practice could be repeated over a longer time, meaning that the person was actually deprived of freedom by the police only (the court or public prosecutor not being involved in the procedure at all). In such a way the opposition contesting the governing regime was fought. Another example of the practice can be found in the legislation concerning the administration of justice. The citizen was guaranteed the right to access to court by the constitution, but not necessarily to court that would be *independent*. The judges were expected to provide so-called guarantees of due performance of their profession; they could be removed from office the guarantees lacking (i.e. the judges considered disloyal to the state or inconvenient to the latter). No doubt that under such circumstances the concept of human rights could hardly be developed freely. The Poland of the communist epoch (1944-1989) had, in fact, all features of a totalitarian state. Certainly enough, the limitation of the citizen liberties varied depending on the specific period of the regime's existence. Beyond any doubt, the hardest time was the 1940s and some part of the 1950s (until 1956) when the manifestation of a critical attitude towards the authorities or even insufficient enthusiasm to the latter could result in a loss freedom (if not life). Later on the repressions got milder, but human rights were not observed anyway.

4. It was also the sphere of education and academic life that lacked liberty and freedom of speech. As required by the then political doctrine, all spheres of life were made subject to the governing ideology, which also meant limitations curbing scientific/academic activities. Not every subject could be tackled in writing or speech. The censorship offices allowed publishing only the opinions favoured by the existing regime. Within a period which was that tough to the scholars, hardly could the legal doctrine deal with subjects as dangerous as the human right concept in the shape existing in the democratic countries. And yet a majority of the excellent academic staff coming from the times preceding WWII maintained the ideals and values from the epoch when Poland was a free and democratic country. In particular, law schools were the centres where classical legal concepts, respect of human dignity, individualised approach to the role of each person in the society (as opposed to the all-powerful collectivism putting the social interest, in its broadest meaning, before interests of the individuals) were cultivated. Despite keen eyes of the censors, outstanding law professors kept smuggling in their works the thoughts that defended the humanistic values from which the European civilization has grown. Examples of such a behaviour include, for instance, brave statements made against the death penalty. In fact, an overwhelming majority of representatives of the penal law doctrine were against the capital punishment, as one violating the fundamental human right – the right to life. Even as late as in the 1960s the penalty was administered in Poland for business-related offences, its administration being later reduced to the sphere of the crimes against life. Finally, towards

the end of the 1980s, the state authorities put a moratorium on the execution of the capital punishment (which was eventually abolished only in 1997). Another success of the legal scholars was the shape of Poland's Civil Code adopted in 1964, which law – while including certain traces of the communist ideology (e.g. the favoured treatment of the state property) - was filled with truly modern legal ideas and was standing out against civil codes of other communist states. Many higher education institutes (including law schools being parts of the latter) offered a safe haven to oppositionists and many professors were directly involved in the illegal opposition activities. It can be rightly stated that thanks to such an attitude of the scholars, the major shock to the system (i.e. the strikes of 1980 which resulted in the formation of the first independent trade union within the communist bloc) revealed not only good preparation of the opposition élites to confrontation with the authorities and the start of a dangerous and risky game aimed at liberalization of the political system, but it also contributed to the accelerated development of citizen awareness among wide circles of the community. This facilitated the later (after 1989) establishment of democracy and building up of the civil society. Throughout the period of communism it was the universities (with the law faculties operating within them) that served as a kind of depositaries for the human right ideas, reminding of the fundamental freedoms each human being is vested in. The ideas were cherished there despite great difficulties and dangers.

5. In 1989, when - under the pressure from popular protests and the country's worsening economic situation - the communist authorities decided to enter into a dialogue with the opposition, leaders of the "Solidarity" Trade Union in the first place, persons of deeply ingrained pro-liberty attitude and full of ideas how to democratically organize the social life, faced representatives of the state authorities at the negotiation table. Following the so-called Round Table arrangements conditions were created for a peaceful and evolutionary transformation of the socio-economic and political system. Over the 23 years that have passed since the beginning of the transformation, huge efforts were made to change the legal system and depart from the centralized economy and limitations of the citizen liberties in order to create a democratic system of market economy. In 2004 Poland joined the European Union, the fact entailing another remodelling of the national legal system to align it with the system of the EU. A great contribution into the work was made by the centres of the academic legal thought. Their tasks, of great importance for the success of the whole undertaking, consisted not only in providing the expertise needed for the transformation of the law, but also in promoting the changes on a major scale. And still, as the experience from the planting of the democratic system in Poland shows, the law schools are faced with the job of spreading the legal culture based on the human rights idea. In young democracies the threat of public authorities not meeting certain standards or abusing their position in contacts with the citizens is relatively high. A dynamically developing legal doctrine of human rights (and in each and every law school there does exist a department dealing with the issues) is one of the guarantees for high standards being observed in that respect.

Should the African Court replace the International Criminal Court in dealing with International crimes in Africa? A human rights perspective

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In the wake of open hostility towards the International Criminal Court (ICC) debate is raging around the proposal of granting the African Court criminal jurisdiction over international crimes. The essay seeks to explore from a human rights perspective the implications of expanding the African Court's jurisdiction. The question will be asked whether African leaders are genuinely ready to end impunity on the continent or this is a disguise meant to shield their own from international scrutiny. The discussion will centre around issues of universal jurisdiction, the principle of complementarily, access to justice, right to fair trial, sovereignty and effectiveness. The essay will contend that it is better for the African Court to complement the ICC in preventing impunity in international crimes than erode human rights in to the name of increasing opportunities for justice in Africa.

The ICC was established in 2002 as a permanent court to put an end to impunity for the perpetrators of international crimes. International crimes encompass "acts that threaten world order and security, crimes against humanity and fundamental human rights, war crimes and genocide.[115] The role of the ICC, considered the pillar of the international justice system, is to complement national criminal jurisdiction. African leaders argue that they are not being treated as equal participants in the application of international criminal justice in the sense that powerful countries are abusing the principle of universal jurisdiction. Hence they want to establish an African court, which deals with international crimes perpetrated in the African continent. An important question to be asked is, "Does the African Court have prosecutorial or investigative powers or institutional capacity to take on the work which is currently being done by the ICC? From the unfolding events it is clear that these issues are not important. What they want is "liberation" from ICC and those issues will be looked at later on.

Existing international law recognizes universal jurisdiction over international crimes. The principle of universal jurisdiction can be defined as, 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator of the victim.'[116] The basis of this is that violation of *jus cogens* is a harm to the entire international community and therefore no safe havens must be available for those who commit these crimes. The Geneva Conventions of 1949[117] provide for the application of universal jurisdiction and Article I of the Rome Statute emphasises the need for cooperation to punish offenders of serious crimes.
The Rome Statute operates on the basis of the principle of complementarity. In terms of this principle, national judicial systems will have the first bite of the cherry in respect of any

[115] Partin, www.asil.org and Articles, 6, 7 and 8 of the Rome Statute

[116] Kenneth C. Randall, 'Universal jurisdiction under International Law, Texas Law Review, No 66 (1988) pp785-8, International Law Association Committee on International Human Rights Law and Practice; Final Report on the Exercise of Universal Jurisdiction in respect of gross human offences, 2000 p.2

[117] Geneva Convention 1, Article 49, Geneva II Article 50, Geneva Convention III, Article 129, Geneva Convention IV, Article 146

investigation, which affects their territory or their nations. According to Zeidy,[118] the principle of complementarity in international criminal law requires the existence of both national and international criminal justice systems functioning in a subsidiary manner for curbing crimes of international law, when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.

Interfering with the national jurisdiction of the states was never an objective of the ICC. As part of the checks and balances, the ICC will not act where national criminal jurisdiction has been exercised or where the case is not of sufficient gravity. States are also given notice of the ICC's interest in a situation allowing them to inform the court of their own investigations and prosecutions. Only in cases of genuine unwillingness or inability to act will the court have authority to act, and the grounds on which the court can determine unwillingness or inability are precise and as relatively objective as possible.[119] Even though the African Union no longer has confidence with the ICC this mechanism is fair and meant to achieve justice in all cases as such there is no genuine need to grant the African Court criminal jurisdiction in international crimes.

It has been said that international prosecutions are being instituted mainly against African nationals, weak actors in the international arena or those who fail to enjoy the support of powerful nations.[120] Hoffman[121] argues that the state that claims sovereignty deserves respect only as long as it protects the basic rights of its subjects because it is from their rights that it derives its own. The African Union is of the view that the way the ICC is exercising its jurisdiction over African leaders is in violation of their different states' sovereignty. Advocating for the replacement of the ICC by the African Court appears to be a disguise meant to shield their own from international scrutiny. State sovereignty should not be a defence for breaches of gross violations of fundamental human rights.

Many a times it is the leaders of different states who perpetrate, abet or aid in the commission of international crimes. There is likelihood that these leaders can use African Court to evade justice. In terms of Article 17.2 of the Rome Statute, a person cannot be tried twice for the same crime. It is this essay's contention that those who want to replace the ICC with the African court failed to shield the perpetration of international crimes because of effectiveness of the non big in idem principle. This is a hurdle, which the African leaders failed to cross that is why they now intend to have their own court, which they can control to suit their situation. As part of the control mechanisms of this principle Article 20(3) of the Rome Statute provides that the ICC can try the person for the second time if the proceedings in the other court were for the purpose of shielding the person concerned or if the proceedings were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner inconsistent with the intent to bring the person concerned to justice. Should we sacrifice international justice by expanding the jurisdiction of the African court? It is this essay's view that there is public demonstration of justice through the ICC and it is an instrument through which individual accountability for massive human rights violations is increasingly internalized as part of the fabric of the African continent therefore we cannot replace it by an African Court.

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[118] Mohammed M.El Zeidy, 'The Principle of Complementarity: A New Machinery to implement International Criminal Law, Michigan Journal of International Law, vol. 23 (summer 2002) p.870

[119] The International Criminal Court, The Making of the Rome Statute, Kluwer Law International. The Hague, London, Boston, 1999 p1

[120] Damasica 'What is the Point' 361, Cherror Jalloy, Regionalising International Criminal Law? (2000) 9 ICLR 445

[121] The challenges to state sovereignty from the promotion of human rights. Available at www.e-ir.info

In terms of Article 27 of the Rome Statute, official capacity as a head of state or government shall not exempt a person from criminal responsibility. Max du Plessis[122], says an individual charged before the International Criminal Court is therefore stripped of immunity, the official status of that person is no longer allowed to lead to impunity in respect of crimes with which s/he has been charged. The chances of weakening human rights on the continent are very high if the African Court is given criminal jurisdiction on international crimes. More perpetrators of these crimes are state leaders and as such they prioritise state and diplomatic immunity. If they are allowed to be above the law then as Richard Gold said, 'the hope of 'never again' will become the reality of again and again.[123] The general understanding of the doctrine of diplomatic or head of state immunity as provided for in the case of Democratic Republic of Congo v Belgium[124] is that it prevents national crimes regardless of what their domestic legislation might insist, from dealing with allegations of international crimes unless that immunity has been waived. However the complementarity principle obliges state parties to the Rome Statute to prosecute or extradite the accused to a country which has jurisdiction to try him. This means that issues of state or diplomatic immunity are avenues to escape given this current ICC set up.
A good example of how issues of diplomatic and state immunity are likely to be abused in Africa is the application to the International Court of Justice by Liberia against Sierra Leone to set aside the indictment and international arrest warrant issued by the special court for Sierra Leone against Charles Taylor, President of the Republic of Liberia. Liberia wanted to assert state sovereignty where it was not relevant. The ICC is effective in achieving its goals which include deference. The indictment of heads of states like Slobodan Milosevic and Charles Taylor and Vice President of Democratic Republic of Congo Bemba have set the precedent that serial crimes will not go unpunished regardless of who you are. In an attempt to shield their own from international scrutiny, some African leaders now want to expand the jurisdiction of the African court. It is submitted that accountability is an indispensable component of peace-building and as such the African Court should not be granted criminal jurisdiction because accountability on African continent will be difficult to implement.

International Conventions such as the Geneva Conventions,[125] impose an obligation to prosecute and punish those responsible for grave breaches of international humanitarian law. If the African Court replaces the ICC in prosecuting these crimes there is no guarantee that impartial trials and effective judgments will be given. The reasons for this are both technical and political. Politically African states have a problem of making decisions based on their political relationship with the opponent state. An example is the arrest warrant issued by the ICC against Al Bashir. Some states were unable or politically unwilling to cooperate with the ICC, others decided to hind under the flimsy reason that they were not party to the Rome Statute and as such they had no obligation to cooperate with it. It is submitted that African leaders are very much aware that crimes allegedly committed by Al Bashir are a violation of *jus cogens* - peremptory norms for which no derogation is permitted under international law and as provided for in the Vienna Convention. This means that once there is a violation of a *jus cogens* an obligation *erga omnes* attaches to every state to apply the principle of universal jurisdiction.

[122] Africa and the International Criminal Court; available at http://www.csvr.org.29/wits/confpaps/duplessis.htm
[123] Were they Just Obeying Orders? The Guardian, May 7 1996, at 10, quoted in Simon Chester Never Again… and Again: Law, Order and the Gender of War Crimes in Bosnia and Beyond: (1997) 22 Yale J. of International Law 229 at 316 quoted by Max du Plessis in Africa and the International Criminal Court available at http://www.csvr.org.29/wits/contpas/duplessis.htm
[124]
[125] See note 3 above

There is poor justice delivery in Africa because of non-independence of the judiciary as such non-compliance and cooperation with regional courts and tribunals is evolving.[126] Zimbabwe's refusal to comply with the decision of the SADC Tribunal contributed to the demise of the tribunal. If this is the attitude of some African states there is no guarantee that African court judgments will be complied with. Courts generally do not want to exercise their jurisdiction where the judgments will be *brutum fulmen*. Establishing an African court with criminal jurisdiction on international crimes will therefore be a violation of the state and individual access to justice.

Further, generally in Africa there is a tendency of abusing the law making organs of states by arbitrarily amending or putting in place laws to suit the prevailing situation for the good of the leaders. This shows that African leaders have the potential to utilize what they practice in their own countries in the African Union and thus make treaties, which may end up ousting the jurisdiction of the African Court.

If the ICC is left with the prerogative to deal with international crimes it is for the international community to intervene when the need arises and bring suspects to book for example through the involvement of the United Nations Security Council. An example was when the council referred the Darfur (Sudan) situation to the ICC.[127] As a result of the referral arrest warrants were issued for four Sudanese officials including President Al Bashir. The government of Sudan objected to the warrant arguing that Sudanese sovereignty had been violated. In solidarity the African Union called on the United Nations Security Council to invoke the provisions of Article 16 of the Rome Statute and suspend the process initiated by the ICC against Al-Bashir. Further to this the African Union incited its member states to withhold cooperation from the ICC in respect of the arrest and surrender of Al-Bashir.[128] In November 2009 the African Union persuaded the UN Security Council to amend Article 16 of the UN General Assembly to be given authority to defer an investigation should the UN Security Council fail to act on their request within six months. It is clear from this that the African Union is just concerned about the welfare of its leaders, and the issue of human rights protection is secondary. It is submitted that the whole debate has nothing to do with prosecuting violators but it is about entrenching the culture of impunity and immunity in the name of fighting perceived biases of the ICC.

The right to fair trial is an essential human right to all. This right is enshrined in both national and international instruments.[129] The essence of this right is that all persons are equal before the courts and tribunals in the determination of any criminal charge against them and are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This right also encompasses the faithful execution of judgments. A careful examination of the Bashir case[130] shows that the case appeared before the Trial Chambers and its decision was reversed by the Appeals Chamber. If the court is influenced by the Western countries then it should have rubber-stamped the trial chambers decision but because of its independence and impartiality in the administration of justice it arrived at a decision which was just and proper even through different from the court a quo's decision. As was said by Koffi Annan[131] 'the ICC is a giant step forward in universal

[126] Coalition's submission on the implications of the African Court to have jurisdiction on International Crimes. Available at http://www.africacourtcoalition.org/index.php?option=com

[127] Resolution 1593 (2005) and Article 13(b) of the Rome Statute

[128] Max Du Plessis www.csvr.org.za/wits/contpas/duplessis.htm

[129] Article 10 of the Universal Declaration of Human Rights, Article 6 of the European Convention of Human Rights, s18 of the Constitution of Zimbabwe, Articles 14 and 16 of the International Convention on Civil and Political Rights

[130] Prosecutor v Bashir ICC-02/05-01/09-OA

[131] www.ngos.net

human rights and the rule of law. Hence the African Court should not replace the ICC in dealing with international crimes.

In addition, the culture of state impunity in international crimes is dwindling due to the ICC. States can no longer afford to be complicit since their consent is not a condition precedent for individual accountability. In the Benba case for instance, the ICC allowed civil society groups such as International Federation for Human Rights (FIDH) to mount vigorous campaigns against the complicity of the Central Africa Republic government.

However, it may be argued that had it not but for the reasons outlined above it should have been a good idea to expand the jurisdiction of the African Court. The issues of geographical location of the court mean that it is expensive to conduct a trial in the Hague. It is also inconvenient for witnesses to travel to that far say for example from Harare, Zimbabwe, as such a court in Africa would have been better because it is less expensive. It is submitted however, that these reasons are outweighed by the need to protect human rights and end impunity, as such human rights protection should prevail.

The African Court Coalition correctly observed that instead of extending criminal jurisdiction to international crimes,[132] the African Court can complement the work of the ICC by contributing to preventing mass human rights violations in Africa by determining state responsibility. It can also establish a regional norm of legality and compliance with decisions of regional courts. It is not within the interests of international justice to erode human rights in the name of increasing opportunities for justice in Africa.

In conclusion the essay has shown that the ICC has to a larger extent been an effective platform for the adjudication of serious international crimes. It has deterred dictators from abusing their powers and allowed society and victims themselves to stop the culture of impunity for human rights violations. The weaknesses of the African leaders have also been highlighted and it is clear that they are not genuinely ready to end impunity on the continent but want to shield their own from international scrutiny.

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The Role of Law Schools and Human Rights
Law Schools as Contributors to Public Policy on Human Rights

The case of Argentina

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Startled at the stillness broken by reply so aptly spoken,
`Doubtless,' said I, `what it utters is its only stock and store,
Caught from some unhappy master whom unmerciful disaster
Followed fast and followed faster till his songs one burden bore -
Till the dirges of his hope that melancholy burden bore
Of "Never-nevermore."' (Edgar Allan Poe – The Raven)

Should law schools teach human rights? The question is a tricky one. We should first determine what is to be understood by the phrase "teaching human rights" in order to provide a proper answer to the question. In an ideal world, we believe that the teaching of the basic concept of human rights, their scope and contents, the very idea that they are inherent to human nature, the importance of them be respected, etc. should be left mainly outside of law schools, since apprehending those matters are essential to the education of every individual from childhood. Paraphrasing Georges Clemenceau, that once said that war is much too serious a matter to be entrusted to the military, we can say that human rights are much too serious matters to be entrusted exclusively to lawyers.

If, on the contrary, by teaching human rights we understand teaching prospective lawyers the challenges that the concept of human rights present to the idea of state-nation and to the principle of national sovereignty, the international promotion and protection of human rights as subsidiary to national protection, and the legal mechanisms to deal with massive and systematic violations of human rights, we could agree that such matters should be, without doubt, within the realm of law school curriculum.

But the truth is that we do not live in such an ideal world. The last century showed that the general principles of human rights were far from being recognized as inherent to the individual. Massive human rights violations throughout the world occurred and continue to occur with various –and indefensible- excuses. The world had to suffer the Holocaust in order that the conscience of the nations be shaken and even then, the document that could be agreed at that time was the Universal Declaration of Human Rights, which only set the worldwide respect of human rights as a goal, "a common standard of achievement for all peoples and all nations". Undoubtedly, a great step at that time, but a too short one when looked from where we stand today.

Despite the great progress made since, massive human rights violations continue to be a day-to-day matter, even in those countries that define themselves as "civilized". Mine, Argentina, is one example. During the 1970s, Argentina was immersed in serious and gross violations of human rights, both from the left-wing guerrilla and, more important, from the Armed Forces that took power in 1976. Torture, kidnapping, and assassination of hundreds of individuals, in cases only because of thinking differently or just by mere suspicion, became common practice.

Once democracy was restored, in late 1983, the new democratic government, which had as one of their main campaign mottos *Somos la vida* ("We are life"), sought measures to bring the country back to normal. Among the measures then adopted with almost the unanimous approval of the political parties, were the repeal of a broad self-amnesty enacted by the military government; the ratification of the main international human rights instruments; the establishment of one of the first ever created truth commissions, the CONADEP (*Comisión Nacional sobre la Desaparición de Personas*), with the aim of investigating the fate of thousands of *desaparecidos*; and the bringing to trial of the leaders of the military government and of the terrorist groups responsible for those serious violations. The CONADEP's motto summarized the idea: *Nunca Más* (never more). The University of Buenos Aires law school, the major law school in the country, followed suit to the trend, and included human rights as part of the mandatory first year basic curriculum for prospective lawyers.

The underlying idea in so doing was that government actions are not enough. In the real, ordinary world in which we live in, the teaching and promotion of human rights must be a key element in education at all levels. And lawyers are particularly well prepared to help developing the public policy of the country in such a sensitive matter. Lawyers' argumentative skills, their actions as civic and political leaders, their role as advisors on all matters of public policy, their court advocacy, the persuasive role of their writings, even their key roles in different sectors of the economy, etc. make lawyers one of the primary groups that influence government and people's actions.

That being the situation, and until such time tenured professors could be appointed, the University of Buenos Aires law school initially filled the teaching positions of the new courses with professors coming from three main departments within the school: legal philosophers, who could provide the new courses and their students with deep thinking on the basis and rationale of human rights; constitutionalists, who brought with them the intimate relationship between constitutional liberties and human rights; and professors of international law, who would teach one of the novel features surrounding those rights, the principle that human rights were no longer dependent on the concept of national sovereignty. They helped the shaping of today's courses, by providing their fundamentals, and served as major contributors to the spreading of the idea that the respect of human rights is worthy for the human development.

Now, almost thirty years after human rights courses have been made part of the law school curriculum, the success of the idea has been proven. A diverse tenured faculty teaches over one hundred one-semester graduate courses each year, a one-year specialization degree and a two-years Masters degree on International Protection of Human Rights for a student body of roughly 25,000. Those courses are the main instrument by which the law school helps the construction of the rule of law principle with a multiplier effect in society at large.

Moreover, the law school hosting of conferences on the subject and promoting research and debate on human rights matters, its cooperative action by providing experts to NGOs and government agencies to help them in their daily tasks regarding human rights promotion and protection, make the law school a key player in the human rights agenda setting in the country, thus contributing to the public good of the people.

Not all graduates, obviously, will become human rights activists, but that was never the purpose. But, undoubtedly, they will incorporate their learning regarding the importance of human rights in their professional lives, either as litigants, from the bench, acting as political leaders or as advisors to people or business. And that will prove the success of our teaching.

As the country moves ahead, and the recent past events are managed, new challenges appear, and the law school has, once again a main role in shaping the agenda: age, race and gender discrimination; protection of the disabled; indigenous people's rights; social, economic and cultural rights, are the new subjects that require our attention. Human rights respect is an evolving concept and once a hurdle is passed, new ones appear and must be tackled.

Law schools are then key to building consciousness on the importance of a subject that only pretends to teach that every individual has the right to develop as a free human being on an equal foot basis with all others, regardless their skin colour, race, religion, nationality, wealth or gender, since they are not different from one.

The corporate responsibility to respect human rights and the question of universal civil jurisdiction in transnational human rights cases. Waiting for the U.S. Supreme Court decision in Kiobel v. Royal Dutch Petroleum.

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Summary: I. Introduction on the "state of the art" in respect to business-human rights relationship.- II. The inherent limits of the new U.N. Framework and Guiding Principles' corporate responsibility to respect human rights. - III. The State obligation to protect and to provide access to remedy for human rights abuses by third parties, including business. - IV. The questions of corporate liability and extraterritorial jurisdiction over abuses committed abroad in the *Kiobel* case. - V. Bringing the Governments back in: their positions on universal civil jurisdiction under international law. - VI. Critical evaluation of the European Union Member States' arguments on the extraterritorial application of ATS. - VII. Conclusion.

I. Introduction on the "state of the art" in respect to business-human rights relationship.

While business activities play a fundamental role in generating economic growth, wealth, jobs, income, innovation and development, thus possibly contributing to the enjoyment of fundamental human rights, there is increasing recognition that non-state actors, such as transnational corporations and other business, can have significant negative impacts on a full range of human rights, including civil and political rights, economic, social and cultural rights, labour and environmental rights.

The corporate responsibility and accountability for human rights violations is an issue firmly implanted on the global political agenda since the 1990s, which reflects a worldwide concern about the increasing role played by non-state actors in the process of globalization coupled with a corresponding decrease in the capacity of societies and governments to manage their negative impacts on the enjoyment by individuals, communities and indigenous people of their human rights. It is generally recognized that these "governance gaps" have created an environment in which-business related human rights abuses can occur with relative impunity.[133] In the 1990s, reports of corporate human rights abuses concerned especially the extractive sector (oil, gas and mining companies operating in conflicting zones or in countries with weak rule of law and high levels of corruption) and the footwear and apparel industries, due to the wide practice of off-shore production in countries with very poor working conditions. But allegation of direct violations by business enterprises, as well as corporate complicity in human rights violations committed by others, not limited to specific countries, industries or contexts, continue to be reported.[134]

Several efforts have been made at the level of United Nations to narrow these gaps, exploring ways for corporate actors to be legally accountable for the negative impact of

[133] *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, April 7, 2008, para. 3.

[134] See UN doc. A/HRC/8/5/Add.2, 23 May 2008, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse.* According to this report, near 60 per cent of cases reported featured direct forms of company involvement in the alleged abuses, where the company is alleged to directly cause the abuse through its own acts or omissions. Around 40 per cent of cases included indirect forms of company involvement in the abuse, where firms were generally alleged to contribute to or benefit from the abuses of third parties, such as suppliers, individuals, States or arms of a State, and other business.

their activities on human rights. In the early 1970s, the request of a "new international economic order" by the developing States [135] has been accompanied by the efforts to negotiate a binding instrument to improve control over the activities of transnational corporations. A draft *Code of Conduct on Transnational Corporations* was elaborated by the U.N. Commission on Transnational Corporations,[136] establishing a legal obligation for transnational corporations to respect human rights and fundamental freedoms in the countries in which they operate. This Code ultimately failed to be adopted do to a major disagreements between industrialized and developing countries, in particular, with regard to the inclusion of international law as standards of treatment for transnational corporations. [137]

Another later United Nations-based initiative, aimed at imposing legal binding obligations on companies, equally failed: in 2003, the Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the U.N. Commission on Human Rights, consisting of twenty-six independent human right experts acting in their personal capacity, approved a set of "*Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises with regard to human rights*".[138] This was a set of comprehensive international human rights norms specifically aimed at, and applying to, corporate entities, supplemented by a robust enforcement mechanism (which included the monitoring by national and international agencies) and by the duty to provide victims with effective remedies.[139]

This proposal was vehemently opposed by the business community and received very little support from Governments. Finally, the Commission on Human Rights, a political body composed by representatives of States, declined to adopt the document arguing that these kind of Norms have not been requested by the Commission; it asserted that, as a draft proposal, the 2003 Norms had "no legal standing", and that the Sub Commission should not perform any monitoring function in this regard.[140] The issue was subsequently moved to the U.N. political organs, the High Commissioner to Human Rights and the U.N. Secretary General.

A mandate for a Special Representative of the Secretary-General "on the issue of human rights and transnational corporations and other business enterprises" was established in 2005 with the aim to undertake an entirely new process. The idea was "to move beyond what had been a long-standing and deeply devise debate over the human right responsibilities of companies" (between those recommending the direct imposition on corporations of obligations under international law and those promoting the use of international soft-law instruments) [141] and to build a meaningful consensus among all stakeholders about the roles and responsibilities of both States and companies with regard to business's impacts on human rights.

Harvard prof. John Ruggie was appointed to the post. In 2006 the Commission was replaced by the U.N. Human Right Council, to which the Special Representative has reported

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[135] UN doc. A/Res/3201 (S-VI), Resolution adopted by the General Assembly of the United Nations on May 1, 1974, calling for a *New International Economic Order*.

[136] UN doc. E/1990/94, June 12, 1990.

[137] UN doc. E/CN.4/Sub.2/1996/12, 2 July 1996, para. 61-62; DE SHUTTER, *Transnational Corporations and Human Rights: An Introduction*, Global Law Working Paper 01/05, Symposium on 'Transnational Corporations and Human Rights'.

[138] UN doc. E/CN.4/Sub.2/2003/12/Rev.2, 2003.

[139] C.F. HILLEMANS, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights*, *German Law Journal*, 2003, 1070.

[140] U.N. Doc. E/CN.4/DEC/2004/116 , April 20, 2004. See also the ECOSOC decision 2004/279.

[141] U.N. Office of the High Commissioner of Human Rights, *New Guiding Principles on Business and Human Rights endorsed by the U.N. Human Rights Council*, June 16, 2011.

annually. From the very begging prof. Ruggie made clear that he would have abandoned the 2003 Norms' approach, consisting in imposing on companies "directly under international human rights law the same range of duties that states have accepted for themselves. Namely, "to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights," with the only distinctions being that states would have "primary" duties and companies would have "secondary" duties, and that the duties of companies would take effect within their (undefined) "spheres of influence".[142]

According to the Special Representative, attributing the same range of duties to corporations that currently apply to "would generate endless strategic gaming" between corporations and Governments over which "who is responsible for what". Despite the call by the majority of human rights organizations for "clear global standards adopted by the governments",[143] Ruggie refused to recommend "that States negotiate an overarching treaty imposing binding standards on companies under international law", as these negotiations "now would be unlikely to get off the ground, and even if they did the outcome could well leave U.S. worse off than we are today". [144]

In 2008, the Special Representative presented to the Council a strategic policy framework for better managing business and human rights challenges, named the *"Protect, Respect and Remedy"* framework. This framework was organized around the three pillars of the State *duty* to protect against human rights abuses by third parties, including business; the corporate responsibility to *respect* human rights; and the need for more effective access to *remedies*.[145] According to the Special Representative, this framework rests on "differentiated but complementary responsibilities". Each principle was conceived as an essential component of a complementary whole: the State duty to *protect* because "it lies at the very core of the international human rights regime"; the corporate responsibility to *respect* because "*it is the basic expectation society has of business*"; and access to *remedy*, because "even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness". [146]

The Human Right Council unanimously welcomed this framework and extended the Special Representative mandate with the task to operationalizing and promoting the framework. [147] In March 2011 prof. Ruggie presented his final report (the culmination of six years of extensive and inclusive consultations) named "*Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*",[148] which was unanimously endorsed on 16 June 2011 by the U.N. Human Rights Council.[149] These thirty-one *Guiding Principles* are organized into three sections corresponding to the same three core principles of the 2008 U.N. framework; each principles is accompanied by a commentary.

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[142] *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*, http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf.

[143] See *Joint NGO Statement to the Eighth Session of the Human Rights Council*, Human Rights Watch, May 19, 2008; Int'l Network for Economic, Social & Cultural Rights (ESCR-Net) & Human Rights Watch (HRW), *Joint Statement: General Debate Item 3: Human Rights and Transnational Corporations*, Business & Human. Rigths Resource Centre, June 4, 2010.

[144] John Ruggie, *Business and Human Rights: Treaty Road Not Traveled*, May 6, 2008.

[145] *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN doc. A/HRC/8/5, April 7, 2008.

[146] *Protect, Respect and Remedy,* para 9.

[147] Human Rights Council resolution 8/7, June 18, 2008.

[148] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* UN doc. A/HRC/17/31, March 21, 2011.

[149] UN doc. A/HRC/RES/17/4, July 6, 2011.

In a nutshell, according to its Author, the Guiding Principles' focus for States "on the legal obligations they have under the international human rights regime to protect human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations". For businesses (beyond compliance with national laws), the focus is "on the need to manage the risk of involvement in human rights abuses, which requires acting with due diligence to avoid infringing on the rights of others, and to address harm where it does occur". For affected individuals and groups, the Guiding Principles "serve as a basis for further empowerment through prescribed engagement with them by business enterprises, as well as well as greater access to effective remedy, both judicial and non-judicial." Summing up, "States must protect; companies must respect; and those who are harmed must have redress". [150]

II. The inherent limits of the new U.N. Framework and Guiding Principles' corporate responsibility to respect human rights.

While the first and third pillars of the Guiding Principles stay on the traditional notion of State responsibility, the second pillar deals with the "responsibility" of business enterprises to respect human rights, translating it into operational principles. In this regard, the Guiding Principles are grounded in recognition of "The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights". The premise is that corporations are "organs of society", more particularly "specialized economic organs, not democratic public interest institutions"; therefore "their responsibilities cannot and should not simply mirror the duties of States".[151]

Accordingly, the Special Representative has framed the distinctive role's of companies in relation to human rights in term of "responsibility" to respect rather than "duty", to indicate clearly that "respecting rights is not an obligation current international human rights law generally imposes directly on companies".[152] Rather, Ruggie described the responsibility to respect human rights as constituting: "a global standard of expected conduct for all business enterprises wherever they operate … [that] exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations". A standard of expected conduct that exists "over and above compliance with national laws and regulations protecting human rights and above compliance with national laws and regulations protecting human rights".[153]

The foundational principle dedicated to corporate responsibility in the Guiding Principles says that:"*Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved".*[154]

It's worth noting that while the 2003 Norms were drafted as "non-voluntary" set of norms, directly binding upon corporations, the Guiding Principles - when comes the discourse of corporate social responsibility – avoid any binding "shall" language and use instead the non-binding "should" terminology. The Commentary clarifies that the responsibility of business enterprises to respect human rights is "distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions".

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[150] John Ruggie, *Opening Address*.

[151] *Protect, Respect and Remedy*, para. 53.

[152] *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*.

[153] *Guiding Principles,* principle 11.

[154] *Guiding Principles,* principle 12.

Further, "hard" terms like "human rights violations" typically used for states are replaced by words like "infringements" and "adverse human rights impacts", the underlying idea being that business enterprises can have "adverse impacts" on virtually the entire spectrum of internationally recognized human rights. But when it comes to define the "human rights" that corporate actors should respect, the Guiding principles adopt a narrow interpretation by selecting as "authoritative list" the *minimum* core internationally recognized human rights contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in Declaration on Fundamental Principles and Rights at Work. In practice the Principles recognize that some rights will be more relevant and salient than others in particular circumstances, with the consequence that business enterprises "may" need to consider "additional standards like the human rights of individuals belonging to specific groups or populations that require particular attention", such as the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; migrant workers and their families and, finally, the standards of international humanitarian law in situations of armed.[155]

In essence, the corporate responsibility to respect human rights, according to the U.N. framework and Guiding Principles, means "non-infringement" on the enjoyment of rights; put simply "doing no harm". This "doing no arm" has been translated into the concept of "due diligence" for corporations that requires companies to take positive steps in order to avoid infringing on the rights of others; to address adverse impacts that may occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[156] To implement their responsibility to respect human rights, business enterprises should put in place policies and process appropriate, including a "policy commitment" to meet their responsibility to respect human rights; a human rights due-diligence process; and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[157]

Even if the responsibility to respect human rights applies, in principle, fully and equally to all business enterprises regardless of their size, sector, operational context, ownership and structure, the Guiding Principles clarify that "While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all." Therefore, according to the Guiding Principles, the scale and complexity of the means through which enterprises meet that responsibility "may vary and be proportional according to various factors, like the size and the severity of the enterprise's adverse human rights impacts".[158]

The Guiding Principles approach to the human rights responsibilities of business entities makes absolutely clear that they are not legally binding and that they do not purport to create new legal obligations for business: according to their Introduction, "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be

[155] *Guiding Principles,* principle 12.
[156] *Guiding Principles,* principle 13.
[157] *Guiding Principles,* principle 15.
[158] *Guiding Principles,* principle 14.

improved." Therefore, the General Principles state that "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights".[159]

In conclusion, the Protect, Respect, and Remedy Framework and the Guiding Principles are another voluntary code, along with various others introduced over the years: among the most widely recognized and accepted are the U.N. Global Compact launched in 2000 by then Secretary-General Kofi Annan as a global platform for engaging companies in the support of universal values, as well as promoting and amplifying businesses' positive contributions to societies' needs; the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises; the ISO 26000 Guidance Standard on Social Responsibility; the International Labour Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

Unsurprisingly, these new Guiding Principles have received broad support from corporations and Governments and have been welcomed as "the authoritative global reference point for preventing and addressing adverse impacts on human rights arising from business-related activity"; [160] a conclusion this that seems to be reinforced by the fact that core elements of the Guiding Principles have already been incorporated by numerous other international and national standard setting bodies.[161] According to Ruggie, the Council's endorsement of the Guiding Principles marked two firsts: "it was the first authoritative guidance the Council had ever issued on how to meet the complex global challenges of business and human rights; and it also was the first time that the Council or its predecessor, the Commission, had ever endorsed a normative text on any subject that Governments did not negotiate themselves".[162] These two "firsts" can be easily explained with the soft-law nature of this new U.N. normative text, which fully reflects the fact that States are not yet able, neither willing, to take firmer measures, and that they consider legally binding mechanisms not the best tool to address this particular issue.

While the Protect, Respect, and Remedy Framework and the Guiding Principles are certainly welcome and contain positive elements, their voluntary nature remains the primary concern. Their non-binding nature casts doubts on the affirmation that the global business and human rights agenda reached "a historic milestone" by their endorsement by the Council, [163] and that, as asserted by Ruggie, "even if this endorsement (by itself) will

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[159] UN doc. A/HRC/17/31, *General Principles*.

[160] UN doc. A/HRC/FBHR/2012/2, September 25, 2012.

[161] The new 2011 Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises now have a human rights chapter drawn from the Guiding Principles. The European Union on 25 October 2011 published a renewed strategy for corporate social responsibility for the period 2011-2014, taking the UN Guiding Principles as the main reference (*A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final); the European Commission has further asked member states to submit national plans for implementing the Guiding Principles. The U.S. government has incorporated the core concept of human rights due diligence requirements incorporates in new laws and regulations, like The Dodd Frank Wall Street Reform and Consumer Protection Act, Sections 1502 and 1504, august 2012 to ensure that supply chains do not contribute to conflict or human rights abuse in the Democratic Republic of the Congo or broader African Great Lakes region; the same in may 2012 for the Reporting Requirements on Responsible Investment in Burma, now that the United States have eased financial and investment sanctions on Burma in response to the historic reforms that have taken place in that country over the past year. See *U.S. Government on Business and Human Rights: Letter to the UN Working Group* submitted in response to the Note circulated by the Office of the High Commissioner for Human Rights on October 5, 2012.

[162] John Ruggie, *Opening Address* at the United Nations Forum On Business & Human Rights Geneva, Switzerland , December 4, 2012.

[163] UN doc. A/HCR/FBHR/2012/3, September 25, 2012.

not bring business and human rights challenges to an end, it will mark the end of the beginning".[164] Many leading human rights non governmental organizations have criticized the Guiding Principles for amounting to nothing more than an endorsement of the *status quo*: "a world where companies are encouraged, but no obliged, to respect human rights".[165] Amnesty International criticized the Guiding Principles' failure to adequately address key issues in corporate accountability, like mandating States to put in place effective regulatory measures to prevent and punish their companies from abusing the rights of individuals and communities in other countries; specifying that States should require companies to undertake human rights due diligence; and explicitly recognizing the right to remedy as a human right.[166]

As to the mechanisms that should ensure that the Guiding Principles are actually put into place, significantly, the U.N. Human Rights Council didn't create any right to an effective remedy for addressing the corporate human rights. In July 20011, it merely established a 'Working Group on the issue of human rights and transnational corporations and other business enterprises', consisting of five independent experts of balanced geographical representation, mandate *inter alia* to identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles; to continue to explore options for enhancing effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas. This Working Group was not been given the authority to consider complaints of victims related to the violation of human rights, even if its mandate leaves open the possibility of country visits. The second mechanism created by Council was the establishment of an annual Forum on Business and Human Rights as a venue open to governments, U.N. bodies, corporations, and other stakeholders to engage in dialogue and cooperation towards the goal of effective implementation of the Guiding Principles.[167] In a recent decision, the Council requested the Secretary General to explore the feasibility of establishment of a global fund to enhance the capacity of stakeholders to advance the implementation of the Guiding Principles.[168]

Given that the Guiding Principles are not legally binding and that they are to be implemented by businesses on a voluntary basis, the question then arises as to why businesses should comply with them. The short answer that this is 'the right thing to do', is not self-evident: the human rights community that has long urged a move "beyond voluntarism" rightly observed that "if self regulation and market forces were the best means to ensure respect for human rights, one might expect…the number of abuses attributable to companies to have diminished"; the experience in many part of the world "is precisely the opposite".[169]

In absence of effective enforcement mechanisms, it's unlikely that these Guiding Principles might usefully constrain corporate conducts.[170] Voluntary schemes and soft-law

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[164] *Guiding Principles*, para. 13.

[165] International Federation for Human Rights, *UN Human Rights Council adopts Guiding Principles on business conduct, yet victims still waiting for effective remedies* , June 17, 2011; *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights* , January 31, 2011; ROBERT C. BLITT, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, University of Tennessee Legal Studies, Research Paper No. 158, 2012, 17-21.

[166] Amnesty International Public Statement, United Nations: *A Call For Action To Better Protect The Rights Of Those Affected By Business-Related Human Rights Abuses*, June 14, 2011.

[167] UN doc. A/HRC/17/L.17/Rev.1.

[168] UN doc. A/HRC/21/L.14/Rev.1, September 25, 2012.

[169] The International Council on Human Rights Policy, *Beyond Voluntarism, Human rights and the developing international legal obligations of companies*, February 2002, 7.

[170] For the argument that the notion of human rights due diligence as framed by the Guiding Principles will lead to the cretion of binding legal duties for corporate actors under corporate law and orporate governance theory, see

approaches alone cannot coerce unwilling business enterprises to adopt corporate responsibility policies, neither could they force companies to abide by their corporate responsibility commitments.[171]

III. The State obligation to protect and to provide access to remedy for human rights abuses by third parties, including business.

In his 2007 Report, the Special Representative - after having recognized that the international human rights instruments do not seem to currently impose direct legal responsibilities on corporations - wrote that "nothing prevents States from imposing international legal responsibilities for human rights directly on corporations".[172] Till now they haven't done.

On this premise, the U.N. framework and Guiding Principles reiterated the traditional view that international human rights instruments impose only "indirect" responsibilities on corporations – that is, these treaty obligations take effects as between non-state actors only under domestic law in accordance with states' international obligations.

Therefore, the very first Principle deals with the State duty to protect, asserting that "*States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*."[173]

No doubt that States have the "primary" obligation to secure universal enjoyment of human rights and that they are the cornerstone around which the human rights regime is constructed.[174] The State duty to protect is firmly grounded in international human rights law and regional human rights systems, which provide that they "are obliged" to take appropriate steps both to prevent corporate abuses of the human rights of individuals and to provide access to remedy.[175] Therefore, States can be held liable for breaches of their obligations.

However, frequently, States fail to regulate the human rights impact of business and/or to ensure effective access to justice for victims of human rights abuses. Prof. Ruggie, himself, recognized that the increasing focus on protection against corporate abuses by the U.N. bodies and regional mechanisms indicates "a growing concern that States either do not fully understand or are not always able or willing to fulfil this duty." According to his own questionnaire survey of States, the Special Representative came at the conclusion that "not all State structures as a whole appear to have internalized the full meaning of the State duty to protect, and its implications with regard to preventing and punishing abuses by non-state actors, including business. Nor do States seem to be taking full advantage of the many legal and policy tools at their disposal to meet their treaty obligations. Insofar as the duty to the protect lies at the very foundation of the international human rights regime, this

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MUCHLIMSKI, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation*, *Business Ethics Quaterly*, 2012, 145-177.

[171] KAMATALI, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Company: Is it Time for an ICJ Advisory Opinion*? *Cardozo Journal of International and Comparative Law* , 2012, 449-450.

[172] *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/035, 2007, para. 62.

[173] *Guiding Principles,* Principle 1.

[174] KNOX, *Horizontal Human Rights Law*, *American Journal of International Law,* 2008, 1-47.

[175] *State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions*, Addendum to the Report of the Special Representative, A/HRC/11/13/Add.1, May 15, 2009, 2.

uncertainty gives rise to concern." [176] Even if this observation should have driven the desire to impose direct obligation on corporations under international law, the Special Representative, as already acknowledged, refused to do so due to the adverse affects that these obligations would have had on States' governance capacities and the current political unfeasibility of any such proposal.[177]

One might have expected, therefore, that in order to "bring back in" Governments which are nor "doing their job", [178] the Guiding Principles put forward a more *progressive* attitude towards State obligations by strengthening their existing obligations and their capacity to address effectively the challenges of the lack of respect for human right laws. Instead, and again, the Guiding Principles adopted a non-expansive view of States duties in relation to business and human rights and potential avenues for redress for alleged victims of business-related human rights violations.[179]

In respect of the State duty to protect human rights, the Principles simply says that States must generally protect against human rights abuses by third parties "within their territory and /or jurisdiction", through appropriate and effective policies, regulations and laws. They do not provide any further guidance on the steps States should take to hold companies accountable in the particular areas where remains a lack of clarity. These areas, according to the Special Representative, include "whether States should impose liability on companies themselves, in addition to natural persons acting on the entity's behalf; when States are expected to provide individuals with civil causes of action against companies (i.e. separate from criminal sanctions and going beyond administrative complaints mechanisms); and whether and to what extent States should hold companies liable for alleged abuses occurring overseas".[180]

No promising approaches concerning extraterritorial jurisdiction and transnational litigations have been developed by the Guiding Principles.[181] As to the exterritorial dimension of the State duty to protect under international human rights law, Principle 2 prescribes that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations". The use of the "should" language in the Principle is reinforced by the Commentary affirmation that what is at stake are only "strong policy reasons" for home States to set out clearly "the expectation that businesses respect human rights abroad", like "ensuring predictability for business enterprises an preserving the State's own reputation".

Shortly, the Guiding Principles refuse to characterize the duty to protect as extending extraterritorially: the commentary simply recognizes that: "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis." The commentary goes on recognizing that in this respect States have adopted "a range of approaches in this regard": some are domestic measures with *extraterritorial implications*, like requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments, and performance standards required by

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[176] *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts,* Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, February 9, 2007, para 86.

[177] KAMATALI, *The New Guiding Principles,* 457.

[178] *Remarks* by John Ruggie at the Forum on Corporate Social Resposibility, Co-sponsored by Fair Labour Association and the German Network of Business Ethics, Bamberg, Germany, June 14, 2006.

[179] MASSOUD, RÖDL, *Waiting for the "Follow-UP"? –Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework*, available at http://column.global-labour-university.org/2011/01/waiting-for-follow-up-guiding.html, 2.

[180] *State obligations to provide access to remedy for human rights abuses by third parties,* 3.

[181] *Waiting for the "Follow-UP"?,* 3.

institutions that support overseas investments. Other approaches amount to "*direct extraterritorial legislation and enforcement*", like "criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs". No indications in the Guiding Principles of which "extraterritorial measures" appear preferable and no further refinement of the legal understanding of the duty to protect and prevent human rights abuses abroad. The choice has been to leave the exterritorial responsibility to home States' discretion.

As regard to the Access to Remedy, the Guiding Principles recognize that: "Unless states take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless". Therefore the Foundational Principle 25 establishes that "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy". But the Operational principle devoted to State-based judicial mechanism does not deal with the causes of states' incapacity, nor does provide suggestions on how states can effectively strengthen their judicial capacity to hear complaints and enforce remedies against corporations by reducing the legal, practical and other relevant barriers (such as costs and legal aid, the lack of support for public interest litigation or mass tort claims, time limitations, and provisions on evidence) that could lead to a denial of access to remedy.[182] In the case of abuses involving third-country subsidiaries or contractors, difficulties are further exacerbated: in his 2009 Report, Ruggie recognized that "Where the company is a subsidiary of an overseas parent, additional factors can compound these barriers. The parent company may use its own leverage with the host Government or mobilize the home Government and international financial institutions. The alternative of filing a suit in the parent company's home State for the subsidiary's actions, or for the parent's own acts or omissions, can raise jurisdictional questions about whether it is the appropriate forum, and may trigger policy objections by both home and host State Governments. Moreover, the standards expected of parent companies with regard to subsidiaries may be unclear or untested in national law. Such transnational claims also raise their own evidentiary, representational, and financial difficulties".[183]

Finally, there is no mention in the Guiding Principles of the State obligation under international law to provide access to remedy in cases involving "gross human rights violations", [184] which included at least the following: slavery, and a slave-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race and gender.[185] It's important to underline that the United Nations Basic Principles provide for an individual right to remedy in such cases "irrespective of who may ultimately be the bearer of responsibility for the violation", thus extending to third party, including corporate-related abuses.[186]

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[182] *Guiding principles*, Operational Principle 26.

[183] *Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework*, A/HRC/11/13, 2009, para. 95.

[184] See the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted in 2005 by the Commission on Human Rights and subsequently by the General Assembly in its resolution 60/147 of December 16, 2005, annex, Principle 3 (c).

[185] International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide*, 2006, 153-168.

[186] In his report on *State obligations to provide access to remedy for human rights abuses by third parties,* p. 34, Ruggie recognized that "The United Nations Basic Principles were intended as a restatement of existing State

IV. The questions of corporate liability and extraterritorial jurisdiction over abuses committed abroad in the *Kiobel* case.

It is undoubtedly the task for States to develop effective tools and measures to ameliorate or eliminate such human rights violations: national laws and their application by courts are a fundamental part of the States response to the negative impacts of corporate activity on people's human rights. Domestic enforcement of binding rules of international law and domestic jurisdiction with the power to award civil damages against human rights violators are undoubtedly among the most efficient tools in promoting and securing effective compliance by non-state actors. [187] It is important to determine to what extent States think appropriate, or possible for them, to extend their powers beyond their own territory in order to combat human rights crimes committed by businesses, especially in the light of failure of the U.N. Guiding Principles to provide greater clarity on the "extraterritorial" dimension of the State duty to protect under international human rights law.

In this respect a very useful insight of the States' *opinion juris* on the issue of exterritorial jurisdiction as a tool to improve the accountability of transnational corporations for human rights abuses committed overseas is provided by the discussions surrounding a landmark case currently under consideration by the U.S. Supreme Court, which concerns the involvement of foreign multinational corporations in overseas human rights violations. The case is *Kiobel v. Royal Dutch Petroleum Co,*[188] brought under the ATS, a judiciary act enacted by the first U.S. Congress in 1789, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[189]

Long a dormant for nearly two hundred years, the statute turned into "a crucial tool for human rights litigation" with the seminal 1980 case of *Filartiga v. Peña-Irala*, [190] which transformed the ATS into "the epitome of extraterritoriality" in U.S. law.[191] Since then, ATS has become "the fountainhead for human rights lawsuits", and in the last three decades more than 120 lawsuits have been filed in Federal Courts against 59 corporations for alleged wrongful acts in 60 foreign countries; almost the majority of these suits have been over "aiding and abetting" abuses by foreign governments, rather than over direct offenses. Most of these corporate ATS cases have been dismissed or settled with very high damages awards.[192]

The Supreme Court in *Kiobel* will deal with some of the hot issues not defined by the U.N. Guiding Principles, such as whether States are expected to provide individuals with civil causes of action against companies and whether and to what extent States should hold companies liable for alleged abuses occurring overseas. Nevertheless, the Guiding principles featured also in this case, as the Respondents placed significant reliance on a statement contained in a 2007 report of the Special Representative to argue that corporations cannot be held liable under international law for the human rights violations alleged by Petitioners,

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obligations. They indicate the international community's enhanced concern with access to remedy in cases involving gross violations, and may reflect increased expectations that individuals should be able to resort to national courts to vindicate their treaty rights in such situations".

[187] REINISCH, *The Changing International Legal Framework for Dealing with Non-state Actors*, *in* Philip ALSTON (ed.), Non-State Actors and Human Rights, 2005, 89; KNOX, *Horizontal Human Rights Law*, 45.

[188] No. 10-1491 (U.S. 2012).

[189] 28 U.S.C.§ 1350.

[190] 630 F. 2d 876 (2d Cir. 1980).

[191] *Development in Law, Extraterritoriality, Harvard Law Review*, 2011, 1234.

[192] BELLINGER III, *Why the Supreme Court should curb the Alien Tort Statute*, February 23, 2012, at http://articles.washingtonpost.com/2012-02-23/opinions/35444954_1_kiobel-alien-tort-statute-human-rights.

including torture, extrajudicial executions, and crimes against humanity.[193] The Special Representative felt obliged to file in this respect an amicus brief in support of neither party in order to correct the "mischaracterizations" of his mandate's findings and conclusions to be drawn by the U.N. Guiding Principles.[194]

Kiobel v. Royal Dutch Petroleum Co is a class action suit filed in 2002 by twelve Nigerians plaintiffs against Royal Dutch Petroleum and British Shell Transport and Trading corporations. The Petitioners alleged that the Respondents and their agents aided and abetted, or were otherwise complicit in, widespread and systematic attacks committed by the Nigerian Government in the Ogoni region of Nigeria between 1992 and 1995 against the Ogoni population and directed, in particular, at people like the petitioners who opposed Shell's environmental degradation in the Niger Delta. Specifically, Petitioners alleged various human rights abuses, including torture, extrajudicial execution, prolonged arbitrary detention, extrajudicial killings and crimes against humanity. Respondents moved to dismiss the claim, arguing *inter alia* that the complaint failed to state a violation of the law of nations with the specificity required by the 2004 *Sosa v. Alvarez Machain* decision, in which the Supreme Court made clear that, at a minimum, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than (the three) historical paradigms" (that's to say: violation of safe conducts, infringement of the rights of ambassadors, and piracy). [195]

In 2006, the U.S. District Court for Southern District of New York dismissed several of the claims. Both parties appealed the decision to the U.S. Court of Appeal for the Second Circuit which decided in 2010, by a majority of the appeals panel, that that this ATS claim must be dismisses for lack of subject matter jurisdiction, as corporations could not be sued under the ATS. Particularly, the Second Circuit court held that "in ATS suits alleging violations of customary international law, the scope of liability—who is liable for what—is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States *inter se*, and because no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernible—much less universally recognized—norm of customary international law that we may apply pursuant to the ATS".[196]

The plaintiffs brought the case in front of Supreme Court, which granted *certiorari* on this question in order to resolve the split created between the Second Circuit and other three federal courts of appeals (the Seventh, District of Columbia and Ninth Circuits) which ruled differently on the issue that the ATS permits suits against corporations for universally condemned human rights violations.[197]

On February 28, 2012 the Supreme Court heard oral arguments for the case on the questions of (1) whether the question of corporate civil liability under the Alien Tort Statute ("ATS") is a merits question or a question of subject matter jurisdiction; and (2) whether corporations may be sued in the same manner as any other private party defendant under the ATS. But, on March 5, 2012 the Court ordered briefing and re-arguments on the

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[193] The sentence relied on states that: "it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations." *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, para 44.

[194] *Kiobel and Corporate Social Responsibility : An Issue Brief by John Ruggie*, September 4, 2012.

[195] 542 U.S, 724, 732.

[196] United States Court Of Appeals For The Second Circuit, Kiobel v. Royal Dutch Petroleum, September 17, 2010.

[197] *Kiobel v. Royal Dutch Shell Petroleum Co., et al.*, 621 F.3d 11 (2d Cir. Sept. 17, 2010), cert. granted (U.S. Oct. 17, 2011) (No. 10-1491).

additional question of "whether and under what circumstances the ATS allows U.S. courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States". [198]

Simply put, the U.S. Supreme Court is going to decide upon the two core issues of the corporate civil liability of corporations under the ATS and the permissibility of universal civil jurisdiction under the same Statute, making *Kiobel* one of the most important cases to be decided and one that could have profound implications for corporations accountability for gross human rights violations committed abroad.

V. Bringing the Governments back in: their positions on universal civil jurisdiction under International Law.

One of the two core questions raised before the Supreme Court in *Kiobel* is whether corporations could be held liable in a federal common law action brought under ATS for human rights violations. In this respect, the U.S. Government filed an impressive *amicus curiae* brief, signed by the, Legal Advisor to the State Department (Yale law School prof. Koh) explicitly supporting the petitioners.[199] In response to the Second Circuit affirmation that "It is inconceivable that a defendant who is *not liable* under customary international law could be *liable* under the ATS", the U.S. Government affirmed that the United States "is not aware of any international law norm …that distinguishes between natural and juridical persons. Corporations (or agents acting in their behalf) can violate those norms just as natural personas can. Whether corporations should be held accountable for those violations in private suits under the ATS is a question of federal common law". A District court, therefore "does not lack jurisdiction over an alien's otherwise colorable tort claim alleging a law-nations violations simply because the defendant is a corporations". Whether Federal Courts should recognize a cause of action in such circumstances "is a question of federal common law that, while informed by international law, is not controlled by it". The Government rightly asserted that the Court of appeals confused the threshold limitation indentified in *Sosa* (which requires violations of an accepted and sufficiently defined substantive international law norm) with the question of how to *enforce* that norms in domestic law, which does not require an accepted and sufficiently defined practice of international law. In other words, according to the U.S. Government, international law establishes the substantive standards of conduct but leaves the means to enforce those substantive standards to each State. "International law informs, but does not control, the exercise that discretion". In conclusion, according to the U.S. Government, nothing in international or in the text and history of ATS justifies "a categorical exclusion of corporations form civil liability for grave human rights abuses under this Statute".

Regarding the Respondents' argument that there is no corporate liability under international law for the human rights violations, including torture, extrajudicial executions, and crimes against humanity,[200] prof. Ruggie's in his *amicus curiae* too advanced good counter-arguments, contesting the "misconstruction" of the central findings of one of the

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[198] *Kiobel v. Royal Dutch Petroleum Co., et al*., 621 F.3d 11, *order for reargument* (U.S. Mar. 5, 2012), *available at* http://www.supremecourt.gov/orders/courtorders/030512zr.pdf . See also KEITNER, *The Reargument Order in Kiobel v. Royal Dutch Petroleum and its Potential Implications for Transnational Human Rights Cases*, March 21, 2012, http://www.asil.org/insights120321.cfm.

[199] All the Briefs and other documents for the Kiobel Case are available at The Center for Justice & Accountability (CJA) website: http://cja.org/article.php?list=type&type=509.

[200] For an analysis of the 20 U.S. Supreme Court cases that already recognized corporations liability under international law, see PAUST, *Non-State Actor Participation in International Law and the Pretense of Exclusion, Virginia International Journal of Law,* 2011, 977-1004.

United Nations report he has authored. According to the Special Representative, his reports explicitly recognized that "corporations may be held directly liable for human rights violations that constitute international crimes such as genocide, torture, slavery, and crimes against humanity". Having examined the developments in the area of corporate responsibility for international crimes, prof. Ruggie concluded that he found that the interaction between "the extension of responsibility for international crimes to corporations under domestic law" and "the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute" has created "an expanding web of potential corporate liability for international crimes." He further refuted the argument that the lack of a current international body for adjudicating corporate responsibility for international crimes excludes such responsibility: "just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today." For these reasons, the Special Representative concluded that "the most consequential legal development" in the "business and human rights constellation" is "the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards." And that remedies for business-related human rights abuses may come in many forms, including "civil, administrative or criminal liability." The Special representative also concluded that the weight of international criminal law jurisprudence in cases involving individual perpetrators supports a "knowledge standard for aiding and abetting human rights abuses".

Prof. Ruggie further expressed his deep concern for the potential implications of this case, that may go well beyond the exterritorial reach of ATS over human rights abuses committed by foreign multinationals in countries other than the United States. He explicitly contested the Respondents strategy seeking to persuade the U.S. Supreme Court not only to dismiss the claims against them, but also "to negate the statutory basis making it possible to use U.S. courts as a forum to adjudicate civil liability for gross human rights violations committed abroad—even when those violations are committed by U.S. nationals, and even if the Americans are natural persons." According to the Respondents not only ATS does not apply to corporations, including U.S. corporations, but its reach - even for natural persons - should be "pulled back" by the Supreme Court to cover only violations committed within the jurisdiction of the United States. Doing otherwise would imply a violation of international law since customary international law does not support the existence of an express rule permitting the assertion of civil jurisdiction over human rights violations committed outside the United States. In this respect, Prof. Ruggie concluded that "had this view held all along, there would have been no *Filártega*, no successful Holocaust survivors' claims, no statutory basis for civil action by foreign victims even against U.S. nationals for gross human rights violations abroad, whether committed by legal persons or natural persons. What is more, there might never have been the knock-on effects of ATS jurisprudence for legal developments in other countries, and also for the growth of voluntary corporate social responsibility initiatives at home and abroad, adopted by companies at least in part to avoid ATS-type liability."[201]

On this particular issue, i.e., the second core question in front of the U.S. Supreme Court (that of the exterritorial reach of the ATS) the various Governments' positions expressed in their *amici curiae* are very illuminating on how little they are concerned to maintain and/or possibly enlarge the extraterritorial scope of civil jurisdiction in relation to human rights abuses.

The European Commission, on behalf of the European Union, filed a supplemental brief in support of neither party stating the concrete interest of the European Union "in ensuring that EU- based natural and legal persons are not at risk of being subjected to the laws of other States where extraterritorial application of laws does not respect the limits

[201] *Kiobel and Corporate Social Responsibility: An Issue Brief by John Ruggie,* 4.

imposed by international law". The core argument of the European Commission's brief is that in order "To preserve harmonious international relations, States and international organizations such as the European Union must respect the substantive and procedural limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory". Therefore, the Commission submits that
for extraterritorial application of the ATS to conform with the law of nations it must be confined to the limited bases for extraterritorial jurisdiction recognized by international law. These bases include also the exercise of universal jurisdiction to reach conduct and parties with no nexus to the United States "but only when the conduct at issue could also give rise to universal criminal jurisdiction." In conclusion, according to the European Commission, the U.S. Federal Courts may exercise universal civil jurisdiction in relation only to the "narrow category of claims involving the most grave violations of the law of nations, such as genocide or torture, or conduct committed outside any nation's territorial borders, such as piracy." The internationally-recognized justification for universal criminal jurisdiction "also contemplate and support a civil component", but limited to the circumstances that could give rise to universal criminal jurisdiction. Within these limits, according to the European Commission, universal civil jurisdiction is consistent with international law principles of comity and equality of sovereignty. As to the procedural limitations imposed by international law, the Commission asserts that the plaintiffs must demonstrate that local remedies have been exhausted or that the local for a- i.e. those States with a traditional jurisdictional nexus to the conduct - are unwilling or unable to provide relief and no international remedies are available.

In conclusion, the extraterritorial reach of ATS is deemed by the European Commission consistent with international law, "provided that the statute's coverage of conduct occurring in the territory of another sovereign implements these constraints." In doing so, "extraterritorial applications of the ATS not only respect principles of comity but also ensure that courts remain open to claimants who might otherwise be subject to a denial of justice."

One might have expected that the European Commission's brief exhausted the opinion of the European Union's twenty-seven Member States. This is not the right conclusion, as European Union rarely succeeds in speaking with only one voice. A conflicting amici brief was also submitted by two EU Member States, precisely two Respondents' domiciliary States: the UK and the Netherlands. In their brief, jointly filed in support of the Respondents, these two Member States expressed a very strong opposition against the assertion of exterritorial civil jurisdiction under the ATS. These States asserted that "the right of the United States or any other sovereign to create and enforce such a domestic civil remedy depends on it being able to satisfy the *proper jurisdictional limits recognized by international law.*" In relation to claims of a civil nature, "the bases for the exercise of civil jurisdiction under international law are generally well-defined. They are principally based on territoriality and nationality. The basic principles of international law "have never included civil jurisdiction for claims by foreign nationals against other foreign nationals for conduct abroad that have no sufficiently close connection with the forum State." The requirement of "a sufficiently close nexus to the forum asserting jurisdiction" is imposed by international law in order to minimize conflicts between States and to prevent forum shopping by plaintiffs and defendants rushing to obtain judgments in a forum that favors their own interests. According to the States submitting the brief, the mere presence of a U.S. corporate affiliate is not "a sufficient basis" to establish U.S. jurisdiction over ATS claims against a foreign parent or affiliated corporation for unrelated activities that have no effect in the U.S. The only exception to the requirement of a sufficiently close nexus to the forum State is the so-called "universality principle", which allows each State to exercise jurisdiction over a limited category of crimes so heinous that every State has a legitimate interest in their repression, regardless of the absence of a sufficiently close connection to the

perpetrator, the victim, or the crime itself. But "universal jurisdiction applies only in criminal cases and does not give rise to a corresponding basis for civil jurisdiction."

Also the Federal Republic of Germany filed an amicus brief in support of the Respondents expressing its opposition to "overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil", contrary to international law. Germany urged the Supreme Court to instruct the lower courts that the power to adjudicate should only be exercised in ATS cases brought by foreign plaintiffs against foreign corporate defendants concerning foreign activities "where there is no possibility for the foreign plaintiff to pursue the matter in another jurisdiction with a greater nexus." Germany also asserted that permitting a broad exercise of jurisdiction without a specific nexus "would result in a legal and economic climate that would make it more difficult for corporations to engage in international business." Therefore, this Government concluded that the Supreme Court "as one of the world's most influential, should take this opportunity to ensure that the ATS is only used as a last resort for limited causes of action in cases that have no significant nexus to the United States".

In the light of the concerns expressed by foreign States on the extraterritorial scope of civil jurisdiction provided by the ATS in relation to human rights abuses, the U.S. Government (with an unsurprising development of its position) filed in June 2012 a supplementary brief in partial support of affirmance of the Second Circuit's decision. While the U.S. continues urging a reversal of this latter court's holding that the ATS does not apply to corporations, the new brief specifically deals with the question of whether and under what circumstances the ATS allows U.S. courts to exercise universal civil jurisdiction over human rights violations which have slight connections to the US, i.e. committed by foreign corporations against foreigners victims on foreign territory.

In its introductory Statement of Interest, the U.S. Government starts significantly explaining that "The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign relations, including the exposure of U.S. officials and nationals to exercises of jurisdiction by foreign States, for the nation's commercial interests, and for the enforcement of international law". While the brief argues that the Supreme Court "should not articulate a categorical rule foreclosing the U.S. courts to exercise jurisdiction under ATS for conducts occurring in a foreign country", the U.S. Government concludes that U.S. courts "should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the sued party is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct". In cases like that, the United States "could not be faulted by the International community for declining to provide a remedy under U.S. Law especially when other more appropriate means of redress would often be available in other forums, such as the principal place of business or country of incorporation, and they choose not to provide a judicial remedy."

Even if a federal common-law cause of action is created under the ATS for extraterritorial violations of the law of nations in certain circumstances, according to the U.S. Government doctrines such as "exhaustion" and "forum non conveniens" should be applied "at the outset of the litigation" and with special force in cases "where the nexus to the United States is slight". In conclusion a U.S. court, applying U.S law, should be a "forum of last resort, if available at all".

This brief, signed only by the Justice Department officials and not by the State Department,[202] undoubtedly partially re-aligns the U.S. position with the various foreign Governments' position over the extraterritorial reach of ATS.

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[202] SANDER, *Kiobel: The U.S. steals the headlines in first round of supplemental brief on universal civil jurisdiction under the Alien Tort Statute*, published on June 26, 2012, avalilable at http://www.ejiltalk.org/kiobel-the-us-steals-the-headlines-in-first-round-of-supplemental-briefs-on-universal-civil-jurisdiction-under-the-alien-tort-statute.

VI. Critical evaluation of the European Union Member States' arguments on the extraterritorial application of ATS.

The milder position of the European Commission in respect of the exercise of extraterritorial jurisdiction in comparison to those expressed by the European Union Member States can be easily understood by the fact that the Commission presented in 2010 a Draft Proposal which aimed to bring radical changes in the current version of the actual cornerstone of the European legislation in civil and commercial matters, i.e. Regulation No. 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).[203] Among the objectives of these radical changes developed by the Commission in its Draft there was also the expansion of the territorial scope of the European jurisdictional rules: currently, the territorial scope of most of the rules of jurisdiction provided for in the Brussels I Regulation, subject to certain noteworthy exceptions,[204] is limited to cases where the defendant is domiciled in a Member State.

The most ground-breaking amendment of the Commission's Draft Proposal consisted in eliminating such a limitation by extending all rules of jurisdiction to defendants domiciled in third countries. The draft Regulation also proposed two additional rules, which would be applicable where no other rule of the Brussels I Regulation would confer jurisdiction to the courts of one of the Member States. Such rules would have applied by definition, in disputes involving non EU defendants domiciled (since the courts of the Member State where the domicile of the defendant is located have, as a matter of principle, jurisdiction). Pursuant to the first rule, non-EU defendants could have been sued at the place where their moveable assets are located, provided that the value of such goods would not be disproportionate with respect to the value of the claim. The second rule for non-EU defendants provided that they could also be sued exceptionally before a *forum necessitatis* in cases where no other forum (outside the European Union) would guarantee the right to a fair trial.

The Council of European Union did not accept these proposals; therefore according to the new recast of Brussels I Regulation, adopted in December 2012, only defendants domiciled in a Member State could thus be sued in another Member State based on the rules set out in the Regulation.[205] This simply means that the European regime does not apply to civil claims brought before EU member State courts against non-EU defendants, and that the rules of international jurisdiction comprised in the domestic law of each Member State would be applicable.

In this respect, the argument advanced by the UK and the Netherlands Governments' in their amici brief in Kiobel that their domestic courts would not allow the plaintiffs to bring these kind of "foreign cubed" tort case, rather, "their courts would generally insist on a sufficiently close nexus with the forum based on the territoriality or active personality principles", is absolutely deceptive. This argument was advanced in response to a question raised by Justice Kennedy (that came from a brief submitted for amici curiae Chevron and other corporations in support of the Respondents) asserting that " No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial

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[203] COM(2010) 748 final.

[204] The rules establishing the exclusive jurisdiction of specific courts and the rules regarding prorogation of jurisdiction are applicable even if the defendant is not located in a Member State.

[205] *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the European Union,* L 351/1, 20.12.2012.

human rights abuses to which the nation has no connection" and asked "for the best authority you have to refute that proposition".

The UK and Netherlands Governments statement that in their countries plaintiffs could not have brought such claims has been strongly denied by an amicus brief filed by Law Professors at four leading universities in the Netherlands who conclude, after a deep analysis of Dutch law and cases, not only that that Dutch courts may exercise criminal and civil jurisdiction over both individuals and corporate actors for extraterritorial violations of the law of nations, but that "they have done so" over ATS-like, so-called "foreign cubed", civil claims in a number of recent cases against defendants that are not domiciled in the European Union, pursuant the tort law provisions of the Dutch civil code. Among the various examples of universal civil jurisdiction exercised by Dutch Courts, they mentioned the Hague District Court decisions in March 2012, where the Court assumed jurisdiction over and sustained a civil claim brought by a foreign plaintiff regarding his unlawful imprisonment and torture in Libya by Libyan officials not resident in the Netherlands.[206] In late 2009 and 2010, in interlocutory judgments relating to a number of tort claims brought by Nigerian farmers against Shell Nigeria and the current British parent company of Shell, for the damages caused by four specific oil spills in the surroundings of their villages in Nigeria, the same Court held that it had jurisdiction not only over the claims against the Netherlands-based parent company Royal Dutch Shell but also over claims against the Nigeria-based subsidiary. In its final judgments of 30 January 2013, the Hague District Court dismissed claims in four out of five lawsuits finding that pursuant to the applicable Nigerian law, an oil company is not liable for oil spills caused by sabotage from third parties; Shell Nigeria has been sentenced to pay damages only in one of the five proceedings. [207]

The Dutch Professors conclude that "Dutch case law is therefore incompatible with any alleged rule of customary international law prohibiting the exercise of jurisdiction by domestic courts over claims" such as those pursued by the Petitioners in *Kiobel*. To the contrary, "recent Dutch case law suggests that such claims are indeed recognized by the courts."

Actually, ATS is, in fact, far from alone.[208] Many statutes and decision of other countries, including the European Member States recognize and have in fact recognized extraterritorial civil jurisdiction over human rights abuses to which they have no more factual nexus than that required by the U.S. doctrine of personal jurisdiction: these statutes and cases are discussed in detail in the supplemental brief filed by the Yale law School Center for Global Legal Challenges and, as to the many national legislations of the European Union Member States which provide universal civil jurisdiction, by the brief of the European Commission.[209] It's also important to stress that under the current U.S. personal jurisdiction doctrine, "an essential element" of any lawsuit, "without which the court is 'powerless to proceed to an adjudication"[210] a foreign defendants who lacks significant contacts with the United States is not subject to suit in U.S. courts: the due process clause protect them in cases where there are no ties to the United States.[211] While, an important tie to the U.S. is provided by the fact that all the Nigerian plaintiffs in Kiobel are legal

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[206] *El-Hojouj/Unnamed Libyan Officials*, The Hague District Court, March 21, 2012, LJN: BV9748.

[207] Dutch judgments on liability Shell, *Decision on oil spills in Nigeria,* at http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Pages/DutchjudgementsonliabilityShell.aspx.

[208] *Hathaway*, *Online Kiobel symposium: The ATS is in good company*, SCOTUSBLOG, July 17, 2012.

[209] Brief of the European Commission, 24.

[210] *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 584 (1999).

[211] Amici brief of Center for Justice and Accountability (CJA) and survivors of gross human rights violations who have filed suit against the individuals responsible for perpetrating those abuses under the Alien Tort Statute, June 13, 2012, 25.

resident in the United States and all have received political asylum by the time the case was filed.[212] If the ATS is in violation of international law, then many other national laws are in violation as well.

Also deceptive is the Federal Government of Germany's line of reasoning, according to which claims against a German corporation for human rights abuses committed in a third country would be more appropriately heard in a German forum, as the Germany's legal system allows plaintiffs to pursue violations of customary international law by German tortfeasors, providing that the victims of those torts can enforce their rights simply and efficiently before the German courts. While the German Government recognized that it certainly "would be inappropriate to require plaintiffs to exhaust their legal remedies in countries which have a proven record of human rights violations and no due process", it concluded that is certainly "reasonable and appropriate to require a victim of a tort committed in a third country by a German tortfeasor to go to Germany and utilize the legal system of the Federal Republic of Germany to seek legal satisfaction." The members of German Bundestag, the highest legislative body of the Federal Republic of Germany in their amici curiae brief submitted in the *Kiobel* case, contended that these claims "are mere pretexts for a parochial interest in protecting German businesses from human rights liability." Significantly, the members of German Parliament accuse their Federal Government to simply and deceptively have omitted important details regarding the "openness of German courts" to such claims. Despite the government's claim that civil remedies exist in German law, the German Bundestag rightly recalled that German enterprises that committed some of the most serious and atrocious violations of human rights of the twentieth century, including the use of forced labor during the National Socialist regime, refused to accept responsibility for the exploitation of thousands of workers, and victims received no redress in the half-century that followed. The solution to this problem emerged only in the late 1990s, and only after victims prepared to initiate civil litigation against the corporate perpetrators under the ATS. "The prospect of ATS litigation induced German enterprises and the German government to cooperate with victims' associations to reach an extrajudicial agreement regarding compensation. A foundation was formed, and individuals were eligible to receive individual payments as redress for the abuses they suffered." The simply prospect of ATS litigation was crucial in creating the conditions for a comphrensive framework for compensating victims of force labor in the Nazi era. Absent the ATS, "none of this would have been possible." The German Bundestag concluded that this "belated compensation of victims of Nazi forced labor" illustrates very well the difficulties faced by individuals who seek remedies for serious human rights violations. "When victims cannot bring claims in the States where the violations took place or the states where potential defendants are headquartered, the ATS may be the only effective form of redress available."

As to the contention that extending ATS and federal common law to suits involving foreign parties and territories would also mean extending U.S. law outside of its borders, it is easy to answer that this statute does not allow United States' courts to project abroad a totally "inappropriate" exercise of U.S. legislature, as it happened in recent years with respect to the U.S. effort to protect the interests of the international system by using means that have been perceived by the rest of world as offensive to international law. ATS is not comparable for example to the U.S. unilateral economic sanctions that extend their reach to third countries and third parties, objected by other nations that enacted the so-called "blocking-statutes", empowering their Governments and courts to prevent their nationals from complying with U.S. orders.[213]

The ATS does not create new U.S. substantive law, but let U.S. courts to enforce, specific, universal norms of international law, aiming at protecting internationally recognized human rights, which all States are in principle bound to comply with, and which it is, at

[212] Petitioners Supplemental Opening Brief, 2.

[213] *Developments in the Law, Extraterritoriality*, *Harvard Law Review,* 2011, 1231, 1289.

least, in the interest of all States, to seek to ensure compliance with. This, from the private international law point of view, the major difference with the European regime for "foreign cubed" civil claims involving foreign defendants: European States do not apply international law to extraterritorial tort-based disputes involving violations of the law of nations; instead they use common "choice of law" rules contained in a Council Regulation known as "Rome II."[214] In relation to torts, the general rule is that liability should be governed by the "law of the country in which the damage occurs" unless there are very strong reasons for applying the law of another country. In most cases, therefore, the law applicable will be the law of the place where the damage occurred, not the law of the forum state. For this reason, precisely, it has been maintained that choice of law rules can help mitigate concerns about extraterritorial jurisdiction in civil cases.[215]

Finally, it is at least contradictory for the European States that have unanimously supported the U.N. Guiding Principles, which precisely calls upon States to recognize the need for effective judicial remedies for violations of human rights perpetrated by corporations, now seek either to abolish or to restrain one of the most effective remedies in the business and human rights field to date. As the German Bundestag said in its amicus brief, in representation of the German people, every single nation should have a special interest in the right of victims of human rights to resort to any jurisdiction that provides an effective remedy, nor should be in the interest of either nation foreign policy to grant businesses impunity, as the accountability of all persons - including business entities - for human rights violations is a high priority.

VII. Conclusion.

Contrary to extraterritorial criminal jurisdiction which is constrained by international law, extraterritorial civil jurisdiction remains largely a matter for domestic law and highly controversial. The considerations above suggest the need for the adoption of a new international instrument, aimed at clarifying the obligations of States to protect human rights against any violations by the activities of transnational corporations.[216] This is also the indication of the Special representative, John Ruggie, whose consultations have indicated a broad recognition that this is an area where greater consistency in legal protection is highly desirable, and that it could best be advanced through a multilateral approach.[217]

To date, the only harmonized regime is that provided by the European Union law that governs also the three other European States members of the EFTA; but also this regime is not complete uniform as it does not cover cases where the defendant is not domiciled within one of the governed States. National laws on jurisdiction currently still apply to these claims. Attempts to develop an international treaty globally harmonizing rules on civil jurisdiction, dating back to the mid-1990s, have brought States to negotiate the Draft Hague Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Draft Hague Convention"). Article 18, paragraph 3, of this

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[214] *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, *Official Journal of the European Union*, L 199/40, 31.7.2007

[215] ZERK, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas. Corporate Social* Responsibility Initiative, Working Paper No. 59, 2010, 160.

[216] DE SCHUTTER, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, November 2006), at http://www.reports-and-materials.org/Olivier-de-Schutter - report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

[217] RUGGIE, *Recommendations on Follow-Up to The Mandate*, February 11, 2011, 4 at http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf.

Draft permitted grounds of jurisdiction which would have to be excluded from national law (because they do not represent a substantial connection between the State and the dispute) when a plaintiff applied to it for relief or damages for an infringement of his fundamental rights. In the end, though, the project proved to be too ambitious and it was abandoned as it was not possible to find uniform solutions that suited all the key States.

The current debate around the Kiobel case demonstrate that, years after there is still a problem in deciding which rules should govern international civil jurisdiction in this field. Among the various, some European Member States pointed to "the risks of improper interference with the rights of foreign sovereigns" in ATS cases because "the U.S. has chosen to adopt plaintiff-favoring rules and remedies that other nations do not accept."[218] The attractiveness of the United States as a forum for foreign plaintiffs is indisputable, as this country accord private plaintiffs a set of advantages not provided by most of other countries, like the so-called "American rule" on litigation costs which requires each side to bear its own costs, the right to a jury trial in a civil case, the "opt out" class action system, and punitive damages generally not allowed elsewhere. Nevertheless, these advantages could well compensate the rarity of remedies for corporate human rights abuses and the great obstacle to the accessibility of effective remedies for victims of corporate human rights violations. Access to justice is a fundamental human right recognized in Article 6 of the European Convention on Human Rights.

The application of ATS is consistent with the growing recognition in the international community that an effective remedy for crimes in violations of fundamental rights includes, as an essential component, civil reparations to the victims, as the European Commission expressly recognized in its amicus brief. A finding by the United States Supreme Court that it would be contrary to international law for United States' courts to hold corporations accountable for extraterritorial abuses would represent a major setback for victims of human rights abuses in their quest for justice. As the Government of Argentine Republic stated in its amicus brief filed in the Kiobel case, the Alien Tort Statute "offers a valuable instrument to promote goals shared by all democratic republics". As many ATS cases arising abroad are brought "in contexts where no alternative forum exists" the loss of the ATS as a tool for human rights victims seeking justice "would be a serious blow to the cause of democracy and human rights".[219]

But, at the end, it seems that the United States Government has been convinced by the Foreign Governments' briefs that ATS might have a broad impact on the sovereignty of other countries that have a strong interest in governing their own subjects and territories, and applying their own laws in cases which have a closer nexus to those countries; thus, ATS could potentially interfere with other sovereignty and governmental interests. This new position can be reasonably explain by the corresponding U.S. interest in ensuring also that its legal persons are not equally at risks of being subject to the law of other States.

It's impossible to predict what position would take the U.S. Supreme Court; due to the widespread critics to the extraterritorial application of ATS it is probable that it will be sensible to the suggestion of the U.S. Government to constrain the most "exorbitant", aggressive, extraterritorial applications of the ATS deemed by other States inconsistent with international law limits; and that certain criteria must be fulfilled, before asserting extraterritorial jurisdiction directly over the foreign conduct of individuals and companies. If so, the hope is that the Court follows the European commission's argument that civil jurisdiction over foreign wrongs should be limited to cases involving very serious human rights abuses already covered by universal criminal jurisdiction, and where the victim would otherwise suffer a denial of justice, such as where there is no adequate, independent judicial body in the State with the closest links with the case, or no reasonable prospect of redress.

[218] *Supplemental brief of the UK and the Netherlands*, 27.

[219] *Brief for the Government of the Argentine Republic as amicus curiae in support of Petitioners*, 14.

Protecting human rights in inter-private relations

Caitlin S. Mulholland

Introduction. Justification.

The purpose of this paper is to show how the issue of human rights – and more specifically protection of the human person's dignity – is today considered a valorizing factor in Brazil's constitutional civil system, one that actually prioritizes existential as opposed to patrimonial relations.

This conceptual twist is of the utmost importance for the teaching of contemporary civil law, since the disciplines included in the sphere of private-law relations, specifically those that involve property and contracts, have traditionally been taught as an area exempt from any influences or interests whatsoever, whether humanitarian or existential. For example, in the 19th and much of the 20th century, the disciplines of contracts and property were a fertile field for the full development of individualism and individual liberalism. The perception that a private relation could have its effects limited on account of some solidary interest aimed at protecting the dignity and humanity of one of the parties of that relation is the consequence of the development of a doctrine that we call constitutional civil law.

This doctrine or methodology embraces the following premises: 1) the juridical system is unique, systematic and obeys a hierarchical structure; 2) the supreme standard norm of this organization is the Federal Constitution of the Republic; 3) the Federal Constitution has a contemporary function that goes beyond that of organizing the political powers, namely that of a central core of values for the community that it represents; 4) one of the pillars of the Democratic State of Law is protection of human rights by means of the general clause of guardianship of the human person (*the dignity of the human person*); 5) private-law relations should always not only be evaluated by the rules concerning contracts and the like contained in civil laws to which they refer, but also referenced to the general clause of protection of human beings, as a way of safeguarding their dignity and humanity.

With regard to the general clause of protection of the dignity of the human person – herein referred to as the general clause of protection of human rights in private relations – we can consider its premises to be as follows: 1) protection of substantial equality in private relations; 2) protection of psycho-physical integrity when faced with situations potentially harmful to existential interests of the human person; 3) protection of social solidarity in private relations when collective preponderates over individual interest; and finally, 4) protection of freedom when individual choice considers the possibility of protecting difference as a form of recognition and self-determination.

Background and the Federal Constitution.

Historically speaking, much has been said about the crisis that civil law and its systematics, as well as the loss of the notion of the Civil Code as the valorizing core of our private juridical structure. The breaking of the public right/private-law dichotomy; the de-codification movement through proliferation of various laws (some of which actually constitute micro-systems); State interventionism in private relations ("publicization" of private law, what Josserand calls contractual State control); and the realization that classic civil law was incapable of protecting the new juridical relations in an equalitarian, fair manner – these are some of the elements that together support this notion of crisis.

The understanding that the juridical system, being unique and hence systematic and hierarchically structured, could no longer be analyzed and interpreted in set and separate blocs, led to the conclusion that, when faced with a system based on a superior standard norm – the Constitution – the principles and values that emanate from it must be respected, otherwise the whole sense of a legal system comes undone. And in this way the system of

the Civil Code as a repository of the values that control private relations becomes the responsibility of the Constitution, which remains the source of the fundamental principles of the juridical system.
The Civil Code thus loses its role as the "constitution" of private life and is replaced as the unifier of the system of private law by the Federal Constitution and its higher principles, norms and values, which serve as the foundations of the whole juridical system for a new Social State. One such value, considered to be central to the conception of the new Social State, is the dignity of the human person, which gains the status of a pillar of the Republic in article 1, III of the Federal Constitution.
Dignity is an absolute value that is intrinsic to the essence of human beings, who are unique in possessing an innate sense of valorizing which is priceless and has no equivalent substitute. Such values will serve as a guide in interpreting and applying juridical norms and will always be taken into account in protecting and guarding the rights of the personality of men and women and in their juridical relations in order to provide the bases for achieving the objectives of the democratic State of law.

In synthesis, these objectives, set forth in article 3 of the Federal Constitution aim at building a fair and free society based on solidarity by eradicating social inequalities and promoting the powers of the State through distributive justice and substantial equality. In this way, the notion of unlimited autonomy granted to individuals in the liberal systems is countered by the idea of social solidarity: if the 19th century was marked by the reign of individualism, the 20th century, with its revaluation of human beings and their dignity, is the era of development of social justice.

Examples.

Following this line of reasoning, we consider not only that each and every inter-private relation should be analyzed by taking into account the interests of the parties who have committed themselves by contract, but also and especially that the finality of protecting the interests of the persons in an inter-private relation is to safeguard the dignity and existence of those who have joined this relationship. This is why in so many concrete situations judges are called to decide on cases where, if the law is strictly interpreted, the result of the case would be different from that derived from an interpretation that takes into account the need to protect the dignity of the human person. For example:

5) By the law of unleviability of family property, only the property that serves as the family residence can be considered unleviable. In the concrete case in question, it was considered that despite the property not being used as the family residence, it was rented out and the value of the rent was used for the family's subsistence;
6) In a contract for financing the purchase of a piece of property, the buyer had already paid 48 of the 50 installments, but was unable the pay the two remaining ones. According to the contract, the seller was entitled to rescind same and claim back the property. The judge felt that this clause in the contract was abusive and that the contract had been substantially respected, leaving it to the seller to simply charge the remaining debt without breaking the contract.
7) Clauses in a health-plan contract are held to be abusive when they impose limits on the number of days spent in an intensive-care unit.
8) Although the Public Registers law does not allow changing a transsexual's sexual status and name before transgenitalization surgery procedures have been performed, one judge permitted such change alleging constitutionally guaranteed protection of the dignity of the human person.

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Conclusion.

In conclusion, there are numerous hypothetical private relations where magistrates apply the criterion of protection of human rights using the general clause of safeguarding the human person primordially for the purpose of protecting the interests of one party against the patrimonial interests of the other. The question gains even more importance when one realizes that this methodology is becoming increasingly more adopted as doctrine in undergraduate Law courses and that Law graduates, at least in the leading schools in Rio de Janeiro, have had some experience with this sort of training, which lends priority to the practice of Law by preferentially considering the protection of human beings and their existential interest, even when this interest involves a relation which in principle is of a strictly patrimonial nature, as in the case of contracts and property.