



## Strategic Litigation Initiative for the OP-ICESCR

*October 12-13, 2010*

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### Questions for Consideration

#### I. Strategies for selection of the case and nature of involvement in the context of the OP-ICESCR

##### **Possible criteria for case selection:**

- Novelty of legal issues;
- Strategic importance for jurisprudence;
- Connection to social movements;
- Intersection with claims of women, disability, indigenous groups, etc;
- Whether the case raises systemic and serious ESCR violations;
- Numbers affected;
- Whether the case raises issues that are concerns in other countries;
- Quality of the advocacy and representation;
- Likelihood to proceed to consideration on its merits;
- Likelihood of effective enforcement of the decision;
- Likelihood of success; and
- Whether the author or groups involved are interested in collaborative work or in need of assistance.

##### **Opportunity to intervene and type of intervention**

- Early v. Late Intervention
- Inclusive and accountable litigation strategy

##### **Other possible criteria:**

- Legal v. Political/Social Movements Focus
- Promoting cases from as broad a range of states and different legal systems.
- Promoting diversity of cases and precedent-setting cases on key issues.

## II. Scope and Functions of a Strategic Litigation Initiative focused on the OP-ICESCR

### Issues to consider on Scope:

- Support only litigation under OP or under other regional and domestic legal systems as well?
- Include the use of the Inquiry Procedure and Periodic Review to complement use of complainants procedure and/or as independent procedures?
- Promote a leadership role for CDESCR in the development of progressive and sophisticated jurisprudence and adjudication of cases on ESCR through skilled legal advocacy, which may be influential in the more judicial-like regional and national systems.
- Indirectly ensure the development of more effective domestic remedies through admissibility decisions on the absence of effective domestic remedies, thereby increasing international pressure on States to develop or improve domestic level procedures to remedy violations of ESCR.
- Contributing to making the procedure more accessible and transparent (tracking complaints, publicize them, etc.)
- Facilitating amicus
- Support for follow-up and implementation of views (to strengthen ability of petitions under OP to bring about real change)
- Focus on legal and non legal strategies
- Type of collaboration should the SLP promote with other international and regional NGOs litigating at the international level
- Provide funding to support cases
- Support the institutional capacity of committee and other related institutions
- Raise awareness of OP
- Encourage quality academic commentary linked to cases
- Promote domestic application of the CDESCR's jurisprudence, particularly by courts, so as to expand impact of the ICDESCR nationally.

### Issues to consider on functions/structure:

- Linking groups in need of support with those who have the interest and capacity to provide it
- Providing direct technical support in collaboration with relevant ESCR-Net Adjudication working group members, such as through legal advice or *amicus curiae*
- Providing funding to groups to support litigation before the OP
- What is the best way to organize technical support to domestic groups?
- Should the SLI hire lawyers that could give advice to groups in the course of preparing the case to be presented before the CDESCR?
- Should an SLI lawyer's role be limited to advice and possibly coordinate/prepare *amicus curiae* or should they also be involved in drafting the actual claims and assisting domestic lawyers?
- Should there be criteria for funding cases, such as a requirement that the SLI vet and approve arguments to be advanced?

- What is an appropriate level of oversight for the SLI to have if providing funding to a case?
- Should the funding arm of the program be separate from the litigation arm?

**III. Substantive legal issues related to litigating cases (case selection, type of cases, type of issues, opportunity for intervention, etc.) Which do you feel are the most critical for the Strategic Litigation Initiative on the OP-ICESCR to focus?**

**Type of arguments:**

- Interdependence v. Distinctness
- Progressive Jurisprudence v. Promoting broader ratification
- Individual entitlements vs. Progressive realization

**Legal issues to address:**

- Reasonableness
- Minimum Core
- Ensuring systemic remedies in individually based claims
- Extra-territorial obligations
- Engaging sub-national levels of government
- Application to Private Law
- International Co-operation and Extra-territorial Obligations

**Relationship with affected communities and other allies**

- Close relationships with Social Movements v. disconnection with the base
- Highlighting Equality Dimensions

**IV. From your experience, which procedural issues related to litigating cases do you feel are the most critical for the Strategic Litigation Program on the OP-ICESCR to focus?**

**Some issue so consider could include:**

- Exhaustion of Domestic Remedies
- Interim Measures
- Developing mechanisms for ongoing monitoring and reporting on implementation of views to as to enhance remedial impact
- Inadmissibility (admissibility criteria, etc.)
- Concept of victim
- Burden of Proof and Availability of Evidence
- Transparency and accountability
- Friendly Settlement (problems of individual settlement)
- Amicus Curiae

