IMPACT LITIGATION:

AN INTRODUCTORY GUIDE

AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

CENTER FOR HUMAN RIGHTS
& HUMANITARIAN LAW

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Message from Dean Claudio Grossman

On the occasion of the 25th anniversary of the Center for Human Rights & Humanitarian Law (Center), we are pleased to present this publication on impact litigation at American University Washington College of Law (AUWCL). So much has happened in the 25 years since I had the honor of establishing the Center with Professors Robert Goldman and Herman Schwartz. The Center has developed and promoted many initiatives and projects, instilling in AUWCL students a robust knowledge of and commitment to strengthening and protecting the rule of law and human rights. Advancing human rights and dignity is a hallmark of American University Washington College of Law. Many important tools, including impact litigation, have helped advance the values that the Center has championed for over two decades. Law schools play a significant role in impact litigation by uniting committed and diverse legal professionals with bright, passionate, and eager law students. In addition to its top Clinical Program, AUWCL offers its students two specific impact litigation initiatives: the Impact Litigation Project and the UNROW Clinic.

The Impact Litigation Project (ILP) is an experiential education initiative that promotes and strengthens the rule of law and democracy around the world. The ILP identifies, pursues, and supports pivotal cases in both international and domestic fora to enhance the development and furtherance of international jurisprudence and standards. The Project also submits and calls for the filing of amicus briefs in paradigmatic cases. To help raise awareness of pressing human rights issues, the Project attracts domestic and international media coverage. By collaborating with and strengthening a formal network of universities and non-governmental organizations, the Project helps defend and safeguard human rights. These initiatives, among others, contribute to a diverse experiential education and offer writing opportunities for AUWCL law students who chose to collaborate on supervised cases with the potential to achieve broad and resounding impact on public policy and legislation.

In addition to documenting human rights violations, these cases often promote government accountability, expand public education and awareness, and provide a foundation for future litigation. Since the Project's origins, faculty, students, fellows, interns, and volunteers not only contribute to the ILP's overarching objectives, but also continue to seek justice in their native

countries and elsewhere through various means. The ILP also organizes national, regional and international conferences, bringing lawyers and advocates together from different parts of the world to advance human rights through strategic exchanges, synergies, partnerships, and best practices. Since 2004, the ILP has organized numerous conferences on topics including women and politics, drug policies, gender, sexuality and LGBTI rights, among others. The Project also conducts human rights trainings for human rights defenders and government officials on the universal and Inter-American systems, in partnership with distinguished institutions such as the Inter-American Commission on Human Rights and the Robert F. Kennedy Center for Human Rights.

For over sixteen years, UNROW students have helped defend the rights of indigent individuals and vulnerable communities through advocacy, conferences, and litigation, in diverse areas such as torture, illegal removal, war criminals, human rights persecutors, abusive government actors, asylum, human trafficking, wrongful exile, and other vital human rights issues. AUWCL's UNROW Human Rights Impact Litigation Clinic is a student litigation and advocacy project that involves students in local and international litigation in which the main claim is a human rights violation. UNROW students propose and prepare new cases, determine litigation strategy, draft motions, argue in court, and travel internationally, if necessary, to support their clients and cases. UNROW's many successes include: obtaining a $7.2 million dollar judgment on behalf of Chilean victims of torture who suffered under the Pinochet dictatorship; initiating a lawsuit and awareness campaign against an alleged war criminal serving on the United Nations Peacekeeping Forces Advisory Council which resulted in the Sri Lankan ambassador being removed from the committee; securing an asylum grant for an unaccompanied minor residing in the United States and who escaped her life in a gang war zone in El Salvador; gathering over 30,000 signatures for a petition concerning the wrongful exile of the Chagossians, among others. These educational experiences, and the professional skills they develop in participants, prepare UNROW students for the "real world" of lawyering.

To learn more about engaging in international impact litigation while expanding legal knowledge and skills, we present this publication, which provides introductory information about impact litigation and the ways AUWCL faculty and students engage in strengthening the rule of law and democracy around the world. For further information, visit AUWCL's Impact Litigation Project and UNROW Human Rights Impact Litigation Clinic web sites. These educational experiences, and many others, await you at American University Washington College of Law.

Claudio Grossman, Dean
American University Washington College of Law

What is Impact Litigation?

Impact Litigation (IL) refers to the strategic process of selecting and pursuing legal actions to achieve far-reaching and lasting effects beyond the particular case involved. In human rights literature, impact litigation is also known as cause lawyering, public interest law, or strategic litigation "where the protection and promotion of a core set of international human rights principles is the driving cause."[1] Unlike traditional litigation, IL combines a series of legal, political, and social techniques that define the exercise from inception to the calculated, strategic outcome, which is not limited to the judicial decision itself, but also anticipates and addresses parties' compliance with such decision. It invokes a rights-based approach to achieving social change through the use of complex litigation strategies and non-litigation tactics, such as the use of social media, grassroots organizing, and engagement with academic institutions.[2]

The "impact" aspect of IL necessitates involvement in a wide variety of non-litigation activities. Litigation as a visible, public, and "newsworthy" phenomenon can serve an educative function, by informing the general public about international human rights norms, calling attention to injustices, shaping opinion, provoking public outcry, and mobilizing grassroots campaigns. Impact litigation carves out a path to not only remedy injustices suffered by current victims who have no other recourse but also to set into motion the structural changes needed to ensure that no other individual suffers the same injustices. IL litigation is one element of a broader project and not an end in itself.[3]

Although all types of litigation must have a strategy, IL is called "strategic litigation" because it requires long-term planning that may start with envisioning objectives and selecting clients according to a specific evaluation of the "ideal client." IL may end with a court decision, or it may continue until the desired structural changes have been achieved. Strategic litigation, therefore, requires actors to think in short, medium and long terms goals and the strategy(ies) to achieve them at each stage of the process.

Planned and Unplanned Impact Litigation

Litigation can become "strategic" or "impactful" as a planned strategy that delineates the route to follow from identifying the goal to achieve and searching for the ideal client to preparing each stage of the litigation and developing an action plan for after a decision has been issued. In order to differentiate each type of litigation, this guide refers to Planned Impact Litigation (PIL) for cases that have been prepared by civil society from its inception, and Unplanned Impact Litigation (UIL) for cases that became impact cases as the litigation unfolded. In both types of litigation, the harms suffered by the victims and their claims are real. However, the difference lies in the moment of civil society involvement in the case. Examples of PIL include *Maria Eugenia Morales de Sierra v. Guatemala,*[4] *Toonen v. Australia,*[5] *Brown v. Board of Education,*[6] and *Plessy v. Ferguson.*[7] In all these cases, activists were involved in setting the long-term strategy and finding the right plaintiffs to move the cases forward. All of them were looking beyond redress for the specific plaintiffs and were focusing on what the Inter-American system calls "guarantees of non-repetition," mainly legal changes that would prevent similar cases from happening again.

Maria Eugenia Morales de Sierra v Guatemala illustrates PIL in the Inter-American system. As Guatemala's Attorney General, Maria Morales challenged the Civil Code's provisions that required married women to request an authorization from their husbands to work outside of the home. Even though it was not enforced, the existence of the statute legalized inequality between men and women. Although Morales had not been denied a work authorization by her husband, and no one had asked her to show a permit from her husband to assume the office of Attorney General, she used her position to challenge a statute that harmed all Guatemalan women by its mere existence, and that could harm some women whose husbands could prevent them from working outside of the home. The Merits Report by the Inter-American Commission on Human Rights in 2001 recognized this inequality, paving the way to a rich case law on gender equality.

Examples of UIL include *Velazquez Rodriguez v. Honduras*[8] and *Atala Riffo and daughters v Chile*.[9]

Velasquez Rodriguez v. Honduras was the first case decided by an international tribunal that declared the practice of forced disappearances as a violation of international human rights. It was also the first case to be decided by the Inter-American Court of Human Rights. On September 12, 1981, Angel Manfredo Velasquez Rodriguez was taken from his house by armed men dressed in civilian clothes and taken to an armed forces headquarters. The Honduran government denied any knowledge or involvement in his disappearance, and Honduran courts refused to hear the family's case. The petitioners argued that the Honduran government was responsible for Velasquez's disappearance. It was common knowledge that the Honduran government was using illegal detentions and killings of individuals who considered a threat to national security. Between 1981 and 1984, around 150 people disappeared in similar circumstances, having been kidnapped in broad daylight by military or police personnel.[10] The Honduran government failed to provide evidence and information about the disappearance and, as a result, the Inter-American Commission on Human Rights presumed the validity of the facts as alleged by the petitioners. The decision of the Inter-American Court of Human Rights in 1988 explicitly referred to disappearances as crimes against humanity. Later on, regional and international bodies referred to forced disappearance as an international crime.[11] The plaintiffs may not have foreseen the reverberating power that the case would have when they first submitted the petition to the Inter-American Commission on Human Rights. The importance of the case, however, became clear during the proceedings. Both the plaintiffs and the Inter-American Commission helped the Inter-American Court by providing strong international law arguments. This allowed the Court to issue a groundbreaking decision that strengthened the rule of law and broadened

Toonen v Australia challenged the anti-sodomy statutes in place in Tasmania. Mr. Toonen was a gay rights activist and the case was planned by his organization with the objective of dismantling the last anti-sodomy statutes in place in Australia. Just as in the case of *Morales de Sierra v Guatemala*, Toonen had not been charged or prosecuted for sodomy. However, as long as the anti-sodomy statute was in place, all LGBT individuals could potentially be charged with a criminal offense. Additionally, the mere existence of the statute sent the message that LGBT individuals' privacy was different than the privacy afforded to heterosexual individuals. In *Toonen v Australia*, the UN Human Rights Committee held that sexual orientation was included in the antidiscrimination provisions as a protected status under the International Covenant on Civil and Political Rights.

Brown v. Board of Education is one of the most well-known decisions in the United States. It legally ended segregation in educational settings and paved the way to end segregation in all areas. *Brown* is usually studied as a successful case of impact litigation. Although there had been earlier cases fighting racial discrimination, *Brown* was a Planned Impact Litigation. The NAACP decided on a strategy, looked for the plaintiffs and carried a complex strategy of multiple and concurrent litigations with a similar goal throughout the south.[12] Before *Brown*, however, *Plessy v. Ferguson* challenged segregation in 1896. The litigants in the case selected the client and had a planned strategy. Unfortunately the Supreme Court upheld segregation and strengthen the doctrine of "separate but equal" that would last until *Brown*.

the protection of human rights in the Americas.

Atala Riffo and daughters v. Chile started in 2004 when the Supreme Court of Chile stripped Ms. Atala of the custody of her three young daughters on the basis that living with her same-sex partner could be detrimental to the daughters. Ms. Atala took the case to the Inter-American Commission on Human Rights at a time when it was unclear whether the Inter-American system would support the protection of LGBT individuals. Furthermore, because this was not a case of violence against an LGBT person, the case was riskier, because it could have been viewed as a purely family law dispute.

In this case, the petitioners had a double challenge: first, proving that the American Convention of Human Rights included, although not expressly stated, sexual orientation within the conditions afforded protection under the anti-discrimination clause of Article 2 of the American Convention; and, second, that in this case Ms. Atala and her daughters had been discriminated against on the basis of Ms. Atala's sexual orientation. Additionally, the petitioners argued that Ms. Atala's and her daughters' right to family had been violated. The case generated strong participation of civil society. It was not, however, a case planned from its inception by civil society. Ms. Atala's case became strategic when it was clear that it would be the first case on sexual orientation and the first case that would provide content to the principle of "the best interest of the child."

The petitioners' strategy prevailed and in 2012 the Inter-American Court of Human Rights established that sexual orientation is a protected category under "other social condition" of Article 2 of the American Convention. The Court further stated that the American Convention did not establish a right to a traditional heterosexual family, thereby rejecting the Chilean Supreme Court's finding. The Court also decided that the right to family and privacy of Ms. Atala and her daughters had been violated. In addition to being the first decision on sexual orientation in the Inter-American system, this case was groundbreaking in the area of children's rights. It was the first decision in which the Inter-American Court gave substantive content to the principle of "the best interest of the child," and it established the relationship between the American Convention of Human Rights and the Convention on the Rights of the Child.

Choosing the Cause and Choosing the Client

Planned Impact Litigation requires far-sighted strategy, specific training and extensive funding. Additionally, finding the right case to fit the impact litigator's criteria requires long-term strategic planning.

Considerations when selecting cases for maximum impact include examining the importance of a case and the availability of relief, and determining if the organization has the capacity to embark on the case, and if partner organizations could join as co-litigators. Assessing the impact of a case requires looking into potential backlash, not only from the government, but from sectors of civil society that may oppose the chosen cause. Depending on the issue, opposition may come from groups that could naturally be considered allies. In cases related to reproductive rights, for example, it is usually easy to identify potential allies and opposing organizations. There can be, however, sometimes tension between advocates of the rights of people with disabilities and abortion rights advocates. The same can be true between advocates of broad protection of freedom of expression and anti-pornography groups. Selecting a case, therefore, requires mapping the potential actors who could be directly or indirectly involved in the case. That identification may lead to potential allies who can direct other aspects outside of actual litigation (e.g., organizing conferences on the topic, leading a social media campaign, etc.).

The assessment must also include potential conflicts of interest, and both the financial and personal costs of litigation. The plaintiffs in *Brown v. Board of Education* suffered great personal losses due to their involvement in civil rights law suits. Harry Briggs, one of the plaintiffs in *Briggs v. Elliott* which later became one of the five suits known as *Brown v. Board of Education*, was fired from his job of 14 years. His wife, too, was fired from her job. Some received threatening letters, their houses were burned down and had to flee their towns.[13] In Planned Impact Litigation, choosing the client is a delicate task. Even more complex is ensuring the client understands and accepts the risks that come with litigation. Those can include losing the case, losing privacy, and losing a job, as well as becoming targets of harassment and even risking his or her life. Despite the main objective of triggering structural change, IL is still litigation and, therefore, must place the interests of the client above all.

Choosing the Right Forum

International human rights is an area of evolving complexity with many bodies and organizations established by different treaties, covenants, or other international law sources with the mandate to, among other things, hear individual petitions. Some of these bodies have a clear geographical mandate, as in the case of the European Court of Human Rights, the Inter-American System of Human Rights, and the African System of Human Rights. Other bodies are thematically oriented, as in the case of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), or the United Nations Committee against Torture. Sometimes these bodies have a broader mandate derived from general conventions, as in the case of the Human Rights Committee which is established by the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR or Covenant). Thus, human rights victims will often have more than one forum to which they may submit a petition. An overly simplistic approach is to automatically assume that regional courts, if competent, are the better forum than UN treaty bodies. First, the European, Inter-American and African courts can issue binding decisions against countries that have accepted their jurisdiction. UN treaty bodies and other groups may issue recommendations or resolutions that are not mandatory. There may be, however, reasons for choosing other international fora, depending on the goal the group wants to accomplish. The group may decide that their regional court will not be as sympathetic to their cause as a non-binding UN committee or body. Having a favorable non-binding resolution or recommendation may give clients and attorneys the possibility of pressuring a government through outside litigation mechanisms. Having a binding unfavorable decision is a risk that can delay the success of a cause many years.

In 2002, the Center for Reproductive Rights submitted a petition to the Human Rights Committee against Peru on behalf of a 17-year-old who had

Challenges of IL

Litigation is typically complex. Impact Litigation, however, poses additional challenges that may include the following:

- *The client's and organization's desires may not match: IL must be client centered and recognize the risk that the client may change his or her opinion about the case strategy. "Impact litigation always bears a tension between the interests of the individuals involved in the litigation and its broader social purpose. In such cases, lawyers must be vigilant about protecting their client's interests and privacy. In addition, any lawsuit carries the risk of losing the case. While any one decision can have a positive impact, expanding human rights, a losing decision does not simply affect one client, but may restrict the rights of a large number of people."*[16] *If the client wants to settle or, later on in the process, realizes that the risks of embarking in litigation are too high and wants to change course, the organization must follow the client's desires. There may be possibilities of compromise to get some guarantees of non-repetition through a friendly settlement. If, however, this is not possible, the client's desires must always prevail.*

- *It may not be clear precisely who the client is: This is a challenge in all litigation with multiple stakeholders, but it is typically more visible in IL. In cases of indigenous communities, for instance, how do the litigators ensure that the community's leaders represent the community's desires? What happens to the voices of women in patriarchal communities? It is instrumental to set up mechanisms and safeguards to ensure as much certainty as possible regarding who is actually the client.*

- *The lack of control in litigation: Litigation can never be 100 percent coordinated. Claimants can neither fully predict the reaction of the opposing parties and organizations, nor can they control the actions of organizations sympathetic to the cause. Other organizations may decide in good faith – or otherwise - to take parallel actions that may jeopardize the outcome of the impact litigation at hand. It is, therefore, imperative, to build and coordinate actions with other allies. Sometimes, the most strategic action may be to help to strengthen actions and strategies already led by other organizations.*

been denied an abortion of an anencephalic fetus despite medical reports about the mental health repercussions of forcing this pregnancy on the young pregnant woman.[14] The victim claimed a violation of Article 2 of the ICCPR since the State "should have taken steps to respond to the systematic reluctance of the medical community to comply with the legal provision authorizing therapeutic abortion, and its restrictive interpretation thereof."[15] The Human Rights Committee concluded that the circumstances in which the denial of abortion services had taken place violated articles 2, 7, 17 and 24 of the Covenant. Although it is not possible to know if the Inter-American Commission and Court would have decided similarly with regards to the American Convention of Human Rights, the authors of the claim, after assessing different scenarios before the Inter-American Commission on Human Rights, could have decided that the Human Rights Committee was a safer forum for this particular claim at that particular time. Other reasons to choose one forum over another may be the speed of the procedure. If having a decision soon is more important than having a binding decision, victims may prefer a UN forum rather than a regional one. Speed, however, is a relative concept.

Advancing Litigation through other Mechanisms

Non-litigation tools must be planned with litigation as the centerpiece of the whole scheme. Working for a government to comply with its international human rights obligations may necessitate a strong public pressure campaign. "Lawyers can magnify the impact of a case by presenting it to the media, [thus] fostering widespread public debate about an important social issue. Whether or not the case is won, public attention presents an added opportunity to assert pressure for political change."[17]

The effectiveness of impact litigation also depends on the communication strategies developed around the case. Both contact with the media and the general use of the precedents by local and international NGOs serve to extend the full potential of the case and to secure compliance by public authorities. The relationship between the public interest law clinics, on the one hand, and NGOs and the community organizations, on the other, demonstrate that public interest actions have diverse dimensions. Many cases have been brought before the tribunals by clinics at the request of NGOs and community organizations. Furthermore, these judicial actions frequently run parallel to other efforts undertaken by those institutions by other means such as campaigns, grassroots actions, and so forth.

The media provides the rare opportunity to gain knowledge of the violation as soon as it happens – and sometimes even while it is happening – and to follow its development domestically. It also provides a source of information as to the issues affecting society and the rule of law in each specific country and how each scenario fits into the larger international arena. Journalists, newspapers, the internet, social media, T.V. stations and radio stations can all provide valuable information regarding potential petitioners, cases, issues, etc. Generally, strategic litigation groups approach the media at the outset of litigation, and at times even earlier, for example, while starting the search for the next case. Some groups have journalists on their permanent team and staff precisely to contact colleagues, activist groups, social groups, other journalist, etc. at the beginning of the search to maximize their outreach, resources and selection process.

Generating public awareness plays a key role in international impact litigation. In doing so, litigation groups usually seek to establish an open environment where members of a society can feel free to voice their concerns, opinions and generally debate the issues affecting public interest and related litigation, discuss possible effects and disseminate pertinent information.

Law School Involvement in Impact Litigation

Given its social significance and legal complexity, *Impact Litigation* or *Public Interest Law* initiatives may be particularly useful in helping train students to become responsible and diligent legal professionals. Impact litigation gives interested students the unique opportunity to gain intimate knowledge of issue-oriented litigation and to acquire key skills related to case and issue selection, utilizing social media, and identifying the short, medium and long term goals of a particular case or cases. Students who engage in IL have a competitive advantage as practicing attorneys in the world of civil society organizations.

Since impact litigation (IL) requires a long term commitment to specific causes, not every institution or private individual may be able to or interested in engaging in IL. Law schools with particular characteristics such as a strong commitment to human rights and faculty expertise in the area are well positioned to do this work. Most importantly, law schools do not seek to, nor should they, replace civil society. When embarking on IL within the realm of human rights, law schools should focus exclusively on the protection and strengthening of human rights standards worldwide. Their educational mission should prohibit them from acting on behalf of particular interests groups. IL in law schools allows future lawyers to develop valuable

skills essential to this particular type of litigation.

IL is an important contributor to the development of the modern rule of law. Litigation can be recourse for politically weak groups. For example, in South Africa, litigators successfully used impact litigation to put pressure on the post-apartheid government to implement an effective legal aid program in the politically sensitive area of land reform. The Legal Resources Center (LRC), a South African NGO, has used impact litigation to create development-related government welfare services such as ensuring drinkable water, housing, primary healthcare, and education, all important primary duties of a democratic government.[18]

Impact Litigation at American University Washington College of Law

At AUWCL, students engage in IL in a variety of ways. AUWCL's ILP and UNROW have led dozens of cases before local, regional and international courts and bodies. Following are examples of AUWCL's cases.

Lorenzo Enrique Copello Castillo y Otros (Cuba): Case 12.477, Inter-American Commission on Human Rights, 2006

In 2003 the Impact Litigation Project began by representing three Cuban citizens who were executed in Cuba without due process. Led and supervised by Dean Claudio Grossman, a group of students identified and filed this case before the Inter-American Commission on Human Rights in October of that year. The case, Lorenzo Enrique Copello Castillo y Otros (Cuba): Case 12.477, was granted two hearings by the IACHR (on admissibility and on the merits/reparations). The case challenged Cuba's summary execution system.

The petitioners alleged that on April 2, 2003, eleven Cuban citizens, including the victims, hijacked a ferry going from La Havana to Regla, with 40 people on board. The petitioners indicated that the intention of the hijackers was to take control of the ferry and use it to travel to the United States. They added that when the ferry ran out of fuel 45 kilometers from the Cuban coast, the Cuban coastguards proceeded to tow the vessel to the island. No violence was committed against the hostages. The hijackers were captured by Cuban authorities, tried on an expedited summary trial for acts of terrorism against Cuba, and sentenced to death. The hijackers were later executed.

The ILP argued that the trial did not comply with due process guarantees and that the death penalty was wrongly applied in this case. The Project alleged that Cuba had violated the right to life, justice and due process of the American Declaration of Rights and Duties of Men. The Inter-American Commission agreed with the petitioners and stated that the application of the death penalty required a heightened scrutiny. The Commission concluded that Cuba had violated Articles XVII and XXVI of the American Declaration by not providing the accused with a fair trial.

The Project selected the Cuban case based on the nature of the violations (of due process of law, of international law, and of Cuba's own laws and moratorium in fact against the death penalty), and the far-reaching negative impact of these violations on fundamental democratic guarantees, particularly if left unchallenged. In reaching a favorable finding of admissibility, the IACHR issued a sweeping reaffirmation of Cuba's international human rights obligations, categorically stating that the "[Cuban] Government's exclusion from the regional [Inter-American] system in no way means that it is no longer bound by its international human rights obligations."[19] At the same time, the AUWCL team developed an innovative approach by requesting, inter alia, detailed and specific amounts of monetary reparations. This approach, in and of itself, created a sort of "impact" on the IACHR proceedings, since the IACHR is not typically requested to issue such detailed recommendations for reparations.

Usón Ramírez v. Venezuela, Inter-American Court of Human Rights, 2009

The case of retired General Usón Ramírez raises issues of direct and indirect means to restrict freedom of expression, due process, humane treatment, and the right to personal liberty. The case involved the prosecution of retired General Francisco Usón Ramírez before a military court on charges of committing the crime of slander against the National Armed Forces, and the subsequent judgment of deprivation of liberty for five years and six months. The charges were based on statements by Mr. Usón in a television interview that was considered by the Venezuelan government as offensive to the military. According to the Venezuelan Organic Code of Military Justice, "whoever slanders, offends, or disparages the National Armed Forces or any of its units shall be subject to three to eight years in prison."[20]

The Inter-American Court used this case to set specific guidelines on how to balance the protection of the military forces and freedom of expression. It established that even in the case involving the military, statutes restricting freedom of expression could not use vague language. The Inter-American Court decided this Venezuela, siding with many of the arguments provided by AUWCL's team.

Urgent Action Request to the United Nations Working Group on Arbitrary Detentions (WGAD) on behalf of Egyptian Photojournalist, 2015

In December 2015, the ILP submitted an Urgent Action Request to the UNWGAD on behalf of Egyptian photojournalist, Mahmoud Abou Zeid (Shawkan), a 28-year-old freelance photojournalist who had worked with a number of media organizations over the past few years. At the time of his arrest in 2013, Shawkan was covering the Muslim Brotherhood sit-in that was occurring in Rabaa al-Adaweya Square for the photojournalism news agency, Demotix.

Shawkan was charged in the "Rabaa Dispersal Case," with other defendants, primarily members of the Muslim Brotherhood. Authorities subjected Shawkan to physical and psychological ill-treatment throughout his detention, have denied him access to medication, and have kept him inside his cell for 23 hours a day. Suffering from a serious case of hepatitis C and anemia, prison authorities have deprived him of any meaningful medical treatment.

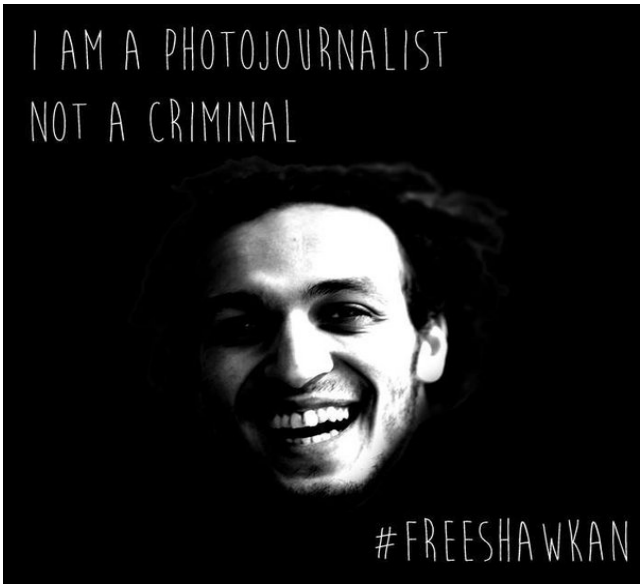
Authorities have repeatedly renewed Shawkan's detention with little to no effort to abide by the domestic laws that govern pre-trial detention. Egyptian law allows for a maximum of two years of pre-trial detention for suspects of crimes punishable by the death penalty or life in prison. Not only do two years of pre-trial detention exceed any international standard for pre-trial detention, authorities have arbitrarily kept Shawkan beyond the two years. Shawkan's detention was renewed for an additional 45 days despite prison security failing to bring him and other defendants to court, resulting in a postponed hearing. Shawkan's lawyers have not able to attend the hearing because security or members of the public prosecution barred them.

For the ILP, it is clear that Egypt is using pre-trial detention as a punitive measure against political prisoners and members of any opposition group, including civil society. Journalists are specifically targeted and the continued detention of Shawkan is a clear of example of Egypt's crackdown on free press in the name of battling terrorism. Being held in deplorable conditions in Tora Prison, Shawkan's health and well-being are at imminent risk.

The ILP is working other civil society organizations to make sure that Shawkan's case remains visible and to put pressure on the Egyptian government to release and clear all charges against him.

UNROW Involvement in Case of Torture in Chile

On September 11, 1973, Augusto Pinochet led a coup that deposed the democratically elected President of Chile, Salvador Allende, and established



a military government that tortured, murdered, and forcibly disappeared thousands of individuals. In 2002, UNROW brought suit against Michael Townley, former Secretary of State Henry Kissinger, and the United States government for crimes against humanity, forced disappearance, torture, arbitrary detention, and wrongful death during the Pinochet government. UNROW won a monetary judgment against Michael Townley for his role in aiding and abetting the torture and assassination of Spanish citizen Carmelo Soria. Townley's enrollment in the Witness Protection Program, however, prevented the collection of the judgment. During a 2007 trip to Chile, clinic members were honored with a meeting hosted by the democratically-elected President of Chile, Michelle Bachelet.

UNROW case: Family of Gen. Rene Schneider v. United States

In 2006, UNROW filed a Petition before the IACHR against the U.S. Government for its role in the 1970 assassination of General Schneider. UNROW argued that the U.S. was responsible for organizing and coordinating the kidnapping and extrajudicial killing of General Schneider, a violation of human rights enshrined in the American Declaration of the Rights and Duties of Man and of the American Convention on Human Rights in the Petition. In addition, the Petition includes a narrative of the U.S.'s actions that led to General Schneider's kidnapping and murder, and these investigations determined that the U.S. may have "encouraged" those responsible for General Schneider's death but the U.S. never supported nor was involved in the General's kidnapping and murder.

The Petition is currently still in the "admissibility" stage of the IACHR's rules of procedure. The IACHR is still determining whether there are enough facts to show violations of the American Declaration that would permit moving the Petition to the merits stage of the procedure.

UNROW Case: The Chagos Islanders

More than four decades ago, the indigenous people of the Chagos Archipelago in the Indian Ocean were removed from their homeland to make way for construction of a U.S. military base on the island of Diego Garcia. UNROW's advocacy for the Chagossians began in 2001 with litigation in the U.S. District Court for the District of Columbia in the case *Bancoult v. McNamara*. The case was dismissed on the grounds that it raised a non-justiciable political question.

UNROW collaborated on this case with legal counsel in London, France, and Mauritius. The Chagossians continue their struggle for redress and the right to return home in the international courts of the European Union and United Nations. In 2012, UNROW and SPEAK Human Rights & Environmental Initiative launched a petition to the White House, calling upon the Obama administration to provide long-overdue redress to the Chagossians.

Impact Litigation at AUWCL: Special Focus on Freedom of Expression

Although the ILP works on a variety of issues, freedom of expression has long been one of the

original pillars of its litigation caseload. The Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights, states that the "consolidation and development of democracy depends upon the existence of freedom of expression."[21] The right to freedom of expression has a dual character, a social dimension which allows free debate and the exchange of ideas and opinions, and an individual dimension that implies both the right to communicate and receive information, ideas and opinions.[22] Its protection is granted in both the American Declaration on the Rights and Duties of Man (Article 4) and the American Convention on Human Rights (Articles 13 and 14).

Examples of successful litigation on freedom of expression include the cases of *Ivcher Bronstein v. Peru*,[23] *Olmedo-Bustos et.al. v. Chile,*[24] and *Horacio Verbitsky et. al. v. Argentina*.[25] These cases built on each other and helped develop a cohesive and protective jurisprudence for the hemisphere.

Ivcher Bronstein was a Peruvian nationalized citizen and the main shareholder as Director and President of the Board of Directors of Channel 2 of the Peruvian television. After the channel aired investigative reports that denounced drug trafficking operations involving a top Peruvian officer under President Alberto Fujimori, Mr. Ivcher Bronstein and his family were threatened, harassed and finally stripped of his Peruvian nationality without notification. Since Peruvian law required that only nationals own television stations, Mr. Ivcher Bronstein could no longer have ownership in the TV channel. Both the Commission and the Court found that the revocation of Mr. Ivcher Bronstein's nationality was an attempt to curtail his freedom of expression and exert pressure on the TV channel to stop criticizing the government. The Court concluded that freedom of expression extends to every kind of idea and opinion, including unpopular ones.

Additionally, the Inter-American Court decided that the Peruvian government had violated Mr. Ivcher Bronstein's rights to nationality, property, fair trial, and judicial protection. The case had a strong impact in Peru, as well as regionally. It expanded the scope of what is considered indirect restrictions to freedom of expression and provided standards to determine when such violations occur.

The case known as *The Last Temptation of Christ* started in 1997 when a group of Chilean citizens submitted a constitutional writ to the Santiago Court of Appeals to stop the viewing of the movie *The Last Temptation of Christ*, scheduled to be in Chilean movie theaters soon thereafter. The Court of Appeals ordered the censorship of the movie, reasoning that its viewing offended those who believed that Christ was the son of God. The Supreme Court of Chile upheld the decision. The case was submitted to the Inter-American Commission by a group of Chilean attorneys who opposed to restrictions to freedom of expression.[26] The case was filed "in order to eliminate prior censorship in the case of motion picture production and its publicity and to replace it by a system for rating films prior to their showing to the public."[27]

Although article 13 of the American Convention allows for legitimate aims in limiting expression, including the "respect of the rights and the reputation of others and the protection of national security, public order, public health, and morals," the Court found in this case that the Chilean government could have adopted less restrictive means to protect the interests of those offended by the movie. It reasoned that prior censorship is a grave threat to democracy and its potential abuse "is so great that enduring the exaggeration of free debate seems better than risking censorship's protective suffocation by public authorities.[28] Additionally, the Court reviewed the legality of the Constitutional norm that served as the root of the power to exercise prior censorship, and thus, ordered Chile to adapt its political Constitution to the American Convention. This became a landmark case not only on freedom of expression, but it was also the first case in which the Inter-American Court ordered a country to amend its constitution in order to comply with the American Convention.

The case *Verbitsky v. Argentina* is important in the area of freedom of expression in the Americas because it limited the use of contempt laws in the region. The case also highlights the role of friendly settlements within the system. Horacio Verbitsky was a journalist who was sentenced by Argentine courts to imprisonment and payment of fines for referring, in a book, to an Argentine Supreme Court justice in a manner which the justice considered offensive. The Inter-American Commission on Human Rights ruled the case was admissible, affirming that people voluntarily acting within the public sphere, political authorities, public activists or associates to them are, and in fact should be, subjected to greater criticism than private individuals. The petitioner and the state reached a friendly settlement following several meetings that negotiated the revocation of Mr. Verbitsky's sentence, the annulment of its effects, and the abolition of the contempt statute. At the parties' request, the Commission agreed to publish a report analyzing the compatibility of contempt laws with the American Convention as part of the settlement in the case. The IACHR's report on contempt laws was the result of a strategic decision to settle the case within certain terms. To this day it remains the only official document that explicitly condemns contempt laws as incompatible with the right to freedom of expression as recognized in the American Declaration and Convention.

All of the above-mentioned cases are examples of successful litigation strategies. Each case was selected and brought to the IACHR and the Court, respectively, at a specific point in time and each allowed for a broadened protection of freedom of expression. The cases also illustrate how the system, first, had to deal with authoritarian regimes and then later moved to consolidating human rights standards in nascent democracies.

Impact Litigation at AUWCL: Third Party Involvement

Impact litigation requires collaboration and coordination of civil society. This collaboration can include the submission of amicus curiae briefs and support to civil society through legal analysis that can be used by organizations in their own litigation efforts. Amicus briefs were conceived as reports to help courts reach a decision. This objective is

clear from the Latin etymology amicus curie or "friend of the court." These briefs, however, are not always as neutral as the name's origin intended. Many times, amicus briefs will be submitted in support of one of the parties. Despite this general practice, when submitting amicus briefs the ILP seeks to highlight a particular point in international law or provide the court with information on comparative law regarding the case at hand. Some examples of AUWCL students work in these areas follow:

Amicus Brief on Freedom of Expression

In April 2006, the Impact Litigation Project submitted an amicus curiae brief in the case of *Claude Reyes vs. Chile*.[29] The case addressed the right to access information in the context of the right to freedom of expression as stated in the American Convention. The team litigating that case focused on recent developments in international law that would justify the inclusion of the right to access information under article 13 of the American Convention. In that effort, they sought amicus briefs from several human rights organizations, including the Open Society Justice Initiative, CEJIL, and AUWCL's Impact Litigation Project.

Amicus Brief on Right to Privacy and Family

In *Artavia Murillo v. Costa Rica*,[30] the ILP submitted an amicus brief in support of the petitioner. The case involved the violation of the right to privacy and family life, the right to establish a family, and the right to equality and nondiscrimination—established in the American Convention on Human Rights—as a result of the general ban on practicing the assisted reproductive technique of in vitro fertilization. The ban had been in effect in Costa Rica since 2000, following a decision by the Constitutional Chamber of the Supreme Court of Justice. Consistent with the Project's role in promoting democracy and protection of human rights, the amicus brief submitted by Dean Claudio Grossman and Professor Macarena Saez provided an in-depth analysis of international and comparative law, patticularly articles 11, 17, 24 of the American Convention, in order to assist the IAHCR in reaching its final decision.

Amicus Brief on Second-Parent Adoption

In 2015 the ILP submitted an amicus brief before the Constitutional Court of Colombia providing international law arguments to the Court in support of the constitutionality of same-sex couples' second parent adoption. The brief provided the Court with International standards regarding joint and second parent adoption in cases of same-sex couples. The brief specifically referred to the principles of 1) equality and non-discrimination; 2) protection of the family; and 3) best interest of the child. The brief also provided information on regulation of second-parent adoption in the United States. The brief concluded that adoption by same-sex couples must be admissible in Colombia.

Amicus Brief on Marriage Equality

In 2014 the ILP submitted an amicus brief to the Supreme Court of Yucatan (Mexico) on the issue of marriage quality. The brief gave the Supreme Court information on the trends regarding marriage equality in other countries. It focused on the legal reasoning of courts around the world that had already decided on marriage equality in their own countries. The brief concluded that most decisions granting marriage quality were based on principles of equality and autonomy.

Drafting of Reports and Media Campaigns: Youth In Solitary Confinement

The use of solitary confinement against incarcerated youth prompted UNROW students to develop an advocacy campaign, which included coalition letters to the United States Attorney General urging the federal government to stop placing youth in solitary confinement. The advocacy campaign culminated in a May 2013 panel entitled "Youth in Solitary Confinement: Facts, Justifications, and Potential Human Rights Violations."

UNROW Amicus Brief: Al-Shimari v CACI International

In September 2015, UNROW filed an amicus brief along with co-counsel at the Center for Justice and Accountability (CJA) on behalf ten CJA clients that successfully litigated similar claims under the Alien Tort Statute and Torture Victim Protection Act. We argued that the definitions for torture, war crimes, and cruel treatment are clear, and these definitions have been relied on by U.S. courts to adjudicate such claims for decades. U.S. courts have had no difficulty in discovering judicially manageable standards for torture, cruel treatment, and war crimes claims and the standard for adjudicating such claims under the Alien Tort Statute existed well before 2004, beginning with the landmark case *Filartiga v. Pena-Irala* in 1980.

Drafting of Reports and Media Campaigns: The Problem of Tamil People

In 2009, the conflict between the Tamil Tigers and the Sri Lankan government ended in a devastating battle. The Sri Lankan government had pushed the rebel group, as well as Tamil civilians who were not affiliated with the group, into a small region in northeastern Sri Lanka. In September 2010, UNROW released a report calling for the establishment of a new international tribunal to prosecute those most responsible for the crimes committed during the conflict.

In December 2010, UNROW submitted evidence of human rights violations committed during the armed conflict to the United Nations Panel of Experts on Sri Lanka.

AUWCL Students Participation in Impact Litigation

Students involved in IL have direct participation in the drafting of briefs, planning cases, discussing and implementing legal and non-legal strategies such as organizing conferences, using social media, and involving civil society. Some students will travel with faculty to interview potential or actual clients and gather information to the involvement of AUWCL in a particular cause. In the past, students have traveled to Chile, Panama, Colombia, Mexico, Spain, Guatemala, Mauritius, and within the United States.

Students have several opportunities to get involved in impact litigation at AUWCL.

- Volunteer opportunities with the Impact Litigation Project

- Apply to Dean's Fellowships with the ILP, the UNROW Human Rights Impact Litigation Clinic and faculty working on IL

- Enroll in the Strategic Litigation in International Human Rights: Theory and Practice seminar

- Apply to the UNROW Human Rights Impact Litigation Clinic

Center Experts

Claudio Grossman is Professor of Law, Dean, and the Raymond Geraldson Scholar for International and Humanitarian Law at AUWCL. Throughout his academic career, Professor Grossman has contributed to promoting human rights, the rule of law, and legal education in both international and domestic organizations. He was elected to the United Nations International Law Commission in November 2016 for a five-year term, and has served as President of the Inter-American Institute of Human Rights since 2014. He is a board member of the OSF's Open Society Justice Initiative, of Robert F. Kennedy Human Rights, and of the ABA's Rule of Law Initiative. He is also a member of numerous associations including the American Law Institute. Professor Grossman previously served as member (elected 2003-2015) and chairperson (4 terms, from 2008-2015) of the UN Committee against Torture, as chair of the UN Human Rights Treaty Bodies for a one-year term, and as a member (1993-2001) and President (in 1996 and again in 2001) of the Inter-American Commission on Human Rights, among other positions. Professor Grossman has published extensively in areas such as international law, international organizations, human rights, and legal education, and he is the recipient of numerous distinctions and awards for his contributions to human rights, international law, and legal education.

Macarena Sáez is the Faculty Director of the Center for Human Rights & Humanitarian Law and a Fellow in the International Legal Studies Program. She teaches in the areas of Gender and Sexuality, Family Law, Comparative Law, and International Human Rights. Her main areas of research are the role of sexual orientation and gender identity in family law, and comparative regulations of sex as an economic activity. Macarena is a founding member of the Network of Latin American Scholars on Gender, Sexuality and Legal Education ALAS, an organization that provides training to law professors in Latin America on mainstreaming gender and sexuality perspectives in legal education. She is also member of Libertades Públicas, an organization that promotes civil liberties in Latin America. With this organization she was one of the lead counsels for the victims in the first case on sexual orientation before the Inter American System of Human Rights Karen Atala and daughters v. Chile. She was a faculty member at the University of Chile Law School where she taught jurisprudence and worked actively in law school's curriculum reform. She has also taught feminist jurisprudence and human rights in different universities of Latin America and Europe. Saez has given her expert testimony on issues of sexual orientation and gender identity before the Constitutional Court of Colombia and the Inter-American Court of Human Rights.

Center Faculty & Staff

Macarena Sáez, Director of the Center and a Fellow in International Legal Studies

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Andra Nicolescu, Assistant Project Director of the Center's Anti-Torture Initiative

Rebecca DeWinter-Schmitt, Director *(pro bono)* of the Center's Human Rights in Business Program

Robert K. Goldman, Professor of Law, Louis C. James Scholar, & Faculty Co-director

Claudio Grossman, Professor of Law and Dean, Raymond Geraldson Scholar for International and Humanitarian Law, & Faculty Co-director

David Hunter, Professor of Law & Faculty Co-director

Juan E. Méndez, Professor of Human Rights Law in Residence & Faculty Co-director

Diane Orentlicher, Professor of International Law & Faculty Co-director

Herman Schwartz, Professor of Law & Faculty Co-director

Richard J. Wilson, Professor of Law Emeritus & Faculty Co-director

Notes

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6. *Brown v. Board of Education*, 347 U.S. 483 (1954).

7. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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9. *Atala-Riffo and Daughters v. Chile*, IACtHR, 24 February 2012.

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21. Declaration of Principles on Freedom of Expression, Inter-American Commission on Human Rights, Approved during its 108th regular period of sessions, October 2 to 20, 2000.

22. Amaya Ubeda de Torres, *Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights*, 10 Hum. Rts. Br. 6, 7 (Winter 2003).

23. *Ivcher-Bronstein v. Peru*. IACtHR, February 6, 2001.

24. *The Last Temptation of Christ (Olmedo-Bustos et. al) v. Chile,* IACtHR, February 5, 2001.

25. *Horacio Verbitsky et al. v. Argentina*, Case 12.128, Report No. 3/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 106 (2004).

26. The case was submitted by *Libertades Publicas*, the same organization that would later represent, jointly with two other organizations, the petitioners in the landmark case *Atala and daughters v. Chile.*

27. I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Judgment of February 5, 2001. Series C No. 73 at para. 5 For a general presentation of the case and its implications within Chilean legislation see, González, Felipe, "Censura Judicial y Libertad de Expresión: Sistema Interamericano y Derecho Chileno", in González, Felipe (Ed.), *Libertad de Expresión en Chile*, Facultad de Derecho de la Universidad Diego Portales, Santiago de Chile, 2006, pp. 11-54.

28. *Olmedo-Bustos v. Chile ("The Last Temptation of Christ" Case)*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001).

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