Supporting Strategic Litigation under the Optional Protocol to ICESCR

1. Introduction

The adoption of the Optional Protocol to the ICESCR is an historic development described by Louise Arbour as representing "human rights made whole".[1] Widespread hunger, poverty, and denial of access to healthcare, education and to work under just and favourable conditions will for the first time be the subject of rights claims, adjudication and remedy at the international level. In addition to providing redress to the authors of complaints, the OP-ICESCR will have a significant influence on the willingness of states to implement domestic remedies to ESC rights, and on courts and tribunals charged with adjudicating them in domestic and regional fora.

The success of the OP, however, is by no means assured. Experience under other UN complaints procedures suggests significant challenges faced by affected individuals and groups bringing claims forward including: frequent inadmissibility findings for failures to exhaust domestic remedies; inadequate evidentiary records; failure of individual communications to address systemic violations, limited participatory rights for both complainants and potential amicus; and obstacles in the implementation of decisions. None of the challenges are insurmountable and each can be addressed strategically, but it is clear that advocates who fought for so many years for the adoption of the OP-ICESCR cannot afford to relax our efforts to promote effective adjudication and remedies under the new procedure. To a large extent, the procedure will be what we make of it.

Experience in domestic and regional systems has demonstrated that the quality of adjudication is largely dependent on the quality of advocacy – both legal and broader socio/political advocacy. Good jurisprudence emerges from compelling facts, solid evidence, convincing legal arguments, effective amicus interventions, supportive academic commentary, well informed and experienced decision-makers and broader social mobilization to support legal claims.

Cognizant of the historic importance of the first cases and early jurisprudence that will emerge under the OP-ICESCR, members of ESCR-Net at their meeting in Nairobi, Kenya in November, 2008, decided to prioritize the development of a Strategic Ligation Initiative (SLI) to support potential claimants and encourage the development of effective jurisprudence to fulfill the purposes of the OP-ICESCR and the aspirations of those who will turn to it to realize their rights. With the support of the Ford Foundation, ESCR-Net in collaboration with the Social Rights Advocacy Centre and the Norwegian Centre for Human Rights, and in consultation with the NGO Coalition for an OP-ICESCR, will be developing with members and relevant experts, a model for supporting and promoting strategic litigation in ESCR, focusing on the Optional Protocol.

The first stage in the developmental process is consultations with stakeholders, experts and advocates with experience in strategic litigation in domestic and regional systems. What follows is a preliminary exploration of some of the over-arching questions we may wish to explore, and ideas to consider.

[1] See full text of Louise Arbour's comments at: http://www.policyinnovations.org/ideas/commentary/data/000068.

2. Expectations for the Optional Protocol – Possible Criteria for Success

Priorities for the Strategic Litigation Initiative will be informed by views on what would constitute the most important criteria for success for the OP itself. There are a range of different dimensions to the perceived value of the new procedure to consider in the design and implementation of a strategic litigation initiative. We have set out criteria linked to expectations which might conflict or require balancing. This provides a framework for decisions on which criteria to prioritise or how they should be balanced in practice.

2.1. Scope of the SLI

Ratifying v. Non-Ratifying States

The number of ratifying states in the early stages of the OP will be relatively small and may over-represent particular regions or legal systems. The value of the OP may be assessed primarily in relation to its effect in those ratifying states, to show that ratification does play an important role in promoting compliance. In this case, the jurisprudence may be of more limited value, however, if the ratifying states are relatively few in number and not representative of a diversity of legal systems.

Alternatively, the adjudication of complaints from ratifying states may be seen as having a more universal value in promoting the justiciability of ESCR within all states, whether or not they have ratified the OP. If that is seen as a priority, the SLI could also work on important cases proceeding in non-ratifying states, utilizing domestic or regional mechanisms, or communication procedures that have been ratified under other UN treaties.

Domestic/Regional v. International Litigation

ESC rights claims at the CESCR must have exhausted domestic remedies. Therefore, issues of standing, violations and remedy will have been initially developed in reference to domestic law which will require a good understanding of domestic procedure. However, if no domestic remedies are clearly available or unreasonably prolonged, less energy will need to be exerted in this domestic arena.

In addition, because ESCR have been adjudicated in recent years before domestic and regional bodies in advance of any adjudication within the UN system, approaches developed by domestic courts and regional bodies are now more advanced and will inform the development of jurisprudence under the OP-ICESCR.

A key question to consider in the design of strategic litigation will be whether to focus resources on test case litigation under the OP itself, or whether to adopt a broader approach to support strategic litigation at the domestic level and regional levels. On one hand, having a broader focus than the OP would benefit general strategic litigation and allow support for cases that may have broad significance and influence, even if they do not end up before the CESCR in Geneva. On the other hand, having a broader approach will weaken the initiative's impact on the OP.

Relationship of Complaints Procedure to Inquiry Procedure and Periodic Review

The OP-ICESCR implements both a complaints procedure and an inquiry procedure. While the latter may not have the symbolic importance attached to an affirmation of the justiciability of ESCR, it may often be a more effective means of seeking remedies to serious systemic and widespread violations of ESC rights. The inquiries procedure has the additional advantage of not requiring the exhaustion of domestic remedies. Strategic litigation might focus on the specific challenges and opportunities provided by communications under the OP-ICESCR or it may aim to equally ensure the effective use of the inquiries procedure.

In addition, there will be considerable interplay of the OP with other aspects of the CESCR's work, in the context of periodic review and the development of general comments. The SLI could also be designed to include work on the development of CESCR jurisprudence under general comments and periodic reviews, where access by civil society is more open, and where the effectiveness of the OP may be enhanced by the development of more progressive jurisprudence and commentary, particularly with respect to the obligation to ensure effective remedies.

2.2. Specific issues related to litigating cases (which type of cases, issues, arguments, etc.).

Individual v. structural/systemic claims

A fundamental principle behind the OP is the value of ensuring universal access to redress for individual victims who may otherwise have no access to adjudication and remedy for violations of ESC rights. On the other hand, in light of limited capacity of an SLI and of the CESCR itself, there is a competing value in prioritizing structural/systemic claims so as to provide the greatest impact from the OP – both in terms of remedial impact on the greatest numbers and of jurisprudence which will have a broader impact.

In terms of litigation strategy, a focus on the value of universal access to remedy might encourage the promotion of a *greater number of communications*. We might try to ensure that disadvantaged individuals or groups in ratifying states have the support they need to prepare and file communications. We would emphasize the individual human dimension of ESCR claims to promote justiciability and there would be a strong emphasis on specific enforcement of those decisions.

Alternatively, a focus on systemic challenges might emphasize the value of working with individuals or groups representing the most adversely affected constituencies or communities, concentrating resources on a few strategically chosen individual or /group cases with a collective dimension, and designing creative approaches to individual claims so as to engage *broader systemic violations*. The remedial impact of such claims would be emphasized in promoting the value of justiciability of ESCR and we would emphasize the broader application of these cases to clarify obligations of non-ratifying states. This systemic and collective approach with individual and group communications has been increasingly used in the Inter-American system and to a certain extent under the European Convention on Human Rights. Under the OP-ICESCR, it would encourage domestic courts and tribunals to adjudicate and remedy structural/systemic claims.

Interdependence v. Distinctness

A value of the OP-ICESCR that has often been emphasized is that it will demonstrate the indivisibility of all human rights and the overlap and shared principles with civil and political rights. In fact, many ESCR claims which proceed under the OP-ICESCR may have been framed under domestic legal provisions as the right to life or to equality, based on more traditional jurisprudence from civil and political rights. Often the particular interests of women, people with disabilities, racialized groups or others facing discrimination are made more visible in an equality framework.[2] There may, therefore, be considerable value in strategic litigation emphasizing interdependence, drawing on civil and political rights jurisprudence. The SLI might cast a wide net, to embrace claims based more on non-discrimination or the right to life, and may utilize complaints procedures under Optional Protocols to other human rights treaties with broader state ratifications, to enhance ESC rights protections by way of interdependence with other rights.

Another perceived value of the OP-ICESCR, however, is the establishment of a more distinct jurisprudence, focusing on the unique obligations under article 2(1), the reasonableness standard of review in 8(4), concepts of progressive realization, and consideration of the value of concepts like minimum core obligations and the tripartite typology of obligations. There are concerns, from this angle, that the CESCR will be tempted to take on too much existing civil and political rights jurisprudence rather than fully considering the additional dimensions of ESCR and the broad sweep of the remedies required, particularly in relation to the obligation to fulfill. From this angle, it may be preferable for the SLI to focus on cases alleging clear violations of ESC rights, proceeding exclusively by way of the OP-ICESCR, applying and developing the specific framework for ESC rights obligations.

Legal v. Political/Social Movement Focus

One aspect of success for the OP-ICESCR will be the recognition of ESC rights as justiciable legal claims. This dimension of success may be enhanced by a focus on claims that have been framed in more conventional legal terms, exhausted domestic remedies and in which individuals have clear standing as victims. Such cases may not, however, be connected to a broader social movement.

An additional criterion for success, however, will be to enhance the connection between individual claims and social movements, so as to ensure that ESCR are not reduced to individualized claims, and to ensure effective implementation of remedies. An emphasis on this criterion for success would encourage more of a focus on developing connections with social movements and designing litigation and political strategies in parallel with legal claims.

Progressive Jurisprudence v. Promoting Broader Ratification

[2] See, for example, Leilani Farha, CEDAW, Malcolm Langford. (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. (Cambridge: CUP: 2009); and Ida Elizabeth Koch "From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities" in Edited by Oddný Mjöll Arnardóttir and Gerard Quinn (eds) , *The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives.*

During the negotiation of the OP, concerns from skeptical states tended to focus on worries about the CESCR intruding into resource allocation and policy decisions that these states believed should be left to governments to decide. Those concerns are certainly on the minds of Committee members. There may, therefore, be some competing values or criteria for success attached to the campaign for ratification as opposed to the encouragement of effective adjudication and remedies in strategic litigation.

Bringing forward claims in the early stages that require the Committee to take a position on the degree of deference to be accorded states in resource allocation may risk creating regressive jurisprudence from a Committee wanting to encourage broader ratification by states. On the other hand, if the cases under the OP are strategically chosen to be reassuring to skeptical states, the historic significance of the OP-ICESCR and its potential impact may be lost. Positive decisions and remedies on substantive ESCR claims addressing structural violations may be seen negatively only by states which would not ratify the OP anyway, while to other states, and to affected constituencies, such cases may represent the essential "value added" of the OP-ICESCR. Successful cases in relation to broader policy and resource allocation may serve to provide a model of how useful and effective adjudication of ESCR can be.

Other Criteria for Success

There are a number of other potential criteria for success of the OP-ICESCR that may also factor into setting priorities for the SLI. These would include:

- Indirectly ensuring 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;

- Developing a broader impact of the jurisprudence by focusing on cases that deal with issues of concern in other states;

- Promoting domestic application of the CESCR's jurisprudence, particularly by courts, so as to expand impact of the ICESCR nationally;

- Enhancing remedial impact by developing mechanisms for ongoing monitoring and reporting on implementation of views;

- Promoting a leadership role for CESCR in the development of progressive jurisprudence and adjudication of cases on ESCR, which may be influential in regional and national systems that are more judicial in nature;

- Ensuring more sophisticated ESCR jurisprudence through skilled legal advocacy on behalf of claimants; and

- Encouraging quality academic commentary linked to cases.

3. Key Lessons from other protocols

There are a number of challenges that can be identified and lessons learned from experiences under other Optional Protocols that should be considered in the development of the SLI under the OP-ICESCR. Of particular relevance are experiences under ICCPR, CEDAW and CERD.

3.1. Related to case selection and opportunity to intervene

Dominance of a few countries

Despite widespread ratification of the OP- ICCPR, communications have come primarily from a few countries such as Jamaica, Canada, Australia and Uruguay. Often, the cases deal with a relatively narrow range of issues. Australian cases, for example, have focused on the death penalty and discrimination and issues related to sexual orientation. However, this dominance is partly or principally explained by the fact that these states are not or were not part of regional human rights systems and thus the Human Rights Committee has been the only viable option. This problem is likely to be less acute for the OP-ICESCR due to the unfortunate lack of effective regional systems for ESC rights. However, it means that the OP-ICESCR may often receive the more cutting-edge cases, while more traditional cases (e.g. forced evictions, social discrimination) may be filed under other mechanisms.

The problem of lack of diversity of states is likely to be a problem under the OP-ICESCR in early years of limited ratification. The SLI may wish to take measures to ensure that communications are submitted from as broad a range of states and different legal systems as possible, targeting activity and resources toward advocates and claimants in the state parties where communications are not being submitted.

Nature of Cases (diversity and precedent-setting cases on key issues)

A general problem in other OP's has been a lack of diversity of cases and an absence of precedent-setting cases on key issues. CEDAW jurisprudence, for example, has focused extensively on violence against women. Though it has in some cases sought broader remedies, such as availability of alternative shelters, CEDAW jurisprudence has not provided many precedents on most key issue of inequality for women, particularly related to access to social and economic rights.

Early v. Late Intervention

An issue that often comes up in domestic and regional strategic litigation is the choice of early versus later involvement in cases. Early involvement can ensure the development of a strong evidentiary basis, properly framed statement of claims and legal argument, connections to social movements, exhaustion of legal remedies and supportive interventions by amicus. However, early involvement may also mean that considerable effort may be put into cases that do not end up proceeding to higher levels of court or to international bodies. Strategic intervention in cases that are already proceeding, or which have at least already exhausted domestic remedies, through

amicus interventions or collaboration once a communication is filed, may prove to be more efficient.

3.1. Related to procedure and institutional capacity

Inadmissibility (admissibility criteria, concept of victim and individual settlement)

Experience under all Optional Protocols suggests that admissibility is the greatest obstacle to the consideration of communications. One particular problem under the OP-ICESCR will be the application of the requirement that the complainant submit a complaint within one year of the violation or exhaustion of domestic remedies. In countries without effective domestic remedies for many ESC rights, this requirement may inadvertently stop many potential complainants (particularly involving negative obligations) because they were not aware of the procedure.

A second issue is the requirement of the complainant being an individual victim. The Human Rights Committee has interpreted this requirement so as to preclude the possibility of '*actio popularis*' or communications submitted by NGOs and limit the ability to challenge the general effects of laws or policies.[3] Given that many of the most important systemic claims advanced under domestic legal systems are undertaken by groups, organizations and/or victims challenging the broad effect of policies or government inaction[4], it will be important for the SLI to prioritize creative approaches to issues of standing, exploring the possibility of admissible communications from groups of victims, and ensuring that the CESCR adopts an approach to the concept of "victim" which is consistent with the uniquely substantive programmatic obligations under the ICESCR.

A more practical challenge is that individual complainants may encounter harassment or may be offered individual settlements in order to prevent the issue from being considered by the CESCR and denying an opportunity to address the wider systemic issues. In some countries, this problem has been solved by having a number of individuals and NGOs submit the complaint together. Such strategies will need to be adapted to the restrictions on standing that exist under the OP-ICESCR. A strong focus should arguably be on supporting claims by groups of individuals.

Burden of Proof and Availability of Evidence

Experience under other OP's suggests that questions of burden of proof and availability of information may also be critical to strategic ligation. This will likely be of even greater importance under the OP-ICESCR, in relation to questions of resource allocation and the application of the reasonableness standard in 8(4).[5] There has been concern in domestic systems

[3] Alex Conte and Richard Burchill, *Defining Civil and Political Rights: the jurisprudence of the United Nations Human Rights Committee* (2nd ed.), (England: Ashgate Pub. Co, 2009) [Conte and Burchill] at 21 -25; A. De Zayas et al, "Application by the Human Rights Committee of the International Covenant on Civil and Political Rights under the Optional Protocol," (1986) 3 Can. Hum. Rights. Y.B. 101 [De Zayas et al] at 110 – 111.

[4] Either thorugh *actio popularis* or some other type of collective actions.

[5] Bruce Porter, "The Reasonableness Of Article 8(4) – Adjudicating Claims From The Margins," *Nordic Journal of Human Rights* (NJHR), Vol. 27, No.1:2009 pp. 39 – 53.

such as South Africa that the burden of showing that a policy is not reasonable has tended to fall on complainants, who lack the resources and means to provide such evidence.

The Human Rights Committee has stated that because the state party often has vastly superior access to the relevant information, the state is obligated to fully investigate allegations of violations of the Covenant and to provide the Committee with all information available to it.[6] This principle has proven important in ICCPR communications and will likely be critical to the success of the OP-ICESCR. Complaints to the CESCR will need to insist that once a prima facie violation of a right has been established, the burden of proof shifts to the State Party to show that reasonable measures have been taken to address it. At the same time, it is critical in these cases that the evidentiary record not all be produced by the state, with that bias. Good evidence gathering by complaints to ensure a full and balanced evidentiary record will also be critical.

Committees have often been unable to adequately address the systemic issues raised by individual communications because of lack of information submitted on the broader issues at stake, and inability of organizations with expertise in the broader policy issues to intervene as amicus in these cases to provide information and analysis. Where Committees have had the opportunity to address issues of substantive obligations to provide adequate social programs for women, for example, as in the case of *Nguyen v. the Netherlands* before CEDAW, dealing with provision of maternity benefits to different categories of women workers, Committees have been severely hampered by an inadequate evidentiary record.[7]

Transparency and Accountability

In general, strategic case development and adjudication under OP's has been seriously impeded by lack of transparency and accountability. For instance, there is often no access to the complainants' documents or State replies and no oral hearing. Generally, in domestic and regional systems, affected constituencies are aware of important cases going forward, and commentators have the opportunity to write about issues as they work their way through courts. Jurisprudence under the OP's has lacked this kind of transparency and openness to broader input. Similarly, there is less accountability of Committees themselves to evolving human rights norms, less training and review of effectiveness, for example, than would characterize domestic adjudicative bodies. This lack of accountability can be reflected in uneven jurisprudence. Strategic litigation under the OP-ICESCR may wish to give some consideration of ways to enhance Committee transparency and accountability.[8] For instance, a reporter could be created like the Investment Arbitration Reporter which publishes every two weeks both confidential and publicly available information on international investment arbitration.

Implementation and Follow-Up

Commentators and treaty bodies have emphasized the binding nature of views and recommendations and the obligation to provide effective remedies to victims under optional

[6] *De Zayas et al.* at 108; J. S. Davidson, "The procedure and practice of the human rights committee under the first optional protocol to the International Covenant on Civil and Political Rights, (1991) 4 Cant. Law Rev. 337 at 352.
[7] Dung Thi Thuy Nguyen v. the Netherlands, CEDAW Communication No. 3/2004 (8 December 2003).
[8] Bal Sokhi-Bulley, "The Optional Protocol to CEDAW: First Steps," (2006) 6 Hum. Rts. L. Rev. 143 at 157-158.

protocols.[9] However, a central weakness of the Optional Protocol processes remains the absence of effective enforcement and follow-up on the Committees' views.[10] A follow-up procedure was established for the ICCPR through the Special Rapporteur for the Follow-Up on Views, but compliance with this follow-up procedure has been deplorably low, at approximately 30%.

It will be important for the SLI to consider ways that pressure can be enhanced on States Parties to implement remedies, through independent monitoring, engagement with special rapporteurs, use of the UPR and other mechanisms. Such mechanisms would need to be supplemented by mobilization of civil society, politicians and media at the local level.

Limited Institutional Capacity

Another common problem to all treaty bodies has been the limits on institutional capacity of treaty bodies. Communications are considered by part time non-remunerated treaty bodies with limited access to staff support or legal research, and without submissions from amicus or oral hearings through which they would benefit from dialogue with representatives of organizations with relevant expertise, as well as legal advocates with expertise in the law. Effective litigation in this circumstance must ensure that Committee members have relatively easy access to summaries of facts and key issues, relevant jurisprudence and solid legal argument. Strategies under other OPs have generally involved working collaboratively with authors of communications to ensure that necessary evidence and argument is submitted as accompanying documentation to communications.

3.2. Related to Litigation Strategies

Gaps between Domestic and International Litigation Strategies

Experience under other Optional Protocols has sometimes shown a serious gap between domestic and international strategies. Domestic strategic litigation in some countries is more readily advanced in an inclusive and accountable fashion, linked to national networks and movements. For example, the test cases under the Canadian Charter of Rights and Freedoms from disadvantaged groups have been advanced through extensive human rights networks and strategic litigation programs. Litigation at the Human Rights Committee from Canada, however, has often lacked transparency and accountability to affected groups, being advanced by a few individual lawyers or claimants without links to broader networks or strategies. It will be important for strategic litigation under the OP-ICESCR to ensure appropriate links to domestic litigation strategies, civil society groups and accountability mechanisms.

4. Lessons from regional / domestic advocacy

[9] Martin Scheinin, "The Human Rights Committee's Pronouncements on the Right to an Effective Remedy - an Illustration of the Legal Nature of the Committee's Work under the Optional Protocol," in Nisuke Ando (ed.), *Towards implementing universal human rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), 101 at 101-102; Steiner, H.J., "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?" in Alston, Philip, James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press, 2000, 15-53.

[10] Scheinin, *supra*, at 114.

There is also much to be learned about designing and implementing strategic ligation from experiences in regional and domestic systems. We are hoping to benefit from consultations from practitioners and experts in this area particularly, including some of the following key issues:

4.1. Related to type of cases, issues involved and relationships with affected communities

Individual entitlements v. Progressive Realization

There have been significant experiences, particularly in the Inter-American system and in domestic systems, of addressing the challenge of framing failures to progressively realize ESC rights as individual rights violations. The interplay between individual entitlement and reasonable policy design and allocation of resources has been addressed in cases in a number of jurisdictions, such as *Decision T-760 of 2008* in the Colombian Constitutional Court, in the *Grootboom* and *TAC* cases in South Africa and in the *Right to Food* cases in India. In some cases, however, there has been considerable resistance of decision-making bodies to find invidual rights violations on the basis of failure to progressively realize rights within maximum available resources. Cases under the OP-ICESCR will be the first time these important issues are considered in international adjudication. In order to ensure that the OP provides effective remedies for all dimensions of ESC rights, the SLI will need to draw extensively from domestic and regional sources, as well as from CESCR jurisprudence and from article 8(4) in providing guidance to the CESCR on this issue as it arises in early cases.

Engaging Sub-National Levels of Government

Another challenge for litigation strategies under the OP-ICESCR will be to deal with cases that address violations within the jurisdiction of subnational (provincial, state, municipal) levels of government. Here again, the experience of domestic and regional human rights systems' decisions, engaging all levels of government, will be essential in the design of strategic litigation under the OP-ICESCR.

Application to Private Law

As many ESCR violations emanate from the private market, and from private actors contracted to perform governmental functions, it will be important to draw on the experience of advocates at the domestic level in dealing with private sector violations. As Sandy Liebenberg has observed, the application of ESC rights to private law has tended to be ignored even in domestic advocacy and jurisprudence. Jurisprudence under the Inter-American system on the "obligation to protect" and case law from the European Court may be useful to consider in developing this aspect of strategic ligation under the OP-ICESCR. [11]

International Co-operation and Extra-territorial Obligations

A developing area of international and domestic human rights law is the question of extra-territorial obligations. While provisions with respect to international cooperation initially demanded by a number of southern states during the Working Group on the OP-ICESCR were

[11] See, for example, *Lopez Ostra v Spain* 16798/90 [1994] ECHR 46 (9 December 1994) and and *Guerra v. Italy* 14967/89 [1998] ECHR 7 (19 February 1998)

not included in the final draft of the OP, there is still at least a general commitment to the principle of international co-operation and assistance as a Covenant obligation. Moreover, and critically, the Optional Protocol is based on State *jurisdiction* not *territory*, thus permitting extra-territorial claims where a State action or omission is traceable to their jurisdiction. While jurisdiction has traditionally been understood as physical or effective control, the definition is expanding in cases before regional and international courts towards a more purposive and contextual assessment.

Complaints alleging, for example, that a states' failure to regulate activities of home state multinationals in host states violated the Covenant could be justiciable in some respects under the OP, Furthermore, the CESCR is permitted under the OP to make recommendations to international institutions such as the World Bank. The impact of UN and other agencies therefore needs to be included in litigation strategy. Strategic litigation under the OP-ICESCR may also benefit from work being done in interventions before trade and investment tribunals, in exploring ways to ensure that the obligation to protect rights in international agreements is not neglected under the OP-ICESCR.[12]

Relationships with Social Movements

While there is general consensus that relationships with social movements are important to effective ESC rights litigation, there is a range of experiences in this regard. In some instances, the goals of social movements may be different from those of strategic litigation, particularly in relation to concerns about using unsuccessful legal strategies as media and public awareness strategies, which may be harmful to the longer term development of jurisprudence. However, there are clear cases where litigation should have been much better anchored in social campaigns and the challenge is to ensure that litigation increases rather than decreases greater democratization and participation of marginalized groups.

Highlighting Equality Dimensions

A common critique of litigation as a force for social change is that it may exclude the most marginalized groups, who have less access to justice domestically and are therefore unlikely to have met exhaustion requirements. We will need to learn from best practices at the regional and domestic levels in developing ways of including those with literacy, economic or other barriers preventing meaningful participation in traditional litigation strategies. Accessible information dissemination and models of accountable litigation, in which legal issues are made accessible to claimant groups so that they make informed strategic decisions about how their cases will be argued, will be important to include in the SLI.

4.2. Related to procedure

Exhaustion of Domestic Remedies

The OP-ICESCR will present unique challenges with respect to the question of exhaustion, focusing particularly on what constitutes an effective remedy in the context of asymmetry

[12] Christian Courtis and Magdalena. Sepúlveda, *Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?* Nordic Journal of Human Rights, Vol. 27, nº 1:2009.

between domestic provisions and Covenant rights. Experiences in regional and domestic systems may be helpful. Some systems, such as the African system, have adopted a more purposive approach to the exhaustion rule, which may prove important as a precedent for the challenges in applying this rule to ESC rights claims.

Interim Measures

The provision in the OP for interim measures will be an important tool for enhancing effectiveness of the OP-ICESCR. Interim measures are used with regularity by the Inter-American System of Human Rights,[13] CAT and the HRC to avoid further damage and to ensure the final decision can be effectively executed. While the CESCR may be tempted to restrict such measures to cases in which state action is being challenged, so that interim measures would compel the state to refrain from acting, a more important use of this provision may involve obligations to provide for such measures as emergency food, water or shelter. The challenges for the SLI will be to ensure the ability to get involved quickly in situations of this sort, in order to ensure that urgent needs are addressed.

Follow-up and Implementation

Regional systems, particularly the Inter-American system, and domestic regimes such as Colombia, have developed effective models for follow-up and implementation that may be applied strategically under the OP-ICESCR. The European Court of Human Rights and to a lesser extent the European Committee on Social Rights, with their use of the Committee of Ministers for enforcement, may also provide useful insights into new models to develop, combining legal and political oversight.

Friendly Settlement

The Inter-American system, as well as domestic systems such as South Africa provide useful models for using friendly settlement as a means of securing remedies in a more timely fashion, and often achieving resolutions that may go beyond those that would be secured through a formal decision. A third model that could possibly be looked at is the practice of the European Court of Human Rights in issuing "pilot" judgments as a response to breaches revealing structural deficiencies, without specifying the type of measures the State should take, nor suspending the handling of similar cases while waiting for the adoption of such measures.[14]

Amicus Curiae

[13] For example, in *The Yean and Bosico Children v. Dominican Republic*, Judgment of September 8, 2005, Inter-Am Ct. H.R., (Ser. C) No. 130 (2005) the Inter-American Commission issued an interim measure which allowed young girls of Haitian descent involved in a deportation case to continue attending school until a final decision could be made regarding their deportation by the Inter-American Court. The deportation was found by the Court to be motivated by the historic discrimination of persons of Haitian descent within the Dominican Republic and the State was found in violation of the girls' rights to equality and non discrimination, to nationality, and to legal status.

[14] For further information on this procedure see, The Council of Bars and Law Societies of Europe, *CCBE Comments on the Pilot-Judgment Procedure of the European Court of Human Rights*, (June 24, 2010), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Commentaires_CCBE1_1277718645.pdf. (last visited August 30, 2010).

Given the relative lack of experience with amicus in the UN Treaty Body system, application of the unique provision in the OP-ICESCR allowing the Committee to consider third party submissions will need to draw extensively from positive experiences with amicus in other jurisdictions, such as the African and Inter-American systems and in domestic systems. Amicus have frequently proven invaluable in providing support for systemic claims and creative legal argument, particularly in cases involving broader systemic issues linked to social policies and programs with diverse implications for various constituencies. There is also, perhaps, a risk that NGOs representing interests hostile to ESC rights, or those with no accountability to constituencies bringing claims forward may seek to undermine the effectiveness of the OP-ICESCR. It will be important for the SLI to fully canvass experiences in this regard to ensure that those NGOs which will be helpful to Committee in fulfilling its mandate under the OP, including domestic NGOs, are able to play a constructive role, while also ensuring the Committee's ability to maintain fairness to the parties.

5. Questions to Consider in Meeting Challenges for a successful OP-ICESCR (through prism of the litigation cycle)

5.1. Related to general issues

Awareness of OP

The scarcity of communications under other OPs has a lot to do with the absence of any domestic initiatives to make these procedures better known. The SLI needs to consider what strategies could be used to increase the visibility of the OP and ensure that it is used by those for whom it could be most useful and in cases that are the most compelling.

Selection of Jurisdiction

Affected groups, legal organizations etc often have a choice of jurisdictions through which to pursue a complaint. The perceived limited effectiveness of the OP to actually address the violation or abuse at stake may affect the decision. The SLI needs to this concern and focus attention, from the beginning, on ways to strengthen ability of petitions to bring about real change. Generally speaking, activists that can choose between the international system and a regional system, may choose the latter, to the extent that the claims are covered under this system. The OP-ICESCR however, will frequently provide an advantage of more explicit recognition of the justiciability of ESC rights. (Also refer to point above under Domestic v. International Framework.)

Committee Competence and Procedures

Adjudication of ESCR is a new area of work within the UN system, yet the OP does not bring with it any new resources to ensure the development of the necessary expertise. Advocates are concerned that the unique challenges of ESC rights may not be properly recognized or addressed within existing units and procedures. The SLI needs to consider what role it can play in

enhancing the competence of the Committee and ensuring adequate research and other support. Informal sessions with experts and practitioners, such as are regularly used in domestic judicial education programs, could be developed for staff of the Petitions Unit and for Committee members. Ongoing work with academics and researchers to ensure the development of expert commentary will also prove to be important. And finally, more effective engagement in the process for nomination and selection of Committee members may be made a priority.

5.2. Related to case selection and type of strategies

Case Selection

An important question is at what stage should cases be selected, and what criteria should be applied in case selection. Should issues in need of remedy be identified and litigation designed to address them, or should the SLI focus on existing projects. Possible criteria for case selection could include:

- novelty of legal issues:
- strategic importance for jurisprudence;
- connection to social movements;
- intersection with claims of women, disability, indigenous groups, etc;
- whether the case raises systemic and serious ESCR violations;
- numbers affected;
- whether the case raises issues that are concerns in other countries;
- quality of the advocacy and representation;
- likelihood to proceed to consideration on its merits;
- likelihood of effective enforcement of the decision;
- likelihood of success; and
- whether the author or groups involved are interested in collaborative work or in need of assistance.

Framing of legal issues

Often the outcome of a case and the broader impact is determined by the original framing of the legal issues. How can we ensure that legal issues are framed appropriately, informed by advances and knowledge of practitioners and experts and challenging the Committee to interpret the Covenant and the OP in a progressive way? To what extent can or should the issue of legal framing be influenced by the broader purposes of strategic litigation? How can we ensure that arguments are fashioned to reflect the difference between domestic level perspectives and international perspectives?

Relationship with Claimants

A key question to consider will be how to best ensure that the litigation strategy is accountable to affected constituencies, that victims are full participants, supportive of the litigation strategy and willing to consider broader interests at stake in their case. There are a number of models that have been developed in domestic and regional strategic test case litigation to consider, such as the creation of "project teams" to work with and support claimants, broader advisory groups of

legal experts to assist in the development of arguments that will promote coherent and progressive jurisprudence and community-based support groups for claimants dealing with the hazards of judicial or quasi-judicial rights claiming.

Non-legal Strategies/Social Movements

Should the SLI focus on legal strategies, since this is an underdeveloped area of work, or should it also include non-legal strategies of political mobilization and work with social moments?

5.3. Related to procedure

Links to Domestic Advocacy

Constructive and lasting linkage of international and domestic advocacy is critical to effective international work. The SLI will need to ensure that arguments and litigation strategies, particularly regarding effectiveness of domestic remedies and the remedies sought are informed by domestic legal strategies and realities. In ensuring that potential admissibility concerns are adequately addressed, the SLI will need to be cautious not to focus excessively on more advantaged claimants who have had access to legal remedies, to the exclusion of more marginalized groups who have not.

Compiling Relevant Evidence

Evidence is often key to successful litigation, particularly in more complex structural challenges. What are the key challenges in getting evidence before the Committee? How much evidence is optimal? To what extent should alternative forms of evidence be relied on, such as videos or requests for oral hearings? How can the SLI be of assistance in this without creating unworkable demands and limiting the number of cases that can be supported?

Friendly Settlement

While it will be important to promote the effective use of friendly settlement procedures, and to ensure that settlements are in compliance with the ICESCR, remedying both individual and systemic violations raised in a communication, there will be occasions when states parties will seek, by way of settlement, to avoid adjudication of a critical issue. Should there be an agreement that if resources are put into a particular case that the author will not accept a friendly settlement without the consent of the initiative? What kind of advocacy strategies has been effective in regional and domestic systems to ensure progressive settlements that ensure effective remedies?

Remedies and Follow-up

ESCR advocates and claimants have identified the issue of remedies and follow-up to be key to effective advocacy. This will need to be a central focus of the SLI. To what extent can strategic litigation try to ensure structural remedies to individual complaints? How can the SLI encourage creative and proactive remedies with ongoing monitoring and reporting? To what extent should the initiative itself engage in follow-up monitoring and reporting?

5.4. Related to SLI's functions and structure

Inquiry procedure

What role should the SLI take in relation to the inquiry procedure? How much of a priority is this work, in comparison to working with communications?

Funding to Support Cases

If resources are not made available to groups or individuals submitting communications, there may a be a tendency for the SLI to support organizations and individuals which already have resources. Those groups most in need of the OP-ICESCR, which have historically had little or no access to human rights adjudication, may again be excluded. The SLI is therefore interested in allocating funding and resources to claimants and their supporters to promote access to justice. Are there particular problems, however, with the initiative providing funding to victims or their advocates? Should there be criteria for such funding, such as a requirement that the initiative vet and approve arguments to be advanced? Should the funding part of the initiative be separate from the litigation arm? It will be important to learn from past experiences in properly designing this aspect of a SLI.

Collaboration with Organizations

In whatever capacity ESCR-Net engages in strategic litigation, it will be important to work in collaboration with other organizations. Questions to consider will be to what extent the initiative should work with UN agencies that are specifically identified in the OP-ICESCR as potential interveners, with international human rights NGOs such as ICJ and AI, and with domestic NGOs and social movements involved in particular cases.

Other Types of Involvement in Cases

In addition to providing funding, it will likely be critical to facilitate other types of involvement in strategic litigation. ESCR-Net, through the Adjudication working group, could operate as an intervening NGO or *amicus* itself or the SLI could constitute an independent NGO for this purpose. Alternatively, the SLI could itself provide legal representation to some victims, or act as an advisor to authors and advocates, as a research resource, or as a co-ordinator and facilitator of complaints. It will be important to learn from experiences in other jurisdictions and initiatives which of these approaches may work best, and to what extent the initiative may incorporate a range of approaches, to be applied on a case by case basis.

6. Possible Strategies

In addition to case-specific litigation support, there are a number of more pro-active strategies which might be incorporated into the SLI. These might include the following:

Public Education/Resources

While there are many public education campaigns addressing ESC rights, it may be useful to consider a campaign focusing on the value of supporting the entry into force and utilization of

the OP-ICESCR. A website might be developed to provide resources, information and updates on communications being considered, including support for national level efforts toward ratification of the mechanism. A toolkit is being developed, and materials may be provided on various aspects of the OP, similar to what IWRAW-AP has developed for the CEDAW OP.

Technical and Research Support

A key role for the initiative may be to provide research and consultative support to groups in the development of legal arguments and in the preparation of communications. This work could also include an aspect which focuses on legal reforms and harmonization of domestic law with the ICESCR. How should such support be offered? Should it be provided primarily by staff, or is it something which is best provided by creating advisory or consultation groups from the network?

Tracking complaints and facilitating amicus

While the OP-ICESCR is unique among UN complaints procedures in permitting third party submissions, there remain practical problems in ensuring that appropriate amicus get involved in important cases within their area of expertise. Under the present system, communications are provided confidentially to States Parties and no information is released by the CESCR about communications. The NGO Coalition for an OP-ICESCR has advocated for a procedure through which the Committee would render admissibility decisions in advance of consideration of the merits of communications which raise broader issues of policy or novel issues of law. This would allow time for summaries of admissibility decisions and important issues raised in communications to be posted on an appropriate website in advance of consideration on their merits. Even if communications are not made public by the CESCR, authors frequently release information about their communications. If no more transparent process were adopted by the CESCR, the Strategic Litigation Initiative may be able to play an important role in sharing information received through informal channels with interested parties.

Support for follow-up

As noted above, experience at other treaty bodies suggests that a core concern about the effectiveness of the OP will be the willingness of states to implement Committee views. A central component of strategic litigation may therefore be strategies to ensure implementation of views. Such strategies might include the creation of a civil society based, independent monitoring committee, involvement in universal periodic reviews, or working with claimants to initiate domestic procedures to require implementation of views.

7. Conclusion

The Strategic Litigation Intiative will need to develop priorities for initial work and learn from early experiences what works and what does not work. Ongoing review of effectiveness will be necessary, as well as accountability to the members of ESCR-Net.

There are well-known risks to using litigation as a strategy for social change associated with a tendency toward non-participatory approaches dominated by lawyers. ESCR-Net is dedicated to

a very different approach. For ESCR-Net, the goal of litigation is to ensure that claimants become full participants in the development of international norms and applications of ESC rights – a process from which they have largely been excluded in the past. It is critical that these rights are supported by procedures through which they can be claimed effectively and through which violations can be remedied. While there are many potential problems and obstacles associated with the OP-ICESCR, it is also a unique opportunity to bring claimants into international standard setting in an unprecedented manner.

This is not to say that strategic litigation in this field will not benefit from the work of the best legal advocates and academic researchers. The conceptual and legal challenges in this emerging field are very much in need of the most advanced legal thinking.

The efforts will have to be fully collaborative, however, and ultimately accountable to those without whom the OP has no purpose – those whose rights have been violated and who are seeking a fair hearing and effective remedy.

We look forward to working together to ensuring that the OP-ICESCR fulfills its promise.

Malcolm Langford, Norwegian Centre for Human Rights
Bruce Porter, Social Rights Advocacy Centre
Julieta Rossi, International Network for Economic, Social and Cultural Rights