

Exhaustion of Domestic Remedies

in the United Nations System



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I. Introduction

Exhaustion of domestic remedies is usually the first step in seeking redress for human rights violations. This step requires that a person attempt to use the available national legal protections to seek accountability or reparation for the violation, appealing as necessary until the claim can be pursued no further at the national level. If a person does not receive an adequate remedy from a national body, then he or she may submit a complaint—a submission alleging human rights violations—for consideration by an international human rights court or mechanism.¹

The exhaustion of domestic remedies requirement rests on the principle that international bodies should supplement State institutions and should not get involved unless the human rights violation cannot be resolved at the national level.² Thus, before submitting a complaint to an international mechanism, such as a UN treaty body or a regional human rights court, individuals or organizations must first attempt to remedy the situation using national proceedings. Generally, this requires that claims be brought before the highest national authority, often the highest court.

Not all domestic remedies must be exhausted. UN treaty bodies only require complainants³—alleged victims or their representatives—to exhaust remedies that are available and effective.⁴ Where multiple remedies are available, complainants are only required to exhaust one of those remedies that would be suitable for remedying a violation.

Whether a remedy is available, effective, sufficient, or adequate depends on the criteria specific to the international or regional mechanism evaluating the complaint. This often requires evaluating the circumstances of an individual case, including the personal circumstances of the complainant and the legal and political context in which the remedies exist. Examples and explanations of each of these standards are provided in the following sections, organized by mechanism.

Complainants have the initial responsibility, in their complaints, for describing the steps taken to seek redress at the national level for the alleged violation, or for indicating why domestic remedies were not exhausted, including if they were unduly prolonged. If a State objects to the admissibility of a communication on the grounds that domestic remedies were not exhausted, it must show that

¹ See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS, art. 5(2)(b) [hereinafter *ICCPR-OP1*], available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>.

² See, e.g., ECtHR, *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V, Judgment of 28 July 1999, para. 74, available at [http://hudoc.echr.coe.int/eng#{"dmdocnumber":\["696164"\],"itemid":\["001-58287"\]}](http://hudoc.echr.coe.int/eng#{); ECtHR, *Schenk v. Germany* (dec.), no. 42541/02, 9 May 2007, pg. 11, available at [http://hudoc.echr.coe.int/eng?i=001-80805#{"itemid":\["001-80805"\]}](http://hudoc.echr.coe.int/eng?i=001-80805#{); ACommHPR, *Social and Economic Rights Action Center v. Nigeria*, Communication No. 155/96, Merits Decision, 30th Ordinary Session (2001), para. 38, available at <http://www.achpr.org/communications/decision/155.96/>.

³ The term “complainant” is used throughout this guide to refer to the alleged victim(s) or their representatives submitting the allegations to the international body. However, committees often refer to victims in the cases as “author”, “petitioner”, “victim”, or “applicant”. For purposes of this guide, “complainant” covers all of these terms.

⁴ See Human Rights Committee, *Vicente et al. v. Colombia*, Communication 612/1995, Views of 29 July 1997, U.N. Doc. CCPR/C/60/D/612/1995, para. 5.2, available at <http://hrlibrary.umn.edu/undocs/612-1995.html>.

remedies exist that are available and effective that could have been exhausted. If the State can show that an available and effective remedy exists that the complainant did not exhaust, then the complainant must demonstrate that the domestic remedy was exhausted. Alternatively, the complainant may demonstrate that an exception to exhaustion of domestic remedies applies.

There are limited exceptions to the exhaustion of domestic remedies requirement. These exceptions excuse complainants from pursuing, or completing, domestic legal claims when the available remedy would have no chance of success or would take an unreasonably long time to pursue. In the universal system, complainants have been allowed to proceed without exhausting all domestic remedies if they can prove that they tried but were unable to fulfill the exhaustion of domestic remedies requirement due to their financial circumstances, either because they did not have enough money to cover the costs of the proceedings or because they were unable to secure legal aid.⁵ At However, some human rights systems lay out additional exceptions to the requirement or specific interpretations of the exceptions.⁶ For instance, times, international mechanisms treat remedies that are inadequate or ineffective as falling into an exception to the exhaustion requirement but as otherwise available and requiring exhaustion, and sometimes categorize them as excluded from the category of remedies that must be exhausted in any circumstances. The difference in categorization leads to a difference in when the effectiveness or adequacy of a remedy is first raised and who bears the burden of proof at that time. If treated as an exception to the requirement, the complainant first raises the effectiveness of the remedy. If treated as an exclusion to the type of remedy covered by the rule, the State must argue from the outset that the available remedy is also effective and, therefore, must be exhausted.

If the State argues that a remedy is available and has not been exhausted, the complainant must explain why the general rule of domestic exhaustion should not apply in their case. A complainant must successfully demonstrate that a recognized exception applies for the mechanism reviewing the case to excuse them from first seeking review before a national authority or, given the particular circumstances of the case, to find that the remedies were inadequate or ineffective. A complainant's mere doubts as to the effectiveness of a remedy do not excuse the complainant from complying with the exhaustion requirement.

⁵ See e.g., Human Rights Committee, *Quelch v. Jamaica*, Communication No. 292/1988, Views of 23 October 1992, U.N. Doc. CCPR/C/46/D/292/1988, para. 8.2, available at <http://hrlibrary.umn.edu/undocs/html/dec292.htm>; see also Human Rights Committee, *Henry v. Jamaica*, Communication No. 230/1987, Views of 1 November 1991, U.N. Doc. CCPR/C/43/D/230/1987, para. 7.3, available at <http://hrlibrary.umn.edu/undocs/html/dec230.htm>.

⁶ See e.g. American Convention, art. 46(2). These same exceptions are outlined in Article 31 of the IACHR Rules of Procedure. See IACHR, Rules of Procedure of the Inter-American Commission on Human Rights (adopted 13 November 2009, entered into force 1 August 2013), art. 31(2) [hereinafter *IACHR Rules of Procedure*], available at <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>; African Charter, art. 56(5).

II. The United Nations System

1. Treaty-Based Body Overview

The independent committees of experts established to oversee States parties' implementation of the core United Nations human rights treaties are commonly referred to as "UN human rights treaty bodies." Eight of these bodies are currently authorized to receive and decide individual complaints. The eight UN treaty bodies that have a complaint mechanism each require that complainants first attempt to remedy alleged violations through the accused State party's domestic system, the exhaustion of domestic remedies requirement.⁷

The [Human Rights Committee](#) oversees implementation of the International Covenant on Civil and Political Rights ([ICCPR](#)) and may receive individual communications relating to States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights ([ICCPR-OP1](#)). Article 5(2)(b) of the ICCPR-OP1 sets out the exhaustion of domestic remedies requirement.

The Committee on Economic, Social and Cultural Rights ([CESCR](#)) monitors compliance with the International Covenant on Economic, Social and Cultural Rights ([ICESCR](#)) and may receive individual complaints relating to States parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ([ICESCR-OP](#)). The exhaustion of domestic remedies requirement is set out in Article 3(1) of the ICESCR-OP.

The Committee on the Elimination of Racial Discrimination ([CERD](#)) oversees implementation of the International Convention on the Elimination of All Forms of Racial Discrimination ([ICERD](#)) and may receive individual complaints against States parties that have made the relevant declaration under Article 14 of the ICERD. The exhaustion of domestic remedies requirement is set out in Article 14(7)(a).

The Committee on the Elimination of Discrimination Against Women ([CEDAW Committee](#)) monitors compliance with the Convention on the Elimination of All Forms of Discrimination Against Women ([CEDAW](#)), and may receive individual communications relating to States parties to the Optional Protocol to Convention on the Elimination of All Forms of Discrimination Against Women ([OP-CEDAW](#)). Article 4(1) of the OP-CEDAW sets out the exhaustion of domestic remedies requirement.

The Committee Against Torture ([CAT](#)) oversees implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment ([Convention against Torture](#)) and may accept individual complaints against States parties that have made the relevant declaration under Article 22 of the Convention against Torture. The exhaustion of domestic remedies requirement is set out in Article 22(5)(b).

The Committee on the Rights of the Child ([CRC](#)) monitors compliance with the [Convention on the Rights of the Child](#) and its two protocols and may accept individual complaints against States parties that have ratified the [Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure](#) (OP-CRC-IC). Article 7(5) of the OP-CRC-IC sets out the exhaustion of domestic remedies requirement.

The Committee on the Rights of Persons with Disabilities ([CRPD](#)) monitors compliance with the International Convention on the Rights of Persons with Disabilities ([ICRPD](#)) and may receive individual

⁷ See ICCPR-OP1, art. 5(2)(b); ICESCR-OP, art. 3(1); CERD, art. 14(7)(a); OP-CEDAW, art. 4(1); CAT, art. 22(5)(b); OP-CRC-IC, art. 7(5); OP-CRPD, art. 2(d); ICPPED, art. 31(2)(d); ICMW, art. 77(b) (*individual complaint mechanism has not yet entered into force*).

complaints against States parties to the [Optional Protocol to the Convention on the Rights of Persons with Disabilities](#) (OP-CRPD). The OP-CRPD sets out the exhaustion of domestic remedies requirement in Article 2(d).

The Committee on Enforced Disappearances ([CED](#)) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance ([ICPPED](#)) and may consider individual complaints against States parties that have recognized the Committee's competence pursuant to Article 31 of the Convention. Article 31(2)(d) of the Convention sets out the exhaustion of domestic remedies requirement.

Finally, the Committee on Migrant Workers ([CMW](#)) oversees implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ([ICMW](#)). An individual complaints mechanism is pending and will begin operating if and when 10 States parties have made the relevant declaration pursuant to Article 77 of the ICMW; currently, four States have made that declaration. Article 77(b) of the ICMW sets out the exhaustion of domestic remedies requirement.

The rationale behind the exhaustion of domestic remedies requirement is to allow States parties an opportunity to remedy a human rights violation through their own legal system before the relevant treaty body addresses the same issue.⁸ Generally, the majority of UN treaty bodies follow the Human Rights Committee's requirements on exhaustion, which instruct complainants to first present the substance of the issues submitted to the Committee before domestic courts.⁹ Although it is not necessary to explicitly refer to the relevant provisions of the ICCPR, or treaty at issue, during the domestic proceedings, a complainant must at least refer to the rights contained in the ICCPR, or other treaty, when he or she presents the facts.¹⁰

This section will provide examples of how domestic remedies are exhausted before submitting a complaint to a UN treaty body, including examples of issues regarding multiple avenues of redress and compliance with domestic procedural rules. Exceptions to the exhaustion of domestic remedies requirement will also be discussed. These include financial impediments, whether the remedies are available and effective, and whether they have been unreasonably prolonged. Additionally, considerations, such as timing for submitting a complaint, will be discussed.

2. Exhaustion of Domestic Remedies

Complainants are expected to exhaust judicial domestic remedies—often referred to as legal remedies—prior to submitting a complaint alleging human rights violations to a treaty body. This

⁸ Committee on the Elimination of Discrimination against Women, *Goekce v. Austria*, Communication No. 5/2005, Views of 6 August 2007, U.N. Doc. CEDAW/C/39/D/5/2005, para. 7.2, available at <http://undocs.org/CEDAW/C/39/D/5/2005> (citing Human Rights Committee, *Panayote Celal v. Greece*, Communication No. 1235/2003, Views of 11 November 2004, U.N. Doc. CCPR/C/82/D/1235/2003, para. 6.3), available at <http://undocs.org/CEDAW/C/39/D/5/2005>.

⁹ Human Rights Committee, *Antonio Corral v. Spain*, Communication No. 1356/2005, Views of 29 March 2005, U.N. Doc. CCPR/C/83/D/1356/2005, para. 4.2, available at <http://undocs.org/CCPR/C/83/D/1356/2005>.

¹⁰ Human Rights Committee, *B. d. B. et al. v. The Netherlands*, Communication No. 273/1988, Views of 30 March 1989, U.N. Doc. CCPR/C/35/D/273/1988, paras. 4.4, 6.3, available at <http://hrlibrary.umn.edu/undocs/session35/273-1988.html>.

requires that a person first attempt to remedy a human rights violation through national procedures.¹¹ Domestic remedies must have been exhausted either at 1) the time the complaint is submitted or 2) by the time admissibility of the complaint is considered.

a) How to Exhaust

(1) Multiple Avenues of Redress

There is no requirement for a victim to pursue multiple ways to seek a remedy (such as through the criminal, civil, and administrative processes, or through different legal theories) to fulfill the exhaustion of domestic remedies requirement.¹² For example, where a State party argued that domestic remedies had not been exhausted given that the complainant had not pursued the most efficient remedy to obtain redress, the CAT concluded that after “having unsuccessfully exhausted one remedy one should not be required, for the purposes of the article 22, paragraph 5(b) of the Convention, to exhaust alternative legal avenues that would have been directed essentially to the same end.”¹³

However, where there are multiple ways to seek a remedy and one remedy proves unsuccessful but another has a higher likelihood of success, a complainant may be required to exhaust the latter remedy.¹⁴ For example, in *Sadic v. Denmark*, the CERD found that a complainant did not exhaust domestic remedies because they failed to bring the domestic legal action under a provision that offered a higher likelihood of success than the provision they did invoke. The complainant brought a domestic complaint under a provision of the Danish criminal code that penalizes acts of racial discrimination. The prosecutor dismissed the complaint because the facts of the case did not meet the requirements of that particular provision.¹⁵ Before the CERD, the State party argued that even after the proceedings were dismissed, the complainant could have requested the criminal proceedings under a more general provision that criminalizes defamatory statements.¹⁶

The CERD considered whether the complainant was required to initiate a private prosecution under this more general provision and concluded that an effective remedy “is not limited to criminal proceedings based on provisions which specifically, expressly and exclusively penalize acts of racial discrimination.”¹⁷ Therefore, the complainant, the CERD found, should have brought a complaint under the more general provision criminalizing defamatory statements because it would have provided a higher likelihood of success. The CERD held the application inadmissible.¹⁸

(2) Complying with Domestic Procedural Rules

If a complainant does not comply with domestic procedural rules, does not appeal in a timely manner, or does not comply with other statutory deadlines set by the relevant domestic jurisdiction, the complaint before the international treaty body may be deemed inadmissible for failure to exhaust

¹¹ See ICCPR-OP1, art. 5(2)(b); ICESCR-OP, art. 3(1); CERD, art. 14(7)(a); OP-CEDAW, art. 4(1); CAT, art. 22(5)(b); OP-CRC-IC, art. 7(5); OP-CRPD, art. 2(d); ICPPED, art. 31(2)(d); ICMW, art. 77(b) (*individual complaint mechanism has not yet entered into force*).

¹² Committee Against Torture, *Osmani v. Serbia*, Communication No. 261/2005, Views of 25 May 2009, U.N. Doc. CAT/C/42/D/261/2005, para. 5.2, available at <http://undocs.org/CAT/C/42/D/261/2005>.

¹³ *Id.* at para. 7.1.

¹⁴ Committee on the Elimination of Racial Discrimination, *Sadic v. Denmark*, Communication No. 25/2002, Views of 19 March 2003, U.N. Doc. CERD/C/62/D/25/2002, paras. 6.2–6.7, available at <http://undocs.org/CERD/C/62/D/25/2002>.

¹⁵ *Id.* at para. 6.2.

¹⁶ *Id.* at paras. 6.2–6.3.

¹⁷ *Id.* at para. 6.3.

¹⁸ *Id.* at paras. 6.5–6.7

domestic remedies. If it is the State party's fault that the complainant failed to comply with procedural rules then failure to exhaust will not keep the treaty body from examining the issues in the complaint. However, the bad advice of the complainant's private lawyer is not attributable to the State. If the lawyer gives bad advice or acts negligently resulting in a failure to comply with procedural rules, the complainant has failed to exhaust domestic remedies.¹⁹

For example, in *E.Y. v. Canada*, the CAT concluded that domestic remedies had not been exhausted given that the complainant did not seek judicial review of a decision because of his lawyer's advice that domestic remedies had been exhausted. The Committee recalled that errors made by a privately retained lawyer cannot be attributed to the State party and concluded that absent particular circumstances justifying the complainant's failure to appeal, domestic remedies had not been exhausted for purposes of Article 22, paragraph 5(b), of the Convention against Torture.²⁰

Similarly, the CERD has held that if a private lawyer does not file an appeal within the State's statutory deadlines, then the failure to comply with procedural rules cannot be attributed to the State party, and the complainant has not satisfied the exhaustion of domestic remedies requirement.²¹

In some instances, treaty bodies have found that the failure to appeal a judgment is justified and have admitted the complaint. For example, the Human Rights Committee has excused a complainant from the requirement to appeal a judgment in order to exhaust domestic remedies when the complainant had difficulties paying court fees barring her from moving forward in the appellate process,²² and when the State party's procedural rules were ambiguous or imposed conflicting time-limits that the complainant made a reasonable effort to navigate.²³

b) What is a Remedy

(1) Types of Remedies

Complainants are generally required to exhaust available and effective judicial remedies,²⁴ and may be required to exhaust administrative remedies if they are the only remedies available and offer a reasonable prospect of success.²⁵ Whether a remedy is available and effective will be discussed below.

¹⁹ Committee Against Torture, *E.Y. v. Canada*, Communication No. 307/2006, Views of 28 April 2010, U.N. Doc. CAT/C/43/D/307/2006/Rev.1, para. 9.4, available at <http://undocs.org/CAT/C/43/D/307/2006/Rev.1>; Committee on the Elimination of Racial Discrimination, *C.P. and M.P v. Denmark*, Communication No. 5/1994, Views of 15 March 1995, U.N. Doc. CERD/C/46/D/5/1994, para. 6.2, available at <http://hrlibrary.umn.edu/country/decisions/CERDDEC5.htm>.

²⁰ Committee Against Torture, *E.Y. v. Canada*, para. 9.4; Committee Against Torture, *Z.H. v Canada*, Communication No. 604/2014, Views of 17 February 2016, U.N. Doc. CAT/C/56/D/604/2014, para. 7.3, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f56%2fd%2f604%2f2014&Lang=en.

²¹ Committee on the Elimination of Racial Discrimination, *C.P. and M.P v. Denmark*, para. 6.2.

²² See, e.g., Human Rights Committee, *Ngalula Mpandanjila et al. v. Zaire*, Communication 138/1983, Views of 26 March 1986, U.N. Doc. CCPR/C/OP/2, para. 2.4, available at <http://hrlibrary.umn.edu/undocs/session41/138-1983.htm>. The Committee explained that the State party's supreme court rendered the remedy of appeal ineffective even after it had been informed that steps were being taken to comply with the court's formalities and noted the difficulties the complainants faced in paying their court fees in a timely manner. *Id.* at para 5.2.

²³ Human Rights Committee, *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, Views of 6 April 1983, U.N. Doc. CCPR/C/OP/2 at 25, para. 8(b), available at <http://hrlibrary.umn.edu/undocs/html/104-1981.htm>.

²⁴ Human Rights Committee, *Vicente et al. v. Colombia*, Communication 612/1995, Views of 29 July 1997, U.N. Doc. CCPR/C/60/D/612/1995, para. 5.2, available at <http://undocs.org/CCPR/C/60/D/612/1995>.

Judicial remedies—often referred to as legal remedies—include remedies that a court of law may enforce. The Human Rights Committee has observed that for the purposes of the exhaustion requirement, a complainant should first exhaust judicial remedies rather than administrative ones. Article 5, paragraph 2(b) of the ICCPR-OP1, which lays out the requirement to exhaust domestic remedies, refers to the exhaustion of judicial remedies first and other remedies only secondary.²⁵

For example, when both administrative and judicial remedies are available, a complainant must exhaust the judicial remedy. It is insufficient to only exhaust the administrative option.²⁷ In *R.T. v. France*, the complainant did not seek judicial remedies but rather used administrative procedures before approaching the Human Rights Committee. The Committee considered whether the complainant's correspondence with associations or members of parliament constitute "remedies" to fulfill the exhaustion of domestic remedies requirement. While two letters addressed to governmental officials, the Committee determined, presented characteristics of an administrative remedy,²⁸ the Human Rights Committee found the communication was inadmissible for failure to exhaust domestic remedies because the complainant did not pursue judicial proceedings, which the State party submitted were "plausibly" available.²⁹

Similarly, while administrative remedies must be exhausted if they are the only effective remedies available, the Human Rights Committee has emphasized that it is generally not necessary to exhaust other non-judicial remedies that cannot provide redress.³⁰ In *A.S. v. Nepal*, the complainant was not required to submit a complaint to the National Human Rights Commission (NHRC) in Nepal, even though

²⁵ Human Rights Committee, *Patino v. Panama*, Communication No. 437/1990, Views of 21 October 1994, U.N. Doc. CCPR/C/52/D/437/1991, para. 5.2 available at <http://hrlibrary.umn.edu/undocs/html/dec437.htm>; see also Human Rights Committee, *S.S. v. Norway*, Communication No. 79/1980, Views of 2 April 1982, U.N. Doc. CCPR/C/OP/1 at 30, para. 6.2, available at http://hrlibrary.umn.edu/undocs/html/79_1980.htm; Human Rights Committee, *J.R.C. v. Costa Rica*, Communication No. 296/1988, Views of 30 March 1989, U.N. Doc. CCPR/C/35/D/296/1988, para. 8.3, available at <http://hrlibrary.umn.edu/undocs/session35/296-1988.html>.

²⁶ See Human Rights Committee, *R. T. v. France*, Communication No. 262/1987, Views of 4 March 1989, U.N. Doc. CCPR/C/35/D/262/1987, para. 7.4, available at <http://hrlibrary.umn.edu/undocs/session35/262-1987.html>; Human Rights Committee, *Vicente et al. v. Colombia*, para. 5.2.

²⁷ See, e.g., Human Rights Committee, *R. T. v. France*, para. 7.4; Human Rights Committee, *Patino v. Panama*, para. 5.2.

²⁸ Human Rights Committee, *R. T. v. France*, para. 5.2.

²⁹ *Id.* at para. 7.4. See also Human Rights Committee, *P.S. v. Denmark*, Communication No. 397/1990, Views of 22 July 1992, U.N. Doc. CCPR/C/45/D/397/1990, para. 5.4, available at <http://hrlibrary.umn.edu/undocs/html/dec397.htm> (noting that the complainant had only exhausted administrative procedures when judicial review of the administrative decisions was available); Human Rights Committee, *Boudehane v. Algeria*, Communication No. 1924/2010, Views of 22 August 2014, U.N. Doc. CCPR/C/111/D/1924/2010, para. 7.3, available at <http://undocs.org/CCPR/C/111/D/1924/2010> (establishing that writing letters to political and administrative authorities without initiating judicial proceedings will not be sufficient to meet the exhaustion of domestic remedies requirement).

³⁰ Human Rights Committee, *A.S. v. Nepal*, Communication No. 2077/2011, Views of 4 January 2016, U.N. Doc. CCPR/C/115/D/2077/2011, para. 7.3, available at <http://undocs.org/CCPR/C/115/D/2077/2011>; see also Human Rights Committee, *Chaulagain v. Nepal*, Communication No. 2018/2010, Views of 8 January 2015, U.N. Doc. CCPR/C/112/D/2018/2010, para. 6.3, available at <http://undocs.org/CCPR/C/112/D/2018/2010> (stating that it is not necessary to exhaust procedures before the Truth and Reconciliation Commission since this is not a judicial body).

it was an option, because the NHRC did not have the power to prosecute or impose punishment on perpetrators of human rights violations, or to provide redress to victims.³¹ The Human Rights Committee noted that institutions such as the NHRC need not be exhausted.³²

(2) Availability and Effectiveness of Remedies

Remedies must be “available” and “effective” in order for the rule of domestic exhaustion to apply.³³ When determining if remedies are available and effective, UN treaty bodies will evaluate various factors, including which right is allegedly violated; whether the remedy provided for ensured procedural guarantees; whether the remedy is binding; and whether the remedy is considered “extraordinary.”

Domestic remedies are considered **unavailable** if there is no legal process under national law to protect the rights allegedly violated, if national law authorizes the human rights violation being complained of, or if the State denies access to the courts or other legal procedures to bring a claim to protect the right infringed.³⁴

Remedies must be binding to be effective. A binding remedy is one that is legally enforceable and that the State is not able to ignore. Remedies that have a “recommendatory rather than binding effect,” and that the State party would be free to disregard, are not considered effective.³⁵ For example, in *D.R. v. Australia* the CERD considered the State party’s contention that the communication was inadmissible because the complainant failed to submit a complaint to the State party’s Human Rights and Equal Opportunity Commission (HREOC); however, the Committee noted that even if the complainant had submitted a complaint and the HREOC had decided in his favor, the decision would not have a binding effect on the State party, and thus the remedy would be ineffective.³⁶

The effectiveness of a remedy, though, depends on the right that is allegedly violated. The Human Rights Committee explained that it will consider the nature of the alleged violation to determine whether or not a remedy is effective.³⁷ For example, if a “serious violation” is at issue, such as a violation to a person’s right to life, then administrative and disciplinary measures alone will not be adequate or effective remedies.³⁸ The Human Rights Committee has not explicitly elaborated on what constitutes “serious violations,” but in *Basnet v. Nepal*, the Human Rights Committee stressed that in cases involving *forced disappearances* and *torture*, the State is required to provide judicial remedies.³⁹ Additionally, the Human Rights Committee has made it clear that for cases involving forced disappearances or violations of the *right to life*, an effective remedy often requires the complainant to bring the matter to the

³¹ Human Rights Committee, *A.S. v. Nepal*, para. 6.6.

³² Human Rights Committee, *A.S. v. Nepal*, para. 7.3; *see also* Human Rights Committee, *Chaulagain v. Nepal*, para. 6.3 (stating that it is not necessary to exhaust procedures before the Truth and Reconciliation Commission since this is not a judicial body).

³³ Human Rights Committee, *Vicente et al. v. Colombia*, para. 5.2.

³⁴ MANFRED NOWAK, A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURES OF THE UN TREATY BODIES 64-65 (Boris Wijkstrom 2006).

³⁵ Committee on the Elimination of Racial Discrimination, *D.R. v. Australia*, Communication No. 42/2008, Views of 15 September 2009, U.N. Doc. CERD/C/75/D/42/2008, para. 6.4, *available at* <http://undocs.org/CERD/C/75/D/42/2008>.

³⁶ *Id.* at para. 6.4.

³⁷ *Id.* at para. 5.2.

³⁸ *Id.*; Human Rights Committee, *Basnet v. Nepal*, Communication No. 2051/2011, Views of 26 November 2014, U.N. Doc. CCPR/C/112/D/2051/2011, para. 7.4, *available at* <http://hrlibrary.umn.edu/undocs/2051-2011.pdf>.

³⁹ *See* Human Rights Committee, *Basnet v. Nepal*, para. 7.4.

authorities' attention so that it can be investigated and so that the State prosecutor can bring charges.⁴⁰ A complainant is not required to sue for damages if that is the only available remedy because damages alone will not be sufficient to constitute an effective remedy.⁴¹

To be available and effective, the Human Rights Committee has also noted that remedies must ensure procedural guarantees for "a fair and public hearing by a competent, independent and impartial [court]."⁴² This requires the court to be independent from the authority being complained against.⁴³ In *L. R. et al. v. Slovak Republic*, the Committee on the Elimination of Racial Discrimination (CERD) observed that independence "is fundamental to the effectiveness of a remedy" in response to a State party's argument that the complainant had to re-present the grievance to the same body that had originally decided on it.⁴⁴

The Human Rights Committee and the Committee Against Torture have also found applications on humanitarian and compassionate grounds, immediately enforced deportation orders, and the supervisory review of legal judgments to be ineffective remedies.

In *Y. v. Canada*, the Human Rights Committee reiterated that an application on humanitarian and compassionate grounds is not considered an effective remedy when it is not able to stay a removal proceeding, meaning that it cannot suspend or halt the legal process that the complainant alleges it needs protection from. See Human Rights Committee, *Y. v. Canada*, para. 9.3.

In *Sorzabal Diaz v. France* the CAT followed the criterion in *Arkauz Arana* and concluded that a complainant did not need to appeal a deportation order served on the same day of expulsion because it did not constitute an effective remedy that needed to be exhausted. See Committee Against Torture, *Sorzabal Diaz v. France*, Communication No. 194/2001, Views of 20 September 2005, U.N. Doc. CAT/C/34/D/194/2001, para. 6.1, available at <http://undocs.org/CAT/C/34/D/194/2001>(citing Committee Against Torture, *Arkauz Arana v. France*, Communication No. 63/1997, Views of 9 November 1991, U.N. Doc. CAT/C/23/D/63/1997, para. 6.1).

In *Kruk v. Belarus*, the Human Rights Committee found that a petition to a prosecutor's office to initiate the review of a final judgment no longer subject to an appeal is not an effective remedy. See Human Rights Committee, *Kruk v. Belarus*, Communication No. 1996/2010, Views of 9 December 2015, U.N. Doc. CCPR/C/115/D/1996/2010, para. 7.3, available at <http://www.undocs.org/CCPR/C/115/D/1996/2010>.

⁴⁰ See, e.g., Human Rights Committee, *Kroumi v. Algeria*, Communication No. 2083/2011, Views of 19 November 2014, U.N. Doc. CCPR/C/112/D/2083/2011, para. 7.4, available at <http://undocs.org/CCPR/C/112/D/2083/2011>; Human Rights Committee, *Berzig v. Algeria*, Communication No. 1781/2008, Views of 18 January 2012, U.N. Doc. CCPR/C/103/D/1781/2008, para. 7.4, available at <http://undocs.org/CCPR/C/103/D/1781/2008>.

⁴¹ See, e.g., Human Rights Committee, *Kroumi v. Algeria*, para. 7.4; Human Rights Committee, *Berzig v. Algeria*, para. 7.4.

⁴² Human Rights Committee, *Arzuaga Gilboa v. Uruguay*, Communication No. 147/1983, Views of 1 November 1985, U.N. Doc. CCPR/C/OP/2 at 176, para. 7.2, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f26%2fd%2f147%2f1983&Lang=en.

⁴³ Committee on the Elimination of Racial Discrimination, *L. R. et al. v. Slovak Republic*, Communication No. 31/2003, Views of 3 October 2005, U.N. Doc. CERD/C/66/D/31/2003, para. 9.2, available at <http://undocs.org/CERD/C/66/D/31/2003>.

⁴⁴ *Id.* at para. 9.2.

Further, the Human Rights Committee has held that remedies that constitute extraordinary remedies are not effective remedies and do not need to be exhausted.⁴⁵ Extraordinary remedies are remedies that are not ordinarily obtained in the courts, such as filing a request for supervisory review of a court decision that would depend on the discretionary powers of the court in question.⁴⁶ Presidential pardons have also been categorized as an “extraordinary remedy” that is not an effective remedy for exhaustion. In *Singarasa v. Sri Lanka*, the Committee observed that the failure to seek a presidential pardon in response to a long prison sentence was not a domestic remedy that needed to be exhausted in order for the complaint to be admissible.⁴⁷

However, mere doubts about the success or effectiveness of remedies does not excuse complainants from resorting to them.⁴⁸ For example, in *P.M.P.K v. Sweden*, the complainant argued that a new application for asylum was not necessary to exhaust domestic remedies since she had already submitted two applications and both had been rejected because her country’s situation had improved.⁴⁹ She argued that a new application on the basis of new medical information would be rejected for the same reason, and highlighted that only five percent of “new applications” succeed.⁵⁰ Nevertheless, the CAT concluded that it could not objectively assert that a new application would be ineffective, or would have no chance at succeeding, and, therefore, the CAT found the application inadmissible.⁵¹

Similarly, in *Sadic v. Denmark*, the CERD held that speculation over the effectiveness of an available domestic remedy did not excuse the complainant from exhausting it.⁵² The CERD considered whether the complainant’s doubts about the effectiveness of an available, civil remedy excused him from exhausting it and concluded that failure to exhaust domestic remedies based on mere doubts about the effectiveness of the remedy would deem an application inadmissible.⁵³

3. Exceptions to Exhaustion of Domestic Remedies

When domestic remedies have not been exhausted by the time the treaty body reviews the complaint, the relevant Committee will consider whether any of the exceptions apply. Exceptions to the exhaustion of domestic remedies requirement apply when domestic remedies would have no chance of success or if it would take the State an unreasonable amount of time to provide a remedy, that is, remedies would be unreasonably prolonged. Some treaty bodies have also allowed complainants to proceed without exhausting all domestic remedies when they are able to demonstrate that, due to their financial circumstances, they tried but were unable to fulfill the exhaustion of domestic remedies requirement. It

⁴⁵ See Human Rights Committee, *Akmatov v. Kyrgyzstan*, Communication No. 2052/2011, Views of 9 December 2015, U.N. Doc. CCPR/C/115/D/2052/2011 para. 7.3, available at <http://undocs.org/CCPR/C/115/D/2052/2011>.

⁴⁶ See *id.* at para. 7.3.

⁴⁷ Human Rights Committee, *Singarasa v. Sri Lanka*, Communication No. 1033/2001, Views of 21 July 2004, U.N. Doc. CCPR/C/81/D/1033/2001, para. 6.4, available at <http://undocs.org/CCPR/C/81/D/1033/2001>.

⁴⁸ See, e.g., Human Rights Committee, *R.T. v. France*, para. 7.4; Human Rights Committee, *S.S. v. Norway*, para. 6.2 (declaring communications inadmissible for failure to exhaust domestic remedies).

⁴⁹ Committee Against Torture, *P.M.P.K v. Sweden*, Communication No. 30/1995, Views of 20 November 1995, U.N. Doc. CAT/C/15/D/30/1995, paras. 2, 5, available at

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsr6u6hkgMxizYzIX%2BH aZo8egqU2eBRqXWYhWCaH3Yu%2BK2qaLPF3aJD7d4uoMKfEwM5E1Y%2BVdx66n7JE%2FkHT2iE%2FF%2F%2BAg6 SbagbfqGflklhw>.

⁵⁰ *Id.* at para. 5.

⁵¹ *Id.* at para 7.

⁵² Committee on the Elimination of Racial Discrimination, *Sadic v. Denmark*, paras. 6.2–6.7.

⁵³ *Id.* at paras. 6.5-6.7.

is the complainant's responsibility to provide detailed reasons for why the exhaustion of domestic remedies rule should not apply.

a) Futile Remedies

A person does not need to pursue futile appeals. A remedy is futile if it objectively has no chance of success. This exception to the domestic remedies rule is explicitly found in Article 22(5)(2) of CAT and has also been recognized in the jurisprudence of the Human Rights Committee, the CERD, and the Committee on the Rights of Persons with Disabilities (CRPD). Generally, this exception will apply if a complainant successfully shows that the domestic court or authority will inevitably dismiss a claim or when a positive result is impossible due to past court rulings, state inaction, or danger in seeking out the remedy.

For instance, the Human Rights Committee held in *Pratt and Morgan v. Jamaica* that complainants are not required to exhaust domestic remedies that objectively have no chance of success.⁵⁴ In that case, the Human Rights Committee noted that, based on past court rulings, a constitutional appeal would be bound to fail and, therefore, considered that there was no effective local remedy still to exhaust.⁵⁵

Similarly, the CERD and the CRPD do not require domestic remedies to be exhausted if, objectively, a positive result is impossible or a claim will inevitably be dismissed given past court rulings. For example, the CERD has stated that remedies do not need to be exhausted if "under applicable domestic law, the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result."⁵⁶

However, for a claim to be objectively futile, past court rulings must concretely establish a rule that would inevitably lead to the dismissal of all future claims or to a negative result; rulings that fall short of that may not be sufficient to meet the objectively futile standard required to establish an exception to the exhaustion of domestic remedies rule. For example, in *Barbaro v. Australia*, the State party argued that "a single majority judgment in a relatively new area of law" did not indicate complaints for redress on the same topic were obviously futile.⁵⁷ The CERD agreed and explained that the domestic legal precedent was weak because the case the complainants were relying on was not a unanimous judgment and that the legal issues were "largely uncharted."⁵⁸ Therefore, to successfully argue that an appeal would objectively have no prospect of success, a complainant must cite to the relevant domestic case law that shows a positive result is impossible.⁵⁹

⁵⁴ Human Rights Committee, *Earl Pratt and Ivan Morgan v. Jamaica*, Communication No. 210/1986 and 225/1987, Views of 6 April 1989, U.N. Doc. Supp. No. 40 (A/44/40) at 222, para. 12.3, available at <http://hrlibrary.umn.edu/undocs/session44/210-1986.htm>.

⁵⁵ *Id.* at para. 12.5.

⁵⁶ Committee on the Elimination of Racial Discrimination, *D.R. v. Australia*, para. 6.5. See also Committee on the Rights of Persons with Disabilities, *Noble v. Australia*, Views of 23 August 2016, U.N. Doc. CRPD/C/16/D/7/2012, para. 7.7, available at <http://undocs.org/CRPD/C/16/D/7/2012>.

⁵⁷ Committee on the Elimination of Racial Discrimination, *Barbaro v. Australia*, Communication No. 7/1995, Views of 14 August 1997, U.N. Doc. CERD/C/51/D/7/1995, paras. 4.9., 10.5, available at <http://undocs.org/CERD/C/51/D/7/1995>.

⁵⁸ *Id.* at para. 10.5.

⁵⁹ Human Rights Committee, *Hew Raymond Griffiths v. Australia*, Communication No. 1937/2010, Views of 26 January 2015, U.N. Doc. CCPR/C/112/D/1973/2010, para. 6.3, available at <http://undocs.org/CCPR/C/112/D/1973/2010> (stating that if the highest tribunal has decided the matter at issue in a manner that would eliminate any prospects of success, a complainant is not required to exhaust that remedy).

Additionally, the complainant may not merely believe remedies are futile. Most recently, in *Young v. Australia*, the Human Rights Committee recalled that although domestic remedies do not need to be exhausted if they objectively have no chance of success, subjective presumptions of the futility of a remedy are insufficient.⁶⁰ That is, a person cannot base the decision not to exhaust remedies on personal feelings or opinions. Rather, the decision must be based on facts so that the decision not to exhaust is objective.

Complainants may also demonstrate that the domestic remedies would be objectively futile by pointing out inaction under domestic laws or analogizing to similar cases. For example, in *Martinez Portorreal v. Dominican Republic*, the complainant successfully alleged that the legal provisions in question were ineffective since no one had been tried for an offense under those provisions in the 141 years of the Dominican Republic's existence.⁶¹ In *Faurisson v. France*, the Human Rights Committee held that an appeal would be futile where the appellate court in France had dismissed the appeal of the

UN treaty bodies have found the application of remedies to be unduly prolonged in cases with timelines ranging from just over three years to 11 years.

- In *Sandra Fei v. Colombia*, the Human Rights Committee observed that judicial remedies in cases involving custodial disputes after the dissolution of a marriage should operate swiftly. It held that 11 years of judicial disputes about custody and access to the complainant's children constituted excessive delays, even if domestic remedies were still available. See Human Rights Committee, *Sandra Fei v. Colombia*, para. 5.1.
- In *Blanco v. Nicaragua*, the Human Rights Committee held that the complainant was not required to pursue additional remedies in Nicaraguan courts after spending 10 years in detention. This case is unique in the sense that at the time the communication was originally submitted there were no domestic remedies available or effective; however, at the time it was reviewed, a new administration had come into power in Nicaragua and had made remedies available. Nevertheless, the Human Rights Committee concluded that even if domestic remedies were now available, "the application of such remedies would entail an unreasonable prolongation." See Human Rights Committee, *Blanco v. Nicaragua*, Communication No. 328/1988, Views of 18 August 1994, U.N. Doc. CCPR/C/51/D/328/1988, available at <http://hrlibrary.umn.edu/undocs/html/vws328.htm>.
- In *Paez v. Colombia*, the Human Rights Committee found that the pursuit of domestic remedies had been unreasonably prolonged and that remedies did not need to be pursued further because six years had passed since the first proceeding began. Human Rights Committee, *Delgado Páez v. Colombia*, Communication No. 195/1985, Views of 23 August 1990, U. N. Doc. CCPR/C/39/D/195/1985, available at <http://hrlibrary.umn.edu/undocs/session39/195-1985.html>.
- In *V.N.I.M. v. Canada*, the CAT admitted the complaint finding that after four years of pursuing remedies in immigration proceedings, any further extension would be unreasonable and admitted the complaint. See Committee Against Torture, *V.N.I.M. v. Canada*, Communication No. 119/1998, Views of 12 November 2002, U.N. Doc. CAT/C/29/D/119/1998, available at <http://undocs.org/CAT/C/29/D/119/1998>.

⁶⁰ Human Rights Committee, *Kroumi v. Algeria*, para. 4.5; Human Rights Committee, *Young v. Australia*, Communication No. 941/2000, Views of 18 September 2003, U.N. Doc. CCPR/C/78/D/941/2000, para. 9.4, available at <http://undocs.org/CCPR/C/78/D/941/2000>.

⁶¹ Human Rights Committee, *Martinez Portorreal v. Dominican Republic*, Communication No. 188/1984, Views of 5 November 1987, U.N. Doc. Supp. No. 40 (A/43/40) at 207, paras. 2.4, 4, available at <http://hrlibrary.umn.edu/undocs/session43/188-1984.htm>.

complainant's co-accused.⁶² In those circumstances, the Human Rights Committee determined that it would be unreasonable to require the complainant to go through an appeal on the same matter and concluded that it "could no longer be seen as an effective remedy."⁶³

Treaty bodies may also consider **dangerous remedies** to be futile. For example, in *Phillip v. Trinidad and Tobago*, the complainant did not report to the authorities or file a complaint regarding the conditions under which he was being detained for fear of reprisal. The Human Rights Committee found that the complainant need not exhaust.⁶⁴

b) *Unreasonably Prolonged Remedies*

The requirement to exhaust domestic remedies does not apply if the application of the remedies is unreasonably prolonged, meaning it would take the State an unreasonable amount of time to provide a remedy.⁶⁵ There is no specific time frame that treaty bodies apply to determine whether a remedy has been unreasonably prolonged. Instead, UN treaty bodies consider a variety of factors, including the specific matter at issue in the case, such as child custody;⁶⁶ the complexity of the case;⁶⁷ whether the delay is caused by the complainant or the State party;⁶⁸ and the age of a complainant,⁶⁹ among other things.

Decisions from the Human Rights Committee and the CAT, however, indicate that three or more years from initiating proceedings are required to conclude that a case has been unreasonably prolonged. For example, the CAT, quoting Human Rights Committee jurisprudence, stated in *Ali v. Tunisia* that "a delay of over three years for the adjudication of the case at first instance, discounting the availability of subsequent appeals, was 'unreasonably prolonged' within the meaning of article 5, paragraph 2(b), of the Optional

In *Durmic v. Serbia and Montenegro*, ongoing changes within the State's judicial system prolonged complainant's claims for over four and a half years. The CERD found that the application of domestic remedies had been unduly prolonged and admitted the communication even when domestic remedies were still available. See Committee on the Elimination of Racial Discrimination, *Durmic v. Serbia and Montenegro*, Communication No. 29/2003, Views of 6 March 2006, U.N. Doc. CERD/C/68/D/29/2003, available at <http://undocs.org/CERD/C/68/D/29/2003>.

⁶² Human Rights Committee, *Faurisson v. France*, para. 6.1.

⁶³ *Id.* at para. 6.1.

⁶⁴ Human Rights Committee, *Phillip v. Trinidad and Tobago*, Communication 594/1992, Views of 3 December 1998, U.N. Doc. CCPR/C/64/D/594/1992, para. 6.4, available at <http://undocs.org/CCPR/C/64/D/594/1992>.

⁶⁵ CAT, art. 22(5)(b); CED, art. 31(2)(d); OP-CEDAW, art. 4(1); ICCPR-OP1, art. 5(2)(b); OP-CRC-IC, art. 7(5); CERD, art. 14(7)(a); ICESCR-OP, art. 3(1); OP-CRPD, art. 2(4).

⁶⁶ Human Rights Committee, *Sandra Fei v. Colombia*, Communication No. 514/1992, Views of 25 April 1995, U.N. Doc. CCPR/C/53/D/514/1992, para. 3.7, 5.1, available at <http://undocs.org/CCPR/C/53/D/514/1992>.

⁶⁷ Committee on the Elimination of Racial Discrimination, *Quereshi v. Denmark*, Communication 33/2003, Views of 10 March 2004, U.N. Doc. CERD/C/66/D/33/2003, para. 6.4, available at <http://undocs.org/CERD/C/66/D/33/2003>; Human Rights Committee, *Fillastre and Bizouarn v. Bolivia*, Communication 336/1998, Views of 5 November 1991, U.N. Doc. CCPR/C/43/D/336/1988 at 96, para. 5.2, available at <http://hrlibrary.umn.edu/undocs/html/dec336.htm>.

⁶⁸ Human Rights Committee, *Fillastre and Bizouarn v. Bolivia*, para. 5.2.

⁶⁹ Human Rights Committee, *Des Fours Walderode and Kammerlander v. Czech Republic*, Views of 2 November 2001, U.N. Doc. CCPR/C/73/D/747/1997, para. 6.4, available at <http://undocs.org/CCPR/C/73/D/747/1997> (taking into account the complainant's advanced age when holding that the application of domestic remedies had been unreasonably prolonged).

Protocol.”⁷⁰ The CAT concluded that because the complainant already waited 23 months for the State to launch an investigation, the complainant would necessarily have to wait longer than the “three-year limit set by the Human Rights Committee” for a remedy and to complete exhaustion of remedies.⁷¹ Therefore, the application of remedies, the CAT held, would be unreasonably prolonged.⁷²

Further, the Human Rights Committee has found that a time frame of two years is not sufficient. In *R.L. et al v. Canada*, the Human Rights Committee considered whether a compensation procedure that had been stalled without progress for two years due to circumstances not attributable to the complainants was unduly prolonged. The Committee concluded, in view of the information provided, that it was not unduly prolonged and that it did not fall within the exception to the exhaustion of domestic remedies rule.⁷³ Similarly, in *Zundel v. Canada*, the Human Rights Committee stated that it “does not find that a delay of two years to consider a constitutional action is unduly prolonged,”⁷⁴ and in *Fernando v. Sri Lanka*, it conclusively stated that an 18-month delay from the time of the incident does not meet the “unreasonably prolonged” exception.⁷⁵

However, there are some cases from the CERD, the CEDAW Committee, and the Committee on Enforced Disappearances that are outliers. For example, in *Quereshi v. Denmark*, the CERD decided that the application of further remedies would be unreasonably prolonged after the complainant had gone through four levels of administrative decision-making—a process that lasted weeks short of two years. The Committee stated that the proceedings did not require complex litigation and admitted the communication.⁷⁶ In *Yrusta v. Argentina*, the Committee on Enforced Disappearances found that

In *Fillastre and Bizouarn v. Bolivia*, two French private detectives argued that their arrest and detention had been unduly prolonged. The Human Rights Committee concluded that “a delay of over three years for the adjudication of the case at first instance, discounting the availability of subsequent appeals, was ‘unreasonably prolonged.’” It also highlighted as relevant that the delay could not be attributed to the alleged victims or to the complexity of the case. See Human Rights Committee, *Fillastre and Bizouarn v. Bolivia*, para. 5.2.

proceedings lasting over one and a half years were unreasonably prolonged.⁷⁷ Further, in *Jallow v. Bulgaria*, the CEDAW Committee concluded that proceedings that had been pending for 14 months constituted an unreasonably prolonged remedy because the proceedings were taking longer than what was reasonably required by law. The CEDAW Committee noted that the

⁷⁰ Committee Against Torture, *Ali v. Tunisia*, Communication No. 291/2006, Views of 26 November 2008, U.N. Doc. CAT/C/41/D/291/2006, para. 7.2, available at <http://undocs.org/CAT/C/41/D/291/2006>; see also Human Rights Committee, *Rajapakse v. Sri Lanka*, Communication No. 1250/2004, Views of 5 September 2006, U.N. Doc. CCPR/C/87/D/1250/2004, para. 6.1, available at <http://undocs.org/CCPR/C/87/D/1250/2004>.

⁷¹ Committee Against Torture, *Ali v. Tunisia*, para. 7.2.

⁷² *Id.* at para. 7.2.

⁷³ Human Rights Committee, *R.L. et al. v. Canada*, Communication No. 358/89, Views of 5 November 1991, U.N. Doc. CCPR/C/43/D/358/1989, para. 6.3, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f43%2fD%2f358%2f1989&Lang=en.

⁷⁴ Human Rights Committee, *Zundel v. Canada*, Communication No. 1341/2005, Views of 14 May 2006, U.N. Doc. CCPR/C/89/D/1341/2005, para. 6.3, available at <http://undocs.org/CCPR/C/89/D/1341/2005>.

⁷⁵ Human Rights Committee, *Fernando v. Sri Lanka*, Communication No. 1189/2003, Views of 10 May 2005, U.N. Doc. CCPR/C/83/D/1189/2003, para. 8.2, available at <http://undocs.org/CCPR/C/83/D/1189/2003>.

⁷⁶ Committee on the Elimination of Racial Discrimination, *Quereshi v. Denmark*, para.6.4.

⁷⁷ Committee on Enforced Disappearances, *Yrusta v. Argentina*, Communication No. 1/2013, Views of 12 April 2016, U.N. Doc. CED/C/10/D/1/2013, paras. 8.5, 8.7–8.8, available at <http://undocs.org/CED/C/10/D/1/2013>.

court of first instance should have heard the matter within one month, but the proceedings lasted five months.⁷⁸

Finally, mere concerns about the potential length of proceedings, does not excuse the complainants from the requirement of at least making a reasonable effort to exhaust domestic remedies—at the very least, complainants should bring the matter before the court of first instance.⁷⁹

c) *Financial Impediments*

Treaty bodies may consider financial impediments an exception to the exhaustion of domestic remedies rule; financial impediments may include the fact that a complainant does not have enough money or is unable to secure legal aid. To trigger this exception, complainants must show first, that they attempted to pursue judicial remedies and second, that when legal representation was necessary, they were unable to afford it and/or that the State party was unwilling to provide it.

For example, in *Quelch v. Jamaica*, the complainant argued that a constitutional motion was not an available remedy because he could not afford to pursue it. The Human Rights Committee agreed that the remedy was not available and held that it was not the complainant's indigence that prevented him from pursuing a constitutional remedy, but rather the State party's unwillingness or inability to provide legal aid.⁸⁰

Practice Tip

It is important that complainants clearly state that they 1) attempted to pursue judicial remedies and 2) that they were unable to afford necessary legal representation and/or that the State party was unwilling to provide it.

On the other hand, the Human Rights Committee and the CEDAW Committee have declined to find this exception applies when the complainant did not pursue remedies due to financial concerns and doubts about the remedies and when the complainant failed to prove that available remedies would be a financial burden. The Human Rights Committee has found that when a complainant refuses to pursue judicial remedies because of "financial considerations and doubts about the effectiveness of domestic remedies," the complainant is not automatically excused from exhausting them.⁸¹ Similarly, the CEDAW Committee has stated that if arguments concerning financial difficulties in securing a lawyer are too general in nature, the exception to exhaustion does not apply, and the complaint is inadmissible.⁸² For example, in *Sankhé v. Spain* the CEDAW Committee declared a communication inadmissible for failure to exhaust domestic remedies after determining the complainant had not convincingly demonstrated

⁷⁸ Committee on the Elimination of Discrimination against Women, *Jallow v. Bulgaria*, Communication No. 32/2011, Views of 28 August 2012, U.N. Doc. CEDAW/C/52/D/32/2011, paras. 5.4, 7.3, available at <http://undocs.org/CEDAW/C/52/D/32/2011>.

⁷⁹ See, e.g., Human Rights Committee, *A. and S.N. v. Norway*, Communication No. 224/1987, Views of 11 July 1988, U.N. Doc. CCPR/C/33/D/224/1987, para. 6.4, available at <http://hrlibrary.umn.edu/undocs/224-1987.html>.

⁸⁰ Human Rights Committee, *Quelch v. Jamaica*, para. 8.2; see also Human Rights Committee, *Henry v. Jamaica*, para. 7.3.

⁸¹ Human Rights Committee, *P.S. v. Denmark*, para. 5.4; see also Human Rights Committee, *Kadić v. Bosnia and Herzegovina*, Communication No. 2048/2011, Views of 9 December 2015, U.N. Doc. CCPR/C/115/D/2048/2011, para. 8.3, available at <http://undocs.org/CCPR/C/115/D/2048/2011> (emphasizing that "financial considerations and unsubstantiated doubts about the effectiveness of domestic remedies do not absolve the authors from exhausting them."); Human Rights Committee, *Faurisson v. France*, para. 6.1.

⁸² Committee on the Elimination of Discrimination Against Women, *Sankhé v. Spain*, Communication No. 29/2011, Views of 28 October 2013, U.N. Doc. CEDAW/C/56/D/29/2011, para. 9.4, available at <http://undocs.org/CEDAW/C/56/D/29/2011>.

that she could not afford to engage a lawyer or that it was impossible for her to obtain a lawyer's services by other means that would not have constituted a prohibitive financial burden for her.⁸³

a) CAT: *Ex officio* Proceedings

In cases involving torture, the CAT may find a communication admissible—even when the complainant has not exhausted domestic remedies—if a State party's courts have been informed and are aware that a person has been tortured. States parties have an obligation to initiate an *ex officio* prosecution in conformity with Article 12 of the Convention against Torture. An *ex officio* prosecution is one that is initiated by the State even if the victim does not press charges or initiate proceedings. In *Gallastegi Sodupe v. Spain*, the CAT admitted a communication even though the complainant had not exhausted domestic remedies, reasoning that it was the State's responsibility to initiate *ex officio* proceedings so long as it was aware of the torture.⁸⁴ The CAT explained that the complainant informed the courts during criminal proceedings that he had been tortured, and, therefore, the State party, not the complainant, had to initiate procedures to prosecute the torture offense *ex officio*.⁸⁵

4. Additional Considerations

a) Duplication of Proceedings

Generally, a complaint is inadmissible if another international judicial or quasi-judicial body is considering or has issued a merits decision on the same matter.⁸⁶ For instance, Article 5(2)(a) of the ICCPR-OP1 states that complaint is inadmissible when the "same matter is being examined under another procedure of international investigation or settlement."⁸⁷ This means that if multiple international remedies are available, a complainant must only submit an application to *one* international body.⁸⁸ For example, the committees cannot examine a complaint that has been submitted to and is pending before another treaty body or regional mechanism such as the Inter-American Commission on Human Rights, the European Court of Human Rights, or the African Commission on Human and Peoples' Rights.⁸⁹ However, the two bodies must be examining, or one body already examined on the merits, the *same matter* in order for the communication to be inadmissible. The purpose of this rule is to prevent multiple international bodies from issuing merits decisions on identical facts and allegations.

If the same matter was considered by another international mechanism but is no longer pending before it and the matter was not decided on the merits, the Human Rights Committee will not be barred from considering the communication.⁹⁰ For example, in *X v. Netherlands*, the Human Rights Committee did not object from considering a communication that dealt with the same facts as those previously

⁸³ Committee on the Elimination of Discrimination Against Women, *Sankhé v. Spain*, para. 9.4.

⁸⁴ Committee Against Torture, *Gallastegi Sodupe v. Spain*, Communication No. 453/2011, Views of 28 June 2012, U.N. Doc. CAT/C/48/D/453/2011, para. 6.4, available at <http://undocs.org/CAT/C/48/D/453/2011>.

⁸⁵ Committee Against Torture, *Gallastegi Sodupe v. Spain*, para. 6.4.

⁸⁶ See, e.g., ICCPR-OP1, art. 5(2)(a); CESCR-OP, art. 3(c).

⁸⁷ ICCPR-OP1, art. 5(2)(a); see also Human Rights Committee, *X v. Netherlands*, Communication No. 2729/2016, Views of 9 September 2016, U.N. Doc. CCPR/C/117/D/2729/2016, para. 4.2, available at <http://undocs.org/CCPR/C/117/D/2729/2016>.

⁸⁸ See Human Rights Committee, *Akmatov v. Kyrgyzstan*, Communication No. 2052/2011, Views of 9 December 2015, U.N. Doc. CCPR/C/115/D/2052/2011, para. 7.2, available at <http://undocs.org/CCPR/C/115/D/2052/2011>.

⁸⁹ See, e.g., ICCPR-OP1 article 5(2)(a); Human Rights Committee, Rules of Procedure of the Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.10, rule 96(c), available at <http://undocs.org/CCPR/C/3/Rev.10>.

⁹⁰ Human Rights Committee, *X v. Netherlands*, para. 4.2.

addressed by the European Court of Human Rights because the European Court had dismissed it as inadmissible without deciding the matter on the merits.⁹¹

b) Time Limit for Submitting Complaints

If domestic remedies are exhausted, then the complainant must prepare a communication to the relevant committee within the allotted time established by each committee.

Each committee has different requirements regarding the amount of time that complainants have to submit a complaint. The Committee on Economic, Social and Cultural Rights places a one-year time limit from the date that domestic remedies are exhausted.⁹² It has established that the date for calculating the starting point, is the day following the date when a complainant “has the right to be notified, or is notified, by means of a copy of the final decision of a national court that marks the exhaustion of domestic remedies.”⁹³ Similarly, Article 7(h) of the OP-CRC-IC on a communications procedure states that: “The Committee shall declare a communication inadmissible when: (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.”

The CERD has the most restrictive time limit. The International Convention on the Elimination of All Forms of Racial Discrimination requires complainants to submit an application to the Committee within six months.⁹⁴

The Human Rights Committee does not place a time limit to submit complaints. However, Rule 96(c) of the Human Rights Committee’s rules of procedure states that if a complaint is submitted five years after exhausting domestic remedies or three years from the conclusion of another international procedure or settlement, the Human Rights Committee may dismiss the complaint on abuse of the right of submission grounds.⁹⁵

The other Committees, like the Human Rights Committee, do not have a specific time limit requirement, although a dissent from the CEDAW Committee suggested a one-year time limit.⁹⁶ However, it is important for complainants to submit the complaint as soon as possible after the exhaustion of domestic remedies to ensure that the relevant Committee can thoroughly evaluate the factual background and that the State party can properly respond.⁹⁷

⁹¹ *Id.* at para. 4.2; *see also* Human Rights Committee, *X v. Norway*, Communication No. 2474/2014, Views of 11 December 2015, U.N. Doc. CCPR/C/115/D/2474/2014, para. 6.2, *available at* <http://undocs.org/CCPR/C/115/D/2474/2014> (holding that the Human Rights Committee is not precluded from considering a communication previously declared inadmissible by the European Court of Human Rights).

⁹² ICESCR-OP, article 3(2)(a).

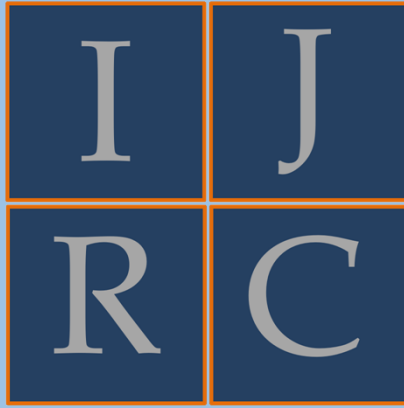
⁹³ Committee on Economic, Social and Cultural Rights, *Lopez Rodriguez v. Spain*, Communication No. 1/2013, Views of 20 April 2016, U.N. Doc. E/C.12/57/D/1/2013, para. 8.3, *available at* <http://undocs.org/E/C.12/57/D/1/2013>.

⁹⁴ International Convention on the Elimination of All Forms of Racial Discrimination, article 14(5).

⁹⁵ Human Rights Committee, Rules of Procedure of the Human Rights Committee, rule 96(c).

⁹⁶ Committee on the Elimination of Discrimination against Women, *M.S. v. The Philippines*, Communication No. 30/2011, Views of 15 August 2014, U.N. Doc. CEDAW/C/58/D/30/2011, at para. 18, *available at* <http://undocs.org/CEDAW/C/58/D/30/2011> (dissenting opinion) (arguing for a one-year time limit for filing a complaint after exhaustion of domestic remedies).

⁹⁷ *See* OHCHR, Human Rights Bodies – Complaint Procedures: Complaining about human rights violations, *available at* <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>.



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