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REPORT

Strategic Litigation: Challenges and Opportunities (Day 1)

The workshop commenced with a welcome from *Jackie Dugard* (Socio-Economic Rights Institute of South Africa - SERI) to all participants, which included members of various NGOs throughout Africa, academics, and government and UN officials.

A short background to the event was presented by *Rebecca Brown* of the International Network for Economic, Social and Cultural Rights (ESCR-Net). The initiative was first envisioned by members of ESCR-Net's Working Group on Adjudication at the ESCR-Net 2008 General Assembly and International Strategy Meeting in Nairobi. The Working Group selected the issues of implementation of judgments and the need for strategic litigation related to the Optional Protocol on International Covenant on Economics, Social and Cultural Rights (OP-ICESCR) as core strategic areas of work for the next phase of activity.

The last few years have subsequently witnessed a range of activities including the establishment of a transnational Strategic Litigation Initiative and a global sharing and learning exercise on enforcement of judgments: which commenced with a conference in Bogota. The Working Group is also supporting organizations and advocates to identify cases which

can substantively influence the development of jurisprudence under the OP-ICESCR.

Brown outlined the objectives of this workshop:

- Supporting the development of economic and social rights cases for strategic litigation and effective enforcement;
- Examining key economic, social and cultural (ESC) rights decisions from the region that have not been implemented and identify cases which could be supported through regional and international advocacy and campaigning;
- Building regional support and strategizing for OP-ICESCR ratification; and
- Supporting regional and international solidarity and networking.

Malcolm Langford (Co-coordinator of the ESCR-Net Adjudication Group and Norwegian Center for Human Rights - NCHR) provided a quantitative overview of constitutional developments related to ESC rights justiciability and the gradual rise in African jurisprudence. He noted that strategic litigation faced many challenges in Africa, including conservative judiciaries, interference from politicians and poor legal representation. But Langford finished by pointing to changes in a number of countries, which demonstrated that often rapid transformations can make strategic litigation feasible. He also posed three questions for discussion on the first day:

- What strategies helped to ensure that the legal objective of litigation was achieved?
- What lessons have been learned in confronting different obstacles and challenges in litigation?
- Why have some ESC rights or aspects of them been more litigated than others?

The first day began with national experiences from a range of countries to see if it was possible to identify common issues, themes, obstacles and strategies.



Susie Talbot (Interights), Reinford Mwangonde (Citizens for Justice), Rebecca Brown (ESCR-Net), and Anita Kiddu (Center for Batwa Minorities)

Housing Rights – National Experiences

Kenya and Housing Rights

According to *Odindo Opiata* (Hakijamii) the emphasis on housing rights in Kenya was no accident. The nature of urban development in Kenya led to the rapid development of informal settlements with unacceptable conditions of living. But the first legal response to such conditions was not based on human rights but rather on traditional common law rules, such as the doctrine of adverse possession (the acquisition of title to land by taking possession of the land for a certain period). In the *Toi Market case*, for instance, where local vendors attempted to secure an injunction against a threatened eviction from the market, the petitioners still struggled with questions of standing and eventually lost in the courts.

However, the *Toi Market case* itself had an important impact on the impending eviction, which was achieved by mobilizing the community, approaching local politicians and the media, attending court proceedings en masse, and creating a committee to

decide on land allocation. In 2006 the government enacted eviction and settlement laws. Moreover, in revised Kenyan Constitution of 2010 the Bill of Rights recognized housing rights, which provides more opportunities for accountability. He concluded by saying that successful litigation on housing rights in Kenya has been the result of a long process and the adoption of different strategies, dependent on the context in each case. The next step is now to take a more comprehensive approach on the right to housing, ensuring that the judiciary and the government know how to apply ESC rights through education and awareness-raising in these bodies.

South African Housing Rights Jurisprudence: The State of Play

Stuart Wilson (SERI) analyzed the groundbreaking jurisprudence on housing rights in South Africa that has been established over the past decade. With regard to the principles established, Wilson cited improvements on alternative accommodation in public and private eviction cases, the requirement of “meaningful engagement” with communities under threat of eviction, and the requirement that only a judge may authorize a foreclosure against a person's home and only if the foreclosure is “justifiable,” taking into account all the relevant circumstances. Wilson also stressed the following principles which should be adopted in the future by courts: (1) a principle of “good faith” in the enforcement of residential leases, and a principle barring termination or a residential lease when it would lead to “undue hardship”; (2) a principle of in situ upgrading (rather than relocation) in case of informal settlements (including a principle placing positive obligations on the state to provide interim access to water and sanitation pending an upgrade); and (3) a principle to guarantee community mobilization free of threats and violence. Finally, Wilson underlined two major threats: violence and lack of awareness about rights. The state has, therefore, the positive obligation to protect community activists and to raise awareness with regard to rights.



*Odindo Opiata (Hakijamii) and
Bruce Porter (Social Rights Advocacy Centre)*

Discussion

Bruce Porter (Social Rights Advocacy Centre) chaired a plenary discussion on housing rights. The issue of balancing rights and interests was brought to light, for example in situations where governments evict persons from land in the name of ‘public interest.’ This begged the question as to whether the ‘public interest’ should be defined as the interests of the marginalized who occupy the land or the general public as a whole. The Panel emphasized the need to balance rights rather than effect a complete prioritization of one group’s rights over the other. Here, for example, the right to property can be enforced without leading to homelessness through remedies such as a temporary right to remain and obligations to develop housing programmes for occupiers. Such remedies are implemented in order to protect the rights of the most disadvantaged.

The urban and rural divide in the context of litigation was also highlighted, with the urban areas being viewed at an advantage both in terms of jurisdiction and the ability to socially mobilize. In Mauritania, the most acute issues related to the right to housing and to land are raised in rural areas on the border with Senegal (Daouda Starr, Mauritania). How then do we deal with this gap between urban and rural areas?

Some questions were also raised about positive and negative obligations regarding the right to housing since it was regularly blurred in South Africa. The Panel responded by cautioning against the distinction between positive and negative obligations, as they are intertwined and inseparable in many cases. The need

for eviction guidelines was highlighted by Gertrude Angote (Kituo, Kenya) as a way of providing more substance to constitutional rights, noting that even judges in Kenya had recommended their development by the State.

Health and Education Rights

Maternal Health Rights in Uganda

Christopher Mbazira (Makerere University) discussed maternal health cases in Uganda. He explained that maternal mortality is still a central problem in the country, because there is a serious lack of medical facilities, among other factors. Mbazira told the story of two mothers who did not receive proper health care in hospitals in Uganda. Both mothers passed away due to lack of basic maternal health commodities and inadequate human resources in the district hospital of Mityana and in a regional referral hospital in Arua. A few challenges were raised by Mbazira. First, the Ugandan government has portrayed the issue not as a right but as a “political question,” not to be decided by the courts. To overcome the Government’s approach, Mbazira suggests the use of the media before and during litigation. This is largely within the reality that lawyers must lead cases and campaigns with very little resources; and often have to deal with overcrowded, corrupt courts. New opportunities for strategic litigation in Uganda have been created with the adoption of more flexible rules of standing and the possibility of shifting the burden of proof. Other opportunities, however, will be created if the case is brought to the courts at the right moment.

Incarceration as Death Sentence: Treatment in Police Custody and Prison

Tafadzwa Christmas (Zimbabwe Human Rights NGO Forum) focused on prisoners’ right to health in Zimbabwe. He discussed the cases, *Nancy Kachingwe, Wellington Chibebhe & Others v. Minister of Home Affairs* and *Blanchard & Ors. v. Minister of Justice*, which involved overall prison conditions (including lack of access to food and water) but also denial of access to ARV medication, leading to physical and mental suffering and harm. The complaints were brought on the basis of the right to life (the right to health is not recognized in

Zimbabwean laws). Christmas highlighted that the main challenge continues to be the conservative government. One strategy used to assure rights' protection in such circumstances involves the avoidance of excessive confrontation and the development of projects with NGOs working closer with the government whenever needed, such as NGOs focused on the right to health. However, there may be important opportunities for ESCR litigation in Zimbabwe, as a new constitution is being drafted that may recognize ESCR.



Christopher Mbazira (Makerere University), Tafadzwa Christmas(NGO Forum) and Adetokunbo Mumuni (SERAP)

Education Infrastructure

Analyzing the successful South Africa case of 'Mud Schools' and the resulting 8.5 billion-rand State commitment to invest in educational infrastructure, *Janet Love* (Legal Resources Centre - LRC) argued that these gains, achieved in an out of court settlement, need to be monitored so that the success is not limited to the Eastern Cape province or the particular schools that the LRC represented. The Mud Schools case involved seven schools which had severe infrastructural deficiencies. This included inadequate water and sanitation facilities, which meant pupils had to use open fields creating a safety hazard for students, particularly girls.

Besides the case's impact on infrastructure-related improvements, the case also led to important lessons on strategic litigation, involving the value of combining a court order with negotiation strategies, community engagement, media activities and individual community clients. Love pointed out though that the gains made with regard to the

development of educational infrastructure represent only one component of the necessary educational reforms.

In addition to infrastructural reforms, Love highlighted the need to initiate management reforms that could strengthen the quality of education. She stressed the relevance of changing procedures involving the performance of teachers without which there will be no improvement in quality in education.



Janet Love (LRC) and Christopher Mbazira (Makerere University)

Education for Girls Who Fall Pregnant



Fausta Musokwa (HakiElimu) highlighted the issue of education for pregnant girls who continue to be expelled from schools in Tanzania. There is no policy that clearly states that they have a right to education. HakiElimu is currently working with Interights, National Organization for Legal Assistance (NOLA)

and the Legal and Human Rights Centre on a litigation case to address the issue that still impacts nearly ten thousand girls every year, especially in public schools in rural communities.

The main challenges in this area are the lack of justiciability of the right to education under the Tanzanian Constitution and the fact that ESC rights in general are a new area for Tanzanian NGOs. Also, litigators in the country must regularly contend with a lack of independence in the judiciary.

According to Musokwa, there are some opportunities, though. The first is the current process of constitutional reform, which presents the possibility of having ESC rights recognized. The second is that several prominent political figures in Tanzania have spoken up recently about the importance of guaranteeing the right to education for schoolgirls who fall pregnant. Moreover, the mere instigation of litigation will likely provide an opportunity for political campaigning and awareness raising on the theme.

Discussion

Adetokunbo Mumuni (SERAP, Nigeria) led the discussion on health and education rights litigation. This included a debate regarding the number of defendants to target in strategic litigation: A higher number of defendants might bring opportunities for accountability (*Ibezin-Ohaeri*, SERAC) but it might considerably increase the costs of litigation (Mbazira). Mbazira also indicated the usefulness of law students as resources for cases; and they have just started a clinic at Makerere University with that idea in mind.

Private Actors

Women's Access to Resources

The session began with an overview of strategic litigation by women in South Africa to access resources through succession (inheritance) and maintenance (alimony). *Shereen Mills* (Women's Legal Centre, WLC) discussed a wide range of cases regarding women's access to land and resources through marriage and inheritance, tackling women's relational role in society (as daughters, mothers, wives). She mentioned cases such as *Bhe*, *Gumede*, *Rylands*, *Khan*, and *Cassim* on challenges to property and family laws that favored males in detriment of children and women.

Multinational Accountability in Malawi



Reinford Mwangonde (Citizens for Justice - CFJ) raised the issue of how mining companies have given preference to countries in Africa with more “flexible” regulations (such as Malawi,

Zambia and Tanzania). He reported on the Australian uranium mining company, Paladin Energy Ltd, operating in Kayelekera, in the Northern district of Karonga, Malawi. The Company promised to not only raise Malawi's GDP but improve conditions of living for local communities, including access to clean and safe water, new schools and new jobs. These outcomes, however, remain a distant dream for the community surrounded by the uranium mining project. Moreover, the Gondwe family, a clan of about 57 people, was displaced from an arable location to an area far in the mountains.

A suit taken to the courts based on the right to water, the right to life and the right to environment proved unsuccessful due to the Company's exertion of pressure over the Malawian government and NGOs involved in the case. A subsequent attempt to take the case under the OECD contact point system failed on grounds of “insufficient evidence”. High costs of litigation, lack of knowledge among private lawyers and judicial officers with regard to ESCR, absence of domesticated international treaties, absence of a legal framework on mining, exemptions to human rights clauses, and absence of organized labor were additional challenges faced by litigators in this case.

CFJ, Friends of the Earth Malawi and other NGOs are considering the possibility of partnering with the Institute for Human Rights and Development in Africa (IHRD) to take the case to the African Court of Justice. They are also considering other strategies such as naming and shaming, applying pressure for respect of home countries' stock exchange guidelines, litigation under the Alien Torts Claims Act, and fostering further engagement of the community. Possible allies include private lawyers, judicial officers, and select n government departments which view the industry as polluters.

Mining Cases in Ghana

Augustine Niber (Centre for Public Interest Law, CEPIL) began by highlighting that the mining sector in Ghana is governed by the Constitution and the Mining Act. Protections under the legislation vary according to the type of land. In addition, the legislation requires payment of compensation by the mining companies to persons affected by mining activities. The impact of mining concessions on the

community is vast, covering issues of health, water, crops, education (physical destruction of schools) and environment. Cases related to compensation for loss of crops have been successful, but not cases related to pollution of water. The main challenges are delays in

A Regional Perspective on Strategic Litigation (Day 1)

The African Commission

Frans Viljoen (University of Pretoria) focused primarily on litigation at the continental rather than sub-regional level. Addressing the African Commission on Human and Peoples' Rights (ACHPR), Viljoen mentioned three main challenges: the obligation to fulfill, compliance with admissibility requirements and enforcement. As to the first two issues, Viljoen stressed that only four cases on ESCR (out of some 300) had successfully considered the States' obligation to fulfill: *SERAC, Gambia, Endorois* and *Darfur*. With respect to the issue of enforcement, Viljoen highlighted how their research had shown social mobilization was critical for effective enforcement of regional decisions. He also highlighted three other factors that usually influence enforcement: political environment, level of expertise on ESC rights and types of remedies ordered by the Commission or the Court.



Benyam Mezmur (The African Union's Committee of Experts on the Rights and Welfare of the Child), Adetokunbo Mumuni (SERAP), Nicole Fritz (SALC), and Frans Viljoen

the process caused by mining companies in order to fatigue plaintiffs and the lack of receptiveness to human rights. Some cases lost in the courts have had positive a impact on the public opinion nonetheless.

Viljoen also underlined some additional challenges regarding strategic litigation in the African system: lack of resources, the system's hybrid structure and indirect access to the African Court. As to the first challenge, Viljoen explained that the African Court of Justice (yet to be created as a venue for inter-state conflict resolution) and the ACHPR are formed under a single institution. Creation of a third chamber on individual criminal responsibility (alternate to the ICC) is now being discussed. It is yet to be seen how effective this hybrid tribunal will be in the protection of rights. Finally, Viljoen stressed that the African Charter explicitly recognizes ESC rights, in particular the right to health and to education.

Children's Rights

Benyam Mezmur (AU Commission's African Committee of Experts on the Rights and Welfare of the Child) noted that his committee provides another opportunity for ESC rights protection. It comprises eleven experts who base their work on the African Charter on the Rights and Welfare of the Child. The Child Charter encompasses rights not recognized by the African Charter on Human and People's Rights, such as the rights of girls, child soldiers and health care. The Committee lays focus on States' positive obligations.

By March 2012, the Committee had received only two cases, one of which was still pending. The concluded case involved the rights to health and education of Nubian children in Kenya, but focused mainly on non-discrimination. Although a Committee member was designated to monitor compliance, the Kenyan government has failed to report on the implementation of the order. According to Mezmur, there may be a possibility to send the decision to the African Court.

Besides enforcement, the main challenge faced by this system is the fact that the Committee is not yet well known. Finally, Mezmur argued National

Human Rights Institutions can be a strategic partner in following-up on issues of enforcement, stating some do assume a considerable degree of independence.

Right to Education and the ECOWAS Court

Adetokunbo Mumuni (Socio-Economic Rights Institute of South Africa, SERAP) highlighted the non-justiciability of ESC rights in Nigeria as a major challenge to their protection. To overcome this initial barrier, remedy was sought at the sub-regional level in the ECOWAS case, regarding the embezzlement of education funds. Despite a positive outcome in the ECOWAS case, enforcement continues to be a major challenge. Currently SERAP is working with ICJ to convince national authorities to move forward with enforcement strategies. SERAP is also exploring the possibility of developing media strategies to increase public pressure for implementation.

Discussion

Nicole Fritz, Southern African Litigation Centre - SALC (South Africa), led the discussion on the regional system. Wrzoncki raised the question as to why ECOWAS was chosen as the jurisdiction for the SERAP case. Mumuni responded that ECOWAS was chosen for at least three reasons: One was the time factor. It is much quicker to get a judgment or ruling at the ECOWAS court than it is at the national courts. Another factor is the human rights perspective. The ECOWAS Court may be more prepared and disposed to look at education-related matters from a rights-based angle and not merely as a directive principle of State policy. More importantly, the ECOWAS Court does not require exhaustion of domestic remedies.

Porter asked about the possibility of taking cases to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) addressing substantive social rights violations when no discrimination is involved. Benyam responded that it is absolutely possible. The wordings of the provisions of the ACERWC on ESC rights are supportive of this position. The Committee has also indicated such a possibility in its considerations of States Parties Report. However, in the children of Nubian descent case (Kenya), the petitioners argued ESC rights within the ambit of the prohibition of discrimination.

Therefore, the Committee had to look at the case from that perspective. Langford queried whether the African backlash regarding the ICC could have an impact on the ratification of new human rights treaties in Africa; Viljoen understood it would not have an effect, while Benyam Mezmur disagreed with that assessment.

Rebecca Brown (ESCR-Net) asked whether precedents from the Inter-American System were used by the Committee on the Rights of the Child. Benyam responded positively, noting that the Committee had paid particular attention to the findings in the *Jean Bosico case*. Finally, Yukyan Lam (DeJusticia) asked whether provisional measures were used in the African System, and Frans Viljoen explained that they were used especially in death penalty cases, but were almost never enforced by states.

Enforcement and Impact (Day 2)

This session aimed to identify challenges and strategies for effective enforcement at the national and the regional level. In his introduction, Malcolm Langford, NCHR, posed three questions for discussion:

1. In Africa, what is the evidence of enforcement of judgments or the impact of litigation (including cases that lose)?
2. What factors can provide an explanation for the variance in levels of enforcement or impacts of a case? Are they legal variables, political variables, civil society variables or contextual & economic factors? And what is the balance of the different costs and benefits from the implementers' perspective?
3. What strategies have civil society been able to use and develop that have improved enforcement and impact?

He highlighted the lessons that emerged from the discussions in the region and the recent workshop in in Bogota, which included, among other strategies: the need to build the enforcement strategy into the litigation, the need to contemplate the existing institutional capacity to shape an effective, implementable remedy based on current

infrastructure, the need to identify and work with allies, the possibility of group cases, the possibility of asking judges to retain jurisdiction to monitor implementation, and the possibility of using innovative arguments, including tax and budget information, among others.

A Comparative Perspective

Cesar Rodriguez-Garavito (De Justicia, Colombia) began his presentation by highlighting the two different components in ESC rights litigation: (1) justification and jurisprudence and (2) enforcement and remedies. His assessment framework focused on the latter element, often disregarded by lawyers.



Rodriguez stressed how a decision that has been enforced can have either a negative or a positive social impact. The same occurs with a decision that has not been enforced. This assessment of impact is key for the elaboration and evaluation of litigation strategies. Cesar identified the different types of effects: material and symbolic, direct and indirect.

A key question is what types of remedies maximize impact. Rodriguez analysed the strength of three remedies: (1) the judicial declaration about rights; (2) the remedial order; and (3) monitoring mechanisms. Analyzing three Colombian cases concerning large-scale ESC rights violations, he concluded that the highest impact for these cases is usually achieved with a combination of “strong” rights, “moderate” remedies (which allow for a dialogical solution), and “strong” monitoring mechanisms by the court.

Finally, Cesar gave a few recommendations for the improvement of enforcement: (1) make courts as accessible as possible by adopting more informal procedures; (2) include in the constitution a clause establishing the automatic domestication of international human rights law; (3) promote judicial trainings on ESCR; and (4) transform formalistic legal cultures into more pragmatic ones.

African Case Studies

Lessons From the Ogoni Case



Ibezim-Ohaeri

Victoria Ibezim-Ohaeri (Social and Economic Rights Action Center, SERAC) analyzed the enforcement of the Ogoni decision by the African Commission on Human and Peoples’ Rights. Whereas the decision ordered the government to pay compensation, halt the attacks on local communities and restore the environment, implementation has been so far “sporadic, uncoordinated and partial”.

A Federal Ministry for the Environment, the Niger Delta Development Commission and a Judicial Commission of Inquiry has been established.

Many factors continue to hinder full implementation, including lack of political will, an implementation strategy, awareness of African Charter-protected rights, court monitoring mechanisms and indicators for measuring implementation and impact.

Ibezim-Ohaeri identified the need for courts to establish specific timelines for implementation, to build capacity of both judicial and political officers responsible for the implementation of court judgments, to foster community engagement, and to build international pressure for enforcement. Finally, she raised the question of whether there could be a special new legal regime for enforcing regional and

international judgments, or whether domestic legal regimes can be adapted to suit this need.

The Endorois Decision

Korir Sing'Oei (Center for Minority Rights Development, CEMIRIDE)¹ and Opiata Odindo (Hakijamii) analysed the enforcement of the recent Endorois decision by the African Commission. Between 1974 and 1979, the Endorois, a semi-nomadic Nilotic community of about 60,000 persons, were forcefully evicted by the Kenyan government to pave way for the creation of the Lake Bogoria Game Reserve. This devastated the Endorois' pastoralist enterprise, disconnected them from a Lake they consider sacred, and denied access to vital medicinal plants in the area. The community's existence was imperiled. Confined to the arid lands of Marigat, they embarked on a sustained campaign to regain the territory that defines their identity, livelihood, spirituality, and survival. Between 1993 and 2010, they sought legal solutions in Kenyan courts. But the High Court dismissed their claim stating "the law does not allow individuals to benefit just because you were born on or reside near a natural resource".

More recently though, the African Commission finally affirmed their right to property, natural resources, development, culture and religion. Recommendations by the Commission included the guarantee of access for the Endorois to their lands, payment of compensation and royalties, employment possibilities, and registration of the Endorois Welfare Committee. Although the Ministry of Land joined the Endorois in celebrating the decision, the decision had not even been partially implemented by March 2012.

From a broader perspective, however, the decision had a positive impact, raising awareness about the right to community ownership of land, the right to culture, and the need to redress historical injustices. It also had an impact on the constitutional process, as the new constitution recognizes the right to culture, among others. Therefore, Opiata agreed with Cesar Rodriguez (DeJusticia) that while assessing a judgment, one needs to go beyond immediate implementation and also assess its impact.

¹ Unable to attend and presentation made by Odindo Opiata.

Discussion

Chair: Mbazira led the subsequent discussion. Saro Pyagbara (MOSOP) reaffirmed that the Endorois decision had indeed a positive impact on the constitutional process in Kenya, even though the Endorois have not yet directly benefited. Porter added that this will always be an issue: balancing the claimants' interests and the advancement of a cause. It should be stressed, however, that sometimes claimants' interests are not immediate. Claimants might also be interested in helping achieving a broader impact.

Langford asked how long would be long enough to declare that a decision has not been implemented. Opiata responded by saying that the timeframe will vary with the nature of the decision. In the case of the Endorois decision, there hadn't been any concrete steps towards implementing the more straightforward remedies of royalties and compensation two years after the decision.

Mwangonde inquired about strategies to deal with frustrations of the community in case of non-enforcement. Christmas asked whether there were major differences in enforcement challenges regarding national and international decisions. Yukyan Lam (DeJusticia) inquired about previous consultation in the Endorois case. To the latter question, Opiata responded that there was participation of the community after the decision in discussions about enforcement, not before. The right of participation is now in the Constitution, though, and there is a need to develop criteria to determine whether participation has been meaningful.

Maximizing Impact within Strategic Litigation

Revisiting Winning and Losing

Jackie Dugard (SERI) highlighted how complex it is to strategize about litigation. The degree of complexity impedes one from establishing a formula for successful litigation; and might actually bar creative approaches. She compared two South African cases to prove her point. The *Mazibuko* case involved the right to water, which has been recognized by the South African Constitution. The

initial perception was that this case was an easy one and was grounded in extensive research, alliance-building, a mobilized community and amici curiae briefs. The *Joseph* case concerned the right to electricity, a right not recognized explicitly by the South African Constitution. Here, there had been no social mobilization and the original perception was that this was a difficult case. Surprisingly, a positive judicial decision was achieved only in the latter case.

However, *Mazibuko* had the most positive impact: It empowered the community and provoked key changes in governmental policies regarding the provision of water, such as the bar on automatic total disconnections. *Joseph* created an important precedent for subsequent cases but the decision itself could not be implemented. Thus, the main lesson was the need for openness and creativity, in order to adapt to new circumstances and challenges during litigation, which rigid formulae might curtail. Dugard stressed that assessments of strategic litigation should go beyond implementation to encompass impact-related issues. Then, one might understand the possibility of winning (in terms of social change) by losing (in courts).

Group 1: Strategies to Ensure Implementation of Successful Judgments

Susie Talbot (Interights) chaired this session which began with *Osmond Mngomezulu* (SERI) who described implementation strategies in the *Blue Moonlight* case, which involved a threatened forced eviction by a private owner in South Africa. SERI wrote letters to government officials, assessed the possibility of going back to the Constitutional Court for implementation, and considered the possibility of arguing contempt of proceedings. (Just after the workshop in April 2012, the High Court temporarily suspended the execution of the eviction order handed down by the Constitutional Court in December 2011.²)

From a regional perspective, *Mumuni* mentioned the strategies SERAP used on the ECOWAS case (*SERAP v. Federal Republic of Nigeria* and

Universal Basic Education Commission). They (1) published newspaper opinions; (2) developed and carried out media strategies with Interights; and (3) sent letters to the Speaker of the House of Representatives, the Senate President, and the Attorney-General of the Federation, requesting full implementation. However, the Senate President has been the only high level public official so far that has promised to take action on the matter. *Mumuni* highlighted a few conditions for the implementation of international and regional decisions: (1) the need to sensitize people about the nature of international and regional decisions – that they are not “foreign” decisions (i.e., establishing legitimacy); and (2) the need to pre-allocate resources for implementing measures issued by international and regional decisions.

Following on the latter point, *Christmas* mentioned that in Zimbabwe there is still a requirement to have regional decisions registered as “foreign decisions”, so that the former can be implemented. As to issues of legitimacy, the problem of lack of information about international decisions was raised by various participants as an obstacle for implementation. *Daniela Ikawa* (ESCR-Net) pointed out that in Brazil implementation procedures of regional decisions were quite dependent on informal conversations with authorities and political campaigning, before discussions for legal procedures could commence. There is a need, therefore, to institutionalize procedures in response to international and regional decisions on human rights.

Finally, *Yukyan Lam* (DeJusticia) stressed the importance of courts retaining jurisdiction over cases in order to assure implementation, scheduling public hearings, establishing a timeline for periodic reports as well as court responses for such reports. However, in face of limited resources, for how long can courts and NGOs commit to assure implementation?

Group 2: Strategies to Maximize Impact Regardless of Judgment Outcome

Gertrude Angote (Kituo) and *Reinford Mwangonde* (CFJ) reported on their group discussions. They enumerated a few challenges and opportunities for enforcement. As to challenges, they cited corruption, lack of political will, the reputation of private actors

²SERI. High Court suspends Con Court's eviction order in *Blue Moonlight* case, 13 April 2012. http://www.seri-sa.org/index.php?option=com_content&view=article&id=69&Itemid=42

and the task of winning public sympathy for the cause. With regard to opportunities, they stressed the need to work with human rights institutions, engage academic institutions to provide technical opinions on certain issues, empower communities, build networks to engage different stakeholders, catalyse media attention, engage members of the parliament, appeal to regional and international mechanisms (including through the submission of shadow reports), and require more precise decisions from regional bodies, including the establishment of a timeline for implementation. It was highlighted that judicial procedures can be dialogical or participatory and that such participation might improve enforcement. The African Commission has guidelines, which can also be used regarding monitoring.

In cases involving companies, suggestions were made to target shareholders and affect investors as well as the company's reputation. But most importantly, it was also highlighted that major companies have to be targeted so they engage small/junior players to protect the reputation of their industries.

Creating a Favorable Environment for Litigation & Enforcement (Day 2)

This session looked at issues from an external perspective and asked what institutional and legal reforms and other strategies could be used to improve the environment for strategic litigation and enforcement. Langford began by proposing a framework for the discussion of a favorable environment, which is reflected on the following figure:



Social Movements and Empowerment

Legborsi Saro Pyagbara (Movement for the Survival of the Ogoni People – MOSOP) discussed how the empowerment goals in the Ogoni case went beyond the Ogoni community to reach the public in general. While organizing the community, MOSOP identified the need to respond to the demands of different groups within the Ogoni community. Therefore, the community was organized in subgroups of women, the youth, the elderly, and the traditional rulers, amongst others. The Ogoni community through MOSOP also reached out to the international community and bodies dealing with human and environmental rights protection. Thus throughout the process the community had engaged with almost all the UN human rights system: Special Rapporteurs, the then Commission on Human Rights Commission and now the Human Rights Council, a UN Fact Finding Team, and treaty bodies.



Legborsi Saro Pyagbara (MOSOP), Bruce Porter (SRAC), Jacob van Garderen (LHR), Gaye Sowe (IHRD), and Iain Byrne (AI)

Why is the OP-ICESCR important for Social Rights Advocacy?

According to *Bruce Porter* (SRAC), the OP-ICESCR could open new opportunities for protecting ESC rights in Africa. The full range of ESC rights are covered. It allows for complaints from both individuals and groups of individuals and includes a rigorous standard of reasonableness review. References to the margin of discretion were deleted, so while it recognizes that there may be a range of policy options that will achieve compliance with the ICESCR, the assessment of reasonableness is up to the Committee, based on evidence, not based on deference to the decisions of the government. This can provide a remedy in cases where domestic courts are excessively deferential, as in the case of *Mazibuko* (South Africa). Bruce called attention not only to the mechanism of individual complaints but also to the possibility of friendly settlements and the inquiry procedure focused on systematic abuse. The latter requires no exhaustion of domestic remedies. Finally, he proposed that the OP-ICESCR offers stakeholders and advocates the opportunity to work collaboratively and internationally in the establishment of a new adjudicative culture, enhanced norms for ESCR and access to effective remedies. This international work can supplement and reinforce both national and regional advocacy.

Migrants and ESC rights

Jacob van Gardere (LHR) began by noting that South Africa only started to offer protection to refugees in 1994 with the end of apartheid. The initial improvement in protection has deteriorated, and strategic litigation has increasingly become a key tool of protection, presenting an opportunity to build jurisprudence on the issue of refugees and ESC rights. However, litigation cannot stand alone as a rights-protection strategy. The level of collaboration between litigators and the government has decreased, which is of concern. Besides, the combination of generalized xenophobia and media coverage of refugee issues has resulted in a general negative public reaction to refugee rights. One of the central needs of the movement in South Africa today is the creation of links with global networks working with refugee rights.

Judicial Education and Constitutional Reform

Odindo Opiata (Hakijamii) stressed the need to sensitize judges on ESC rights, to simplify procedural rules, to change courts' authoritarian model of work and to focus on constitutional reforms around Africa. He also highlighted challenges, such as judges' reluctance to go to trainings, the process of judges' appointment, and some degree of alienation of the judiciary in regard to social reality.

Trends in Africa

Iain Byrne (Amnesty International) pointed out the tendency to neglect the role of local government in delivering ESC rights. He focused on trends in Africa from the perspective of local governments, underlining obstacles such as the lack of disaggregated data, technical capacity and resources, and due diligence procedures to ensure non-repetition, as well as diminished state power. He also mentioned the lack of work being done on disability rights in Africa.

As for opportunities, he signaled the possibility of looking for allies within governments, as no institution is monolithic. The main challenges of working with governments are to envisage projects that can actually be implemented by existing governmental institutions and to cooperate with governments without losing independence or becoming service providers. Governments can help in the protection of rights, but they are still potential violators of rights.

Discussion

Gaye Sowe (Institute of Human Rights and Development) led the discussion. Following on *Iain Byrne's* last remark, *Mezmur* suggested activists explore alliances with national human rights institutions, even though such institutions work very closely with governments.

With regard to judicial training, *Angote* suggested programs with professors from abroad in order to overcome usual resistance from the judiciary to be trained by local lawyers and activists. *Ibezim-Ohaeri* noted that there has to be a balance between judicial independence and sensitization of judges about

human rights issues, as human rights are often viewed as a political issue, although Byrne argued that judges are inevitably and constantly influenced by different forces.

As to non-monolithic institutional structures, van Garderen mentioned that, although exceptional, government officials do ask their organisation to initiate litigation in order to remove obstacles to the protection of human rights.

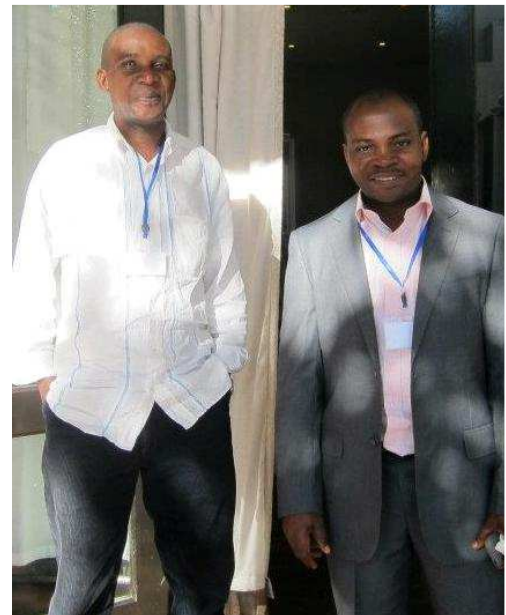
The issue of funding for litigation was also raised by several participants, and Mbazira posed the question of how to deal with donor pressures. Van Garderen highlighted the enormous risks faced by NGO litigators due to the current structure of grants (no

assurance that grants will cover the whole length of litigation).

Finally, Opiata highlighted that one of the most important lessons was the need to develop the capacity to respond to an opportunity when it appears. There is a need to keep your mind open to creative remedies and tools for rights' protection.



Ivahanna Larrosa (OP-Coalition), Jackie Dugard (SERI), Victoria Ibezim-Ohaeri (SERAC), Daniela Ikawa (ESCR-Net), Anna Alcaro (SERI)



Alain Dieudonné Oyandzi (Observatoire Congolais des droits de l'Homme) and Nadikpa Akpossogna (LTDH)



Elin Wrzoncki (FIDH) and Jacob Van Garderen (LHR)



Imen Bejaoui (Tunisian Forum) and Daouda Sarr (AMDH)



Malcolm Langford (NCHR)



Victoria Ibezim-Ohaeri (SERAC), Imen Bejaoui (Tunisian Forum) and Theodoros Chronopoulos (The Sigrid Rausing Trust)



Gertrude Angote, Kituo

Roundtable Discussion: What Is Next? Needs and Opportunities for Partnerships and Support

Chairs: Malcolm Langford and Daniela Ikawa

This session aimed at identifying opportunities for mutual support in litigation initiatives among participants and with ESCR-Net. The discussion focused on needs and responses to those needs by participants themselves.

Country:	Participant:	Organization:	Next Steps:	Possibilities of Collaboration:	Organizations that can provide or get collaboration:
Congo	Alain Dieudonné Oyandzi	Observatoire Congolais des droits de	Mining issues. Need to monitor violations and compliance to legal	Capacity building and resources.	ESCR-Net; ICJ; and Funders

		l'Homme	standards in a context where the judiciary is not independent.		
Canada	Bruce Porter	Social Rights Advocacy Centre	-	OP campaign; ESCR-Net WG adjudication; capacity building and support/collaboration in litigation	ESCR-Net; NGOs
Colombia	Cesar Rodriguez-Garavito/Yukyan Lam	DeJusticia		Provide information on environmental issues as well as rights of indigenous peoples; share information and build capacity on multi-media and research methodologies; provide information on new technologies for social change	Through ESCR-Net
Regional (Ethiopia)	Benyam Mezmur	The African Union's Committee of Experts on the Rights and Welfare of the Child	They are interested in working on law reform with regard to rights of vulnerable groups		
Finland	Merja Lahtinen	The Finnish Ministry of Foreign Relations	-	Support to human rights and development, including for Kenya and Tanzania. Some focus on constitutional processes. Attempt to integrate ESCR in all programs.	Hakielimu; Hakijamii; Kituo
France	Elin Wrzoncki	International Federation for Human Rights (FIDH)		Capacity building; submission of reports to the ICESCR Committee. Work on the OP.	OP coalition.
France	Sandra Ratjen	International Commission of Jurists (ICJ)		ICJ offers support on human rights cases upon request. Support to judges through dialogues and trainings with lawyers and activists. Rely on ICJ Commissioners who are eminent jurists (Judges, Lawyers, Law Professors).	NGOs

Ghana	Augustine Niber	Centre for Public Interest Law (CEPIL)	Augustine will keep his focus on cases involving the right to housing and mining. CEPIL will also start cases on health and education. With regard to enforcement, CEPIL will take concrete steps to enforce positive decisions granted in 2011.	Support from SERAP on how to take cases to ECOWAS. Capacity building and information sharing.	ESCR-Net members; AI; SERAP
Kenya	Gertrude Angote	Kituo Cha Sheria	Working on the right to housing (Mudulua case), on the right to community land (against land grabbing/ case under development), and some possibility of working on issues such as the right to education of pregnant girls, mining and access to medicines. They are also starting research on tools to assess damages on eviction cases. Finally, she is interested in testing cases involving the rights to water and to food.	Kituo needs enforcement experts for its annual colloquium on public interest law and experts who could write for its new journal on public interest litigation; capacity building for Kituo's 700 volunteer lawyers; support with amici curiae; resources; research materials.	SERI; Finland; AI; ESCR-Net' other NGOs
Kenya	Odindo Opiata	Hakijamii	Odindo is planning to file a petition to the High Court on standards (such as progressive realiation) for the right to water and sanitation. He is also planning to work on an enforcement strategy for Garissa	Sharing of information on comparative jurisprudence and support in issues of enforcement.	ESCR-Net WG on Adjudication; Finland
Malawi	Reinford Mwangonde	Citizens for Justice Malawi	Need to engage parliament, judges and civil society on issues regarding ESCR, as this is still a new issue in Malawi. They are conducting training with ICJ in May 2012.	Support from other African NGOs to exert pressure on the Malawian government to include ESCR in its new constitution. Support on corporate accountability case. Need for materials on ESCR. Include ESCR in law school curricula. Need to influence the nomination of judges.	ESCR-Net WG on corporate accountability; ICJ; other NGOs

Mauritania	Daouda Sarr	Association Mauritanienne des droits de l'Homme (AMDH)	Deal with the fact that the Executive branch is significantly stronger in Mauritania than the judicial branch. Also, deal with the problem of generalized lack of enforcement for judicial decisions. Raise awareness of civil society on human rights to pressure the government to implement the law (there is a lack of human rights reports coming from inside).	Exchange of information	ESCR-Net members; ICJ
Nigeria	Adetokunbo Mumuni	Socio-Economic Rights and Accountability Project (SERAP)	Lobbying for enforcement of the SERAP decision (National Assembly) and continue mobilization on the case on the relevance of the right to education. Take new cases to ECOWAS on ESCR.	Technical assistance on litigation. Offer expertise on litigation before ECOWAS to other organizations.	ESCR-Net WG on Adjudication; CEPIL, IHRDA, and others
Nigeria	Legborsi Saro Pyagbara	Movement for the Survival of the Ogoni People (MOSOP)	Saro is particularly concerned with the enforcement of SERAC's decision, the domestication of international norms, the ratification of the OP and the use of UPR	Capacity building and information sharing.	ESCR-Net members
Nigeria	Victoria Ibezim-Ohaeri	Social and Economic Rights Action Center (SERAC)	Work on projects related to the disproportionate, violent governmental responses to "Occupy Nigeria" in January 2012.	Think together about ESCR issues that could be raised in relation to the protests in Nigeria and frame them properly.	ESCR-Net and other NGOs

Norway	Malcolm Langford	Norwegian Centre for Human Rights (NCHR)		Five initiatives: (1) ESCR-Net WG on adjudication and support to SLI litigation on ESCR; (2) capacity building through the global school in 2013; (3) enforcement work on pilot jurisdictions through Judgment Watch and ESCR-Net; (4) research through NCHR; and (5) research on quantitative methods for measuring compliance through "Metrics for Human Rights"	
South Africa	Ebenezer Durojaye	Community Law Centre		Amici curiae on cases before the African Commission; need of technical support.	ESCR-Net and other NGOs
South Africa	Jackie Dugard	Socio-Economic Rights Institute of South Africa (SERI)	SERI is working on alternative accommodation issues and on bringing a first case on the right to food in South Africa	Getting assistance on issues regarding the right to food. Providing assistance on water rights and eviction (including lease-related evictions).	ESCR-Net members (FIAN?); other NGOs
South Africa	Osmond Mngomezulu	Socio-Economic Rights Institute of South Africa (SERI)	Osmond identified a need for enforcement monitoring and for combining advocacy, research and litigation.	Sharing of information and support through amici curiae.	ESCR-Net members
The Gambia (Regional)	Gaye Sowe	Institute for Human Rights and Development in Africa (IHRDA)	They are organizing a meeting in Nigeria in May 2012.	Support from SERAP on how to take cases to ECOWAS for a Nigerian case. Inviting amicus curiae in new case. Need to publicize cases.	SERAP; ESCR-Net WG on adjudication
Togo	Komlan Nadikpa Akpossogna	Ligue togolaise des droits de l'Homme (LTDH)	Existing focus on CPR. Ratification of most treaties. Mobilisation of civil society is necessary. Focus on rights of women and children as well as on the right to food.	Work together as part of the network	ESCR-Net

Tunisia	Imen Bejaoui	Tunisian Forum on Economic, Social and Cultural Rights	Work with NGOs and the government with regard to the new constitution	Support for the inclusion of ESCR in the new constitution.	Finland
Uganda	Anita Kiddu	Advocate; Center for Batwa Minorities	In the Platform for Labour action they instituted a case against the Government on the grounds that the minimum wage should be declared by the constitutional court as unconstitutional. In addition to that they have public interest litigation cases relating to workers rights and the right to education of children who were found in child labour activities. Anita is currently handling a case on the right to health of the Batwa women in Kanunugu district as well as before the Masindi high court on the right to life and the right to standard of living.	Support for cases	ESCR-Net and other NGOs
Uganda	Christopher Mbazira	Public Interest Law Clinic, School of Law, Makerere University	Use the new public interest law clinic to increase the pool of public interest lawyers in Uganda. Also, get the support of clinical students for new litigation. They are organizing a conference on PIL for East Africa.	Need of PIL and human rights experts at law school. He is creating a Public Lecture Series. Need for resources beyond the current UN funding.	ESCR-Net members; other NGOs; Funders
United Kingdom	Iain Byrne	Amnesty International		Support for domestic litigation on issues of evictions and health (including amicus). Support for human rights defenders under threat. Materials on the right to housing and evictions. Support for capacity building for judges. Work on the OP campaign.	ESCR-Net; OP-Coalition; other NGOs

United Kingdom	Susie Talbot	International Centre for the Legal Protection of Human Rights (Interights)		Litigation surgeries all over Africa and capacity building on ESCR litigation.	NGOs
United States of America	Daniela Ikawa and Rebecca Brown	International Network for Economic, Social and Cultural Rights (ESCR-Net)		Support to ESCR litigation, including amici curiae; information sharing (ESCR-Net list servers and databases); materials and support to constitutional processes; Sharing of information; social movements; corporate accountability; dissemination of cases through the caselaw database; membership at ESCR-Net	NGOs
Uruguay	Ivahanna Larrosa	International Network for Economic, Social and Cultural Rights (ESCR-Net)		OP campaign: add more information here.	ESCR-Net; NGOs
Zimbabwe	Tafadzwa Christmas	Zimbabwe Human Rights NGO Forum	Raise awareness of the general public on the importance of including ESCR in the new constitution. Interest in starting litigation on ESCR cases to show the courts that protection to CPR is not enough to assure ESCR.	Capacity building on national campaigning (urgent) and more generally on ESCR, targeting the judiciary, civil society and law makers. Need for resources for bottom up initiatives, as there is a resistance against foreign interference.	Funders; ESCR-Net
Regional	Victoria Maloka	OHCHR	-	The office for the Southern Africa could facilitate access to UN mechanisms; share civil society handbook produced by them; share information on UN mechanisms; raise awareness; co-host events with regional focus; exchange information	ESCR-Net and other NGOs