Strategic Litigation Initiative for the OP-ICESCR

Results of Consultation Process

During September 2010, ESCR-Net undertook a consultation process with several active members of the Adjudication Working Group of ESCR-Net in preparation for the Workshop on a Strategic Litigation Initiative in support of the OP-ICESCR. Below is a summary of the responses we received. For a full list of questions presented, please refer the "Workshop Questions" document, as the questions and answers included below are only those which received specific responses. Please review as we hope to start the discussion with this input in mind. Note: Comments are listed anonymously.

Group 1: There is a real need for this initiative, particularly how to make sure the procedure is known and accessible to groups we usually work with. That should be the main goal of initiative – deeply embedded in the rest for the work of ESCR-Net. Groups we work with need to be aware of this procedure and use the Net resources to actually bring a case. This is a big challenge as cases are usually brought opportunistically by issues that somehow present themselves rather than something more contemplated. Important to have cases which address systemic as well as individual cases which offer the more clear individual dimension. Changes in law and changes in policy it not that easy to prove that its useful to people on the ground. To ensure this initiative is truly strategic, it need to be mainstreamed within the Net to ensure the relevant groups become aware and involved.

I. From your experience, what should be the scope and functions of a Strategic Litigation Initiative Program focused on the OP-ICESCR?

General Comments:

Group 2: The importance of the adoption of OP-ICESCR is an establishment of a complaint mechanism on ESCR issues and therefore, provides victims of ESCR violations who are not able to get an effective remedy in their domestic legal system with redress at the international level.

However, in Asia, only Mongolia ratified the OP-ICESCR while Timor-Leste signed it. Therefore, it is very important for Asian NGOs to make their governments ratify the OP-ICESCR. In this regards, we hope that SLP also considers how to continue ratification campaign and how to benefit people from the country that has not ratified OP-ICESCR yet. For this, we can promote domestic application of the CESCR's jurisprudence so as to expand impact of the ICESCR nationally, so that even for those countries who did not ratify the OP-ICESCR can benefit from the adoption of the OP. To make victims utilise this system in countries that has ratified the OP, SLI can focus on raising awareness on the OP-ICESCR. Translating OP-ICESCR into local languages, conducting trainings and providing expertise can be one of the ways to raise awareness on the OP-ICESCR.

Group 3: Start with support for the OP-ICESCR, include the use of the inquiry procedure as well as periodic review as the political/advocacy branches of the litigation strategy, promote the leadership of CESCR of progressive and sophisticated jurisprudence and develop ways to spearhead its use by domestic, regional and international courts. Create a mechanism engaging civil society and social movements to act as accountability mechanism and as a forum of participation in the follow up and implementation of decisions.

Group 1: This is an issue of capacity. We should be flexible. If we want to have an effective OP, we need first because of limited ratifying states, we need to invest in other supportive activities. The main purpose of this initiative should be to prepare case. This doesn't exclude other mechanisms or other legal systems, but this will come naturally, when a request comes for support on case which is before another body. But it would be better to have clear primary aim for the initiative. I have the impression that a lot can already be done by the ADJ WG, but there is little means for the groups to be pro-active. Give more operational means for the groups to function in collaboration. I would like to see the initiative find something is not currently currently working on. Also, given that ESCR-Net has the coordination of the Coalition and the working groups, it makes sense that this moves forward under the aegis of the Network, but be conscious of where we have value-added.

Specific issues to consider:

1.a. Support only litigation under OP or under other regional and domestic legal systems as well?

Group 4: I feel it would be advisable to support litigation under other regional and domestic legal systems in addition to OP as it would expand the reach of the Program to advance the jurisprudence of ESCR in regions that may not have ratified OP-ICESCR but have at their disposal regional and domestic systems that allow for litigation on Economic and Social Rights. Such involvement should however be based on strategic selection of cases that could benefit from the jurisprudence emanating from the OP-ICESCR system. Kenya under its recently promulgated constitution for example has introduced ESCR within the Bill of Rights and has provided mechanisms for public interest litigation on the same; such a program would be highly beneficial and would at the same time provide a much needed link to emerging jurisprudence from the OP-

ICESCR while at the same time through direct involvement in cases, allow for development of domestic jurisprudence that would lay a foundation for enjoyment of these rights going forward.

Group 1: Focus on preparing cases under the OP-ICESCR. This does not exclude looking at other mechanisms, it will come naturally, maybe as a second stage. Take advantage of working groups to exchange information.

Group 7: UN litigation will complement and not supplant appropriate interventions at the domestic and regional level. For us, as with our other thematic work it is not a question of either/or but having identified cases ripe for litigation and then examining the range of options available dependent upon the jurisdiction's domestic legal arrangements – both constitutional and statutory - and international and regional commitments.

Clearly in some cases it may be strategic to take cases directly to the UN level (where domestic remedies are ineffective and/or there are no regional mechanisms) but otherwise we would attempt to exhaust all available remedies. This will not only ensure the greater likelihood of the case being declared admissible but allow appropriate arguments to be made at an early stage which can then be relied on at the supranational level.

Assuming it is widely ratified the OP should over time act to fill the gaps within the regional framework (particularly within Asia Pacific and Europe in the case of individual victims). Furthermore the differences of approach (e.g. the African Charter does not emphasize progressive realisation) may allow a distinct and more progressive jurisprudence to develop under the OP. Clearly, if this the case then more emphasis can be placed on using the OP. However, as with all UN mechanisms the problem of implementation will remain – a factor which will have particular significance when litigating ESR.

1.b. Include the use of the Inquiry Procedure and Periodic Review to complement use of complainants procedure and/or as independent procedures?

Group 4: Include the inquiry procedure and periodic review to complement the complaints procedure and as a way of harnessing the efforts of civil society movements in the field of ESCR. The Endorois case for example benefited and continues to benefit from inquiry procedures and review mechanisms such as: the CESCR; the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples; the African Peer Review Mechanism and; the Universal Periodic Review which have all highlighted the Endorois case and continue to monitor government's implementation of the decision.

Group 5: In our experience, although the use of the communication mechanism is very popular, the increased utilization of the Inquiry Procedure and Periodic Review should be encouraged under the SLP. Beyond the prospects they hold for uncovering and redressing widespread or systemic violations of ESC rights, the inquiry procedure in particular, provides a unique opportunity for grave or systematic violations of the Covenant to be investigated in circumstances where individuals are unable or unwilling to avail themselves of the

communications mechanism under article 2, whether for fear of reprisals, lack of resources or other reasons unrelated to the merits of the communication.

Group 1: Inquiry procedure, yes the SLI should definitely engage. In the UPR, probably not, as it might dilute the focus, but potentially it could be used to reinforce cases in the future. To be effective using the periodic review you need real processes at the national level that can be sustained over time.

Group 7: While we may encourage both local and international partners to utilize both the periodic and inquiry reviews (the former to support implementation and the latter to act as a potential source of litigation), it is unlikely that we would use either independently.

1.c. Promote a leadership role for CESCR 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.

Group 4: The program should seek to synergize the litigation at the OP-ICESCR, regional and domestic systems perhaps through careful selection of cases before the OP-ICESCR that would develop jurisprudence that could easily be utilized to advance ESCR within the regional and domestic systems that are beginning to actively adjudicate on the same.

Group 7: This could be problematic and there will be need to liaise with national and regional systems so that developments at this level are fed into the CESCR system and to ensure legitimacy of CESCR decisions within those systems. There are many criticisms from SA lawyers and academics, for example, about CESCR general comments. It is critical that the CESCR has credibility as an adjudicatory body both in the eyes of states and civil society – something which has not always been the case with other treaty bodies. Ultimately the CESCR must be given the resources to fulfill this role, something for which the ESR net and its members could be advocating for.

1.d. 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.

Group 4: Yes. Through careful selection of cases that examine the responsiveness and effectiveness of domestic remedies, a finding of admissibility before the OP-ICESCR would create a ripple effect of causing the State in question to re-examine the area of concern and introduce a raft of reforms that present effective remedies. In the Endorois case for example, the finding of admissibility and final recommendations of the African Commission on Human and Peoples' Rights has had a significant bearing on the formulation of the National land Policy, the National Action Plan and Policy on Human Rights and various constitutional provisions (on

economic and social rights within the bill of rights, land, culture and affirmative measures for minorities and marginalized groups).

Group 1: This will be a very big challenge. This could be a priority for the initiative, but also might require a separate line of work on this. NGO Coalition cannot handle alone, but could be complimented by the initiative. Could try and facilitate meetings at national level. Need to be concrete and deliberate on this in order for something to happen.

Group 7: This can be a double edged sword because the decision by lawyers to avoid domestic remedies can simply contribute to the lack of trust in the local judiciary and reinforce negative trends in local judicial systems. This should only be considered where a particular state is likely to comply with recommendations and is likely to take a decision that there are no local remedies seriously. There is also a high risk for the victim in advising to go straight to the UN which may backfire (witness CEDAW).

1.e. Contributing to making the procedure more accessible and transparent (tracking complaints, publicize them, etc.)

Group 1 and 4: The SLI should consider developing a law reporter – type publication.

1.f. Facilitating amicus

Group 4: The program should track complaints and where possible, facilitate the preparation of amicus briefs for such complaints and this should extend to domestic and regional cases where requested. This would enable cases to benefit from the comparative strengths of various institutions that would contribute in mounting compelling and persuasive legal arguments.

Group 6: It can be very useful to have international amicus, the SLI could liaise with others or come in itself as an amicus. If one wants to grow the protocol, it would be useful to get groups together to submit an amicus. Structure should be set up to do this. It would be really useful to help gather facts effectively and then share how this case was built with others who also want to litigate – basically build a template for building a case under the OP-ICESCR form evidence gathering to exhaustion to merits and enforcement.

Group 7: We would certainly be interested in looking for opportunities to make 3P interventions both independently and in partnership with others as we have done at Strasbourg – this is definitely something ESCR-Net could coordinate.

1.g. Support for follow-up and implementation of views (to strenghen ability of petitions under OP to bring about real change)

Group 1: This is also a real challenge and we should link with current work of members, particularly social movements. Could link with current ADJ WG Enforcement project. Even under the parallel reporting processes, without coordinated effort there will be little reporting and follow up. Important to raise awareness of decisions. Skeptical of capacity of Committee to

follow up, even if they establish something they may be ineffective. We need to be strong on this on our side. Initiative could issue an annual report on follow up and implementation of views, issues to Committee and OHCHR.

Group 4: The program should be able to provide support for follow-up and implementation of views in various forms such as offering technical assistance to complainants and State parties especially in the case of systemic claims that may involve comprehensive policy or legislative reforms.

Group 7: Implementation of decisions is perhaps the hardest aspect of international litigation and will be even harder in enforcing ESCR decisions. While separate implementation programmes are important they must not take over the emphasis from the actual litigation. Cases often have impact beyond the immediate parties and this aspect should always be recognized (don't necessarily judge the efficacy of litigation on the implementation of individual cases).

1.h. Focus on legal and non legal strategies

Group 4: The program should encompass both legal and non-legal strategies such as the targeted use of media, the utilization of civil society networks and prominent persons to illuminate and advocate around the issue and the utilization of other inquiry and review mechanisms within the regional and United Nations systems.

Group 5: The effectiveness of litigation focused on the OP-ICESCR could be bolstered by having the SLP and the partnering organizations develop media and advocacy strategies around the cases being litigated upon. Another way is to make the actual litigation part of a broader social movement or OP-ICESCR-focused campaign involving the civil society and human rights stakeholders who are prepared to take mass action, by monitoring the legal development in the case, as well mounting pressure on the offending state actors to give full effect to court orders.

Group 7: Social movements are crucial in giving any meaning to ESCR litigation. Experience in South Africa and India is that for really successful cases, litigation can only be one of the tools (In TAC the huge local and international pressure on the SA government may have been more important than the legal decisions in getting the government to change its policy). Experience in Nigeria also demonstrates the importance of advocacy around legal cases. However, experience also demonstrates that this aspect should not be led by lawyers and that links with social movements and pressure groups is key.

1.i. Type of collaboration should the SLP promote with other international and regional NGOs litigating at the international level

Group 4: Where appropriate filing joint complaints, seconding of legal personnel, provision of amicus briefs and other forms technical assistance such as comparative legal research upon request.

Group 7: The SLP should identify the appropriate range of partners – both legal and non legal – to best progress particular issues: i.e. INTERIGHTS focus on health and education, COHRE on housing, the CRR on reproductive rights etc. Any collaboration needs to be task driven and clearly different partners could cooperate on a range of cases depending on what they can bring to the table. Much will depend on the strategic case opportunities identified.

1.j. Provide funding to support cases

Group 4: The request for funding to support cases may be insatiable so the program should consider joint fund-raising strategies as opposed to exclusively funding cases.

Group 6: Be cautious about this. The Net has a great ability to help other groups get funding themselves, but to become a funding entity itself might significantly shift relationships. But becoming a funding entity itself might shift how ESCR-Net functions and in relation to accountability to members, etc. Need to figure out how to shift funding to groups we work with rather than being the gatekeepers to the funding. How can we facilitate cases to move forward but not become a funding organization?

Group 7: National level NGOs may often be crucial in bringing successful international cases on ESCR (including sourcing victims and gathering evidence) but often lack the funding and therefore this should be a priority. Query whether you fund lawyers directly.

1.k. Supporting the institutional capacity of committee and other related institutions

Group 7: The Committee will be asked to take on a role it is not necessarily designed for. Progressive (and not so progressive) jurisprudence from South Africa, India and Latin America has been designed by Judges with the experience of writing judgments and establishing the law from legislation, precedent etc. Some members of the Committee will not have this skill and will need assistance in the early stages to ensure they are able to exercise their mandate. ESR net could have role in bringing national and international jurists together to share experiences with Committee

1.l. Raise awareness of OP

Group 4: The program could develop IEC materials explaining the mandate and procedures of the OP and engage in training of civil society actors and lawyers interested in strategic litigation. A case journal keeping interested persons apprised of the jurisprudence emanating from the OP-ICESCR.

Group 1: This is something which needs to be discussed with OP Coalition, who could take what role.

Group 7: This is critical especially at a time when there is a perceived lack of confidence in and/or awareness of UN mechanisms especially in the South. However, we must be careful not to raise unrealistic expectations whilst also providing support enabling people on the ground to access it.

1.m. Encourage quality academic commentary linked to cases

Group 4: The program could develop links with reputable law schools through offering fellowships and volunteer positions for their law students in addition to seeking expert opinions from professors or scholars with an extensive track record in researching and commentating on ESCR.

Group 5: One of the goals of the OP-ICESCR is to strengthen the protection and promotion of ESC rights at the domestic level. A situation whereby the SLP is able to play a direct active role in the development and promotion of the international ESC rights jurisprudence will not only enhance the thematic competence and popularity of specific ESCR concerns, but essentially, facilitate the monitoring of the recommendations of the conventional bodies at the national levels. Some of the several ways to achieve this are by working together with domestic groups to bring legal action before domestic tribunals; providing funding to support ongoing or new cases entirely; amicus briefs; supporting the institutional capacity of committee and other related institutions; assistance of pro bono counsel; intensifying awareness-creation of the OP-ICESCR; and including the facilitation of the litigants/civil society follow-up and monitoring of state implementation of the decision of a court or other decision-making body.

Group 5: Some critical questions that workshop participants may delve deeper into when considering the objective of promoting domestic application of the CESCR's jurisprudence nationally are: What domestic courts, if any, have relied on the ICESCR, particularly the general comments for persuasive jurisprudential guidance? Which courts have been the most influential? To what extent should we be focusing on the decisions of domestic courts to plug the jurisprudentual gaps in procedural issues that other international courts have not addressed?

Group 7: There is likely to be keen academic interest in decisions of the CESCR anyway, but the SLP can play a role in contributing to the interpretation and significance of decisions – the case database is a good format which can be further developed.

1.n. Promote domestic application of the CESCR's jurisprudence, particularly by courts, so as to expand impact of the ICESCR nationally.

Group 7: Certainly where it is more progressive but cant assume that all CESCR jurisprudence will be better than national caselaw. Hence the need for expert analysis as per 1.l

II. In terms of supporting litigation specifically, what do you feel could be the most effective structure for a Strategic Litigation Initiative focused on the OP-ICESCR?

Group 2: We believe that a SLP should focus on linking groups in need of support with those who have the interest and capacity to provide it. We believe that national NGOs or victims should be the main actors of using OP-ICESCR and outside NGOs or networks can provide supports to their activities. Bearing this in mind, we think that SLP can provide direct technical and legal supports to national NGOs, identify national lawyers who can provide services to victims, give training to national organisations and NGOs on how to use OP-ICESCR and provide modules for training.

Group 4: A collaborative component where the program partners with local groups to advance litigation before the OP. This would entail the provision of financial and human resources in additional to technical support such as the formulation of legal arguments and collection of evidence. This collaborative component would be based on identified criteria for selection of cases and a memorandum of understanding that clearly defines the role of each party. A component supportive of domestic and regional cases on ESCR through offering of technical support such as legal research and amicus briefs. Partial funding may also be offered based on the broader impact of the case in advancing the overall jurisprudence on ESCR. A funding component where the program would receive application from various groups to advance litigation around ESCR. Such funding would be hinged on identified criteria for selection of cases and upon a successful application, a memorandum of understanding that identifies the responsibilities and targets to be met by the fund recipient.

Group 6: Consider integrating the use of budget analysis as this could be beneficial for groups litigating in states which are not a party to the OP-ICESCR.

Group 7: Different regions have different needs and all of the proposed ideas have merit. Above all any structure should be based on the principles of inclusiveness, mutual accountability, transparency and empowerment. The SLP must have adequate representation from all the major regions where it plans to operate and have a mix of international, regional and national members.

- 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?

Group 5: Yes. Once it is sufficiently certain that some case(s) jointly identified by SLP and the domestic group are clearly capable of adjudication, it is important to have an SLP lawyer provide technical assistance with the investigation, drafting and even participating in the actual litigation of the cases(s) by researching and providing information, through an amicus brief or other means that it agrees to, on international and transnational human rights standards relating to the specific social and economic rights violations.

Group 7: Amicus curiae have been successful in Europe – partly because of the rules of the court and partly because of an existing litigation culture in most of the countries in the region. In Africa more hands on intervention is needed because there is not as strong a litigation culture

and because the human rights sector is not as strong. There will therefore need to be flexibility to meet both the needs of the forum and of the local litigators.

In some cases it will be necessary for lawyers to work directly with local lawyers and NGOs in the development of cases. This will be particularly the case where there has been little or no experience of domestic litigation on ESR which applies to many African, Middle Eastern and Asian jurisdictions. In others where there is more experience of litigating ESR, financial assistance and more limited technical input may be sufficient to enable a good case to be brought (eg India, S Africa, Latin America). Where cases have been brought without assistance from the SLP and there may well be need for amicus briefs to ensure that appropriate arguments are sufficiently explored.

- Should there be criteria for funding cases, such as a requirement that the SLI vet and approve arguments to be advanced?

Group 5: I consider it very important to have well established criteria for determining cases supported by the SLP. Vetting and approving arguments are useful strategies. Beyond that, it is also very important to provide a framework and basis for the relations between SLP and the domestic agency.

Group 7: Where the SLP funds cases but is not a representative it will be difficult to claim a right to vet submissions and this could be counterproductive over the long run as it is likely to antagonize local lawyers. Where the SLP is funding but not co-representing emphasis would be on financial accounting, priorities etc. and it would not be advisable to get too involved in the content of briefs. However, I would recommend more emphasis on co-representation and an agreement between parties on how briefs are finalized and signed off rather than a simple funding arrangement.

If and where the SLP work on a case (as a representative) there will have to be an agreement on how the briefs are signed off and who decides the final content of the brief as failure to agree to a structure will simply lead to antagonism. Where the SLP provides advice to local layers the final decision on briefs will be with the local lawyers. Care must always be taken that litigation is conducted in accordance with the instructions of clients where applicable.

Group 6: Claimant /lawyers is bringing forward a case which is not framed in the best way. Through funding, can insist that they frame the arguments in the most progressive way possible. Joe Slovo, amicus raised issues around location that extended beyond the needs of the client community. Community can demand same location and amicus can come in and claim more general standard on location. Client adds to factors considered, which lawyers need to be responsive to.

- What is an appropriate level of oversight for the SLI to have if providing funding to a case?

Group 5: The SLP may in advance (prior to fund disbursement) possibly set timelines within it would review the workings of the domestic group, and, if necessary, to revise them in accordance

with its experience. However, special care should be taken that it not be used to reduce their (domestic group's) margin of maneuver. Both parties should hold periodic meetings at an agreed interval to discuss updates and address developments that are necessary to advance the litigation process. The way or any other agreed method the periodic meetings will be held should be determined in advance (should it be via teleconference, physical meetings etc). Special meetings can also be held at any other time to address urgent developments. It is also important to for the framework (referenced in the section for funding cases above) to clearly spell out how to collectively reach key decisions, particularly where one party's decision is likely to have a significant impact on the duties and responsibilities of the others, provided that each party may make independent decisions to fulfill their specific roles and duties.

- Should the funding arm of the program be separate from the litigation arm?

Group 1: Not sure about the implication of such a proposal, to which extent the initiative should have two separate arms because funding could be one of the support that the initiative provides. Capacity and resources need to be considered, have litigation pots. Most natural role for this initiative, is this the priority? At the beginning all the resources might not be there, so we need to rely on what members are already doing, current capacity, etc. should be first priority. Once the OP is in force, the funding aspect will then become very important as well. Exchanging timely information on cases, soliciting experience for help is so critical and has already been really important. Criteria for funding: could be discussed more in workshop, which type of cases, etc.

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

Group 6: The different contexts in which ESCR are being litigated are critical in how to define the strategy. Where is the law currently and where do you want to take. Do have all the facts available? Getting them right and getting them on paper. Really important that you can present a court with as many informed expert facts as possible and it allows the law to function most effectively. Also, draw on SA as amicus on reasonableness arguments to help buttress that the CESCR should be considering issues in this way.

Group 2: Since it is still at the beginning stage of OP-ICESCR, we believe that it is important to set good precedent cases on key issues and by doing that, increase diversity of issues that we are going to cover. In terms of Asia, right to housing or water case can be the good cases to start with. Since only Mongolia ratified the OP-ICESCR among Asian countries, we can identify ESCR cases from Mongolia that can be used as a precedent in other countries. Also, the case should raise systematic and serious ESCR violation to be a precedent of many other ESCR cases. In addition to this, we expect that the SLP should be in support of social movements.

- Possible criteria for case selection

Group 6: Criteria on which lawyers consider cases at our organization to this point has been ad hoc, but there is a variety of criteria, but a lot is resource based. The budget plays large part in how we decide the case and how it will be litigated. Need of the case, need of client, impact of the case – broad impact on class or group and actually change the law. Skill in the organization to take on the case and the cost of the case. Choose cases where the facts of the cases can be clearly established. Make sure you are clear in whose best interests are you really acting - are you really serving particular self-interests rather than systemic/community needs?

Group 7: All of these issues will be important but you cannot have selection criteria cast in stone and each case will need to be considered on its merits – no case will tick all the boxes and in some cases different criteria will carry different weight. In some cases having good quality advocacy and representation will mean that there is no need for assistance and cases where the communities/victims are badly represented will need more assistance. Interest in collaboration will be crucial (although it is not really a selection criteria) as you don't want to force your assistance on anyone. With respect to the initial cases the likelihood of implementation of the decision is particularly important as a number of decisions implemented by the countries concerned will give the CESCR a good reputation.

Group 3: Criteria should address the complete array of issues proposed: novelty of issue (we would suggest to start with cases that deal with the right to health, which might be easier to address at the initial stages of the OP than for example right education or right to housing), cross country issues (look for violations affecting different parts of the world and issues in which relatively all agree on the atrocity of the violation (i.e. maternal mortality). Such criteria will make the case an easy case with less political cost to assume and therefore better chance of implementation), quality of the advocacy and representation, likelihood of enforcement of the decision, likelihood of success, intersection with other claims. But at this phase it could be convenient to address:

- Strategic importance for jurisprudence: At this stage it might be strategic to develop admissibility standards that face the challenge of the dichotomy regimes when at national level ESC rights are not justiciable and at the international they are. Right to health cases could be the best way to address the issue at a starting point given its interdependence with right to life and dignity.

- Systemic vs. individual: Bear in mind the risk of addressing systemic violations at the beginning of the OP-ICESCR. With no jurisprudence developed is very difficult to know how a case will turn out and what kind of standards will be set. To test the OP with systemic problems can be a double-edged sword. First, States might be hesitant to ratify if the issues taken up are, as systemic, of major importance for the country and deal with complicated policy and budget considerations. (i.e. a case addressing IDP situation in Colombia that burdens more than 3 million people might be tempting, but it might raise a red flag for other states and for the case itself as there is no way of knowing what will happen). It would be a good call to perhaps start with important but lower profile cases.

- novelty of legal issues:

Group 4: The program should turn its attention to precedent-setting cases that would advance an elaboration of ESCR within various legal systems.

Group 7: This will always be an important consideration but often strategic cases in the early life of a mechanism will be "easy" cases where the legal issues may be relatively straight forward and therefore the legal liability of the state easier to demonstrate.

- connection to social movements;

Group 4: By identifying cases linked to social movements, the program will be able to utilize such movements to advance non-legal strategies that would complement the legal strategy in addition to providing impetus for the implementation of issued remedies. The social movements should however be complementary to the main legal strategy as opposed to being the focal point of the program.

Group 7: This will make cases easier to develop and hopefully to enforce. Unlike civil and political rights cases (which can often stem from the violation of one individual's rights) ESCR cases will usually need to affect a large sector of society and will need to have a large level of support among the population to be successfully argued and implemented. Role of public support in TAC case – failure to get public support for Basarw/San case in Botswana.

- intersection with claims of women, disability, indigenous groups, etc;

Group 7: These may often be among the "easier" cases to argue as non-discrimination and equality law is more entrenched than ESCR law. At the same time these cases often impact on a large number of people as discrimination is usually an endemic problem. For these reasons these cases are often a good entry point. The problem is that the ESCR aspect of a case may easily be lost to the "stronger" discrimination/equality issues.

- whether the case raises systemic and serious ESCR violations;

Group 4: This will enable the program to pursue cases whose impact will be far reaching and beneficial to the overall jurisprudence on ESCR.

- whether the author or groups involved are interested in collaborative work or in need of assistance.

Group 4: This will enable the program to maximize its impact by tailoring specific interventions in accordance with the assistance sought.

- Type of arguments

Group 3: The distinctive nature of the OP-ICESCR should be underscored. Such difference is an open door that can provide different opportunities that are not present in the other TMBs. Such opportunities should be used. At this stage the stage for progressive jurisprudence should be set by addressing admissibility standards and taking right to health cases as the starting point. Right

to health cases are an "easy" start as justiciability of ESC rights has had en evident starting point with such cases and its interdependence to right to life and dignity. Caution at the start to provide a solid base for coming systemic and groundbreaking cases should be emphasized. Such approach can lead to broader ratification. At this stage, individual entitlements seem to be a better path to follow while the systemic ones (again, at this stage) could be addressed through the inquiry procedure.

Group 7: I don't think we should be engaged in an 'either/or' debate but look for opportunities as they arise. However, clearly progressive realization will be a long haul and care will need to be taken with these types of cases to the Committee to ensure that they do not adopt an overly cautious approach.

- Engaging sub-national levels of government

Group 7: Critical to engage sub national level but query how much impact a UN decision will have given that regional cases (eg Social Charter) often seem to have little traction.

- International Co-operation and Extra-territorial Obligations

Group 7: Think international cooperation and ETO should be part of longer term strategy as both need more intellectual input from our side and for Committee to be comfortable with issues otherwise we risk a negative result.

Group 1: Engaging on ETO's is a critical issue.

- Relationship with affected communities and other allies

Group 3: The SLP should be a link not only between litigators/petitioners and the committee, but also between litigators and social movements, it should be an open forum that serves as a tool to push for cutting edge jurisprudence. The SLP could also focus on the effectiveness of the implementation of the decisions, and the community that should benefit from its impact -- as well as bridge the divide between the legal community and the victims. A monitoring body that links the social movement in the surveillance of implementation could be a good way of creating such a bridge.

Group 1: Be conscious of using this project to bring about broad based change on real issues rather than used to enforce individual, very particular issues (such as right to health cases in Brazil). This connection will help us ensure that we are addressing real issues. But where groups are not able to find direct legal support at national level, they should be able to come directly to initiative.

Group 7: For lawyers this can be the hardest part of a case, as well as one of the most important. Different roles and goals need to be understood and clarified. The ESCR-net needs to assess whether it has the right membership mix re these broader movements (including equality)

and how to reach out to them through the SLP. ESR net members will also benefit from greater input from national social movements both in terms of substance and process.

- Opportunity to intervene and type of intervention

Group 3: While it is indeed a lot of work to start interventions at such early state of the process, such efforts will prove to be successful when addressing admissibility issues and in developing the standards for the OP.

Group 1: It will depend on would be engaged in the case at the early stage, if it's a member of ESCR-Net who can draw on capacity of initiative at a later stage it could be fine. Early intervention could help ensure the HR framework is used and arguments are strong.

Group 7: Early intervention (at national level litigation and even at social "mobilization" stage) would be ideal as these discussions can both determine individual lawyers' understanding of cases but also determine how communities/social movements see the development of cases. This may not often be possible and where good cases have been developed at the national level forum specific expertise at the CESCR will always be welcome. Clearly we hope that the strategy will be inclusive and accountable re national partners – it is critical that a few international NGOs are not seen to hijack/dominate the early years of OP litigation whilst also providing leadership and support.

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?

Group 2: We believe that developing mechanisms for ongoing monitoring and reporting on implementation of views to as to enhance remedial impact can be an important role of SLP on the OP-ICESCR. Also, it is important for us to establish widening admissibility criteria so that more victims on ESCR can benefit from this mechanism.

Group 3: Admissibility and implementation are the two key issues that the OP-ICESCR should focus on. Admissibility issues are linked to the moment of intervention at the domestic level case. Such work can always be carried in partnership with local organizations and training should be involved. The key to success of the OP is not only good jurisprudence that generates respect for the mechanism, but also its implementation. Efforts should be focused towards accountability mechanisms for the implementation of the views. This kind of work involves, among other things, advocacy efforts to generate the political will to comply with views.

- Exhaustion of Domestic Remedies

Group 7: Our experience both in Europe and at the African Commission has been that exhaustion of domestic remedies has been critical – with the number of cases before the ECtHR it continues to adopt a rigorous scrutiny of non exhaustion whilst the Commission has been reluctant to simply write off a country's national legal system. Arguably there could be many

cases where there simply will not be available local remedies because the rights are not constitutionally protected (or even protected in legislation), but I suspect the CESCR will be wary of simply waiving the requirement in all cases. This issue could be the subject of a ESR net seminar to share experiences to date of different supranational mechanisms to ensure that any decision to proceed straight to the Committee is sound.

Group 4: Demonstrating the exhaustion of domestic remedies is not always apparent or straight-forward. The program should invest heavily in analyzing the availability, effectiveness and sufficiency of domestic remedies in relation to the cases they undertake in order to formulate the appropriate legal argument for admissibility.

Group 5: On account of the stringent admissibility and the exhaustion requirements under the OP-ICESCR, it has become necessary to contribute to, or support the development of a solid jurisprudence around these three procedures for the benefit of prospective litigants. In this regard, the provisions of many regional and international instruments as well as the decisions of regional courts and treaty monitoring bodies provide useful insights, for instance, Article 5 of the Optional Protocol (ICCPR). In many contexts where local remedies for ESCR violations (particularly housing rights) are usually ineffective or unreasonably delayed, the jurisprudence of the Human Rights Committee can help substantiate the claim that the local remedies rule should not preclude admissibility of the valid complaints/actions brought under the OP-ICESCR because local remedies have not been exhausted. The HRC has considered time frames of less than ten years to be "unreasonably prolonged" so as to allow the HRC to review the merits of a complaint, notwithstanding exhaustion.

Group 5: Issues of locus and the instruments relied upon clearly influence choice of forum for litigating ESCR questions. In some jurisdictions like Nigeria where there are constitutional mechanisms such as the 'Fundamental Human Rights Enforcement Procedure Rules' that allows a broad range of litigants to bring actions in relation to real or threatened violations of constitutional rights, the civil litigation rules require that the person(s) bringing the case (or on whose behalf the case is being brought) is/are directly affected by the state conduct complained of. However, in other jurisdictions such as Ireland, it is possible for a person or body to advance legal arguments on behalf of a third party, even where the rights of those advancing the arguments are themselves neither infringed nor threatened by the impugned conduct. For this argument to be sustained under the OP-ICESCR, robust legal research and advocacy is required to see what legal strategies have been deployed in different legal contests to overcome this hurdle, and what remedies have been awarded, and whether those remedies are capable of providing appropriate relief.

Group 5: Comparative law research should be undertaken into international human rights bodies and some domestic courts that would be targeted under the Strategic Litigation Initiative focused on the OP-ICESCR. At the workshop, participants (who support this idea) may consider which regional, international human rights bodies and national courts are most influential on the application and enforcement of social and economic rights provisions. My first guess is South Africa, because of the fact that its Constitution is so influenced by international human rights and the depth of its Constitutional interpretation, but this is just a guess.

- Burden of Proof and Availability of Evidence

Group 4: The program could invest in collaborative approaches to gathering of evidence such as reliance on the documentation of civil society organizations or collaborations with institutions that would be able to conduct field visits. Alternative forms of evidence such as videos (which was highly effective in the Endorois case for example) should also be considered.

- Amicus Curiae

Group 4: As previously discussed, the program should undertake to provide amicus briefs when requested as a way of enhancing legal arguments advanced in respect of ESCR. It should also actively seek to establish networks with institutions that could readily prepare amicus briefs in respect of cases it advances before the OP-ICESCR.

- Interim Measures

Group 7: Interim measures can have an important impact in cases such as forced evictions (if complied with by the government), but may be more tricky to conceptualise outside the negative obligations paradigm.