From Dyad to Triad: Reconceptualizing the Lawyer-Client Relationship for Litigation in Regional Human Rights Commissions

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FROM DYAD TO TRIAD: RECONCEPTUALIZING THE LAWYER-CLIENT RELATIONSHIP FOR LITIGATION IN REGIONAL HUMAN RIGHTS COMMISSIONS

Melissa E. Crow*

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I. INTRODUCTION

If public interest litigation is intended to empower victims, the intervention of lawyers may be counterproductive. As numerous legal scholars have noted, the dynamics of the lawyer-client dyad may foster a

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pattern of dependence which replicates the type of subjugation that drove the client to seek legal assistance in the first place.1 The client, seduced by the prospect of alliance with a perceived player in the prevailing power structure, cedes decision-making authority to her lawyer all too readily. The lawyer, consumed with the pursuit of a social change agenda, dispenses with time-consuming client consultations in order to focus more single-mindedly on the cause. In the process, the client’s individual needs are sacrificed to the pursuit of JUSTICE writ large.

As Stephen Ellmann notes, most public interest litigation in U.S. courts is intended to empower a victim population which extends beyond those individuals whose interests are specifically addressed in the courtroom.2 The public interest lawyer thus works “either explicitly or implicitly” on behalf of groups.3 In cases of explicit group representation, a lawyer’s fiduciary obligations extend to the client entity rather than its individual members, whose views are normally represented by a designated intermediary.4 Group members have even less autonomy in class action litigation, where a lawyer may, with judicial approval, settle a case despite the opposition of a majority of designated class representatives.5 Although the choice to structure litigation on behalf of a group technically rests with the client, the lawyer may, either consciously or

1. See Gerald P. López, Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice 51–52 (1992) (“When a client asks a lawyer to intervene in his life, he seeks help at the risk of further subordination . . .”); see also Richard D. Marsico, Working for Social Change and Preserving Client Autonomy: Is There A Role for “Facilitative” Lawyering?, 1 CLINICAL L. REV. 639, 639 (1995) (noting that “the risks to client autonomy inherent in any attorney-client relationship are exacerbated in social change lawyering, as the client’s social subordination may simply replicate itself in the attorney-client relationship”); Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 BROOK. L. REV. 861, 861 (1990) (“Because advocacy is a practice of speaking for—of presuming and thereby prescribing the silence of the other—the advocate . . . inevitably replays the drama of subordination in her own work.”); Gary Bellow, Turning Solutions Into Problems: The Legal Aid Experience, 34 NLADA BRIEFCASE 106, 108 (1977) (“The definition of the client’s problems and the ‘best’ available solutions are not mutually explored and elaborated; they are imposed by the lawyer’s view of the situation and what is possible within it.”).


3. Id.

4. See MODEL RULES OF PROF’L CONDUCT R. 1.13 (2002) (declaring that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents”); MODEL CODE OF PROF’L RESPONSIBILITY EC 5–18 (1980) (“A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to . . . [any individual] person connected with the entity.”).

5. Ellmann, supra note 2, at 1118–19. As Ellmann recognizes, class action litigation may be the only option to secure class members’ legal rights, which they can then use to enhance their autonomy. See id. at 1108 n.19.
unconsciously, influence this decision in the course of the counseling process.6

The tension between client autonomy and the advancement of a social change agenda is exacerbated in the context of public interest litigation in the international arena, otherwise known as international human rights litigation.7 In many cases, international human rights lawyers do not have regular contact with their clients, who live in other countries. In situations where clients live in remote locations with minimal communications infrastructure or where direct contact with foreign lawyers could pose a security risk, contact may be primarily or exclusively through intermediaries such as local lawyers or nongovernmental organizations (NGOs). In most cases, the proceedings occur outside the victims' country of residence, which may limit their resonance with the population whose rights are at issue. Cultural and linguistic differences often compound these logistical barriers.

Moreover, the clients' priorities may be at odds with those of their lawyers. Whereas victims and their families are often primarily interested in obtaining redress for the harm they have suffered,8 the focus of international human rights lawyers tends to be more prospective than retrospective.9 If the victims are awarded damages, the difficulty of enforcing judgments rendered by most international fora minimizes the prospect of obtaining such relief.10 Thus, broader strategic goals such as obtaining constructive judicial articulations of prevailing norms, holding defendants accountable,11 generating greater public awareness of past

6. Id. at 1111-12.
7. For purposes of this Article, the term "international human rights litigation" refers to any type of judicial or quasi-judicial proceedings in a regional or international forum for the purpose of protecting the rights of individuals or groups under international human rights law.
8. The types of redress sought may include information and reputational rehabilitation, as well as monetary compensation. For example, families of disappeared victims have frequently filed petitions with the Inter-American Commission on Human Rights to determine the location of their relatives' remains and obtain public statements that the victims were good citizens. I am grateful to Dinah Shelton for drawing this point to my attention.
abuses, and deterring future abuses are usually paramount in the minds of international human rights lawyers.\textsuperscript{12} This hierarchy of priorities may cause all but the most sophisticated clients to feel disengaged from the litigation process unless they fully understand its purpose.\textsuperscript{13}

The potential for victim disempowerment is exacerbated by the liberal standing requirements in the Inter-American Commission on Human Rights (Inter-American Commission) and the African Commission on Human and Peoples’ Rights (African Commission), which permit third parties to file petitions without the victims’ authorization.\textsuperscript{14} Third-party petitioning is necessary to ensure access to the Inter-American and African Commissions for victims who are unable to communicate with these fora directly due to a lack of sufficient financial or technical resources, personal incapacity, or a fear of government retaliation.\textsuperscript{15} NGOs often use this practice to file petitions on behalf of groups of victims who would otherwise have been precluded from litigation due to incarceration, minority status, mental disabilities, security risks, disappearance, or death.\textsuperscript{16}

\begin{itemize}
\item[12.] These goals are not always mutually exclusive. Even unenforceable judgments have been used to facilitate political settlements. Koh, \textit{supra} note 9, at 2397-98.
\item[14.] The admissibility criteria of most other human rights fora preclude the filing of petitions by parties who have not been personally injured by the alleged violations. \textit{See} Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, arts. 1, 2, 999 U.T.T.S. 302 (entered into force Mar. 23, 1976); \textit{see also} Protocol 11, \textit{supra} note 10, art. 34.
\end{itemize}
NGOs are often uniquely well-placed to represent the interests of victims or their families. Local NGOs benefit from their geographic proximity, as well as their familiarity with victims’ languages, politics, and cultures. These assets permit communication with communities affected by human rights abuses and facilitate the gathering of evidence. Local NGOs often collaborate with international NGOs having greater expertise in international law and broader regional experience.

Notwithstanding these advantages, an NGO’s ability to represent particular victims may be complicated by a number of factors. First, NGOs may face challenges in representing victims who are minors or who have been detained. Second, NGOs may have limited resources to pursue cases, particularly in cases involving complex legal issues. Third, NGOs may face resistance from governments or other entities that are implicated in human rights abuses.

17. See Melissa Crow & Clement Nwankwo, Before “Things Fall Apart” in Nigeria: The Role of Non-Governmental Human Rights Organizations in Conflict Prevention, in VIGILANCE AND VENGEANCE 171 (Robert I. Rotberg ed., 1996) (asserting that these factors make Nigerian human rights NGOs “in touch with the nation’s heartbeat”); see also Martin A. Olz, Non-Governmental Organizations in Regional Human Rights Systems, 28 COLUM. HUM. RTS. L. REV. 307, 357 (1997) (noting that “local human rights groups and institutions often receive information on human rights violations or are approached by victims or their families for help in the form of legal assistance”). Presumably for this reason, the Inspection Panel of the World Bank, an independent administrative body authorized to investigate complaints by groups of people who claim to be adversely affected by the execution of a Bank project, strongly prefers that requests be submitted by the affected individuals or their local representative. In exceptional cases where the requesting party alleges that no appropriate local representative is available, a foreign representative may be permitted to submit a request, subject to the approval of the Bank’s Executive Directors. See The World Bank Inspection Panel, I.B.R.D. Res. No. 93–10, I.D.A. Res. No. 93–6, ¶ 12 (Sept. 22, 1993), 34 I.L.M. 520 (1995).


factors. These include conflicting priorities imposed by the organization's funders, organizational mandate constraints dictated by the Board of Directors, and differences of opinion among members of a sizeable group. Moreover, local NGOs tend to be staffed by the country's educated elite, who may have difficulty cultivating trust among victims with whom they have little in common. In the African Commission, non-African NGOs often take the lead, creating additional linguistic, cultural, racial, socioeconomic, logistical, and geographic barriers to communication with victims. The adoption of a blatantly political agenda further compromises the effectiveness of some NGOs. The procedural rules of the Inter-American and African Commissions do not account for these threats to NGO accountability.

The lack of any ethical guidelines for lawyers practicing in the international arena further complicates this scenario. In contrast to public interest litigation in U.S. courts, where a lawyer's fiduciary obligations

20. Some of these factors may also interfere with the adequacy of a private lawyer's representational efforts.


22. See, e.g., Kingsbury, supra note 13 ("Where litigation involves a large and diverse group, there is frequently confusion over the boundaries of the relevant community, who exactly is a leader with a mandate to instruct the lawyers, whether dissenting views within the community have been adequately aired, and who controls the presentation of the group's case in national politics and the news media. These problems are magnified when ... there are other intermediaries, such as NGOs ... or confederations of indigenous organizations.").

23. See id. (noting that "[m]ost African human rights organizations are modeled after Northern watchdog organizations, located in an urban area, run by a core management without a membership base"); Peter Willetts, What is a Non-Governmental Organization?, City University, London, 2002, at http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM (noting that prominent NGOs may have leaders who are more engaged with global politics than with the organization's members and supporters). But see Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 HARV. INT'L L.J. 201, 242 (2001) (noting that "a more politically educated activist and thinker, one who questions the human rights project more seriously and who seeks a culturally grounded program for social change, has started to emerge" in Africa over the last decade).

24. See Olz, supra note 17, at 363.

25. See Hugo Slim, By What Authority? The Legitimacy and Accountability of Non-Governmental Organizations, The International Council on Human Rights Policy, International Meeting on Global Trends and Human Rights—Before and After September 11th, Geneva, Switz., Jan. 10–12, 2002, ¶ 41 (defining "NGO accountability" as "the process by which an NGO holds itself openly responsible for what it believes, what it does and what it does not do in a way which shows it involving all concerned parties and actively responding to what it learns"); see also Martha Minow, Public and Private Partnerships: Accounting for the New Religion, 116 HARV. L. REV. 1229, 1260 (2003) (defining "accountable" to mean "answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations").
to an organizational client are comparatively well-defined and an NGO must demonstrate its entitlement to represent a group of victims before filing a complaint on their behalf, the relationship among lawyers, NGOs, and victim groups in the Inter-American and African Commissions is much more amorphous. Upon receipt of a petition from an NGO, neither the Inter-American nor the African Commission is obligated to explore the nature of the relationship between the petitioning organization and the alleged victims. Although some NGOs have a policy of asking victims to sign a power of representation agreement, neither forum requires victims to consent to NGO representation before a case is filed or indeed even to know about it. Given these ambiguities, the adjudication of cases filed by NGOs in regional human rights commissions may have limited resonance with victims and their communities.

In Part II, I analyze the standing requirements for NGO petitions to the Inter-American and African Commissions and explore the ways in which they may undermine the legitimacy and effectiveness of each of these fora, especially in the context of litigation on behalf of groups. In Part III, I evaluate various proposals for addressing these problems based on principles of class action and client-centered lawyering and conclude that they are inadequate. I argue in Part IV that, for purposes of NGO petitions to the Inter-American and African Commissions, the traditional lawyer-client dyad should be recast as a lawyer-NGO-victim triad in which petitioning NGOs and their lawyers have joint fiduciary obligations to victims, who are the critical stakeholders in the proceedings. At


27. See infra notes 66–68.

28. These include CEJIL, an NGO based in Washington, DC which specializes in litigation before the Inter-American Commission and the Inter-American Court of Human Rights. Telephone Interview with Viviana Krsticevic, Executive Director, CEJIL (October 7, 2005).


30. I use the term "victim" for purposes of identification only. As Sister Dianna Ortiz has eloquently pointed out, "To call us victims is to validate the image our torturers tried to mold us into and leave us—weak, subjugated, helpless. We are not victims. We are survivors." Sister Dianna Ortiz, The Survivors' Perspective, in The Mental Health Consequences of Torture 15 (Ellen Gerrity et al. eds., 2001). See also Mutua, supra note 23, at 229 (asserting that "[a] basic characteristic of the victim is powerlessness, an inability for self-defense against the state or the culture in question").
a minimum, these obligations should include obtaining free, prior, and informed consent of victim groups before initiating litigation, keeping victim groups apprised of developments as the litigation unfolds, and incorporating victims' voices into the process.

In Part V, I analyze the viability of implementing the triad through promulgation of a code of professional conduct for international human rights lawyers, the development of norms on NGO accountability, and amendment of the existing standing requirements in the Inter-American and African Commissions. I conclude that, at least in the short term, the last option would most effectively ensure that petitioning NGOs and their lawyers, to whom I will refer jointly as "advocates" in instances where their interests overlap, adequately represent victims in regional human rights commissions.

II. REGIONAL HUMAN RIGHTS FORA AND THE IMPENDING THREAT TO LEGITIMACY

The burgeoning number of international human rights institutions is a testament to the international community's desire to breathe life into treaty norms promulgated in the wake of World War II. These institutions employ a broad spectrum of enforcement mechanisms ranging from reporting requirements to adversarial proceedings. In cases where the domestic judiciary has failed to provide redress for human rights abuses, victims can file petitions against governments in Europe, the Americas, and Africa with the European Court of Human Rights, the Inter-American Commission on Human Rights,31 and the African Commission on Human and Peoples' Rights,32 respectively. Through the


conduct of their proceedings and the substance of their judgments, these fora have tremendous potential to restore victims' dignity. The cathartic effect of enabling victims to give voice to the human rights violations they have suffered may itself facilitate the healing process. The resulting judgments may provide further vindication by affirming that a particular government's conduct violated prevailing international human rights norms, ordering injunctive relief, and, in some cases, awarding damages to individual victims.

Although the decisions of the Inter-American and African Commissions are not legally enforceable, they can be used strategically to generate far-reaching condemnation of rights-violating governments by the international community. This process, known as "public shaming,"


34. See Claudio Grossman, Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation, 15 HASTINGS INT'L & COMP. L. REV. 363, 383 (1992) ("For victims, being able to tell 'their truth' is valuable in itself. It also allows victims to confront oppressors who may deny their very existence. Direct access empowers those who, in the view of their oppressors, were supposed to be totally helpless."); see also Beth Van Schaack, Unfulfilled Promise: The Human Rights Class Action, 2003 U. CHI. LEGAL F. 279, 281 (2003) (highlighting the importance of providing victims with a meaningful litigation experience and promoting human dignity in human rights class actions in U.S. courts).

35. If proceedings before the Inter-American Commission do not result in a friendly settlement or if a target state fails to comply with the Commission's recommendations within a prescribed period, the Commission generally refers the matter to the contentious jurisdiction of the Inter-American Court of Human Rights, which is empowered to issue legally binding judgments. See ACHR, supra note 10, arts. 61, 63, 68; see also INTER-AM. C.H.R. RULES OF PROCEDURE, supra note 29, art. 44. In order for the Inter-American Court to have jurisdiction over such a case, the relevant state party must have filed a declaration or special agreement recognizing the Court's jurisdiction. Id. art. 62.
is critical to promoting governments’ compliance with their international legal obligations.\textsuperscript{36}

Both the Inter-American and African Commissions, located respectively in Washington, D.C. and Banjul, The Gambia function as quasi-judicial tribunals which permit broad access to individuals, groups of individuals, and NGOs. The standing requirements for NGOs in these commissions are considerably more liberal than those of the European Court of Human Rights,\textsuperscript{37} which is located in Strasbourg, France and is widely considered among the most effective international human rights institutions in the world.\textsuperscript{38} Whereas the European Court accepts communications only from NGOs which are themselves victims of a violation of the European Convention on Human Rights or its protocols,\textsuperscript{39} the In-


\textsuperscript{37} The European Court of Human Rights (ECHR) was established in 1953 to ensure the observance of states parties’ obligations under the European Convention on Human Rights. European Convention, \textit{supra} note 10, art. 19. Initially, cases submitted to the ECHR were handled by the European Commission on Human Rights, which ruled on admissibility, established the facts, and promoted friendly settlement. See A.H. ROBERTSON & J.G. MERRILLS, \textit{HUMAN RIGHTS IN THE WORLD} 127–30, 149–51 (1996). Protocol 11, which entered into force on November 1, 1998, eliminated the European Commission and transferred its functions to the ECHR, Protocol 11, \textit{supra} note 10.


\textsuperscript{39} Protocol 11, \textit{supra} note 10, art. 34 (“The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.”). See Norris v. Ireland, App. No. 10581/83, 44 Eur. Comm’n H.R. Dec. & Rep. 132 ¶ 26 (1985) (noting that the European Commission on Human Rights had declared inadmissible the claims filed by the National Gay Federation while allowing claims filed by the individual applicant, who had been directly affected by the prohibition on male homosexual activity under Irish law). In addition, NGOs filing petitions in the European Court are
ter-American and African Commissions permit NGOs to file communications in their own names. 40

The Inter-American Commission has been more vigilant than the African Commission in exploring the identity of the victim populations whose rights a petitioning NGO purports to protect. With respect to NGO petitions, the only explicit requirements in the Inter-American Commission's Rules of Procedure are that the petitioning organization be legally recognized in one or more member states of the Organization of American States and that the name and signature of a "legal representative" of the NGO be included. In its rulings on admissibility, however, the Inter-American Commission consistently requires the existence of identifiable individual victims, whose names must be listed in the

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40. See ACHR, supra note 10, art. 44 (providing that "(a)ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization [of American States], may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party"); INTER-AM. C.H.R. RULES OF PROCEDURE, supra note 29, art. 23. The African Commission Rules of Procedure once explicitly permitted communications by "organizations alleging, with proofs in support... serious or massive cases of violations of human and peoples' rights." AFRICAN COMM'N RULES OF PROCEDURE, supra note 32, art. 114(1)(b), adopted Feb. 13, 1988. This language was removed from the most recent Rules of Procedure. AFRICAN COMM'N RULES OF PROCEDURE, supra note 32, R. 116, adopted Oct. 6, 1995 (providing that admissibility of communications shall be governed by art. 56 of the African Charter, which does not address issues of standing). Since this revision, however, the African Commission has regularly considered communications filed by NGOs. See, e.g., Egyptian Organisation for Human Rights v. Egypt, Comm. No. 201/97, African Comm. Hum. & Peoples' Rights (2000); Legal Defence Centre v. The Gambia, Comm. No. 219/98, African Comm. Hum. & Peoples' Rights (2000). Cf. Charter to the African Protocol, supra note 32, art. 5(3) (permitting "relevant [NGOs] with observer status before the [African Commission] to file cases before the African Court on Human and Peoples' Rights).

41. INTER-AMER. C.H.R. RULES OF PROCEDURE, supra note 29, art. 28(a). The term "legal representative" refers to an individual acting on behalf of the organization who may or may not have legal skills.

communication if possible. In its Report No. 48/96, the Inter-American Commission clarified the scope of its liberal standing requirements, which:

should not be interpreted ... to mean that a case can be presented before the Commission in abstracto. An individual cannot institute an actio popularis and present a complaint against a law without establishing some active legitimization justifying his standing before the Commission. The applicant must claim to be a victim of a violation of the [American] Convention, or must appear before the Commission as a representative of a putative victim of a violation of the Convention by a state party. It is not sufficient for an applicant to claim that the mere existence of a law violates her rights under the American Convention, it is necessary that the law have been applied to her detriment. If the applicant fails to establish active legitimization, the Commission must declare its incompetence rationae personae to consider the matter.

Notwithstanding these qualifications, the Inter-American Commission does not require NGOs to obtain authorization from victims before filing petitions and does not explore the adequacy of the NGO's representational efforts at the outset of litigation.

OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶ 3 (2003) (finding the petition inadmissible for failure to identify individual victims and finding the petition's scope overly broad in alleging that state-authorized construction of a public roadway through Metropolitan Nature Reserve violated Panamanian citizens' rights to property and due process); Banco de Lima, Case 10.169, Inter-Am. C.H.R. 423, Report No. 10/91, OEA/Ser.L/V/II.79, doc. 12 rev. 1 ¶ 3 (1991) (explaining that the petition was inadmissible because the real party in interest was the Banco de Lima, rather than the individual shareholders on whose behalf the complaint was filed).

43. INTER-AM. C.H.R. RULES OF PROCEDURE, supra note 29, art. 28(e). For practical reasons, however, the petitioning organization need not identify with particularity each and every victim whose rights have allegedly been violated. See Mapiripán v. Colombia, Case 12.250, Inter-Am. C.H.R. 209, Report No. 33/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 27 (2000) (finding admissible a petition specifically identifying only two of approximately 49 victims, where the inability to recover and identify the corpses of the remaining victims stemmed from the facts alleged by the petitioners); see also Maya Indigenous Communities v. Belize, Case 12.053, Inter-Am. C.H.R. 129, Report No. 78/00, OEA/Ser.L/V/II.111, doc. 20 rev. ¶¶ 45–46 (2000) (finding admissible a petition lodged by Toledo Maya Cultural Council of Belize on behalf of Mopan and Ke'ekchi Maya people of the Toledo District of Southern Belize).


The communication filed by the Sierra Club Legal Defense Fund (SCLDF) on behalf of the Confederación De Nacionalidades Indígenas De La Amazonia Equatoriana (CONFENIAE), an Ecuadorian NGO, against Ecuador illustrates the problems that may arise from these omissions. CONFENIAE was an umbrella organization which claimed to represent the interests of various indigenous communities in the Oriente region of Ecuador. The communication charged the Ecuadorian government with violating the rights of the Huaorani people by permitting Conoco to build roads and undertake large-scale oil development within their traditional Amazon homeland. In the course of the proceedings before the Inter-American Commission, CONFENIAE engaged in negotiations with Conoco for the sale of drilling rights on Huaorani land, an action which the Huaorani opposed. The Shuar and Quichua, the Oriente's largest communities, which had controlled CONFENIAE since its founding in 1980, stood to benefit substantially from this initiative.

46. Specifically, the petitioners alleged that the Ecuadorian government, through Conoco, was violating the rights of the Huaorani people to life and security of the person, preservation of health and well-being, humane treatment, protection of the family, freedom of movement, inviolability of the home, freedom of religion, property, and privacy pursuant to the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, and the Commission's jurisprudence. Petition submitted to the Inter-American Commission on Human Rights by CONFENIAE on behalf of the Huaorani Nation against Ecuador, 4-5 (June 1, 1990). For a more complete account of the controversy that gave rise to this case, see Thomas S. O'Connor, "We Are Part of Nature": Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin, 5 COLO. J. INT'L ENVTL. L. & POL'Y 193 (1994).


48. Id. at 73 (noting that the newly elected president of CONFENIAE, a member of the Quichua ethnic group, had taken steps to foster conflict between the Huaorani and larger indigenous communities, while members of the Shuar ethnic group were moving aggressively to take over Huaorani land).
whereas the Huaorani had only sporadic involvement in the cash economy. Because the Inter-American Commission was under no obligation to consider, either during the admissibility phase of the proceedings or thereafter, CONFENIAE's ability to represent the interests of the Huaorani people in good faith, this conflict of interest initially went undetected. The Commission's oversight appears to have been remedied when SCLDF filed a Supplemental Report on behalf of CONFENIAE and the Organización de la Nacionalidad Huaorani de la Amazonía Ecuatoriana (ONHAE). Although the Supplemental Report enabled the Commission to take into account the interests of all relevant cross-sections of the victim population, this case flags the need for more rigorous screening standards for petitioning NGOs, especially in the context of representing indigenous peoples or other exceptionally large groups.

The requisite link between a petitioning NGO and the victim population is even more ambiguous in the African Commission, which focuses on cases which "reveal the existence of a series of serious or massive violations of human and peoples' rights." Unlike the Inter-American Commission, the African Commission accepts NGO communications in the nature of an actio popularis, or citizens' action, challenging African governments' laws on behalf of the public interest, regardless of whether they have been applied to the detriment of particular individuals. Some communications filed with the African Commission rely on secondary

49. See Kingsbury, supra note 13.
50. In this particular case, the conflict might not have been apparent during the admissibility phase of the proceedings. The decision to negotiate with Conoco appears to have been made by the president and vice president of CONFENIAE, who had been elected only two months earlier. Kane, supra note 47, at 73. Prior to the election of these individuals, CONFENIAE had been more supportive of the Huaorani, assisting them in obtaining official title over part of their land and in founding the Organización de la Nacionalidad Huaorani de la Amazonía Ecuatoriana (ONHAE). Id.
52. The Commission responded to the communication in its final Report on the Situation of Human Rights in Ecuador, which set forth a list of broad recommendations to the Ecuadorian government. These recommendations were intended to ensure, among other things, adequate measures to protect the rights of indigenous individuals and communities affected by oil and other development activities, meaningful and effective participation of indigenous representatives in decision-making processes about development, and resolution of pending claims over title, use, and control of traditionally indigenous territory. See Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1 ch. IX (1997).
53. See African Charter, supra note 32, art. 58.
sources, such as accounts of violations contained in previously published human rights reports, rather than individual testimonies collected for the purpose of litigation. In certain cases, victims have reportedly intervened directly to request that the African Commission disregard communications filed by NGOs on their behalf.

The experience of student attorneys from American University's International Human Rights Law Clinic (IHRC) before the African Commission demonstrates how a forum can actively disempower victims due to the comparative ease and efficiency of dealing with NGO representatives. The petitioning NGO was the Institute for Human Rights and Development in Africa, based in Banjul, The Gambia, which had requested the IHRC's assistance in filing a case against the Government of Guinea. The case intended to hold the Guinean government accountable for rights violations committed against former Sierra Leonean refugees in response to Guinean President Lansana Conté's xenophobic speech on September 9, 2000.

In April 2002, the student attorneys joined three lawyers from the Institute on a week-long fact-finding mission to Freetown, Sierra Leone. With the assistance of the Council for Good Governance, a Sierra

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55. Interview with Julia Harrington, Senior Legal Officer for Equality and Citizenship, Open Society Justice Initiative; Former Executive Director, Institute for Human Rights and Development in Africa (June 28, 2005). Although human rights reports are often based on interviews with individual victims, the purpose of such interviews differs substantially from interviews conducted with a view toward litigation. Regarding the modalities of human rights fact-finding, see generally HANS THOOLEN & BETH VERSTAPPEN, HUMAN RIGHTS MISSIONS: A STUDY OF THE FACT-FINDING PRACTICES OF NON-GOVERNMENTAL ORGANIZATIONS (1986); Hurst Hannum, Fact-Finding by Non-Governmental Human Rights Organizations, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS 293 (Richard B. Lillich ed., 1992); Diane Orentlicher, Bearing Witness: The Art and Science of Human Rights Fact-Finding, 3 HARV. HUM. RTS. J. 83 (1990). Communications may not be based exclusively on mass media reports. The African Commission may reject cases on the grounds that a plaintiff has not presented sufficient, or sufficiently credible, information. In these cases, communications are declared inadmissible for failure to make out a prima facie case. E-mail from Julia Harrington (Nov. 30, 2004) (on file with author).


57. I supervised this case during my three-year term as a Practitioner-in-Residence in the International Human Rights Clinic at American University's Washington College of Law.

58. Despite these dynamics, the involvement of an NGO with resources for transportation and staff to coordinate logistics may actually increase the likelihood that victims will have the opportunity to attend a hearing.

59. President Conté's speech, which was broadcast on national radio, reportedly exhorted the Guinean population as follows: "We know that there are rebels among the refugees . . . I am giving orders that we bring together all foreigners in (Guinean) neighbourhoods, so that we know what they are doing . . . and that we search and arrest suspects . . ." Guinea Rounds Up Refugees, BBC News, Sept. 11, 2000, at http://news.bbc.co.uk/1/hi/world/africa/919632.stm.
Leonean NGO whose staff served as both Krio translators and "cultural brokers," the student attorneys, together with lawyers from the Institute, interviewed Sierra Leonean refugees who had either personally endured or witnessed evictions, arbitrary arrests, detentions, beatings, rapes, killings, looting and extortion of property, or forced expulsions by Guinean soldiers, police, and civilians on or after September 9, 2000. The process resulted in 23 notarized affidavits. By the time the student attorneys left Sierra Leone, most of the witnesses seemed enthusiastic about the prospect of testifying before the African Commission.

During its November 2003 session, the African Commission deemed the case admissible. Seven months later, when the Commission finally scheduled the merits hearing, the Institute arranged for three witnesses to attend. In preparation for the hearing, originally scheduled for Monday, May 30, 2004, a new group of IHRC student attorneys spent two days reinterviewing the witnesses, preparing them to testify, and reworking opening and closing statements accordingly. The Commission postponed the hearing several times, and the Commission's Secretariat informed the Institute on Tuesday morning that it might not have time to hear the case at all. The witnesses' emotional responses to the experience varied as the hours passed, from tentativeness, to panic, to faith in the importance of their task, to exhaustion, to complete disillusionment with the African Commission's apparent indifference to their plight.

The low point came when the team finally entered the hearing room on Tuesday afternoon. After permitting brief introductions, the Chairperson of the Commission pronounced that, in the interest of time, she did not think it would be necessary to hear witnesses. Only after an Institute representative assured her that the witnesses' testimonies would be extremely brief did she relent.

These cases against Ecuador and Guinea demonstrate how liberal standing requirements may compromise the autonomy of victims by excluding their views and voices from proceedings in the Inter-American

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60. I borrowed this term from Anne Fadiman, The Spirit Catches You and You Fall Down 272 note (1st paperback ed., 1998).

61. Initially, the Institute had difficulty finding any of the witnesses due to the closure of the refugee camp where most of the interviews had taken place. Fortunately, one of the three Institute lawyers, who had since returned to live in her native Sierra Leone, was resourceful enough to track down three witnesses, who agreed to attend the hearing.

and African Commissions, respectively. Such exclusion may result from the internal politics of the petitioning NGO, as in the Ecuador case, or from the priorities of the forum itself, as in the Guinea case. Whatever the cause, these trends may ultimately undermine the legitimacy and effectiveness of the Inter-American and African Commissions. In addition to eroding victims’ dignity and depriving them of a vital opportunity for healing, the consistent exclusion of victims’ voices will compromise the ability of these commissions to conduct comprehensive fact-finding and promulgate judgments which accurately reflect, analyze, and address the rights violations that have occurred. Moreover, the resultant jurisprudence, no matter how legally sophisticated, will have little resonance in the victims’ communities.

III. CLASS ACTIONS, CLIENT-CENTERED LAWYERING, AND CRISSES OF ACCOUNTABILITY

Standing requirements are intended to promote fairness and judicial efficiency by permitting only the most effective petitioner to proceed. In U.S. courts, these requirements derive from Article III of the U.S. Constitution, which permits courts to hear only “cases and controversies” involving plaintiffs who can demonstrate that they or, in the case of groups, their members have suffered a redressable injury caused by the defendant. An organizational plaintiff must also demonstrate that the interests it seeks to protect are germane to the organization’s purpose and

63. See Jerry Mashaw, Due Process in the Administrative State 158–221 (1985) (regarding dignitary theories and instrumental value of due process); cf. Marcy Strauss, Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy, 65 N.C. L. Rev. 315, 349 (1986–87) (concluding that “[r]espect for clients’ autonomy truly ensures that the legal system is just, not only in its results, but also in its process”).

64. See Lucie E. White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. Rev. L. & Soc. Change 535, 564 (1987–88) (“At a minimum, lawyers must be sensitive to the fact that their litigation can draw poor clients into a culture and a discourse that is likely to seem strange and intimidating.”).


67. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (denying wildlife conservation and other environmental organizations standing for failure to demonstrate that regulation limiting coverage of Section 7(a)(2) of the Endangered Species Act to the United States and the high seas would cause an imminent injury to one or more of their members); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976) (dismissing as purely speculative an indigent group’s claim that an IRS code revision affecting non-profit hospitals led to denial of request for full medical coverage); Warth v. Seldin, 422 U.S. 490 (1975) (denying taxpayers standing to challenge zoning regulations because they could not demonstrate that their desired remedy would provide redress for their constitutional injury); Sierra Club v. Morton, 405 U.S. 727 (1972) (denying an environmental advocacy group standing to challenge the development of a ski resort because its members were not personally injured).
that neither the claim asserted nor the relief requested requires the participation of individual members.68 The belief that social change should come about as a result of deliberation by the legislative branch, whose members can be held accountable through the election process, was among the rationales behind these restrictions.69 Canadian and European courts have similarly emphasized that plaintiffs should have a personal interest in the subject matter of the litigation.70

With the exception of the African Commission, international fora have traditionally declined to accord standing to plaintiffs who seek to initiate legal actions in the public interest, or actio popularis.71 States have generally rejected actio popularis for fear that such expanded access to their courts would directly affect their capacity to govern. For precisely this reason, European Commission member states opposed a proposal to grant nongovernmental environmental organizations standing to challenge actions and omissions of public authorities that allegedly contravene environmental law.72

William Aceves has proposed that adoption of certain criteria from Federal Rule of Civil Procedure 23 (Rule 23)—namely, commonality,73

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72. See Commission Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters, COM(03)624 final, Explanatory Memorandum § 5.1. In preparing the Directive of the European Parliament and of the Council, which emerged from the consultation process, the Commission discounted most of the member states’ objections. See id. The Commission did, however, omit provisions that would have accorded legal standing to groups without legal personality. See id. The Commission also rejected a proposal by nongovernmental organizations to accord them unlimited actio popularis standing, which would have alleviated the requirement that nonenvironmental organizations demonstrate a “sufficient interest” in or “maintain the impairment of a right” resulting from the challenged act or omission of a public authority that allegedly contravenes environmental law. See id. §§ 5.2, 6 art. 4.
73. Fed. R. Civ. P. 23(a)(2) (requiring commonality as a way of limiting a putative class to those members whose cases present common questions of law or fact).
typicality,⁷⁴ and adequacy of representation⁷⁵—could help to avoid the
problems associated with an actio popularis in the context of interna-
tional human rights litigation.⁷⁶ Although Aceves focuses on cases filed
in regional and other human rights fora by groups of individuals, the
representation-related issues arising in cases filed by NGOs are sufficiently
similar to make his analysis relevant to the present discussion. While
Aceves’ proposal could limit the ability of certain questionable NGOs to
file communications in regional human rights commissions, the auton-
omy of victims may still be at risk.⁷⁷

Empirical evidence demonstrates that most U.S. courts approve class
representatives and class counsel with little or no analysis of criteria
bearing on their adequacy.⁷⁸ As a result, the class representative is often
“more a figurehead than an actual decisionmaker.”⁷⁹ Even if class

⁷⁴ FED. R. CIV. P. 23(a)(3) (requiring typicality to ensure that class representatives are
sufficiently invested in the matter to pursue it zealously and have a close enough connection to
other class members to represent their interests).
⁷⁵ FED. R. CIV. P. 23(a)(4) (requiring that plaintiff class is fairly and adequately repre-
sented by the lead plaintiff(s) and counsel); FED. R. CIV. P. 23(g) (enumerating criteria courts
must consider in appointing class counsel, including work to identify or investigate potential
claims, past experience handling similar claims and complex litigation, knowledge of applica-
table law, and available resources).
⁷⁶ See William J. Aceves, Actio Popularis? The Class Action in International Law,
that “[i]nternational human rights class actions fit uncomfortably within Federal Rule of Civil
Procedure 23”).
⁷⁷ Aceves himself acknowledges this risk, but proposes to address it through a rigor-
ous class certification process including opt-out provisions. See Aceves, supra note 76, at
396–97, 401–02.
⁷⁸ See Robert H. Klonoff, The Judiciary’s Flawed Application of Rule 23’s “Adequacy
of Representation” Requirement, 2004 Mich. St. L. Rev. 671, 682 (noting that courts have
“approved class representatives despite significant evidence that the representatives lacked
even basic knowledge about the case”). See also Debra Lyn Bassett, When Reform Is Not
Enough: Assuring More Than Merely “Adequate” Representation in Class Actions, 38 GA. L.
Rev. 927, 989 (2004) (advising a more careful application of the adequacy of representation
requirement to ensure fairness and due process); Linda S. Mullenix, Taking Adequacy Seri-
ously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes, 57 VAND.
L. Rev. 1687, 1692 (2004) (concluding that “courts pay lip service to the concept of
adequate representation but fail to robustly engage in any meaningful inquiry”).
⁷⁹ John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loy-
alty in Representative Litigation, 100 COLUM. L. REV. 370, 406 (2000); see also Paul
Bergman, Class Action Lawyers: Fools for Clients, 4 AM. J. TRIAL ADVOC. 243, 244–46
(1980) (questioning whether the class representative is a “mere formality” in the lawyer-driven
class litigation model); Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 ARIZ. L.
Rev. 923, 927 (1998) (“[C]lass representatives often are recruited by class counsel, play no
client role whatsoever, and—when deposed . . . commonly show no understanding of their
litigation.”); Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs’ Attorney’s Role in Class
Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. CHI.
L. REV. 1, 71 (1991) (noting that the “plaintiffs’ attorney dominates the litigation
regardless of whether the representative plaintiff is a complete stranger or the attorney’s
representatives play a more active role in the litigation, their perspectives may not accurately reflect the full range of views held by class members. Recognizing this problem, the U.S. Supreme Court has emphasized the need for class representatives and, implicitly, class counsel to consult with other class members about the merits of cases and the appropriateness of accepting settlement offers.

As Aceves acknowledges, the risk of alienating members of the victim population is exacerbated in litigation in international fora due to religious, cultural, nationality, and other differences between lawyers and class members. The same risk exists in human rights class action litigation in U.S. courts pursuant to the Alien Tort Claims Act (ATCA), which provides that U.S. federal courts shall have jurisdiction over "a tort only, committed in violation of the law of nations." Since the landmark case of *Filartiga v. Pena-Irala*, in which the U.S. Court of Appeals for the Second Circuit affirmed that victims of human rights abuses abroad could seek legal redress in U.S. courts against foreign perpetrators, creative lawyers have used this statute to enforce international human rights norms. Catherine MacKinnon characterizes the lawyer's relationship to unnamed class members in ATCA litigation as follows: "[O]ne claims to represent huge numbers of people with whom one has no contact, speaking for them in public or policy settings, taking positions on issues that deeply and directly affect their lives, on which they have diverse and nuanced opinions." Other scholars have similarly emphasized the potential disconnect between advocates and victims in the

80. See Rhode, * supra* note 79, at 1185 (suggesting a theory of representation that "mandates full disclosure of . . . class sentiment"); see also Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 485–88 (1976) (noting the tensions among the minority parent class members, as well as between some class members and the NAACP in desegregation cases); Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 *SYRACUSE L. REV.* 709, 734 (1989) (noting that, barring a conflict of interest, courts will not ordinarily inquire as to what role clients play in decisionmaking); Klonoff, * supra* note 78, at 673 (noting that the "vast majority of U.S. courts perform virtually no gate-keeping function and approve class representatives and class counsel with little or no analysis"); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 *Tex. L. REV.* 571, 605–06 (1997) (noting that even adequate representation can conflict with class members' right to be heard).


82. See Aceves, * supra* note 76, at 397. These obstacles seem to undermine the feasibility of Aceves' proposal for a rigorous class certification process.


84. See 630 F.2d 876 (2d Cir. 1980).

context of ATCA litigation, which may deprive the latter of the full rehabilitative benefits of this process.\footnote{86}

In an effort to afford victims a more meaningful experience, some scholars have proposed a client-centered approach to class action litigation.\footnote{87} By contrast with the traditional lawyering model, in which lawyers function as experts who provide advice with minimal client input, client-centered lawyering actively involves the client in identifying problems, generating a range of options, and making decisions.\footnote{88} The underlying assumption is that clients are in a better position than lawyers to understand the economic, social, and psychological dimensions of their problems and to evaluate potential solutions by balancing relevant legal and nonlegal concerns.\footnote{89} By integrating clients into the decision-making process, the client-centered approach seeks to restore their autonomy and dignity and thereby increase the likelihood they will be satisfied with the end results.\footnote{90}

Although the demands of class action litigation indisputably require the lawyer to play a more directive role than in individual client representation,\footnote{91} client-centered lawyering techniques can help to ensure such

\footnote{86.} See Van Schaack, supra note 34, at 321–22; see also M.O. Chibundu, Making Customary International Law Through Municipal Adjudication: A Structural Inquiry, 39 Va. J. INT’L L. 1069, 1108 (1999) ("[I]t is hard to imagine how the class victim thousands of miles away from U.S. shores and with at most the dimmest conception of the complicated proceedings that go on in American courthouses can possibly share a sense of justice from these proceedings."); Ralph G. Steinhardt, Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos, 20 Yale J. INT’L L. 65, 93 (1995) ("A mass human rights tort trial inevitably compromises claim autonomy . . . .").

\footnote{87.} See Grosberg, supra note 80, at 709; see also Van Schaack, supra note 34, at 281 (emphasizing the importance of “providing victims with a meaningful experience” and “promoting . . . human dignity” through ATCA litigation).

\footnote{88.} See David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach 17–18, 22–23 (1991); see also David F. Chavkin, Clinical Legal Education: A Textbook For Law School Clinical Programs 51–52 (2002) (defining client-centeredness as a type of legal representation that “expands the role of the client as decision-maker and colleague in the lawyer-client relationship and places additional demands on the lawyer to make this role a reality”).

\footnote{89.} See Binder, supra note 88, at 17.

\footnote{90.} See D. Rosenthal, Lawyer and Client: Who’s In Charge 168–69 (1974) (noting that client participation in problem solving promotes dignity and increases client satisfaction with the results). But see Ellmann, supra note 2, at 1122 (“Principles of client-centered practice suggest that even within the attorney-client dyad, the client’s autonomy is still in danger from lawyers who unwittingly or unwittingly override the client’s own wishes in favor of outcomes that the lawyers prefer.”).

\footnote{91.} See Grosberg, supra note 80, at 713 (“Class action clients, by contrast [with individual clients], cannot collectively be the primary decisionmaker, especially if the class is large or its members have conflicting interests.”); see also Coffee, supra note 79, at 417–18 (noting that client autonomy “can only be incompletely realized at best in representative litigation where the attorney is not simply an agent of the client . . . [but] also the creditor and joint venturer”)}
litigation is responsive to the views of the broadest possible spectrum of class members. Lawrence Grosberg recommends, for example, that lawyers confirm the typicality of proposed class representatives by sampling putative class members and keeping class members apprised of the scope of ongoing consultations. Although the viability of implementing these strategies in remote areas of the developing world is doubtful, the need to ensure that class representatives effectively represent the interests of absentee members is no less critical. Moreover, given the minimal likelihood of enforcing most damage awards in the international arena, lawyers must effectively educate class members about the broader purposes of the litigation to ensure they remain invested in the process.

In the context of ATCA litigation, Beth van Schaack recommends the selection of "natural leaders" who have already represented the community in denouncing or responding to abuses. Other experienced practitioners caution that the most charismatic or outspoken individuals in a group are not always the most sensitive to the group's needs. The authenticity of such individuals' claims to leadership should thus be continually reevaluated.

Van Schaack further emphasizes the importance of engaging a broader cross-section of the victim population in the litigation process through the establishment of notice regimes and effective outreach. By way of example, van Schaack cites the opt-in scheme adopted by a Hawaii district court in a case filed by Filipino victims of the Marcos regime and the elaborate notice regimes employed in Holocaust-related cases. Where feasible, such techniques give victims an effective

92. See Grosberg, supra note 80, at 747 n.176, 753, 755–56, 766–68, 774. To the extent that the lawyer failed to fulfill these obligations, the court could intervene pursuant to its discretionary supervisory authority under Rule 23(d). See id. at 750. Cf. Mary Kay Kane, Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer, 66 Tex. L. Rev. 385, 405 (1987) (suggesting that deeper judicial involvement in the entire class action process, including closer cooperation between the judge and plaintiffs’ counsel, could help eliminate some of the conflicts that arise in class actions between class representatives and class members).
93. But see Kingsbury, supra note 13, at 5 (proposing the use of polling devices or other local processes to establish the preferences of large groups involved in international human rights litigation).
94. See Van Schaack, supra note 34, at 345.
95. Telephone Interview with Viviana Krsticevic, Executive Director, CEJIL (Oct. 7, 2005); E-mail from Cynthia Morel, Legal Cases Officer, Minority Rights Group International (Oct. 3, 2005) (on file with author). For this reason, the London-based Minority Rights Group (MRG) tries, wherever possible, to deal with traditional or elected leaders. Id. Even where such leaders do not include women, MRG works to ensure the inclusion of a gender-sensitive perspective. Id.
96. See Van Schaack, supra note 34, at 345–46.
“voice” in the proceedings, although technological, logistical, linguistic, cultural, and security barriers often preclude using them in many parts of the developing world.

Acknowledging these practical obstacles to communication with victims, many human rights NGOs define their raison d’être as giving “voice to the voiceless.” Some of these groups have made significant inroads through a variety of strategies, including litigation, fact-finding, legislative advocacy, and public education. Despite their increasing influence in the international arena, however, international law does not hold NGOs accountable for their conduct. Existing informal controls are also inadequate to ensure that they execute their activities responsibly.

Denouncing the lack of any mechanism to evaluate NGOs’ representational authority, one scholar concludes that many NGOs are “little more than self-appointed and self-created lobbies.” Such

98. See id. at 346; see also Coffee, supra note 79, at 419 n.134, 437, & 437 n.166 (emphasizing the importance of enhancing the “voice” of class members in institutional reform litigation where inconsistent outcomes are unacceptable).


100. See generally Blitt, supra note 36; see also Thomas R. DeGregori, NGOs, Transgenic Food, Globalization, and Conservation, 13 COLO. J. INT’L ENVTL. L. & POL’Y 115, 127 (2002) (“NGOs demand good governance and transparency from all institutions except themselves”); Peter J. Spiro, The Democratic Accountability of Non-Governmental Organizations: Accounting for NGOs, 3 CHI. J. INT’L L. 161, 166 (2002) (“NGOs have not been held responsible for their conduct; they cannot violate international law or agreements.”).


102. Andrew Hurrell, Principles and Prudence: Protecting Human Rights in a Deeply Divided World, in HUMAN RIGHTS IN GLOBAL POLITICS 277, 289 (T. Dunne & N.J. Wheeler eds., 1999); see also Kerstin Martens, Examining the (Non-)Status of NGOs in International Law, IND. J. GLOBAL LEGAL STUD., Summer 2003, at 2–3 (noting that “lack of regulation raises questions about NGO representativity and legitimacy”); Ratner, supra note 11, at 533 (noting that NGOs lack “accountability . . . to anyone other than their members and donors”); P. J. Simmons, Learning to Live with NGOs, FOREIGN POL’Y, Fall 1998, at 82 (asserting that many NGOs are “decidedly undemocratic and unaccountable to the people they claim to represent”); Slim, supra note 25, ¶ 26 (explaining that “simply being part of the new sacred space of ‘civil society’ is not enough to guarantee an NGO’s legitimacy”); Peter J. Spiro, New Global Potentates: NGOs and the “Unregulated” Marketplace, 18 CARDOZO L. REV. 957, 963 (1996) (noting that unelected NGO leaders are unlikely to be scrutinized by their memberships).
well-respected human rights NGOs as Amnesty International, Human Rights Watch, and the International Federation of Human Rights have expressed concern that the lack of formal distinctions between themselves and more partisan NGOs may erode their credibility. Nonetheless, human rights NGOs have adamantly rejected proposals for regulation for fear of compromising their independence.

IV. THE NEED FOR A LAWYER-NGO-VICTIM TRIAD

The increasing challenges to NGO accountability, together with the unique dynamics of litigation by NGOs in the Inter-American and African Commissions, render the traditional lawyer-client dyad obsolete in this context, especially where the real party in interest is a large group of victims. The mechanics of filing petitions with regional human rights commissions differ from one NGO to another. Some NGOs have staff lawyers whose responsibilities include such projects, while others retain outside counsel for this purpose. In-house and outside counsel may also work together on different aspects of a case. Regardless of the particular representation arrangement selected, the identity of the client becomes harder to pinpoint as the size of the victim group increases. To improve the likelihood that a petitioning NGO effectively represents the interests of a victim group, the lawyer-client dyad should be recast as a lawyer-NGO-victim triad in which the lawyer and the petitioning NGO

103. See Martens, supra note 102, at 8.

104. See Blitt, supra note 36, at 263 n.10 (noting that the launch of www.ngowatch.org by two U.S.-based conservative foundations triggered “strident opposition” among the NGO community); see also Benedict Kingsbury, The Democratic Accountability of Non-Governmental Organizations: First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society, 3 CHI. J. INT’L L. 183, 183, 186 (2002) (noting that “an operational code resembling First Amendment liberalism has been the de facto guide in the construction of international civil society,” which creates problems of accountability).

105. Although the filing of petitions with regional human rights commissions does not require a lawyer, most cases involve lawyers in some capacity. See INTER-AM. C.H.R. RULES OF PROCEDURE, supra note 29, art. 23 (2000) (“The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in another writing.”) (emphasis added). The Rules of Procedure of the African Commission on Human and Peoples’ Rights do not address the subject of representation by counsel. See AFRI-CAN COMM’N RULES OF PROCEDURE, supra note 32.

106. See, e.g., E-mail with attached sample MRG partnership agreements from Cynthia Morel, Legal Cases Officer, Minority Rights Group International (Sept. 28, 2005) (on file with author) (explaining that work on behalf of indigenous peoples is “conducted in a tripartite fashion: the victim/community, the domestic lawyer, and MRG,” with the local partner organization assuming ownership of the case and MRG playing an advisory role); Sample Working Agreement Between CEJIL and Local Representatives of the Victims (on file with author) (expressing the understanding that CEJIL and the victims’ local representatives will jointly design litigation strategy, draft and present pleadings, and appear at hearings).
have joint fiduciary obligations to victims, who are the real parties in interest. Where the alleged rights violations include the death of some or all of the victims, the triad will have to be reconfigured to replace the deceased with their next of kin.

The proposed fiduciary obligations are targeted to ensure meaningful representation of the affected victim group, however large. At a minimum, they should include duties to obtain free, prior, and informed consent of the victim group before initiating litigation, to keep the victim group apprised of developments as the litigation unfolds, and to incorporate victims' voices into the process. Although these objectives may seem self-evident to domestic litigators, their application to regional human rights litigation, which often spans several countries and involves communities in remote locations without access to e-mail, telephone, or other technology, may be challenging.\footnote{107}

In order to fulfill the proposed fiduciary obligations, advocates will have to define the relevant victim group—or prospective victim group for purposes of filing an actio popularis with the African Commission—at the outset of the litigation. In cases where victims are not well-organized, advocates should make a good faith effort to facilitate communication among group members. Where victims' capacity to interact with their advocates is limited due, for example, to minority status, detention, mental disabilities, or security risks, certain objectives may not be fully attainable.\footnote{108} However, the advocates' fact-finding methodology should be sufficiently sound to ensure that group members' priorities drive the litigation.

A. Free, Prior, and Informed Consent

The right of free, prior, and informed consent is well-established in the context of international development. Numerous international instruments concerning the rights of indigenous peoples affirm this right.\footnote{109}

\footnote{107. The achievement of these objectives in class action litigation in U.S. courts has proven similarly elusive.}

\footnote{108. The client-centered approach is similarly inapplicable in such situations. See Binder, supra note 88, at 20 n.17 (noting that the client-centered approach cannot be used where the client has not reached majority or suffers from mental incapacity). Cf. Model Rules of Prof'l Conduct R. 1.14(a) (2002) ("When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").}

\footnote{109. See, e.g., General Recommendation XXIII on Indigenous Peoples, U.N. Office of the High Comm'r for Human Rights, Comm. on the Elimination of Racial Discrimination, ¶ 4(d), CERD/C/51/Misc.13/Rev.4 (Aug. 18, 1997) (calling upon states to "[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent"); Draft Declaration on the Rights of Indigenous Peoples, U.N. DOC.}
as does the jurisprudence of the Inter-American\textsuperscript{110} and African\textsuperscript{111} human rights systems. The UN Working Group on Indigenous Populations has elaborated on the substantive and procedural aspects of this concept:

Substantively, the principle of free, prior and informed consent recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by indigenous peoples about their development path.\textsuperscript{112}

\begin{itemize}
  \item E/CN.4/Sub.2/1994/56, 34 I.L.M. 541 (Oct. 28, 1994) (requiring states to obtain free and informed consent of indigenous peoples regarding relocation (art. 10), takings of cultural, intellectual, religious, and spiritual property (art. 12), legislative or administrative measures that may affect them (art. 20), and projects affecting their lands, territories and other resources (arts. 27, 30); Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1990) (prohibiting relocation of indigenous peoples without "free and informed consent" except as an exceptional measure (art. 16) and requiring consultations regarding development activities and exploration or exploitation of resources pertaining to their lands (arts. 6, 7, 15);
  \item 110. See Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R. 860, Report No. 75/02, OEA/Ser.L./II.117, doc. 5 rev. 1 ¶ 131 (2002) (construing Inter-American human rights law to require "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation").
  \item 111. See Soc. & Econ. Rts. Action Ctr., supra note 54, ¶ 58 (holding that the Nigerian government's failure to involve the Ogoni communities in decisions affecting the development of Ogoniland constituted a violation of their right to dispose freely of their wealth and natural resources under art. 21 of the African Charter).
\end{itemize}

Free prior and informed consent should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather, it is a process by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to
More specifically, this principle is intended to ensure that indigenous peoples receive comprehensive information in an accessible and understandable form about the scope and expected impact of proposed development activities on their land, resources, and well-being, including all reasonably foreseeable risks to the affected community; that their approval is sought and obtained without coercion, pressure, or intimidation; and that their choices are respected and upheld. Appropriate modalities of communication may vary from one group to another, or may even depend on the activity involved, but existing governance structures should generally be respected.

Obtaining free, prior, and informed consent of victim groups is similarly critical prior to initiating litigation in regional human rights commissions. This practice will help to ensure that victims’ rights are not trampled by their representatives, compounding the governmental abuses that gave rise to the litigation. At a minimum, lawyers or petitioning NGOs should be required to apprise the victims, through linguistically and culturally appropriate channels, of the purpose of the proposed litigation, its various stages and their expected duration, the nature and likelihood of available relief, potential negative repercussions, and opportunities for their involvement. In particular, victims should be informed, and reminded as often as necessary, that even if monetary damages are awarded, the prospect of collecting them is minimal in most cases.

As in the development context, group members should have an opportunity to request additional information or clarification, seek outside advice, and invoke their internal decisionmaking processes outside the presence of their advocates before deciding whether to proceed with the litigation. Such a discussion may also give advocates a more complete picture of the prospect of reprisals by the target government and permit the implementation of appropriate protective measures where necessary. Consultations are unlikely to involve one-on-one communication with each member of the victim group. The time required may vary depending on the number of victims involved, their level of education, their gender or

negotiate conditions under which they may proceed and an outcome leaving the community clearly better off.

114. Id. ¶ 20, 21.
115. On a more practical note, if advocates fail to obtain consent, another lawyer or NGO could take over the case. CEJIL’s practice of obtaining powers of representation from all group members involved in litigation before the Inter-American Commission alleviates this possibility. Telephone Interview with Viviana Krsticevic, Executive Director, CEJIL (Oct. 15, 2005).
116. Cf. Standard Setting, supra note 112, ¶ 22; Ellmann, supra note 2, at 1151-52 (recommending that lawyers representing organizational clients give a group’s leaders primary responsibility for shaping decisionmaking methods).
other distinctive characteristics, the nature of the group to which they belong, the complexity of the issues, and the scope of the proposed litigation. Advocates must be particularly sensitive to prevailing power dynamics and avoid leading questions, which may prompt victims to give a particular answer. Whatever the outcome of these processes, the decision of the victim group must be respected.

The modalities of effective consultation should be tailored to the needs of the victim group. The lawyer or petitioning NGO might utilize a previously scheduled traditional assembly or town meeting, conduct a house-to-house survey, designate local human rights activists as their proxies, or communicate with the community’s freely chosen representatives, who can then utilize their own networks to disseminate information. The difficulty of identifying genuine representatives in a foreign setting should not be underestimated. If so-called “natural leaders” present themselves, advocates should confirm their bona fides in a respectful manner which emphasizes the best interests of the group involved in the litigation and serves to advance, rather than thwart, the process of trust-building. If not, input from human rights activists or foreign scholars who have undertaken field research in the relevant country may be helpful in choosing representatives. Such experts may also be able to provide critical information regarding divergent interests of particular subgroups, which may indicate the need for additional representatives in order to avoid conflicts of interest.

B. Ongoing Communication

The process of obtaining free, prior, and informed consent of group members should provide sufficient insight into internal community dynamics to facilitate the establishment of channels of communication which can be utilized for the duration of the litigation. If genuine community representatives are identified, they can serve as useful points of contact for lawyers and petitioning NGOs. An expression of interest by “outsiders,” whether lawyers or NGOs, may itself prompt the designation of representatives and even serve as a catalyst for broader community mobilization. However, where such representatives are not readily accessible by telephone or e-mail, advocates may have to enlist the assistance of a reliable intermediary to keep victims informed of developments in the litigation, solicit victims’ input when necessary, and monitor any continuing violations or reprisals by the target government.


118. Cf. Standard Setting, supra note 112, ¶ 27 (emphasizing importance of “[I]ndigenous peoples’ right to withhold consent or to say ‘no’ to inappropriate development”).

Once a case is filed, advocates may feel less need for regular contact with the affected community. Both the Inter-American and African Commissions meet only twice a year, which makes the pace of their cases extremely protracted. Moreover, the merits phase, in which the victims' voices can and should be incorporated, is normally preceded by a hearing on admissibility, which is highly legalistic. Pending opportunities for more constructive involvement by the victims, their advocates must keep them engaged in the litigation despite the passage of time and periodically confirm their desire to pursue the litigation. Especially when the case is part of a broader strategy to address the community's problems, ongoing communication among all relevant participants is particularly important.

C. The Transformative Potential of Storytelling

Feeling “heard,” whether by a single sympathetic listener or a broader audience, is essential to the process of recovery for victims and survivors. In order for victims of traumatic events to begin healing, they must learn to live with traumatic memories. By allowing victims to confront in a supportive environment the painful experiences they have suffered, storytelling prevents the internalization of suffering and resentment which, if left unaddressed, can perpetuate the cycle of violence and lead to further abuses.

120. Regarding the use of litigation in the context of organizing, see, for example, White, supra note 64, at 545–46 (reconceptualizing a lawsuit as “an occasion for poor people to join together, outside of the formal boundaries of the litigation, in spaces that are parallel to it, to engage among themselves in reflective conversation and strategic action”); Kingsbury, supra note 13, at 3 (“For human rights litigation to meet its potential as a means of political expression and community mobilization for human rights victims depends, in part, on the extrajudicial skills of the lawyers who represent them.”); Marsico, supra note 1, at 658–63 (proposing a model of “facilitative lawyering” in which the lawyer’s role is limited to providing technical legal advice and assistance sought by the client).

121. See Judith Lewis Herman, Trauma and Recovery 210 (1992) (noting that “the survivor draws power from her ability to stand up in public and speak the truth without fear of the consequences”).

122. See Christopher J. Colvin, ‘We Are Still Struggling’: Storytelling, Reparations and Reconciliation after the TRC, Centre for the Study of Violence and Reconciliation (2000), at http://www.csvr.org.za/papers/papcolv.htm (“As with most trauma therapy, the emphasis is always on the traumatic event(s) itself and trying to find ways to live with traumatic memories without repeating them.”).

123. See Mark A. Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, 75 N.Y.U. L. Rev. 1221, 1269 (2000) (quoting Albie Sachs, Lecture at Columbia University School of Law (Apr. 13, 1999)); see also Herman, supra note 121, at 222–23 (explaining that storytelling “serves a purpose beyond simple ventilation or catharsis; it is a means toward active mastery”); but see Colvin, supra note 122 (“[S]ome members are reluctant ... to speak since they[ ]say it will only stir up anger and hatred in themselves or in those who are listening ...”).

124. See Drumbl, supra note 123, at 1288 (“[P]olicies [deemphasizing victim participation] aggravate social division, procrastinate the determination of accountability, and sow mistrust.”).
Storytelling can also play a critical role in restoring victims' dignity.\textsuperscript{125} The storytelling process was a central feature of the South African Truth and Reconciliation Commission, in which victims' stories were often corroborated by the testimonies of their aggressors,\textsuperscript{126} and served as a rallying point for more far-reaching political action in some cases.\textsuperscript{127} Similarly, an Australian government commission of inquiry established that “being heard” was as important to victims as compensation; the subsequent adoption of a requirement that judges review Victim Impact Statements at sentencing reportedly increased victims’ satisfaction with the criminal justice system.\textsuperscript{128} Plaintiffs in ATCA litigation have likewise confirmed the empowering effect of confronting their abusers in U.S. federal courts.\textsuperscript{129}

These successes underscore the importance of incorporating victims’ voices into case preparation and presentation. The process of eliciting a victim’s personal experience through an initial interview, however time-consuming, may be the first opportunity accorded the victim to give voice to the abuses suffered and affirm their gravity. If foreign lawyers are involved in interviewing, they should work in collaboration with local advocates who, having received the requisite training, can continue to gather evidence after their foreign counterparts have left the country. Victims should also be invited and encouraged to testify in the proceedings, and regional human rights commissions could facilitate their involvement by scheduling at least one session of the merits phase in the target country.\textsuperscript{130} The submission of detailed declarations from a repre-

\textsuperscript{125} See Raquel Aldana-Pindell, In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes, 35 Vand. J. Transnat'l L. 1399, 1440 (2002) (noting that victims may be motivated to tell their stories in order to "'clear' their family members' or their own reputation and to restore their dignity").

\textsuperscript{126} See Drumbl, supra note 123, at 1269 (“The fact that the [South African] aggressors in their testimony fully corroborated so many victim stories lends these stories an undeniability that contrasts with the systematic denials that can result from the adversarial trial system.”); see also Carrie J. Niebur Eisnaugle, Note, An International “Truth Commission”: Utilizing Restorative Justice as an Alternative to Retribution, 36 Vand. J. Transnat'l L. 209, 223 (2003) (describing one purpose of the proposed Truth Commission as providing an “opportunity for victims to be vindicated through publicly telling and memorializing their story”).

\textsuperscript{127} See Colvin, supra note 122 (tracing the progression of a storytelling group, formed under the South African post-apartheid Truth and Reconciliation Commission, from its initially powerless victimized state towards a justice-seeking political role).


\textsuperscript{130} I appreciate this idea from Beth Stephens.
sentative cross-section of victims, together with the presentation of oral testimony by some or all of them, should ensure that the forum has reliable information about the nature and scope of relevant abuses.

Obviously, time, resource, and efficiency constraints preclude the possibility of having every victim testify or even attend the proceedings. Accordingly, advocates must work to ensure they convey critical developments in the proceedings and the ultimate decision rendered by the forum to the victim group. While the effectiveness of particular strategies will vary depending on the context, available options include organizing press conferences, disseminating e-mail updates, making arrangements with a local radio program for witnesses to recount their experience of testifying, publishing victims' testimonies in a newsletter, or providing funding for a journalist from the target country to attend the proceedings. Given that the decisions of regional human rights commissions are not legally enforceable, the development of broad public consciousness of such decisions, both within the victim group and beyond, is indispensable if they are to have any lasting effect.

V. IMPLEMENTATION MECHANISMS

Implementation of the lawyer-NGO-victim triad is complicated by the fact that the foregoing proposals, while framed in the language of fiduciary obligations among lawyers, petitioning NGOs, and victim groups, also affect the relationships between all of these actors and the relevant forum. At the most basic level, these proposals are intended to give victims maximum autonomy over litigation in regional human rights commissions. The requirements of free, prior, and informed consent and ongoing communication ensure that victims decide of their own accord to undertake litigation, effectively authorize a particular lawyer or petitioning NGO (or both) to represent their interests, and have the opportunity to participate in strategic decisionmaking as the case unfolds. The requirement of an opportunity to be heard permits at least some of the victims to give voice to the abuses they have suffered and start healing.

131. Neither the Inter-American nor the African Commission requires the submission of a written declaration before hearing in-person testimony. E-mail from Richard Wilson, Professor, American University Washington College of Law (July 5, 2005) (on file with author); E-mail from Julia Harrington, Senior Legal Officer for Equality and Citizenship, Open Society Justice Initiative; Former Executive Director, Institute for Human Rights and Development in Africa (July 25, 2005) (on file with author).

132. The Center for Justice and Accountability, a California-based NGO, regularly employs this practice in ATCA cases. Telephone Interview with Sandy Coliver, Executive Director, Center for Justice and Accountability (Dec. 4, 2004).
At the same time, these proposals have the potential to bolster the legitimacy and effectiveness of the forum. By obtaining free, prior, and informed consent of the victim group, advocates will be in a better position to consult regularly with the different cross-sections of that population. By using established channels of communication to remain in contact with victims over the course of the proceedings, advocates can monitor their needs and goals, which may change over time, and help to ensure that the litigation resonates with the people whose rights are at issue. By giving victims an opportunity to be heard, advocates will be better equipped to present the best available evidence.

Given the overlapping interests implicated by these proposals and the spectrum of actors involved, different modes of implementation are possible. These include promulgation of a code of professional conduct for international human rights lawyers, the development of norms on NGO accountability, and amendment of the commissions' current standing requirements. Each of these options is discussed below.

A. Code of Professional Conduct for International Human Rights Lawyers

Traditionally, lawyers' ethical obligations have been embodied in codes of professional conduct, which are enforced by local or national bar associations. These codes provide sparse guidance regarding transnational practice. To the extent that lawyers remain bound by their home countries' codes of professional conduct when litigating in international fora, their ethical obligations may differ from those of their adversaries.

Divergent conceptions of the lawyer's role in different parts of the world have made the development of universally applicable ethical standards exceedingly difficult. The first of two major attempts at codification of international ethical standards is the International Bar Association's International Code of Ethics (IBA Code), a set of 21 non-binding general principles which, by its own terms, serves only as "a guide as to what the International Bar Association considers to be a de-

133. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 7 (2002) ("The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise."). See also Malini Majumdar, Ethics in the International Arena: The Need for Clarification, 8 GEO. J. LEGAL ETHICS 439, 441, 444-47 (1995) (discussing the inadequacies of the American Bar Association's approach to regulating American lawyers' ethical obligations in transnational practice).

134. See, e.g., Christopher J. Whelan, Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?, 34 VAND. J. TRANSNAT'L. L. 931, 943-44 (2001) (contrasting the United States' libertarian ideology, which places the client's cause above all else, with legal practice in Europe, which places more emphasis on the lawyer's duty to serve as an officer of the court).
sirable course of conduct by all lawyers engaged in the international practice of law.\textsuperscript{135} The only provisions of the IBA Code that bear directly on the lawyer-client relationship relate to zealous advocacy, candor, avoidance of conflicts of interest, and confidentiality. The second attempt is the Code of Conduct for Lawyers in the European Community (CCBE Code), which has been implemented in all of the member states of the European Community.\textsuperscript{136} The CCBE Code contains more detailed provisions regarding the lawyer-client relationship, requiring lawyers to represent clients “promptly, conscientiously and diligently,” keep clients informed as to the progress of their cases, avoid conflicts of interest, segregate client funds, and purchase professional indemnity insurance.\textsuperscript{137} In addition, the CCBE Code emphasizes that a lawyer must obtain instructions from a party before undertaking representation, although it does not specify the requirements for obtaining such authorization from groups in remote locations.\textsuperscript{138}

The appropriate parameters of the lawyer’s relationship with victims in international human rights litigation are particularly controversial. Some scholars believe that the promulgation of constructive jurisprudence should preempt the interests of an aggrieved individual or group and that “[h]uman rights norms or principles can even be the underlying ‘client.’”\textsuperscript{139} Indeed, David Weissbrodt has argued that a lawyer should forego the pursuit of particular claims if the client has “virtually no chance” of prevailing and the resulting precedents may adversely affect prospective litigants.\textsuperscript{140} To illustrate his point, Weissbrodt denounced the “doomed” challenge to legalized abortion in the United States filed with the Inter-American Commission by the lawyers for the plaintiffs in \textit{Baby Boy}.\textsuperscript{141}

\begin{footnotes}
\item[136.] See John Toulmin, \textit{A Worldwide Common Code of Professional Ethics, in Rights, Liability, and Ethics in International Legal Practice} 207 (Mary C. Daly & Roger J. Goebel eds., 1995).
\item[138.] Id. art. 3.1.1.
\item[140.] See David Weissbrodt, \textit{Ethical Problems of an International Human Rights Law Practice}, 7 \textsc{Mich. Y.B. Int’l Legal Stud.} 217, 247–48 (1985). The class of cases referenced by Weissbrodt, including those which could create bad law, appears to be broader than the frivolous cases prohibited by Rule 11 of the Federal Rules of Civil Procedure. \textsc{See Fed. R. Civ. P. 11.}
\item[141.] \textit{Baby Boy}, Case 2141, Inter-Am. C.H.R. 25, Res. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981). Weissbrodt also criticized the lawyers for the plaintiffs in \textit{Tel-Oren v. Libyan Arab Republic} for seeking review by the U.S. Supreme Court of the decision of the District of Columbia Court of Appeals, which had affirmed the district court’s decision that it
Action, Lawyers for Life, and certain like-minded individuals, alleged that the U.S. government had violated the right of an aborted fetus to life by permitting the termination of a pregnancy in accordance with the U.S. Supreme Court's decisions in *Roe v. Wade* and *Doe v. Bolton*. While conceding that a refusal by the lawyers might have violated their obligations to represent their clients "with reasonable diligence," Weissbrodt justified his ranking of priorities based on the relative paucity of international human rights precedent (at least in 1985, when his article was published) and the corresponding impact of each new decision on the future development of the law. He further maintained that withdrawal would have been permissible to prevent "imprudent or repugnant" conduct.

lacked jurisdiction under the ATCA to adjudicate a claim for damages filed by Israeli survivors of the victims of an attack by the Palestinian Liberation Organization. See Weissbrodt, supra note 140, at 245-47. The U.S. Supreme Court denied certiorari. 470 U.S. 1003 (1985).


144. *MODEL RULES OF PROF'L CONDUCT* R. 1.3 (2002). "Reasonable diligence" is defined as acting "with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* at R. 1.3 cmt. 1. In the context of ATCA litigation in U.S. courts, where lawyers are bound by applicable state codes of ethics, a lawyer's failure to comply with this obligation could lead to disciplinary sanctions. *Id.* at Preamble ¶ 19. Other relevant obligations embodied in the Model Rules of Professional Conduct and replicated in most state ethical codes are the duties of loyalty and zealous representation. *Id.* at R. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); *id.* at R. 1.3 cmt. 1 ("A lawyer must also act with ... zeal in advocacy upon the client's behalf."). The common U.S. nationalities of the petitioners, lawyers, and the respondent arguably provide a stronger rationale for applying the Model Rules in *Baby Boy* than in other cases filed in the Inter-American Commission.


146. See Weissbrodt, supra note 140, at 250 (quoting *MODEL RULES OF PROF'L CONDUCT* R. 1.16(b)(3)). See also *MODEL RULES OF PROF'L CONDUCT* R. 1.16(a)(1) ("[A] lawyer ... shall withdraw from the representation of a client if ... the representation will result in a violation of the rules of professional conduct or other law"); cf. *MODEL CODE OF PROF'L RESPONSIBILITY* EC 7-8 (1980) (permitting a lawyer to withdraw when a "client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the ... advice of the lawyer but not prohibited by Disciplinary Rules"); cf. *id.* DR 2-110(c)(1)(e) (permitting withdrawal where a client insists, "in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under Disciplinary Rules").
Weissbrodt’s reasoning is questionable. A scenario where a plain-
tiff’s lawyer could know with absolute certainty that her client has
“virtually no chance” of success is hard to imagine. In cases where a
client decides to undertake litigation in order to get a “day in court” or
advance a broader political strategy intended to raise public conscious-
ness, success may be relative—although clearly frivolous litigation in
U.S. courts would be barred by Rule 11 of the Federal Rules of Civil
Procedure. Even a loss in litigation could achieve these ends, and a
lawyer would, under these circumstances, thwart her client’s goals by
failing to pursue the case.

Given the level of disagreement among international lawyers about
the role of victims in international human rights litigation, the negotia-
tion of a code of professional conduct embodying applicable fiduciary
obligations would be difficult. The absence of any global association of
international human rights lawyers, which could coordinate the negoti-
ations and monitor the enforcement of any standards ultimately
promulgated, further complicates this project. Moreover, the prospect
of self-regulation poses its own problems.

One possible alternative would be for each regional human rights
system to promulgate its own ethical code, which would bind attorneys
appearing before it. The administration of a forum-specific bar exam

147. The opportunity to present in-court testimony may improve the plaintiff’s chances of receiving a favorable judgment. See Linda Drucker, Governmental Liability for “Disappearances”: A Landmark Ruling by the Inter-American Court of Human Rights, 25 STAN. J. INT’L L. 289, 297 (1988) (noting that the “decision [of the Inter-American Court of Human Rights] to hear the impassioned, heart-rending testimony of live witnesses ... gave the plaintiffs a decided advantage in presenting their case”).

148. See, e.g., Abram Chayes, Nicaragua, the United States, and the World Court, 85 COLUM. L. REV. 1445, 1481 (1985) (expressing the hope that the World Court could fulfill its role as “teacher to the citizenry” and assume the “extended resonance” of Brown v. Board of Education).


151. A crucial problem in Baby Boy was the lack of any relationship between the petitioning organizations and the party whose interests they purported to represent. The petitioners easily satisfied the Inter-American Commission’s liberal standing requirements by naming the victim, an aborted fetus, and then used this forum as a platform to advance their own political agenda. As in the Ecuador case discussed in Part II, the representatives of the petitioning organization had unfettered authority over the litigation.

152. Groups that might be willing to spearhead such a project include the Human Rights Interest Group of the American Society of International Law, the American Bar Association’s International Law Section, and the International Bar Association’s Human Rights Institute.

could confirm attorneys' mastery of applicable ethical norms; disciplinary sanctions could be imposed in cases of noncompliance following admission to practice.\textsuperscript{154} Given the increasing popularity of regional human rights fora, however, the implementation of these recommendations is likely to require additional staff and resources.

\section*{B. Norms on NGO Accountability}

In the absence of any consensus regarding the scope of lawyers' obligations to ensure that petitioning NGOs effectively represent victim groups in litigation before regional human rights commissions, alternative methods of promoting NGO accountability are necessary. While domestic legislation governs recognition of these entities in many countries, their activities remain largely unregulated at the international level.\textsuperscript{155}

Some constraints on NGO participation in the international arena do exist. In order to obtain consultative status with the United Nations,\textsuperscript{156} for example, NGOs must be "of representative character"\textsuperscript{157} and fulfill certain organizational criteria, including having an established headquarters, an executive organ and office, a democratically adopted constitution providing for policy determinations by a representative body, authority to speak for their members, and financial independence from governmental bodies.\textsuperscript{158} As Kerstin Martens has noted, however, these standards are sufficiently open-ended that certain human rights-violating governments have succeeded in manipulating them to obtain consultative status for their own NGOs, known as GONGOs (government-organized NGOs), which can then advocate on their behalf at the United Nations.\textsuperscript{159}

Over the last several decades, international lawyers and social scientists have tried repeatedly to develop international standards governing the juridical personality of NGOs, but governments have generally re-

\footnotesize{154. I am indebted to Dinah Shelton for these ideas.}

\footnotesize{155. Martens, \textit{supra} note 102, at 2.}

\footnotesize{156. \textit{See} U.N. \textit{CHARTER} art. 71 (providing that the United Nations Economic and Social Council "may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence").}

\footnotesize{157. Arrangements for Consultation with Non-Governmental Organizations, E.S.C. Res. 1296, U.N. ESCOR, 44th Sess., Supp. No. 1, at 21, U.N. Doc. E/4548 (1968) (requiring NGOs to "represent a substantial portion, and express the views of major sections of the population or of the organized persons within the particular field of its competence").}


\footnotesize{159. Martens, \textit{supra} note 102, at 8–9.}
jected their efforts. To date, the only international agreement on NGOs that has entered into force is the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations. This agreement requires states parties to recognize national NGOs accorded legal status pursuant to the laws of other states parties, as well as international NGOs with a “non-profit-making aim of international utility” that operate in at least two European countries. This instrument has no bearing, however, on NGOs’ ability to file communications with regional human rights commissions.

The increasing prominence of human rights NGOs in the international arena has heralded new calls for formal regulation to bolster their legitimacy. By contrast with earlier initiatives, which have focused on government legislation, Robert Blitt advocates the adoption of standards that could be independently developed, implemented, monitored, and enforced by human rights NGOs themselves. He proposes that such standards should be advanced by a representative consortium of leading human rights organizations working with academics and judges who have expertise in international law. Such standards would encompass a broad spectrum of issues, including mandate definition, professional staff and board membership criteria, financing and financial disclosure requirements, best practices for operations, and best practices for collaboration with other human rights organizations. Blitt envisions supplemental guidelines for particular types of NGO work, including

160. Id. at 19–20 & nn.78–83 (summarizing initiatives undertaken by the Union of International Associations and the Institut de Droit International).
162. See id. art. 1.
163. See, e.g., Martens, supra note 102, at 23–24; Slim, supra note 25, ¶ 45–49.
164. See Blitt, supra note 36, at 391–93. Numerous humanitarian organizations have already undertaken similar initiatives. See Slim, supra note 25, ¶ 11 (noting that numerous humanitarian and development NGOs, including World Vision International, Oxfam International, and Caritas International, are pursuing a “quality and standards approach”). For instance, 307 humanitarian NGOs have signed a Code of Conduct authored by the International Red Cross. See International Federation of Red Cross and Red Crescent Societies, The Code of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, available at http://www.ifrc.org/publicat/conduct/index.asp (requiring signatories to be independent of government and religion and to pledge accountability to “those we seek to assist”); see also Humanitarian Accountability Project, at http://www.hapinternational.org (representing the combined effort of 50 humanitarian organizations, which established an ombudsman to monitor NGO accountability); The Sphere Project, Humanitarian Charter and Minimum Standards in Disaster Response, at http://www.sphereproject.org.
165. Blitt, supra note 36, at 392.
166. Id. at 393.
litigation,\textsuperscript{167} which could incorporate the fiduciary obligations discussed in Part IV.

While innovative, Blitt's proposed strategy has many of the same practical limitations as an international code of professional responsibility. The selection of a "representative" consortium of "leading" human rights organizations is likely to be quite controversial, and NGOs which do not feel sufficiently engaged in the process of developing the standards may opt out completely. Moreover, as Blitt himself acknowledges, enforcement of international standards is a perennial problem.\textsuperscript{168}

Some of these obstacles could be addressed if the norms were promulgated by a body of independent experts under the auspices of the United Nations and had legally binding force. The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Corporate Norms),\textsuperscript{169} offer a useful precedent. The UN Working Group on the Working Methods and Activities of Transnational Corporations developed these norms with input from governments, intergovernmental organizations, NGOs, unions, multinational corporations, and other business enterprises.\textsuperscript{170} A comparable UN Working Group could be established to develop norms on NGO accountability, with input from international and local human rights NGOs, victims, governments, and other relevant actors. However,
the process used to formulate the Corporate Norms is not directly transferable to the realm of NGO accountability due to the different stakeholders involved and the heightened interest of governments, whose conduct is often the focus of human rights NGO activities.

With respect to enforcement, the Corporate Norms are ultimately intended to impose binding human rights obligations on private business entities. The Norms anticipate that the United Nations and "other international and national mechanisms already in existence or yet to be created" will monitor companies' compliance, with input from NGOs and other relevant stakeholders.171 In cases where monitoring reveals that a company's failure to comply with the Corporate Norms has resulted in harm to an individual, entity, or community, the company may be required to pay reparations.172 However, the lack of any consensus in the international community on the authoritativeness of the Corporate Norms or the viability of implementing the proposed enforcement scheme may make their use as a model premature.

C. Amendment of Standing Requirements

Given the substantial hurdles to promulgation of a code of professional conduct for human rights lawyers and adoption of legally binding norms for human rights NGOs, the most expedient option for implementing the lawyer-NGO-victim triad would appear to be amendment of the existing standing requirements in the Inter-American and African Commissions. At a minimum, petitioning NGOs and their lawyers should be required to prove that they have obtained the free, prior, and informed consent of the relevant victims (or their next of kin) or justify their failure to do so,173 demonstrate the bona fides of the fact-finding methodology they have employed to prepare the petition, and disclose their funding sources.174 These additional requirements would help to ensure that petitioning NGOs adequately and effectively represent the people whose interests are at the heart of regional human rights litigation and that the work of regional human rights commissions resonates with these individuals and, where appropriate, their communities. Obviously, the requirements would also give governments additional grounds on which to challenge the admissibility of a petition.

171. Corporate Norms, supra note 169, art. 16.
172. Id. art. 18.
173. For example, advocates' failure to obtain free, prior, and informed consent could be justified with respect to victims who are very young or severely mentally disabled.
174. Ideally, petitioning NGOs would also be required to present a plan for engaging in ongoing communications throughout the litigation process. Revealing such information to the target government, however, could threaten the confidentiality of future communications. Thanks to Viviana Krsticevic for highlighting this risk.
If implemented, these supplemental requirements would impose an added administrative burden on the commissions. This burden could be reduced through the use of pre certification requirements, which have been employed in Europe. In Germany, for example, both the Standard Contract Terms Act and the Unfair Competition Act grant a right of action to consumer associations that have been screened by the Federal Administrative Office. Similarly, a proposed Directive of the European Parliament and Council on access to justice in environmental matters would confer automatic standing on certain independent non-profit environmental organizations characterized as “qualified entities” under either an advance recognition procedure or on a case-by-case basis.

Amended standing requirements would have the added advantage of according the gate-keeping function to a third party, namely the forum itself, which makes effective enforcement more likely than in contexts where self-regulation is the norm. The only potential drawback, other than the long negotiation process that any changes to the procedural rules of a regional forum will inevitably require, is that the requirements could be applied so rigidly that they deprive deserving victims of an opportunity to be heard.

VI. CONCLUSION

The liberal standing requirements that apply in the Inter-American and African Commissions have the potential to marginalize the people whose rights these fora were established to protect. This Article attempts to avert this scenario by delineating fiduciary obligations intended to

175. These laws were promulgated in furtherance of Germany’s obligations under the European Directive on Injunctions for the Protection of Consumers’ Interests, which assigned rights of action to “qualified entities,” including consumer associations and independent public bodies. See Edward F. Sherman, Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions, 52 DePauW L. Rev. 401, 418–19 (2002).


177. See Commission Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters, COM(03)624 final, arts. 5, 8, 9. In order to be recognized as a “qualified entity,” an organization must have a structure which enables it to ensure the adequate pursuit of its statutory objectives, must have been legally constituted and worked actively for environmental protection for a specified period not exceeding three years, and must have its annual statement of accounts certified for a specified period. See id. art. 8.

178. Indeed, the narrow interpretation of Article III by some U.S. courts has arguably had this effect. See, e.g., Warth, 422 U.S. at 490 (1975) (denying taxpayers standing to challenge zoning regulations, which allegedly increased the need for subsidized housing through imposition of higher taxes); Sierra Club, 405 U.S. at 727 (1972) (denying a group standing to challenge a licensing agreement because it was not personally injured). I appreciate this insight from Paul Hoffman.
foster a deeper connection between advocates, whether lawyers or NGOs or both, and the victims of human rights abuses whom they purport to represent. The proposed lawyer-NGO-victim triad is intended to grant victims maximum autonomy over litigation in regional human rights commissions while bolstering the legitimacy and effectiveness of these fora. If successfully implemented, this arrangement could foster greater empowerment of victims, heighten the impact of regional human rights litigation, and begin to resolve controversial ethical dilemmas in the international arena.