

OP-CEDAW Technical Papers No. 1

# **OVERVIEW OF THE RULE REQUIRING THE EXHAUSTION OF DOMESTIC REMEDIES UNDER THE OPTIONAL PROTOCOL TO CEDAW**

Donna J. Sullivan



International Women's Rights Action Watch Asia Pacific



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This is part of a series of technical briefing papers aimed at promoting and disseminating the use of the Optional Protocol to CEDAW as a mechanism for women to claim rights under the UN treaty body system and also makes available emerging discussions and debates related to IWRAP Asia Pacific's areas of work. The views here reflect those of the author(s) and do not necessarily always reflect the views of the organization.

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#### **Overview Of The Rule Requiring The Exhaustion Of Domestic Remedies Under the Optional Protocol To CEDAW**

This paper was written by Donna J Sullivan.

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## Introduction

The exhaustion of domestic remedies is a requirement of admissibility for communications submitted under of the Optional Protocol (OP) to the Convention on the Elimination of All Forms of Discrimination Against Women (the Convention). Article 4(1) of the OP stipulates that the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee or the Committee) “shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.”

This overview of the exhaustion requirement outlines its main features as detailed in jurisprudence under the other major human rights treaties, which all incorporate the exhaustion rule, and in the communications decided by the CEDAW Committee as of November 2007. It notes the implications of the trends which emerge from this review, for how the exhaustion requirement should be addressed in preparing communications. To aid in the preparation of communications under the OP, references to, and quotations from, a wide range of international and regional human rights cases are included in the endnotes.

The extensive practice that has been built under other international and regional human rights treaties and the still limited practice under the OP itself, indicate that the exhaustion of domestic remedies is consistently contested by States Parties. Human rights bodies have typically devoted significant attention to the relevant facts and related legal questions.<sup>1</sup> In all but one of the communications considered by the CEDAW Committee as of November 2007, States Parties have raised the failure to exhaust domestic remedies as a bar to admissibility.<sup>2</sup> In the majority of cases, States Parties have provided specific information both as to the nature of the allegedly unexhausted remedies and the facts regarding exhaustion in the case concerned. The degree of specificity has varied both among communications and with regard to different remedies canvassed in a single communication. The arguments raised by the authors of communications have similarly varied in the degree of specificity with which they addressed both the availability and nature of domestic remedies and the factual bases for claiming an exception to the exhaustion requirement.

Because the CEDAW Committee has considered only a small number of communications to date, its approach to the exhaustion requirement has yet to be clarified in detail. However, the rule requiring exhaustion of domestic remedies is well-established in international customary and conventional law, including international and regional human rights treaties.<sup>3</sup> The substance of the requirement therefore may be clarified by reference to interpretations of the exhaustion requirement under other human rights treaties, including: the First Optional Protocol to the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the European Convention on Human Rights; the American Convention on Human Rights; and the African Charter on Human and Peoples' Rights.<sup>4</sup> Although the wording of the exhaustion provisions in these treaties varies, their interpretations are substantially similar. (For the texts of these provisions, see note 3). Some differences exist with regard to such questions as burden of proof and the range of factual circumstances that have been recognized in the case law as grounds for exception to the requirement, but these may be attributed in large part to the differences in contextual application of the rule. This includes not only differences in the facts of individual cases, but regional differences in the broader

factual context. For example, among the regional human rights systems, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights have received more communications in which the effectiveness of domestic remedies was undermined or nullified by broad-based failings in the administration of justice and widespread human rights violations than has the European Commission of Human Rights.

The exhaustion requirement as stated in the OP to the Convention fits squarely within the context of other human rights treaties. Jurisprudence established under both international and regional human rights treaties formed the basis of discussion of the exhaustion requirement during the drafting of Article 4. The intent of the Commission on the Status of Women in adopting the language of Article 4(1) was to incorporate established understanding of the main parameters of the exhaustion requirement. The language of Article 4(1) of the OP mirrors that of Article 22 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The CEDAW Committee has referred to the practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) as supporting authority for its conclusions regarding certain aspects of the exhaustion requirement. States Parties to communications have cited jurisprudence under the First Optional Protocol to the ICCPR and the European Convention on Human Rights in their submissions. In the future, it is likely that both States Parties and the authors of communications will refer to the practice of other human rights bodies with increasing frequency. It should be expected that the Committee will continue to take into account the practice of other human rights bodies, whether on its own initiative or in response to submissions by the parties.

It should also be expected that the CEDAW Committee will follow the general outlines of jurisprudence established under other human rights treaties in developing its own approach to the exhaustion rule, as the underlying principles of the rule are broadly agreed upon in human rights law. The differing results in its application to particular cases point to the fact-specific nature of the analysis required by the rule. This need for contextualized application gives the Committee the necessary flexibility in applying the relevant criteria. As a consequence, victims and/or their advocates will need to become familiar with existing interpretations of the exhaustion rule.

- The exhaustion of domestic remedies is an admissibility requirement for communications submitted under the OP.
- Article 4(1) of the OP stipulates that the CEDAW Committee “shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.”
- Although the CEDAW Committee has considered only a small number of communications, and its approach to the exhaustion requirement has yet to be clarified in detail, the rule requiring exhaustion of domestic remedies is well established in international law, including international and regional human rights treaties.
- The substance of the requirement therefore may be clarified by reference to interpretations of the exhaustion requirement under other human rights treaties.



# What constitutes a “domestic remedy” for purposes of the exhaustion requirement

## Overview

Article 4(1) refers to the exhaustion of “all available domestic remedies.” The type of remedy encompassed by this language is understood in international and regional human rights jurisprudence to include judicial remedies, administrative remedies and extraordinary remedies. Each of these categories is subject to qualification, however. Human rights jurisprudence makes clear that in order to fall within the scope of the exhaustion rule, a remedy must be available in practice, adequate to provide relief for the harm suffered and effective for the object sought by the complainant in the particular circumstances of the case. In addition to its conventional bases in human rights treaties, the requirement that remedies be exhausted at the domestic level before a claim may be brought at the international level is a rule of customary international law. The commentary on Article 44(b) of the International Law Commission’s Articles on State Responsibility, on the exhaustion rule, explains that: “[t]he mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would apply can lead only to the rejection of any appeal.”<sup>5</sup>

Under Article 4(1) of the OP the rule applies only to remedies that are available, not unduly prolonged and likely to bring effective relief. These limitations regarding the type of remedy that must be exhausted express broad principles recognized by other human rights bodies in construing the exhaustion requirement as set out in their respective treaties.

For example:

### Human Rights Committee

“The Committee recalls that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to an author.”<sup>6</sup>

### Inter-American Court of Human Rights

“[The internal legal remedies that need to be exhausted are those that are] suitable to address an infringement of a legal right [and] capable of producing the result for which [they were] designed.”<sup>7</sup>

“Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted.”<sup>8</sup>

### Inter-American Commission on Human Rights

“the requirement to exhaust all remedies available under domestic law does not mean that the alleged victims are obliged to exhaust all the remedies at their disposal. As to the

exhaustion of domestic remedies, the Commission has reiterated that if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative judicial remedy available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled.”<sup>9</sup>

### European Court of Human Rights

“[To meet the exhaustion requirement] normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness.”<sup>10</sup>

“The Court emphasises that its approach to the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights.... Accordingly, it has recognised that [the rule] must be applied with some degree of flexibility and without excessive formalism....[T]he rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant....”<sup>11</sup>

### African Commission on Human and Peoples’ Rights

“Three major criteria could be deduced ... in determining [the exhaustion] rule, namely: the remedy must be available, effective and sufficient.”<sup>12</sup>

“[Complainants are not required to exhaust remedies that are] found to be, as a practical matter, unavailable or ineffective.”<sup>13</sup>

Although the exhaustion requirement is addressed primarily to ordinary judicial remedies, it also encompasses certain administrative and extraordinary remedies, as outlined below.

Human rights jurisprudence makes clear that in order to fall within the scope of the exhaustion rule, a remedy must be:

*available in practice;*

*adequate to provide relief for the harm suffered; and*

*effective for the object sought by the complainant in the particular circumstances of the case.*

### Judicial Remedies

The exhaustion rule as interpreted in international and regional jurisprudence refers principally to *ordinary judicial remedies*. Exhaustion of judicial remedies implies resort to the courts of first instance and to the highest level of appellate review available. Since judicial remedies are accepted as the most effective means of redressing violations of legal rights, victims are expected to utilize judicial remedies where these are available, effective and adequate. They may not rely on non-judicial processes, such as appeals for legislative action, as the means of seeking redress, with the exception

of administrative actions which satisfy basic legal requirements, as explained in the section below. The parameters of established requirements concerning judicial remedies are described extensively below ('Administrative remedies'), particularly page 8 ('The need for a final decision'), the need to make normal use of a remedy, and facts indicating the availability, adequacy and effectiveness of remedies.

## Administrative Remedies

With regard to administrative remedies, the Human Rights Committee has explained that "the term 'domestic remedies' must be understood as referring *primarily* to judicial remedies,"<sup>14</sup> but also refers to administrative remedies.<sup>15</sup> The European Commission of Human Rights and the Inter-American Commission on Human Rights similarly interpret "domestic remedies" to include certain types of administrative remedies.<sup>16</sup> Whether an administrative remedy is of the type that must be exhausted is determined by whether it meets the criteria of availability, adequacy and effectiveness. Administrative remedies awarded by bodies such as national human rights commissions or employment discrimination tribunals may fall within the scope of the exhaustion requirement, if those bodies have the requisite independence, the decisions issued are enforceable, the proceedings provide due process of law and the remedies provided are adequate in the circumstances of the particular case.<sup>17</sup> The key criteria are; whether the administrative body applies clearly defined legal standards, and the remedy is adequate for the relief sought. For example, although the Inter-American Commission on Human Rights has concluded that the complaints procedure of the Mexican National Commission on Human Rights was not an effective remedy within the meaning established by its case law, it based that finding on the facts that the National Commission, which has responsibility for overseeing public authorities, is structured like the office of an ombudsperson and its recommendations are not legally enforceable.<sup>18</sup>

In contrast, the African Commission on Human and Peoples' Rights has held that "the internal remedy to which Article 56, 5 [of the African Charter] refers entails a remedy sought from courts of a judicial nature."<sup>19</sup> It found that proceedings before a national human rights commission did not satisfy the exhaustion requirement, noting that such proceedings could be "taken as preliminary amicable settlement and should, in principle, ...be followed by an action before the law courts."<sup>20</sup>

In cases involving violations of the rights to life and security of person, contentious administrative remedies have been held by the Inter-American Commission on Human Rights to be inadequate, on the grounds that such cases necessitate criminal law measures that must be carried out by the State.<sup>21</sup> However, the Commission has found contentious-administrative remedies to be adequate and effective in cases involving labour rights.<sup>22</sup>

The term "*domestic remedies*" is thus understood in human rights jurisprudence to refer primarily to judicial remedies, as the most effective means of redressing human rights violations, but if there are administrative remedies which are available, adequate and effective in the particular circumstances of the case, it may be necessary to exhaust these. In a situation where administrative remedies have been pursued as an alternative course to judicial remedies,<sup>23</sup> the decision to forego judicial remedies in favour of administrative ones is likely to result in a finding at the international level that domestic remedies have not been exhausted.<sup>24</sup>

This appears to have been the basis for the CEDAW Committee's finding in *Salgado v. U.K.*<sup>25</sup> that domestic remedies had not been exhausted. The victim had sought redress through administrative procedures and appeals to legislators on humanitarian grounds but had made no attempt to use the available judicial procedures, including an appeal to the High Court. She offered no specific justification for this failure, relying instead on a general assertion that such procedures were too complex and inaccessible due to her age and limited financial means. The Committee did not address the question of whether judicial remedies must be exhausted even if effective and adequate administrative remedies have been fully exhausted. Since the State Party conceded that the victim had pursued several administrative and legislative forms of redress, it was open to the Committee to assess these remedies to determine whether they were adequate in the circumstances of the case if it considered them to be adequate as a matter of law. It therefore may be reasonably inferred from the Committee's reference in its finding of inadmissibility to the victim's failure to appeal to the High Court that it agreed with the State Party that "all available domestic remedies" necessarily includes judicial remedies.

The term "domestic remedies" is understood in human rights jurisprudence to refer primarily to judicial remedies, as the most effective means of redressing human rights violations, However, if there are administrative remedies which are available, adequate and effective in the particular circumstances of the case, it may be necessary to exhaust

## Extraordinary Remedies

In the case of extraordinary remedies, it is not their designation as extraordinary rather than ordinary remedies that determines whether they must be exhausted, but whether or not they offer "the possibility of an effective and sufficient means of redress."<sup>26</sup> Remedies that are discretionary in nature, whose "purpose is to obtain a favour and not to vindicate a right,"<sup>27</sup> are not subject to the exhaustion rule.<sup>28</sup> Examples of extraordinary remedies that have this discretionary character include presidential pardons and relief awarded through interventions by other executive organs or the legislature, in which the decision-maker is not obliged to act impartially on the basis of legal principles.<sup>29</sup>

Extraordinary remedies that are adequate and effective means of vindicating rights have been considered by the Human Rights Committee and other human rights bodies to be subject to the exhaustion rule, including certain types of constitutional actions.<sup>30</sup> The key criteria are: whether decisions are based on legal principles rather than the decision-maker's discretion; whether the remedy has the capacity to produce the result for which it was designed; and whether it is directly accessible to the victim rather than dependent on the exercise of discretionary power by officials. . For example, the Inter-American Commission on Human Rights has held that: "while in some cases such extraordinary remedies may be suitable for addressing human rights violations, as a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right. In principle, these are ordinary rather than extraordinary remedies."<sup>31</sup> It therefore examines the effectiveness of specific extraordinary remedies with regard to the redress sought by petitioners to determine if those remedies should be exhausted.<sup>32</sup>

In *A.S. v. Hungary*,<sup>33</sup> the CEDAW Committee was presented with the question of whether the exhaustion requirement should be applied to an extraordinary constitutional remedy. It concluded that the victim was not required to exhaust this remedy, a "revision of judgment" applicable in cases where a third

instance review is warranted to remedy a defect regarding a legal issue. However, the facts and the Committee's rationale indicate that this finding was not based on the extraordinary character of the remedy per se, but on its ineffectiveness and unavailability to the victim. The Committee noted the author's assertion, uncontested by the State Party, that the criteria for "revision of judgment" that applied at the time that the appellate court issued its decision in her case had been subsequently declared unconstitutional by the Constitutional Court, on the ground that they were unpredictable. It also cited other factors related to the availability and effectiveness of the "revision of judgment:" "[t]he author also maintains that her case did not fulfill the criteria for this remedy. She further maintains that the decision of the Court of Second Instance had specifically stated that no appeal against it was permitted." Finally, it noted that "[t]he State party has acknowledged the extraordinary nature of the remedy." In stating its finding on exhaustion, the Committee referred to the totality of these facts: "[u]nder these circumstances, the Committee considers that it cannot be expected of the author that she would have availed herself of the remedy."

The CEDAW Committee did not address the implications of the extraordinary character of the "revision of judgment" or the question of whether extraordinary remedies in general, or specific types of extraordinary remedies, fall with the exhaustion requirement. Since it did not take up the issue directly and the facts in the case amply demonstrated the ineffectiveness and unavailability of the remedy in question, there is insufficient basis to conclude that the Committee considers extraordinary remedies per se outside the scope of Article 4(1). It therefore may be assumed that it will follow the approach of other human rights bodies and analyze the availability, adequacy and effectiveness of extraordinary remedies to determine whether they must be exhausted.<sup>34</sup>

- Extraordinary remedies whose purpose is to obtain a favour rather than to vindicate a right are not subject to the exhaustion rule.
- Extraordinary remedies may fall within the scope of the exhaustion requirement if they offer an effective and sufficient means of redress and are based on legal principles rather than the discretion of the decision-maker.

## Meeting the Exhaustion Requirement: Key Aspects

### The Need to Make “Normal Use” of the Remedy

If a domestic remedy is covered by the exhaustion rule (i.e., it meets the requirement of effectiveness and other conditions), a victim is obliged to make “normal use” of that remedy. “Normal use” implies that she complies with procedural requirements in domestic law, such as time limits, and formal requirements, such as subject matter jurisdiction and standing to bring the action.<sup>35</sup> The failure of counsel to observe procedural requirements will not absolve the victim of the responsibility to meet the requirements of domestic law, unless that failure is in some way attributable to conduct by the State.<sup>36</sup> If procedural requirements are so onerous or impractical as to make the remedy ineffective or inaccessible in the circumstances of the case, or authorities impede recourse to the procedure, resort to those remedies would not be considered “normal use.”<sup>37</sup>

In *B.J. v. Germany*,<sup>38</sup> the CEDAW Committee found that the victim had failed to exhaust domestic remedies because she had not filed her constitutional complaint in an admissible form, having failed to meet applicable deadlines and satisfy the requirement that claims be exhausted in the lower courts before raising them in the Constitutional Court. It also concurred with the State Party that she should have included her claim regarding equalization of pensions in divorce decrees in her action before the appellate court, rather than relying on the fact that it would be resolved as a part of the divorce decree. The Committee thus applied the requirement of normal use.

If domestic remedies have not been exhausted due to a failure to meet procedural requirements, complainants should provide information demonstrating that the procedural requirements were unreasonable in the particular circumstances of the case or rendered the remedy unavailable. Examples of unreasonable procedural requirements include extremely short timelines for filing a claim or an appeal in complex cases, and very restrictive requirements regarding standing to bring a case. Where procedural requirements are so onerous or unreasonable as to make the remedy inaccessible or ineffective, exemption from the exhaustion requirement may be argued on those grounds.<sup>39</sup> In more complex cases, such as those involving review by constitutional courts and appellate courts which have discretion regarding cases accepted for review, authors of communications should detail their legal arguments regarding the requirements in domestic law, in order to counter any claims by the State Party that domestic remedies were not exhausted due to a failure to make normal use of such remedies.

- A victim must have made “normal use” of domestic remedies: she must have complied with procedural and formal rules in domestic law, including time limits.

### The need for a final decision

In order to meet the exhaustion requirement, a victim must have obtained a final decision from the highest court to which recourse is available. If there are ongoing proceedings at the time the Committee considers a communication, the claim will not have been properly exhausted. In such circumstances,

the complainant must either demonstrate that an exception to the requirement applies or re-submit the communication after obtaining a final judgment. A final decision implies that appeals have been taken to the highest possible level. If there are multiple claims, all must have been pursued through to a final decision at the highest appellate level. Claims that have been discontinued by the victim will be considered unexhausted. Like initial proceedings, appellate remedies must be available, adequate and effective in the particular circumstances of the case in order to be subject to the exhaustion rule.

Communications should include information confirming that a final judgment has been obtained from the highest possible court with regard to all aspects of the claims brought before the Committee. If victims have not pursued appeals where available under domestic law or have abandoned one or more of several claims prior to a final decision in the case, they should present information substantiating that the available appellate remedies are unduly prolonged or unlikely to provide effective relief.

- In order to meet the exhaustion requirement, a victim must have obtained a final decision from the highest court to which recourse is available.

## **The need to raise the substance of the claim at the domestic level**

In order to satisfy the exhaustion requirement, the claim presented in a communication must have been raised in substance at the domestic level. This requirement is well-established in human rights jurisprudence and has been affirmed by the CEDAW Committee in *Salgado v U.K.*, *Kayhan v. Turkey* and *Goekce v. Austria*. *Kayhan* was declared inadmissible on this ground.

In *Salgado v. U.K.*,<sup>40</sup> the Committee stated that “authors of communications are required to raise in substance before domestic courts the alleged violation of the provisions of the Convention, which enables a State party to remedy an alleged violation before the same issue may be raised before the Committee.” As supporting authority, it referred to the “longstanding jurisprudence of other international human rights treaty bodies, in particular the Human Rights Committee,” and cited two communications decided by the latter body.<sup>41</sup> However, it found the communication inadmissible due to the victim’s failure to resort to any judicial remedies and certain administrative remedies, not due to any defects in the substance of the claim articulated at the domestic level.

In *Kayhan v. Turkey*,<sup>42</sup> the author argued that the State Party had violated her rights under Article 11 of the Convention by dismissing her and terminating her status as a civil servant for wearing a headscarf, a piece of clothing that is unique to women. She had not alleged sex discrimination in any of the proceedings at the domestic level, however, but had charged violations related, *inter alia*, to freedom of expression and religion. She had referred to “discrimination” without clarifying the grounds of such discrimination and the substance of the arguments she presented at the domestic level focused on discrimination on religious and ideological grounds. The Committee concluded that the author had failed on multiple occasions in domestic fora to “put forward arguments that raised the matter of discrimination based on sex in substance” and in accordance with domestic procedural requirements. Her failure to do so meant that the State party had not been given the opportunity to remedy the alleged violation before the issue was presented to the Committee. The Committee’s



finding indicates that, in accordance with established human rights jurisprudence, it will review the substance of the arguments presented at the domestic level to determine whether the claims presented at the international level were articulated in a manner that allowed the domestic fora to address the essence of those claims.

The established jurisprudence of other human rights bodies makes clear that the substance of the claim should be presented at every stage of domestic proceedings. In cases involving multiple claims a failure to raise one of those claims in appeals to higher courts will lead to a finding that domestic remedies have not been exhausted with regard to that claim. Victims and their legal counsel should therefore consider carefully whether to abandon one (or more) of several claims considered by the courts of first instance when taking the others forward to the appellate level.

It is not necessary to raise the claim in a form that corresponds to the form in which it is later presented at the international level or to refer in domestic proceedings to the specific conventional provisions violated.<sup>43</sup> Nor is it necessary for purposes of the exhaustion requirement that the domestic court or administrative body have dealt with the claim presented at the international level; all that is required is that the domestic authorities were given an opportunity to do so.<sup>44</sup>

The relationship between this requirement that the substance of the claim have been put forward at the domestic level and the underlying rationale of the exhaustion requirement itself has been emphasized by the CEDAW Committee. In *Goekce v. Austria*, it noted that the substance of the claims presented in communications should first be presented to an appropriate domestic body in order to fulfill the underlying purpose of the exhaustion requirement, which is to give States Parties “an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems” before the Committee addresses the same issues. In support, it cited a decision of the Human Rights Committee recalling the rationale of its corresponding rule: “the function of the exhaustion requirement under ... the [First] Optional Protocol is to provide the State party itself with the opportunity to remedy the violation suffered...”<sup>45</sup>

The widespread recognition of the principle that claims before domestic fora must encompass the substance of the claim presented at the international level, the Committee’s repeated references to this principle, and its decision in *Kayhan*, all point to the need to have included a reference, in some form, to sex discrimination in the arguments advanced in domestic proceedings. In order to make the case that remedies have been exhausted, at a minimum, it is necessary to have articulated the claim in a form that alleges discrimination on the ground of sex or the disproportionate effect on women of the State’s action or inaction. If such claims are not cognizable in the applicable domestic law, then it can be argued that there are no available or adequate remedies to be exhausted.

- In order to satisfy the exhaustion requirement, the claim presented in a communication must have been raised in substance at the domestic level.
- To present a claim under the OP, arguments in domestic proceedings should have included a basic allegation of sex discrimination or alleged the disproportionate effect on women of the State’s action or inaction.



# The legal nature of the exhaustion requirement and criteria for assessing exhaustion

## Exhaustion is a necessary condition for admissibility of a communication

Under Article 4(1), the CEDAW Committee must ascertain that all domestic remedies have been exhausted prior to considering the merits of a communication. It will carry out a substantive evaluation of the law and procedure related to domestic remedies based on the information provided by the parties. If it concludes that domestic remedies have not been exhausted, it must determine whether it will recognize one of the exceptions to the requirement. The rule establishes a necessary condition for admissibility.

Rule 67 of the Committee's Rules of Procedure for the OP, on the "[c]onditions of admissibility of communications," states that: "[w]ith a view to reaching a decision on the admissibility of a communication, the Committee, or a working group, *shall apply* the criteria set forth in articles 2, 3 and 4 of the Optional Protocol." (Emphasis added). Rule 72(4) stipulates that: "[t]he Committee *shall not decide* on the merits of the communication without having considered the applicability of all of the admissibility grounds referred to in articles 2, 3 and 4 of the Optional Protocol." (Emphasis added). The language of Article 4(1), Rule 67 and Rule 72(4), as well as the Committee's statements regarding this condition in several communications<sup>46</sup> indicate that Committee will raise the issue of exhaustion on its own initiative even if the State Party does not assert a failure to exhaust as a bar to admissibility. This is the case despite the fact that the exhaustion requirement functions as a defence for the State Party, whose interests it is aimed at protecting, and could therefore be subject to explicit and implicit waiver by the State.<sup>47</sup> (For discussion of waiver, see section on 'Waiver of the exhaustion requirement').

In *Kayhan v. Turkey*, the CEDAW Committee found the communication inadmissible for failure to exhaust domestic remedies because the victim had not presented a claim of sex-based discrimination in any of her multiple attempts to secure relief at the national level. The Committee raised this issue on its own initiative. The State Party had challenged admissibility on the grounds that the author had not utilized any of the three avenues of redress it identified as available and effective. However, it did not advance any arguments regarding the failure to present the claim of sex discrimination in domestic proceedings, notwithstanding the fact that it did challenge admissibility on the ground that the communication was incompatible with the Convention because the actions in question did not constitute sex discrimination.

The Committee thus may be expected to assess any aspect of the exhaustion requirement that is apparent from the information submitted by the parties, not merely those aspects that are addressed in the objections by States Parties to admissibility. In its views on several communications it has noted that one or both parties had failed to substantiate their arguments for or against the availability and/or effectiveness of remedies and that it had reached a determination based on an evaluation of such information as was available on the record.

- Under Article 4(1), the CEDAW Committee must ascertain that all domestic remedies have been exhausted prior to considering the merits of a communication. The rule establishes a necessary condition for admissibility.

## Information relating to the exhaustion requirement to be submitted by the parties

A communication must either provide information indicating that domestic remedies have been exhausted, including the specific remedies utilized, the substance of the claim raised in domestic proceedings, and whether a final decision has been issued in the proceedings; or, in the alternative, present information supporting arguments that no effective domestic remedies are available or, if they are available, one or more of the recognized exceptions to the requirement applies.

The two exceptions recognized in Article 4 are remedies that are ***unduly prolonged*** or ***unlikely to bring effective relief***. The concept of effectiveness has been the subject of extensive analysis in international and regional jurisprudence and encompasses a broad range of factors. The threshold determination of whether domestic remedies are available and adequate is likewise the subject of extensive interpretation by human rights bodies. Complainants may be guided by these analyses, in addition to the CEDAW Committee's practice, in determining how the criteria identified in Article 4(1) apply to their own cases.

The model communication form requests the following information regarding steps taken to exhaust domestic remedies:<sup>48</sup>

"Describe the action taken to exhaust domestic remedies; for example, attempts to obtain legal, administrative, legislative, policy or programme remedies, including:

- Type(s) of remedy sought
- Date(s)
- Place(s)
- Who initiated the action
- Which authority or body was addressed
- Name of court hearing the case (if any)
- If domestic remedies have not been exhausted, explain why."

It also requests copies of all relevant documentation.

It should be noted that this list does not specify information related to several key points that may be considered by the CEDAW Committee in reaching a decision on exhaustion, including the threshold determination of whether domestic remedies are in fact available. In preparing a communication it therefore will be helpful to refer to the CEDAW Committee's practice and established jurisprudence under other human rights treaties in order to identify information that should be included regarding exhaustion. (See Section 4.3, below, for a list of questions to be considered in light of established jurisprudence.)

The Committee's Rules of Procedure outline the process for submission by the parties of information regarding admissibility, including information on the exhaustion of domestic remedies. At the initial stage, following receipt of the communication and prior to forwarding it to the State Party concerned, the Secretariat may "request clarification from the author of a communication, including: ...[s]teps taken by the author and/or victim to exhaust domestic remedies." (Rule 58(1)(e)).

Thereafter, Rule 69 sets out the process through which information regarding admissibility is to be submitted. The Committee requests a written reply to the communication. The State Party must respond within 6 months of receiving this request with a statement relating to the admissibility and merits, "as well as to any remedy that may have been provided in the matter." In the alternative, the Committee may request an

explanation relating solely to admissibility, which includes the question of exhaustion. The State Party may, within two months of receiving the initial request from the Committee for a statement on the admissibility and merits, request that the communication be rejected as inadmissible, including for failure to satisfy the exhaustion requirement. The Committee or its working group or rapporteur may also request “the State party or the author of the communication to submit, within fixed time limits, additional written explanations or statements relevant to the issues of the admissibility or merits of a communication.”

Rule 69(6) provides that “[i]f the State party concerned disputes the contention of the author or authors ... that all available domestic remedies have been exhausted, the State party shall give details of the remedies available to the alleged victim or victims in the particular circumstances of the case.”

Rule 69(9) requires the Committee, working group or rapporteur to “transmit to each party the submissions made by the other party pursuant to the present rule and ... afford each party an opportunity to comment on those submissions within fixed time limits.”

Under Rule 71(1), if the issue of admissibility is decided by the Committee or a working group before the State Party’s written explanations or statements on the merits of the communication are received, that decision and all other relevant information “shall be submitted ... to the State Party concerned ... and the author of the communication shall ... be informed of the decision.”

Rule 70(2) provides for reconsideration of a finding of inadmissibility, based on a written request from the author, “containing information indicating that the reasons for inadmissibility no longer apply.” In addition, the Committee may “revoke its decision that a communication is admissible in the light of any explanation or statements submitted by the State party” (Rule 71(2)); this amounts to a reconsideration of admissibility at the State Party’s request.

The procedure outlined for requesting and submitting information on admissibility thus provides ample opportunity for the State Party to challenge admissibility on the grounds of a failure to satisfy the exhaustion requirement. In addition, the CEDAW Committee may on its own initiative request additional information from either party regarding exhaustion.

It is therefore important that the author of a communication responds to each allegation by the State Party regarding exhaustion and to requests by the Committee for clarification or additional information on the subject. As noted below, exhaustion is a question of fact to be determined by the Committee, which will base its decision on the information provided by the parties. If the author does not respond to the State Party’s allegations regarding the facts related to exhaustion in the victim’s case or the facts concerning the remedies themselves, the Committee may decide to accept those allegations as true.

The author of a communication must either:

- a) provide information indicating that domestic remedies have been exhausted, including the specific remedies utilized, the substance of the claim raised in domestic proceedings, and whether a final decision has been issued in the proceedings;
- b) or, in the alternative, present information supporting arguments that no effective domestic remedies are available or, if they are available, one or more of the recognized exceptions to the requirement applies.

## Exhaustion is assessed by a fact-specific inquiry: key questions to be considered

In order to determine whether domestic remedies have been exhausted, the CEDAW Committee must analyze the specific facts of the case, based on the information that has been submitted by the parties. The key questions to be resolved regarding the various aspects of the exhaustion requirement are:

**Whether a domestic remedy is available**, including whether such a remedy: exists in the law; is capable of being applied in practice by administrative and judicial authorities; and is applicable to the complainant's case. It is not sufficient that a remedy be available theoretically under the law: the remedy must be, according to the law, applicable to the complainant's case. In the case of extraordinary remedies, such as special constitutional procedures, and non-judicial remedies, such as administrative and legislative procedures, the key questions to be resolved are whether it is a merely discretionary remedy whose object is to obtain a favor and not to vindicate a right and whether the decision-making body must apply clearly defined legal standards. If it has merely discretionary character and/or is not determinable according to law, an extraordinary or non-judicial remedy is not a remedy which must be exhausted. (See sections on 'Administrative remedies' and 'Extraordinary remedies' above).

**Whether the domestic remedies available are adequate or sufficient to redress the alleged violation.** The adequacy of a remedy depends on the type of relief that may be obtained in the event of a successful outcome and the nature of the alleged violation. For example, a civil suit for damages is not an adequate remedy where criminal prosecution is necessary to redress a violation and the State has failed to pursue such prosecution.<sup>49</sup>

**Whether domestic remedies are effective.** The effectiveness of a remedy depends both on the nature of the remedy and the relationship between the remedy and the facts of the case. Ineffectiveness may be demonstrated by facts indicating that particular remedies or types of remedies are ineffective in general, due to broad-based defects rendering them ineffective in most or all cases, or, more narrowly, by facts indicating that the remedy in question is ineffective in the specific circumstances of the case, or by both general and case-specific facts.

- a) Facts that indicate that a remedy is not effective in general include: malfunctioning of the judicial system for reasons related to incompetence, corruption or interference with the independence of the judiciary; executive or legislative action suspending judicial guarantees, including states of emergency and "ouster clauses";<sup>50</sup> its unsuitability for redressing specific types of violations, for reasons related to, inter alia, the complexity of the procedure, its civil or criminal character, the existence of ongoing harm or a threat of harm to victims who attempt to access remedies, or the non-legal, discretionary nature of the remedy in question; the existence of widespread human rights violations; and a pattern of failure by the domestic system for the administration of justice to satisfy international standards, either generally or with regard to the protection of specific rights.
- i) *Grave or widespread human rights violations.* In cases alleging grave or widespread human rights violations, the State can be presumed to be aware of the violations if their scale is sufficiently broad or the violations have been well publicized. The failure of the State to prevent and respond to the abuses points to its inability or unwillingness to remedy the situation despite having notice and the opportunity to do so. The underlying rationale of the exhaustion rule, which is to allow the State to correct the violations, is therefore

inoperable under such circumstances. An exception to the rule may be asserted on the basis of evidence substantiating the occurrence of grave or widespread violations of the type being challenged in a communication, on the grounds that the scope and/or severity of the violations demonstrate that there are no effective domestic remedies in general (that is, none that offer a reasonable prospect of success). In such situations, the ineffectiveness of remedies in general dispenses with the requirement that a complainant demonstrate the ineffectiveness of particular remedies available in the specific context of her case.

For example, the African Commission on Human and Peoples' Rights has held that the existence of pervasive human rights violations obviates the exhaustion requirement. In these cases, it reasoned that the states concerned had notice of the abuses, bearing in mind the gravity of the violations, including the large numbers of victims involved, and the high levels of national and international attention directed to the situations.<sup>51</sup>

As a separate matter, the African Commission has concluded that the large numbers of victims involved in situations of massive violations made the "channels of remedy unavailable in practical terms."<sup>52</sup> In cases alleging massive and serious human rights violations, the Commission considers that the exhaustion requirement does not "apply literally in cases where it is impractical or undesirable for the Complainant to seize the domestic courts in respect of each individual complaint. This is the case where there are a large number of victims. Due to the seriousness of the human rights situation and the large number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable..."<sup>53</sup>

Although victims of widespread violations of women's human rights may choose to seek the intervention of the CEDAW Committee under the inquiry procedure established in Article 8 of the OP CEDAW, if they do elect to use the communications procedure (for example, in order to benefit from its greater capacity to redress the specificities of individual harm), evidence of the gravity and or scope of the violations may be offered to support an argument that the remedies allegedly available are ineffective *in general* (or available only in theory). It may then be argued that the ineffectiveness of the remedies in general dispenses with the need to show ineffectiveness in the specific circumstances of the case.

- ii) *A pattern of defects in the administration of justice.* Similarly, evidence of a pattern of defects in the administration of justice indicating that the domestic justice system fails to meet international standards could be offered to substantiate a claim that domestic remedies in general are ineffective, either broadly or with reference to particular categories of remedies. The American Convention on Human Rights expressly recognizes the absence of adequate due process guarantees as a basis for exception to the exhaustion rule. Article 46(2) stipulates that the exhaustion requirement "shall not be applicable when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated..." The African Commission on Human and Peoples' Rights has held that "[t]he invocation of the exception to the rule requiring that remedies under domestic law should be exhausted ... must invariably be linked to the determination of possible violations of certain rights enshrined in the African Charter, such as the right to a fair trial enshrined under article 7 of the African Charter. The exception to the rule on the exhaustion of domestic remedies would therefore apply where the domestic situation of the State does not afford due process of law for the protection of the right or rights that have allegedly been violated."<sup>54</sup> In a series of cases against

Turkey involving events that took place in a region subject to martial law and characterized by civil strife, the European Court of Human Rights held that the exhaustion rule was inapplicable when official tolerance by state authorities of repeated violations was demonstrated. Under those circumstances, the malfunctioning of the system for the administration of justice dispensed with the victims' obligations to exhaust domestic remedies.<sup>55</sup>

One prominent commentator on the exhaustion rule has suggested that "[a]lthough not all forms of denial of justice may have the result of exempting the claimant" from the exhaustion requirement, an absence of due process would seem to have the effect of rendering remedies "obviously futile ... and fairness cannot be expected to prevail. The exception would be relevant in the absence of specific provisions for it in a conventional instrument."<sup>56</sup>

This reasoning would support an argument that evidence of a pattern of defects in the administration of justice with regard to women's human rights, such as discriminatory evidence rules or a widespread refusal by the judiciary and/or the police to apply existing legal protections for women's human rights, demonstrates the ineffectiveness of the remedies in question as a general matter. Evidence substantiating the existence of a pattern of widespread defects in the administration of justice might then dispense with the need to prove ineffectiveness in the particular case.

- iii) *Necessity for criminal justice measures.* In cases where the State must take penal measures in order to meet its obligation to respect and ensure a right, as is the case with violations of the rights to life and security of person, human rights bodies have made clear that civil remedies cannot be considered effective for purposes of the exhaustion requirement.<sup>57</sup> For violations of the right to life and personal integrity, an effective remedy requires a criminal investigation, prosecution, punishment, where appropriate, and compensation.<sup>58</sup> Moreover, in cases involving prosecutable domestic crimes, if the State fails to move the investigation and prosecution forward, a complainant cannot be expected to exhaust domestic remedies.<sup>59</sup>

The CEDAW Committee has been presented with the question of whether civil remedies must be exhausted in cases of domestic violence where the criminal measures taken by the State had failed to prevent the victim's death. In *Goekce v. Austria* and *Yildirim v. Austria*, the authors challenged the adequacy and effectiveness of the protective measures taken by the State Party; the effectiveness of domestic remedies was thus at issue with regard to both the exhaustion requirement and the merits of the claim. In these communications, the authors argued that existing legal and administrative measures for preventing and responding to domestic violence were inadequate, as they did not provide for preventive detention of offenders and were ineffective in preventing such violence in practice. They alleged that criminal justice personnel had failed to act with due diligence to investigate and prosecute acts of violence against the deceased victims. In essence, they argued that the only effective remedies would have been a "pro-arrest and detention" policy in order effectively to provide safety for women victims of domestic violence and a "pro-prosecution" policy.

With regard to the adequacy of the measures taken against domestic violence, the State Party argued that existing policy, legislation and administrative arrangements satisfied its obligations to prevent and respond to such violence. With regard to the exhaustion of domestic remedies, it asserted, *inter alia*, that: a civil action for damages remained available to the victims' heirs; and that the victims should have brought an action before the Constitutional Court challenging



the penal code on the grounds that no appeal was available against the Public Prosecutor's failures to comply with the requests to issue arrest warrants.

In its views on both communications, the Committee noted that, in communications regarding domestic violence, "the remedies that came to mind for purposes of admissibility related to the obligation of a State party concerned to exercise due diligence to protect; investigate the crime, punish the perpetrator, and provide compensation as set out in general recommendation 19..." (Goekce v. Austria, para. 7.3; Yildirim v. Austria, para. 7.3). In these two cases it also found that the constitutional procedure was not an effective remedy for purposes of the exhaustion requirement, since it was not likely to bring effective relief either to the victims or to their heirs: the procedure "could not be regarded as a remedy which was likely to bring effective relief to a woman whose life was under a dangerous criminal threat... [nor was it] likely to bring effective relief in the case of the deceased's descendants in light of the abstract nature of such a constitutional remedy." It also rejected the State Party's contention that the victims should have lodged a complaint under legislation designed to determine the lawfulness of the actions by the responsible Public Prosecutor, finding that this did not constitute a remedy which is likely to bring effective relief "to a woman whose life is under a dangerous threat."

In addition, in Goekce v. Austria, the State Party argued that the victim should have exhausted the remedy of "associated prosecution," which permits a private individual to take over the prosecution of a criminal case where the Public Prosecutor declines to act. The Committee decided that the remedy of "associated prosecution" was not de facto available to the victim, given that: "the requirements for a private individual to take over the prosecution of the defendant are more stringent than those for the Public Prosecutor, ... German was not [the victim's] mother tongue and, most importantly, ... she was in a situation of protracted domestic violence and threats of violence." It also concluded that the fact that the State party "introduced the notion of 'associated prosecution' late in the proceedings indicates that this remedy is rather obscure."

In its views on these communications, the CEDAW Committee did not address the broader question of whether civil remedies can be an adequate and effective alternative that must be pursued for purposes of the exhaustion requirement in domestic violence cases where the available criminal remedies have proven ineffective in protecting a victim. It focused on the fact that the civil remedies in question were not adequate for dealing with threats of immediate harm rather than on their civil character as such. Moreover, it did not comment on whether under the Convention it would be permissible for a State to avoid its responsibility for prosecuting crimes by authorizing a private individual to carry out prosecution. Were the Committee to take such a position, it would be inconsistent with international human rights law on state responsibility.

- b. Facts that may indicate the ineffectiveness of a remedy in the specific case are typically presented in arguing for an exception to the application of the exhaustion rule on the ground that it is unlikely to bring effective relief (ineffectiveness of the remedy). (See section on 'Whether one of the recognized exceptions to the exhaustion requirement applies' below).

**Whether the remedy fits the specific circumstances of the case.** The availability, adequacy and effectiveness of remedies are to be evaluated not only in light of the facts regarding the law and procedures related to the remedies as such, but with reference to the specific circumstances or context of the victim's case. The adequacy of a remedy is thus to be determined with reference to its suitability for redressing the

type of violation to which it applies, and with reference to its capacity to provide the relief sought in the circumstances of the particular case.<sup>60</sup> If in the circumstances of the case the claimant cannot meet the substantive legal or procedural requirements for utilizing a remedy, that remedy is not available in practice.<sup>61</sup> For example, if the facts of the case do not enable the victim to meet the substantive requirements for utilizing a particular remedy or the victim lacks legal standing, the remedy is de facto unavailable.

**Whether the author has exhausted those remedies.** When the author argues that domestic remedies have been exhausted key questions to be determined include: whether a final decision has been obtained in domestic proceedings at the initial level; whether any appeals of such a decision are available; whether such appeals have been taken; whether final decisions have been rendered in those appeals; whether the substance of the claim presented at the domestic level encompasses the claim raised in the communication; and, where multiple remedies are available, whether all must be exhausted or opting for one and exhausting it meets the requirement.<sup>62</sup>

**Whether one of the recognized exceptions to the exhaustion requirement applies,** in cases in which domestic remedies have not been exhausted. The principal exceptions apply to remedies that are:

- a) *Unduly prolonged.* Whether a remedy is unduly prolonged must be evaluated in the particular circumstances of the victim's case. Human rights bodies have not adopted general guidelines on delay, relying instead on case-by-case assessments.<sup>63</sup> Factors to be evaluated in determining unacceptable delay include whether the delay is: imputable to the State, due to active obstruction, negligence or inactivity;<sup>64</sup> imputable to the conduct of the victim; reasonable in light of the nature and severity of the violation, the complexity of the case, and its criminal or civil character;<sup>65</sup> or likely to have a negative impact on the effectiveness of the relief sought by the victim.<sup>66</sup>

The CEDAW Committee found that domestic remedies were unduly prolonged in *A.T. v. Hungary*. It concluded that a delay of over three years from the dates of the incidents that were the subject of criminal proceedings for assault and battery amounted to an unreasonably prolonged delay, "particularly considering that the author has been at risk of irreparable harm and threats to her life during that period." This finding was based on the immediacy and gravity of the threat of harm to the victim. The Committee noted that: no measures of temporary protection for the victim had been available during the criminal proceedings; the defendant had never been detained; and the State Party had admitted that the remedies pursued by the victim were not capable of providing immediate protection. In addition, the Committee had requested the State Party to provide interim measures of protection while the communication was under consideration.

- b) *Unlikely to bring effective relief.* The effectiveness of domestic remedies in the positive sense is an aspect of the threshold determination as to whether there are remedies that should have been exhausted. However, the concept of effectiveness has been elaborated principally in the context of exceptions to the rule.
- i) Article 4(1) refers to the likelihood of relief, which should be interpreted in light of established human rights jurisprudence and the Committee's approach to this issue as the existence of a "reasonable prospect of success."<sup>67</sup> This standard requires that victims make use only of those remedies that offer a "*reasonable prospect of success*." It is not necessary to meet



the higher standard of “obvious futility, under which victims must utilize all available remedies unless it would be obviously futile to expect relief. (See point (vii) below)

- ii) Ineffectiveness in the specific context of the case *must be substantiated by facts*: “mere doubts” or a subjective belief that a remedy is ineffective (that is, there are no reasonable prospects of success) do not justify a failure to make use of domestic remedies.<sup>68</sup>
- iii) Effectiveness is to be *assessed in light of the circumstances in advance of resorting to the remedy (ex ante)*, rather than in light of the actual outcome of the case.<sup>69</sup>
- iv) Effectiveness depends also on the *nature of the violation*.<sup>70</sup> The fit between a remedy and the nature of the violation may be assessed by reference to the nature of the right violated, the gravity of the violation, the suitability of the remedy for addressing the type of violation alleged, and the specific context of the case. For example, in cases involving violations of the right to life, remedies which are incapable of providing timely action to protect the victim may be deemed ineffective.
- v) Facts that may indicate the *ineffectiveness* of a remedy include: defects in the functioning of the judicial system, the existence of widespread or severe human rights violations, its unsuitability for redressing specific types of violations, and other factors indicating ineffectiveness *in general* (outlined on page 14, point (a) of ‘Whether domestic remedies are effective’; a climate of insecurity in connection with the specific case or conditions in the region;<sup>71</sup> the existence of settled law or precedent in the State’s highest courts that is clearly applicable to the victim’s claim and negates any reasonable prospect of success;<sup>72</sup> and unreasonable obstacles to meeting procedural requirements, such as unreasonably short deadlines for filing appeals.<sup>73</sup>

The effects of established jurisprudence on the likelihood of effective relief has been at issue in several communications decided by the CEDAW Committee but the it has not discussed the matter directly. In *Muñoz-Vargas v. Spain*, concerning male primacy in succession to titles of nobility, the Committee was presented with the question of whether settled law or precedent negated a reasonable prospect of success with regard to the remedy of amparo. The State Party argued that domestic remedies had not been exhausted because an amparo appeal was pending. The author contended that a 1997 judgment of the Constitutional Court had settled the question of male primacy in succession to titles of nobility and no recurso de amparo on this point could succeed. The State Party disputed the author’s claim that the decision of the Constitutional Court made amparo ineffective, asserting that “the jurisprudence of the Constitutional Court was not static...” and it could revise its jurisprudence “in the light of the social reality of the moment or in the light of changes in its composition.” The Committee declared the communication inadmissible *ratione temporis* and did not address these arguments regarding the consequences of established case law for the effectiveness of the remedy.

In *A.T. v. Hungary*, challenging the adequacy of protective measures against domestic violence, the author argued that her pending appeal to the Supreme Court was unlikely to be successful in light of settled case law and therefore exhaustion of this remedy should not be required. She contended that the pending appeal was an extraordinary remedy available only in cases of a violation of the law by lower courts and it was “very unlikely that the Supreme Court will find a violation of the law because Hungarian courts ... do not consider the Convention to be a law that

is to be applied by them.” During the process of the Committee’s deliberations on admissibility, the author’s appeal was dismissed by the Supreme Court on the grounds, “inter alia, that the jurisprudence is established” with regard to the legal issue raised in the petition. In its views, the Committee concluded that the exhaustion requirement did not bar admissibility, noting that the State party had not raised any preliminary objections to the admissibility of the communication and had conceded that “the currently existing remedies in Hungary [had] not been capable of providing immediate protection to the author from ill-treatment...” The Committee went on to observe that the available remedies were unduly prolonged and ineffective, but it did not mention the Supreme Court’s jurisprudence among its reasons for finding the remedies ineffective.

In *Nguyen v. The Netherlands*, the CEDAW Committee was presented with the question of whether a prior decision in an action brought by the victim obviated the effectiveness of an appeal in her second action, which was based on a separate incident involving facts virtually identical to those in the first action. The author challenged the national benefits scheme under which she had sought maternity leave in connection with two different pregnancies. She argued that she had exhausted all domestic remedies because she had appealed the outcome of the decision concerning benefits during her first maternity leave to the highest administrative court. She had filed an appeal of the decision concerning benefits in connection with her second pregnancy but withdrew it after losing her final appeal in connection with her first pregnancy. The Committee found that: “[i]n the absence of particulars from either the State party or the author on which to assess whether the author should have continued her appeal [regarding benefits for the second period of leave] or whether these proceedings were unlikely to bring relief on the face of it and in light of the unambiguous wording of the decision rendered [in the first case by the] highest administrative court in social security cases, proceedings regarding the author’s [second period of leave] were unlikely to bring relief.”

Key factors in determining whether settled law or precedent negates a reasonable prospect of success with regard to a remedy include: whether the jurisprudence is that of the highest court; whether the victim is similarly situated with regard to the facts of the case; whether there is any basis for concluding that the courts might reach a different outcome in the victim’s case; and, where the prior decisions are those of a lower court in a similar action brought by the victim, whether there has been a subsequent change in the law or there is a significant distinction between the facts of the two cases.

- vi) *Inaccessible*. Inaccessible remedies will necessarily be inadequate and/or ineffective. *Inaccessibility is thus recognized in human rights jurisprudence as a limitation on the exhaustion rule and provides a basis for exception from the application of the rule under the OP. Facts that may indicate that a remedy is not accessible include: absence of the victim from the jurisdiction of the State Party, due to deportation, expulsion or refugee status, in circumstances where return to the territory of the State is prohibited or entails personal risk, where the remedies available after deportation, expulsion or displacement from the territory of the State would not be adequate for the relief sought, where counsel cannot effectively pursue the action on behalf of the victim in domestic fora or where procedural requirements cannot be met;*<sup>74</sup> a victim’s fear that she or her family will face retaliation if she were to seek redress, based on an actual threat of harm or circumstances that create vulnerability to, and a likelihood of, harm;<sup>75</sup> direct action by the State or action by third parties tolerated by the State that prevents the exhaustion of remedies;<sup>76</sup> a generalized fear in the legal community that

prevents a victim from obtaining legal representation when such representation is necessary in order to exhaust the appropriate remedies;<sup>77</sup> and characteristics of the victim which do not per se constitute the basis for an exception but in the particular circumstances of the case are factors affecting her ability to access remedies, such as age, mental incapacity, language skills, and indigence that prevents a victim from retaining counsel where necessary to access a remedy or from paying court costs.<sup>78</sup>

With regard to indigence, if legal counsel is necessary to make effective use of a remedy, the inability of an indigent victim to retain counsel and a failure by the State to provide legal aid renders the remedy inaccessible. The Inter-American Court of Human Rights has held that under the American Convention on Human Rights “if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies.”<sup>79</sup> The Court stated that the need for counsel must be assessed in the context of the particular case: “the circumstances of a particular case or proceeding - its significance, its legal character, and its context in a particular legal system - are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.”<sup>80</sup>

In several communications the Human Rights Committee has similarly held that if counsel was necessary in order to access a remedy, as in the case of certain constitutional remedies, and the State did not provide legal aid, indigent complainants were not required to pursue those remedies.<sup>81</sup> However, the Committee has rejected arguments that financial considerations constituted a basis for exception to the exhaustion requirement in circumstances where no effort was made to obtain legal aid and where the complainant had the financial means to pursue the remedy.<sup>82</sup>

The European Court of Human Rights also rejected a claim that indigency excused a failure to exhaust remedies where the applicant had made no effort to secure legal aid.<sup>83</sup> The position of the African Commission on Human and Peoples' Rights on indigency and the unavailability of legal aid appears to be unsettled. In one decision it suggested that the availability of assistance from non-governmental organisations compensated for a complainant's lack of financial resources to pursue remedies and the failure of the State to provide legal aid.<sup>84</sup> However, in a communication involving detentions on mental health grounds, the Commission held that the unavailability of state sponsored legal aid for the individuals likely to be detained made the available constitutional remedies “unrealistic” and therefore ineffective. It stated that: “[t]he category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services.”<sup>85</sup>

These cases indicate that indigence per se is not sufficient grounds for arguing that a remedy is inaccessible: the nature of the remedy must be such as to require the assistance of counsel in the particular circumstances of the case and the State must have failed to provide legal aid.<sup>86</sup> These circumstances, as well as the victim's indigence, should be substantiated by specific information regarding: the nature of the violations; the nature of the legal proceedings (such as their legal complexity); particular characteristics of the victim that point to a need for legal

representation (such as age or a lack of language skills); efforts by the victim to obtain legal aid; and the unavailability of legal aid.

An inability to pay court filing fees may also render a remedy inaccessible to indigent victims if there are no provisions for waiver of the fees or other alternative arrangements. The Inter-American Court of Human Rights has held that “[i]n cases requiring the payment of a filing fee ..., if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the state provides some alternative mechanism.”<sup>87</sup> As with the need for counsel, “the circumstances of each case and each particular legal system must be kept in mind.”<sup>88</sup>

With regard to other characteristics of the victim that may constitute factors restricting access to remedies, it should be noted that ignorance of the existence of a remedy or the conditions for using it do not excuse a failure to exhaust remedies.<sup>89</sup> Mental disability or lack of knowledge of the law per se similarly do not constitute grounds for exemption from the requirement.<sup>90</sup>

- vii) *Standard of effectiveness.* Both the Human Rights Committee and the Inter-American Commission on Human Rights apply the standard of a “reasonable prospect of success” in evaluating effectiveness.<sup>91</sup> The jurisprudence of the European Commission is less clear: although in some cases it adopted a stricter test requiring “obvious futility” with regard to exceptions, in numerous other cases it applied the less stringent test of the absence of a reasonable prospect of success or a “real chance” of success.<sup>92</sup> The African Commission on Human and Peoples’ Rights has applied the standard of “a prospect of success;” if success is not sufficiently certain, it will not meet the requirements of availability and effectiveness.<sup>93</sup>

The test of effectiveness is an objective rather than subjective one.<sup>94</sup> Complainants must substantiate a claim that the available domestic remedies did not offer a reasonable prospect of success. “Mere doubts” or a subjective belief about the effectiveness of a remedy or the prospects for success do not excuse the failure to exhaust remedies.<sup>95</sup> The absence of a reasonable prospect of success in the particular circumstances of the case should be substantiated by information regarding the remedy itself, the factual and legal aspects of the complainant’s case, and any relevant details concerning the broader context.

The CEDAW Committee has not yet addressed the question of the standard to be applied in determining whether remedies are likely to bring effective relief, but its analyses to date have been consistent with the standard of a “reasonable prospect of success.” In *N.S.F. v. U.K.*, for example, the State Party contended that in order to exhaust domestic remedies the author should apply for judicial review by the High Court of the refusal to grant her discretionary leave to remain in the country on humanitarian grounds. The Committee agreed despite noting that, in the opinion of the State Party itself, the granting of permission to apply for judicial review is “uncertain.” In this and several other communications the Committee has evaluated the efficacy of remedies based on information from the parties that lacked significant detail, while in others it had more specific information on factors related to the efficacy of the remedies in general and in the context of the authors’ particular cases. It has also declined to comment on the efficacy of specific remedies where admissibility was decided on other grounds, while noting the absence of sufficient information to evaluate the efficacy of the remedies in question.<sup>96</sup>

In *Ragan Salgado v. U.K.*, the State Party argued that Article 4(1) embodies the test of a reasonable prospect of success: “[it requires the author to have made] use of all judicial or administrative avenues that offer [her] a reasonable prospect of success.... The State party submits that the test for an effective remedy cannot be whether a complaint would have been successful or not but rather whether there is a procedure available in the domestic system capable of considering and, if persuaded of the merits, providing a remedy....”<sup>97</sup> The CEDAW Committee did not comment on this argument.

Special questions regarding the standard of proof to be applied in assessing the effectiveness of domestic remedies arise in cases where the merits of the communication concern an alleged failure to provide effective remedies. The CEDAW Committee has considered three communications concerning domestic violence in which the effectiveness of domestic remedies was at issue with regard to both the exhaustion requirement and the substance of the claim. It did not address the question of whether the standard of proof with regard to the effectiveness of remedies for purposes of the exhaustion requirement differs from the standard applicable in assessing the merits and appears not to have made any distinction in the level of proof required for these two purposes. (See *A.T. v. Hungary*, *Goekce v. Austria* and *Yildirim v. Austria*).

In such cases, the approach most consistent with the need to develop a sufficiently detailed factual record for consideration of the merits is to apply a less stringent standard in assessing the effectiveness of remedies for purposes of the exhaustion requirement than is applied in analyzing whether there has been a violation of the right to provide effective remedies. This approach is illustrated by the analysis by the Human Rights Committee in a communication alleging, *inter alia*, a violation of the right to an effective remedy for breaches of the ICCPR (Article 2(3)). The Committee noted that:

As regards the possibility of bringing a court action based on the tort of negligence in common law, the Committee acknowledges the State party's argument that lack of evidence on the author's part does not have a direct bearing on the question of whether or not effective judicial remedies were available to him. However, the lack of evidence for a recognizable psychiatric injury does have a bearing on the question of whether or not it would have been futile for the author to exhaust such remedies. In this regard, the Committee observes that to be contrary to articles 7 and 10 of the Covenant, treatment of a person deprived of liberty must not necessarily cause any recognizable psychiatric injury to that person, as seems to be the standard required for establishing a tort in negligence under Australian law. It considers that the author has sufficiently shown, and the State party has not refuted, that the emotional distress and anxiety allegedly suffered by the author would have constituted insufficient grounds for filing a court action based on a breach of duty of care....[T]he Committee considers that, although in principle judicial remedies were available, in accordance with [Article 2(3) of the ICCPR], it would have been futile for the author, in the circumstances of his case, to commence court proceedings. It therefore concludes that he was not required...to exhaust these remedies.<sup>98</sup>

The Inter-American Commission on Human Rights has taken a similar approach in cases where the merits involve an alleged failure to provide adequate remedies. It has held that the standard for assessing the adequacy and effectiveness of domestic remedies for purposes of the exhaustion requirement is less strict than the standard which must be met to demonstrate a violation of the rights to a remedy and equal protection of the law.<sup>99</sup>

## Time at which remedies must have been exhausted

The CEDAW Committee has held that the question of whether domestic remedies have been exhausted is to be determined at the time of its consideration of a communication, rather than at the time the victim submits the communication.<sup>100</sup> It noted that this approach follows that of the Human Rights Committee, which “generally makes an assessment of whether an author has exhausted domestic remedies at the time of its consideration of a communication, in line with other international decision-making bodies, save in exceptional circumstances, the reason being that ‘rejecting a communication as inadmissible when domestic remedies have been exhausted at the time of consideration would be pointless, as the author could merely submit a new communication relating to the same alleged violation.’”<sup>101</sup> Given that significant time may elapse between the submission of a communication and its consideration by the CEDAW Committee, authors may benefit from this rule. However, as a general matter it is inadvisable to submit unexhausted claims based on the mere possibility (rather than a well-founded expectation) that they will be exhausted by the time the Committee takes up the communication.

- The question of whether domestic remedies have been exhausted is to be determined at the time of its consideration of a communication.

## Burden of proof regarding the exhaustion of domestic remedies

When submitting a communication an author must provide information indicating that all available domestic remedies have been exhausted or supporting a claim that an exception to the exhaustion requirement applies. If the State Party wishes to contest admissibility based on a failure to exhaust, it has the burden of showing that there are specific remedies that have not been exhausted which would be “available to the alleged victim or victims in the particular circumstances of the case.” (Rule 69(6) of the Committee’s Rules of Procedure). The phrase “in the particular circumstances of the case” makes clear that “availability” refers to remedies that are available in practice, not merely in theory, and to remedies that are capable of providing relief in the specific factual context of the case concerned. Rule 69(6) does not indicate that the State Party has the burden of showing that the available remedies are effective, however. It merely requires the State Party to provide the details of remedies that are available.

The CEDAW Committee has not explicitly addressed the burden of proof with regard to the effectiveness of remedies, although this question has been raised by the parties in communications. In *Yildirim v. Austria*, the State Party argued that the author had the burden of demonstrating that the remedies were ineffective: “the rules of international law emphasize the high test of ineffectiveness of possible remedies which must be found to exist before the general requirement of exhaustion of domestic remedies will be held no longer to apply.” It did not present detailed information pointing to the effectiveness of the remedy it claimed should have been exhausted, such as prior decisions by the court in factually similar cases, but relied on a general assertion of effectiveness: “[t]he State party further states that, while it is impossible to assess with any certainty whether such an application to the High Court would, in the end, be successful, there can be no suggestion that such access to the High Court does not amount to an effective remedy which the author is required to have exhausted.” The Committee did not respond to these assertions.



The CEDAW Committee's practice to date has been to assess the availability and effectiveness of remedies in light of whatever information has been submitted by the parties, without reference to which party held the burden of showing effectiveness or ineffectiveness. For example, in *B.J. v. Germany*, it noted that since the author had not denied that there were no final decisions in two domestic proceedings and had not "argued persuasively" that the proceedings had been unreasonably prolonged or are unlikely to bring relief, it had concluded that the claims at issue in those proceedings were inadmissible for the failure to exhaust domestic remedies. In *Nguyen v. The Netherlands*, the Committee noted the "absence of particulars" from either party and proceeded to decide on the basis of the available information that the unexhausted remedies were unlikely to bring effective relief, again without reference to the burden of proof regarding effectiveness of the remedy.

The approach of the Human Rights Committee is to require the State Party to provide detailed information concerning the remedies allegedly available to the author in the circumstances of his or her case and evidence of the effectiveness of such remedies:

"[The State party is required to give] details of the remedies which it submitted had been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective."<sup>102</sup>

The burden then shifts to the author to present facts to support a finding by the Human Rights Committee that one of the exceptions to the exhaustion requirement applies; that is, detailed information indicating that the remedy was de facto unavailable, inadequate to redress the violation at issue, ineffective in the circumstances of the case, unduly prolonged or inaccessible. If the author fails to present such information, the Committee bases its evaluation of the remedies in question on the information provided by the State Party.<sup>103</sup> If the author does detail facts supporting an exception to the rule and the State party "does not provide an answer to an author's allegations, the Committee will give due weight to an author's uncontested allegations as long as they are substantiated."<sup>104</sup>

The approach taken by the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the European Court of Human Rights similarly involves a shifting burden of proof. The State claiming non-exhaustion has the burden to prove that domestic remedies remain to be exhausted and that they are effective.<sup>105</sup> The petitioner must then show that remedies have been exhausted or that the case comes within one of the exceptions to the exhaustion requirement.<sup>106</sup> If the petitioner invokes exceptions the rule, "it is up to the State to demonstrate that there are internal remedies that have not been exhausted, unless that is clear from the record."<sup>107</sup>

The African Commission on Human and Peoples' Rights also applies a shifting burden of proof: "[w]henver a State alleges the failure by the Complainant to exhaust domestic remedies, it has the burden of showing that the remedies that have not been exhausted are available, effective and sufficient to cure the violation

- When submitting a communication an author must provide information indicating that all available domestic remedies have been exhausted or supporting a claim that an exception to the exhaustion requirement applies.
- If the State Party wishes to contest admissibility based on a failure to exhaust, it has the burden of showing that there are specific remedies that have not been exhausted which would be "available to the alleged victim or victims in the particular circumstances of the case."

alleged, i.e. that the function of those remedies within the domestic legal system is suitable to address an infringement of a legal right and are effective. When a State does this, the burden of responsibility then shifts to the Complainant who must demonstrate that the remedies in question were exhausted or that the exception provided for in Article 56(5) of the African Charter is applicable.”<sup>108</sup> When submitting a communication applicants are required to describe their attempts to exhaust domestic remedies and offer some prima facie evidence of exhaustion or state their reasons for not pursuing domestic remedies. If they do not provide sufficient information initially, the Commission will request additional information. Failure to provide such information results in a finding of inadmissibility.<sup>109</sup>

## Waiver of the exhaustion requirement

It should be anticipated that States Parties will contest the admissibility of communications under the OP on grounds of a failure to exhaust domestic remedies whenever there are plausible grounds for doing so. However, if a State Party fails to assert non-exhaustion in the initial stages of proceedings but later seeks to do so, it could be argued that it has waived the requirement.

Jurisprudence under the American Convention on Human Rights recognizes that a State Party may expressly or tacitly waive the exhaustion requirement, since the rule is designed for the benefit of the State. In the *Velásquez Rodríguez Case*, the Inter-American Court of Human Rights held that an “objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed.”<sup>110</sup> The failure of the State to assert non-exhaustion at an early stage thus creates a presumption that it has waived its objection and failed to meet its burden of proof on exhaustion:

The principles of international law, as reflected in the precedents established by the Commission and the Inter-American Court's case law, are that the respondent State can waive, either expressly or tacitly, its right to file an objection alleging failure to exhaust the remedies under domestic law. Secondly, to be timely, the objection alleging failure to exhaust domestic remedies must be made at an early stage in the proceedings, lest a tacit waiver of the requirement on the part of the interested State be presumed. Thirdly, on the matter of burden of proof, the State alleging failure to exhaust domestic remedies must prove that domestic remedies remain to be exhausted and that they are effective. Therefore, if the State in question does not assert its objections regarding this requirement in a timely fashion, the presumption is that it has waived its right to allege failure to exhaust local remedies and therefore to fulfill its burden of proof.<sup>111</sup>

Waiver is irrevocable once it is effected.<sup>112</sup> Similarly, if a petitioner does not explain a failure to exhaust the domestic remedies identified by the State or the reasons those remedies are not effective, he or she may be presumed to have waived those arguments.<sup>113</sup>

The Human Rights Committee has also recognized that “[i]n certain cases, a State party may waive ... the requirement of exhaustion of domestic remedies.”<sup>114</sup>

Although the CEDAW Committee has been presented with the opportunity to address the question of whether a State Party may waive the exhaustion requirement either explicitly or tacitly, it has not taken up



the issue. In *A.T. v. Hungary*, the State Party indicated that it did not “wish to raise any preliminary objections as to the admissibility of the communication,” but claimed that the author had not made “effective use of the domestic remedies available to her” and some domestic proceedings were still pending. It “[admitted] that these remedies were not capable of providing immediate protection to the author...” The State Party also conceded that the existing system of remedies against domestic violence was “incomplete in Hungarian law and that the effectiveness of the existing procedures is not sufficient...”

The CEDAW Committee acknowledged that the State party had decided not to raise any preliminary objections as to the admissibility of the communication and had conceded that “the currently existing remedies in Hungary [had] not been capable of providing immediate protection to the author from ill-treatment...” Although it was open to the Committee to recognize explicitly that these statements constituted a waiver of the requirement and to deal separately with the question of effectiveness for the purposes of the merits, it did not do so. Instead, it noted that its assessment of the effectiveness of domestic remedies was in agreement with that of the State Party and went on to offer more detailed comments regarding the effectiveness of certain national remedies.

In *Goekce v. Austria*, at the outset of proceedings before the Committee the State Party objected to admissibility based on the failure to exhaust several different remedies. At a later stage of the proceedings, it raised a new challenge based on the victim's failure to exhaust the remedy of “associated prosecution.” The author objected to the introduction of this challenge, arguing that it was impermissible “at this stage for the State party to introduce an argument concerning the remedy of ‘associated prosecution’ in light of the fact that the State party was given two earlier opportunities to comment on the question of admissibility.” It was open to the Committee to address the issue of waiver in this context, but it did not do so. Instead it merely observed that the fact that the State party “introduced the notion of ‘associated prosecution’ late in the proceedings indicates that this remedy is rather obscure,” a comment perhaps intended to address the accessibility of the remedy.

In *Nguyen v. The Netherlands*, the author pointed out in a supplementary submission that the State Party's initial submission had not alleged non-exhaustion as a bar to the admissibility of one of two aspects of her claim. The State Party had conceded exhaustion of the first of these aspects. In response, the State argued that it should not be inferred from the fact that it had not explicitly addressed the question of whether the author had exhausted domestic remedies regarding the second aspect of her claim that it believed the exhaustion requirement to have been satisfied. This amounts to a denial that it had waived the requirement. The Committee did not comment on this issue and went on to assess whether the requirement had been satisfied.

The CEDAW Committee should be encouraged to address the question of explicit and tacit waiver of the exhaustion requirement when a State Party fails to object to admissibility on grounds of non-exhaustion at an early stage of the proceedings or concedes the inadequacy of domestic remedies. It should be encouraged to adopt the approach taken by the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the Human Rights Committee, an approach which recognizes that the exhaustion rule operates for the benefit of the State and should not prevent the victim of an alleged violation from seeking redress at the international level if the State has failed to assert its interests.

- If a State Party fails to assert non-exhaustion in the initial stages of proceedings but later seeks to do so, it could be argued that it has waived the requirement.

## Conclusion: how to approach the exhaustion requirement in preparing communications

The requirement that domestic remedies have been exhausted as a condition for the admissibility of a human rights claim at the international level is founded in long-established international law. The interpretation by the CEDAW Committee of the exhaustion rule as embodied in Article 4(1) of the OP will doubtless be guided by jurisprudence concerning the rule under other human rights treaties. That jurisprudence indicates that the exhaustion rule is flexible in its application rather than rigidly formulaic. This flexibility is a consequence of the fact-specific nature of the analyses that must be carried out. It also reflects a recognition by human rights bodies that the underlying purpose of the rule, which is to give states the opportunity to correct violations through their domestic processes, must be weighed together with the aim of providing redress to the victims of human rights violations.

The central implication of the fact-specific nature of the rule is that complainants should argue their case concerning exhaustion thoroughly. They should provide detailed information about the facts of the violation and the availability, adequacy, and effectiveness of domestic remedies. To the greatest extent possible, they should offer support for their position from the jurisprudence of international and regional human rights bodies. The communication should present as much specific information as possible about: the availability, adequacy and effectiveness of domestic remedies in light of established understandings of those criteria; the status of the victim's efforts to exhaust domestic remedies; the legal grounds for claiming an exception to the rule, if applicable, and the facts that support that claim; and references to the decisions of other human rights bodies.

In certain circumstance, the reasons a remedy is ineffective may be more readily apparent on the face of the information presented, as was the case in the communications related to domestic violence that have been considered by the CEDAW Committee to date (see *A.T. v. Hungary*, *Goekce v. Austria* and *Yildirim v. Austria*). However, every effort should be made to spell out the factual circumstances related to exhaustion and relevant legal arguments, rather than leaving it to the Committee to adopt the most favorable interpretation of the information that is provided. Complainants should rebut all allegations regarding exhaustion made by the State Party in its initial response and any subsequent submissions. They should answer all questions posed by the Committee in requests for additional information regarding exhaustion.

General claims that domestic remedies are unavailable, inadequate, or ineffective are unlikely to be accepted by the Committee. For example, in *Ragan Salgado v. U.K.*, the CEDAW Committee found that the author had failed to exhaust domestic remedies because she had not sought judicial review of her claims in the High Court. The author argued that: she had exhausted the available administrative remedies and had sought legislative redress; and that she could not be expected to exhaust judicial remedies due to her age, the complexity of judicial procedures and her limited financial resources. The latter argument amounts to a "mere doubt" that judicial remedies as a category were available, accessible and effective. She did not address the specific judicial remedies that might have been available or their complexity, nor did she explain the manner in which her age and the limitations of her resources actually affected her ability to pursue judicial remedies. She gave no indication of whether or not she sought legal aid.

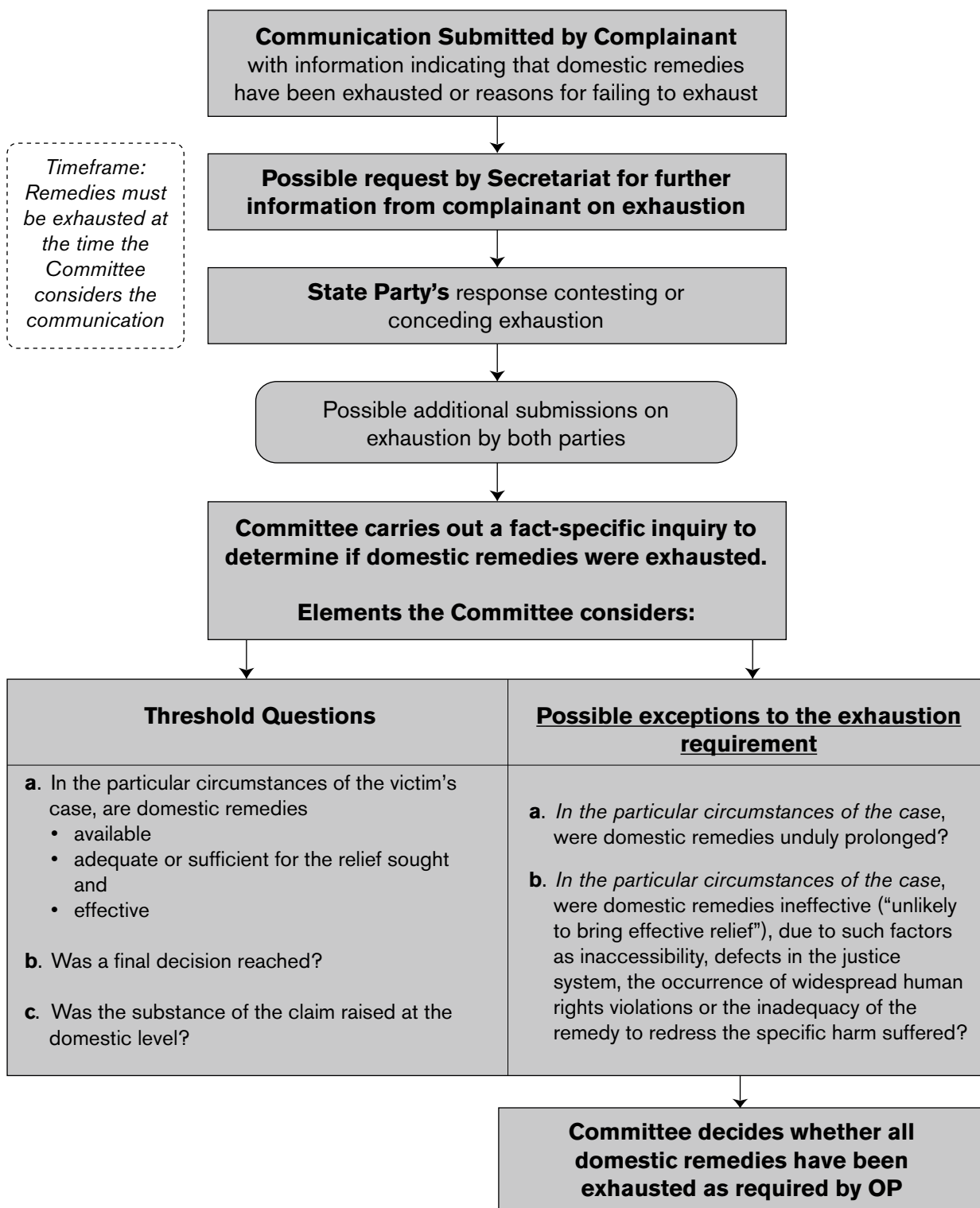
The State Party described the relevant law under which the author could have sought judicial redress and the procedure for review by the High Court. However, it did not present detailed information pointing to the effectiveness of the unexhausted remedies, such as prior decisions by the High Court in similar cases, but relied on a general assertion of their effectiveness. The author failed to respond to the State Party's arguments or to substantiate her own claims. Had she done so, the CEDAW Committee presumably would have required the State Party to provide more detailed information to support its claim that the remedies identified were, in fact, effective. By failing to address the reasons judicial remedies were inaccessible, the author permitted the State Party's general characterization of the applicable remedies to serve as sufficient proof of their effectiveness.

The range of factual circumstances recognized in established international and regional human rights jurisprudence as justifying exceptions to the exhaustion requirement offer multiple entry points for advocating the admissibility of communications under the OP. In cases which raise more complex legal questions about the nature of the domestic remedies available, it will be useful to seek legal advice from attorneys or non-governmental organizations with the relevant expertise.

Finally, the CEDAW Committee should be urged to address several of the key legal issues related to exhaustion that it has yet to take up directly, including the standard of effectiveness, waiver of the requirement by the State Party, burden of proof and the categories of remedies to which the requirement applies. To the extent permitted by their resources, the authors of communications can encourage this process by outlining such issues in their submissions.

- Communications should present as much detailed factual and legal information as possible about:
  - the availability, adequacy and effectiveness of domestic remedies in light of established understandings of these criteria;
  - the status of the victim's efforts to exhaust domestic remedies;
  - the grounds for claiming an exception to the rule if remedies have not been exhausted.
- Complainants should attempt to rebut all allegations made by the State Party regarding the exhaustion of domestic remedies and to answer all requests by the Committee for additional information about exhaustion.

## Guide to navigating the exhaustion requirement:



## Resources

The communications decided by the Committee on the Elimination of Discrimination Against Women from July 2004 until December 2007 are available on the website of the UN High Commissioner for Human Rights: <http://www2.ohchr.org/english/law/jurisprudence.htm>

The communications decided by the Human Rights Committee are published in its annual reports to the UN General Assembly, which is assigned the General Assembly document number Supplement 40, Volume II. The UN document number is A/[GA session number]/40, Volume II. For example, the 2006 Annual Report of the Human Rights Committee is UN Doc. A/61/40.

The communications decided by the Committee Against Torture are published in its annual reports to the UN General Assembly, which is assigned the General Assembly document number Supplement 44. The UN document number is A/[GA session number]/44.

The communications decided by the Committee Against Torture are published in its annual reports to the UN General Assembly, which is assigned the General Assembly document number Supplement 18. The UN document number is A/[GA session number]/18.

These treaty body reports are available on the main UN website, <http://www.un.org>, as General Assembly documents, and may also be accessed through the website for the UN Office of the High Commissioner for Human Rights: <http://www.ohchr.org>.

The decisions of the European Commission on Human Rights up until October 1999 and all decisions of the European Court of Human Rights are available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

The decisions of the Inter-American Commission of Human Rights are published in the annual reports of the Commission, available at: [www.cidh.org](http://www.cidh.org).

The decisions and judgments of the Inter-American Court of Human Rights are available at <http://www.corteidh.or.cr/casos.cfm>. Its advisory opinions are available at <http://www.corteidh.or.cr/opiniones.cfm>

The decisions of the African Commission on Human and Peoples' Rights are available at: <http://www.achpr.org>.

Many decisions of UN treaty bodies, the Inter-American Commission and Court and the African Commission on Human and Peoples' Rights are also available on the website of the University of Minnesota Human Rights Library: <http://www1.umn.edu/humanrts/index.html>.

## (Endnotes)

- 1 See, e.g., Nsongurua J. Udombana, "So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights," *American Journal of International Law*, Vol. 97:1, pp.2-3: "[t]he incorporation of the rule into human rights instruments has greatly influenced the development of human rights jurisprudence, for better and for worse. It is the one condition most frequently invoked and contested by the parties before the African Commission, and 'that which usually requires the most attention.'" (citing Constitutional Rights Project, *Civil Liberties Organisation*, and *Media Rights Agenda v. Nigeria*, Communication Nos. 140/94, 141/94, 145/95, Thirteenth Annual Activity Report (1999-2000), para. 26; Communication No. 148/96, *Constitutional Rights Project v. Nigeria*, *ibid*, para. 7; Communication No. 151/96, *Civil Liberties Organisation v. Nigeria*, *ibid*, para. 11).
  - 2 Communication No. 2/2003, *A. T. v. Hungary*.
  - 3 See Second report on diplomatic protection, Mr. John Dugard, Special Rapporteur on Diplomatic Protection, International Law Commission, Fifty-third session, UN Doc. A/CN.4/514, para. 5: "[t]hat the exhaustion of local remedies is a well-established rule of customary international law is not disputed. It has been affirmed by the decisions of international and national courts, bilateral and multilateral treaties, State practice, codification attempts by governmental and non-governmental bodies and the writings of jurists." (Citations omitted).
  - 4 First Optional Protocol to the International Covenant on Civil and Political Rights, Article 5(2): "The [Human Rights Committee] shall not consider any communication from an individual unless it has ascertained that: (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged."
- International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 22(5): "The [Committee Against Torture] shall not consider any communications from an individual under this article unless it has ascertained that: ... (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention."
- International Convention on the Elimination of All Forms of Racial Discrimination, Article 14(7) (a): "The [Committee on the Elimination of Racial Discrimination] shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged...."
- European Convention on Human Rights, Article 26: "The [European Commission of Human Rights] may only deal with [complaints] after all domestic remedies have been exhausted, according to the generally recognized rules of international law...."
- American Convention on Human Rights, Article 46: "(1) Admission by the [Inter-American Commission on Human Rights] of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law; b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; (2) The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."
- African [Banjul] Charter on Human and Peoples' Rights, Article 56: "Communications relating to human and peoples' rights referred to in Article 55 received by the [African Commission on Human and Peoples' Rights], shall be considered if they: ... (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged...."
- 5 The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, James Crawford (2002), p. 265. The origins of the rule lie in the law of the diplomatic protection of aliens and human rights bodies have accepted the broad principles and general concepts developed in that law in their interpretations of the exhaustion requirement. See generally Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (2d ed. 2004), pp. 22-77, 425-437.
  - 6 Human Rights Committee, Communication No. 1403/2005, *Gilberg v. Germany*, Views adopted 25 July 2006, para. 6.5 (citing Communication No. 1003/2001, *P.L. v. Germany*, Views adopted on 22 October 2003, para. 6.5; Communication No. 1188/2003, *Riedl-Riedenstien et al. v. Germany*, Views adopted 2 November 2004, para. 7.2).
  - 7 Inter-American Court of Human Rights, Advisory Opinion OC11/90 on the Exceptions to the Exhaustion of Local Remedies [Art. 46.1, 46.2, and 46.2(b) of the American Convention on Human Rights].
  - 8 Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, (Ser. C), No. 4, para. 64.



- 9 Inter-American Commission on Human Rights, Report No. 18/06, Petition 12.353, Arley José Escher et al. v. Brazil (March 2, 2006), para. 28 (citing Inter-American Commission on Human Rights, Report No. 57/03, Petition 12,337, Valdés Díaz v. Chile (October 10, 2003), para. 40; Report No. 70/04, Petition 667/01, Naranjo et al. v. Venezuela (October 13, 2004), para. 52).
  - 10 European Court of Human Rights, Akdivar et al v. Turkey, Judgment of 16 September 1996, Reports of Judgments and Decisions 1996 IV, p.1210, para. 66.
  - 11 Aksoy v. Turkey, Judgment of 18 December 1996, Reports of Judgments and Decisions 1996 IV, p. 2275, para. 53.
  - 12 African Commission on Human and Peoples' Rights, Communication Nos. 147/95, 149/96, Jawara v. The Gambia, Thirteenth Annual Activity Report (1999-2000), para 31.
  - 13 African Commission on Human and Peoples' Rights, Communication 71/92, Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia (Zambian expulsion case), Ninth Annual Activity Report (1995 -1996), para. 11.
  - 14 Human Rights Committee, Communication No. 1159/2003, Sankara v. Burkina Faso, Views adopted 28 March 2006, para. 6.4 (emphasis added).
  - 15 See, e.g., Human Rights Committee, Communication No. 1184/2003, Brough v. Australia, Views adopted 17 March 2006, para. 8.6: the term "domestic remedies" "not only refers to judicial but also to administrative remedies ..."; Human Rights Committee, Communication No. 1403/2005, Gilberg v. Germany, Decision adopted 25 July 2006, para. 6.5: "in addition to ordinary judicial and *administrative* appeals, authors must also avail themselves of all other judicial remedies..." (emphasis added); Committee Against Torture, Communication No. 238/2003, Z.T. v. Norway, para. 8.1 (published in UN Doc. A/61/44 (2006)): "[the Committee had] accepted that judicial review, in the State party's courts, of an administrative decision to reject asylum was, in principle, an effective remedy..."
  - 16 For decisions by the European Commission on Human Rights holding various administrative remedies in which the outcome was determined by legal standards to be subject to the exhaustion rule, see Chittaharajan Felix Amerasinghe, *Local Remedies in International Law* (2d edition 2004), at p. 314, notes 17-21. See also *Theory and Practice of the European Court of Human Rights*, Fourth Edition, Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak (editors) (2007), p. 133.
  - 17 See e.g., Inter-American Commission on Human Rights, Report No. 60/03, Petition 12.108, Reyes et al. v. Chile (October 10, 2003), para. 51: "[w]ith respect to the administrative remedy argued by the State, the Commission finds that it is not an adequate or effective remedy in this case. *The administrative norm referred to does not specifically protect the right to access to information and does not set forth any guidelines for the protection of this right.* Moreover, the petitioners have previously essentially complied with the terms of the statute, having written a letter to the agency in question, and were denied access to the information requested. Given these facts, the Commission concludes that the administrative *recurso de reposición* does not constitute an adequate and effective remedy and that the petitioners need not exhaust it." (Emphasis added).
- In the context of the law of diplomatic protection of aliens, in which the exhaustion rule is rooted, the Special Rapporteur for the International Law Commission noted that "[a]dministrative or other remedies which are not judicial or quasi-judicial in character and are of a discretionary character therefore fall outside the application of the local remedies rule." Second report on diplomatic protection, Mr. John Dugard, Special Rapporteur on Diplomatic Protection, International Law Commission, Fifty-third session, UN Doc. A/CN.4/514, para. 14 (citations omitted).
- 18 See Inter-American Commission on Human Rights, Report No. 36/05, Petition 12.170, Colmenares Castillo v. Mexico (March 9, 2005), para. 36: "the [Inter-American Commission] has previously ascertained that administrative remedies such as lodging a petition or complaint with the National Commission on Human Rights, for instance, 'is not a suitable remedy for the alleged human rights violations described in the instant case ...[since] it is not effective in the sense established by the case law of the Inter-American system, for which reason the petitioner [is] under no obligation to exhaust it before having access to the international protection provided for in the American Convention.'" Citing Report No. 73/99, Petition 11.701, Ejido "Ojo de Agua" v. Mexico (May 4, 1999), paras. 15-16: "[t]he Commission deems it timely to refer first to the investigation by the [Mexican National Human Rights Commission], mentioned by the State as a remedy still pending in Mexico. It should be highlighted that the law creating the Mexican ombudsman, in force since June 30, 1992, itself provides in Article 6, paragraph III that the CNDH has the authority to "submit *non-binding*, autonomous public recommendations, as well as petitions and complaints to the respective authorities."... Based on the foregoing, the Commission concludes that lodging a petition or complaint with the CNDH is not a suitable remedy for the alleged human rights violations described in the instant case..." (Citations omitted) (emphasis added). The Inter-American Commission also referred to an earlier petition in which it had held that "the National Human Rights Commission ...*is a quasi-judicial body that issues recommendations, which are therefore not legally enforceable.*" Report No. 45/96, Petition 11.492, Lara Preciado v. Mexico, (October 16, 1996), para. 24 (emphasis added). In addition, it cited its prior conclusions in a Report on the Situation of Human Rights in Mexico: "[t]he National Human Rights Commission is structured like the office of an ombudsman, hence it does not in any way replace the agencies with jurisdiction, i.e. the courts, which are entrusted with procuring and imparting justice. The CNDH is an independent body with responsibility for overseeing the public authorities. It has the power to receive complaints from the people against public authorities, except in political matters.

Therefore, it is not competent to hear electoral disputes. Its *decisions are not binding*, since they are issued in the form of recommendations; hence they have moral force but are not compulsory.” Report on the Situation of Human Rights in Mexico, OEA Ser.L/V/II.100, Doc.7 rev.I, September 24, 1998, para. 117 (emphasis added).

- 19 African Commission on Human and Peoples’ Rights, Communication 221/98, *Cudjoe v. Ghana*, Twelfth Annual Activity Report (1998-1999), para. 13. See also African Commission on Human and Peoples’ Rights, Communication No. 275/2003, Article 19 v. Eritrea, Twenty-Second Annual Activity Report (2006-2007), para 70: “[b]y sending the writ to the Minister of Justice, the Complainant cannot claim they were attempting the exhaustion of domestic remedies as Article 56(5) requires the exhaustion of legal remedies and not administrative remedies.”
- 20 African Commission on Human and Peoples’ Rights, Communication 221/98, *Cudjoe v. Ghana*, Twelfth Annual Activity Report (1998-1999), para. 13.
- 21 See, e.g., Inter-American Commission on Human Rights, Report No. 75/03, Petition 42/02, *Cañas Cano et al. v. Colombia* (October 22, 2003), paras. 27-28: “[t]he Commission considers that the facts alleged by the petitioners in this case involve the alleged violation of such fundamental rights as the right to life and the right to humane treatment. As these are indictable offenses under domestic law, it is the State itself that must investigate and prosecute them. Therefore, it is the development of this criminal law process that the Commission must consider in order to determine whether local remedies have been exhausted, or indeed whether the corresponding exceptions apply....[T]he Commission has held that *the contentious-administrative jurisdiction is exclusively a mechanism for supervising the administrative activity of the State, aimed at obtaining compensation for damages caused by the abuse of authority. In general, this process is not an adequate mechanism, by itself, to make reparation for human rights violations* and hence need not be exhausted when, as in the present case, there is another means for securing redress for the harm done and the prosecution and punishment that the law demands.” (Citations omitted) (emphasis added).
- 22 See, e.g., Inter-American Commission on Human Rights Report No. 86/05, Petition 4416-02, *Luis Edgar Flores v. Peru* (October 24, 2005), para. 34: “[t]he information submitted by the petitioner indicates that the contentious-administrative suit was available at the time of the events and was used successfully by others in a situation similar to the petitioner’s. On August 5, 1997, for example, the Chamber for Employment of the Superior Court of Justice of Lima ruled on the suit brought by Hugo León and others against the resolution issued by the labor authority that had authorized the collective dismissal. The ruling found that the complaint was well founded and declared Resolutions N 015-94-DPSC and No. 017-94-DPSC null and void. Finally, the [Commission] considers that based on the information available to it, the contentious-administrative remedy is in effect for the parties to the case and not *erga omnes* as the petitioner alleges....” See also Inter-American Commission on Human Rights, Report No. 107/06, Petition 12.318, *Jorge Teobaldo Pinzás Salazar v. Peru* (October 21, 2006), para. 28: “[t]he Commission considers that an administrative law appeal constituted an available and effective remedy that was not used appropriately by the petitioner for reasons that do not entail the State’s responsibility. Accordingly, the petitioner did not make adequate and timely use of available domestic remedies, thus failing to comply with the [exhaustion requirement].” For decisions under the European Convention on Human Rights treating reference to administrative courts as exhaustible remedies, see: *X. v. Federal Republic of Germany*, Application 1197/61, 5 Yearbook of the European Convention on Human Rights, p. 92; *X. v. Federal Republic of Germany*, Application 254/57, 1 Yearbook of the European Convention on Human Rights, p. 150; *X. v. Federal Republic of Germany*, Application 232/56, 1 Yearbook of the European Convention on Human Rights, p. 143; *X. v. Federal Republic of Germany*, Application 423/59, 4 Yearbook of the European Convention on Human Rights, p. 302.
- 23 In a number of domestic legal systems, the decisions of administrative tribunals can be appealed to the courts; this is distinct from arrangements offering a choice between administrative and judicial procedures.
- 24 See, e.g., Committee Against Torture, Communication No. 250/2004, *A.H. v. Sweden*, para. 7.2 (published in UN Doc. A/61/44 (2006)): “[n]or is the Committee persuaded that remedies such as petitions to the Government or the Parliamentary Ombudsman absolved the complainant from pursuing available judicial remedies before the ordinary courts against the judgment which had ordered his expulsion.”; Human Rights Committee, Communication No. 397/1990, *P.S. v. Denmark*, Decision adopted 22 July 1992, para. 5.4: “the Committee notes that the author has only exhausted administrative procedures; it reiterates that [Article 5(2)(b)] of the Optional Protocol, by referring to ‘all available domestic remedies,’ *clearly refers in the first place to judicial remedies*. [Citing Communication No. 262/1987, *R.T. v. France*, declared inadmissible on 30 March 1989, para. 7.4.] The Committee recalls the State party’s contention that judicial review of administrative regulations and decisions, pursuant to section 63 of the Danish Constitutional Act, would be an effective remedy available to the author. The Committee notes that the author has refused to avail himself of these remedies, because of considerations of principle and in view of the costs involved. The Committee finds, however, that financial considerations and doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them.” (Emphasis added). See also Inter-American Commission on Human Rights, Report No. 36/05, Petition 12.170, *Colmenares Castillo v. Mexico* (March 9, 2005), para. 37; African Commission on Human and Peoples’ Rights, Communication 221/98, *Cudjoe v. Ghana*, Twelfth Annual Activity Report (1998-1999), para. 13; African Commission on Human and Peoples’ Rights, Communication No. 275/2003, Article 19 v. Eritrea, Twenty-Second Annual Activity Report (2006-2007), para 70.
- 25 Communication 11/2006, *Ragan Salgado v. the United Kingdom of Great Britain and Northern Ireland*, Decision of the CEDAW Committee.



- 26 Nielsen v. Denmark Case, Application No. 343/57 (1958-9), 2 Yearbook of the European Convention on Human Rights, p. 438. See also Lawless Case, Application No. 332/57 (1958-9), 2 Yearbook of the European Convention on Human Rights, pp. 318-322.
- 27 De Becker v. Belgium, Application No. 214/56, Decision of 9 June 1958, 2 Yearbook of the European Convention on Human Rights, p. 238. See also African Commission on Human and Peoples' Rights, Communication 60/91, Constitutional Rights Project v. Nigeria (in respect of Akamu and Others) v. Nigeria (Robbery and Firearms decree case), Eighth Annual Activity Report (1994-1995), para. 10: "[t]he object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles."
- 28 See Second report on diplomatic protection, Mr. John Dugard, Special Rapporteur on Diplomatic Protection, International Law Commission, Fifty-third session, UN Doc. A/CN.4/514, para. 14: "[t]he local remedies which must be exhausted include remedies of a legal nature 'but not extra-legal remedies or remedies as of grace' or those whose 'purpose is to obtain a favour and not to vindicate a right.'" (citing J. L. Brierly, The Law of Nations, 6th ed. (ed. H. Waldock), p. 281; I. Brownlie, Principles of Public International Law, 5th ed. (1998), p. 499; C. F. Amerasinghe, "The Local Remedies Rule in Appropriate Perspective" (1976), 36 Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht 747; A. M. Aronovitz, "Notes on the Current Status of the Rule of Exhaustion of Local Remedies in the European Convention of Human Rights" (1995), 25 Israel Yearbook on Human Rights 89; Greece v. United Kingdom, Application No. 299/57 (1958-9), 2 YECHR at 192; Finnish Vessels Arbitration (1934), 3 U.N.R.I.A.A. 1479).
- 29 See, e.g., African Commission on Human and Peoples' Rights, Communication 60/91, Constitutional Rights Project v. Nigeria (in respect of Akamu and Others) v. Nigeria (Robbery and Firearms decree case), Eighth Annual Activity Report, (1994-1995), paras. 9-11 (finding that legislation permitting the governor of the State to confirm or disallow a conviction by a tribunal constituted a discretionary extraordinary remedy of a non-judicial nature which the complainant was not required to exhaust); African Commission on Human and Peoples' Rights, Communication 64/92, 68/92, 78/92, Achuthan and Another (on behalf of Banda and Others v. Malawi), Eighth Annual Activity Report (1994-1995) (finding the likely remedy to be largely discretionary where the complainant was being detained on the executive orders of the head of state); Inter-American Commission on Human Rights, Report No. 60/03, Petition 12.108, Reyes et al. v. Chile (October 19, 2003), para. 51: "[w]ith respect to the legislative remedy proposed by the State, the Commission finds that a legislative remedy can never be an effective remedy because it is not available to all persons, nor are there guarantees that it will be impartially applied, a requirement for 'effectiveness.'"; Human Rights Committee, Communication No. 1132/2002, Chisanga v. Zambia, Views adopted 18 October 2005, para. 6.3: "[w]ith respect to the State party's argument that the author did not exhaust domestic remedies in failing to request a Presidential pardon, the Committee ... reiterates its jurisprudence that presidential pardons are an extraordinary remedy and as such do not constitute an effective remedy" (citing Communication No. 1033/2001, Nallaratnam Singarasa v. Sri Lanka, Views adopted 21 July 2004); Committee Against Torture, Communication No. 250/2004, A.H. v. Sweden, para. 4.10 (published in UN Doc. A/61/44 (2006)): "[the State party] adds that an appeal to the competent court of appeal, and, if necessary, a further appeal to the Supreme Court constitute domestic remedies that the complainant must exhaust.... The remedy available to the complainant through the regular appellate process cannot be replaced by a petition to the Government seeking a cancellation of the expulsion order. Such a petition is an extraordinary remedy that could be considered to be equal to a petition for mercy."
- 30 See, e.g., Human Rights Committee, Communication No. 1403/2005, Gilberg v. Germany, Decision adopted 25 July 2006, para. 6.5: "*in addition to ordinary judicial and administrative appeals*, authors must also avail themselves of *all other judicial remedies, including constitutional complaints*, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to an author" (emphasis added) (citing Communication No. 1003/2001, P.L. v. Germany, Decision adopted 22 October 2003, para. 6.5; Communication No. 1188/2003, Riedl-Riedenstien et al. v. Germany, Decision adopted 2 November 2004, para. 7.2. But see Human Rights Committee, Communication No. 322/1988, Rodríguez v. Uruguay, Views adopted 19 July 1994, para. 6.2: "[t]he Committee further took note of the State party's contention that the author had failed to exhaust available domestic remedies, and that civil and administrative, as well as constitutional, remedies remained open to him. It observed that [Article 5(2)(b)] required exhaustion of local remedies only to the extent that these are both available and effective; authors are not required to resort to extraordinary remedies or remedies the availability of which is not reasonably evident." See also European Commission of Human Rights, Nielsen v. Denmark, Application 343/57, Report of the Commission, pp. 36-37. For cases under the European Convention on Human Rights treating reference to a special constitutional court and special remedies provided by constitutional courts as exhaustible remedies, see: X v. Federal Republic of Germany, Application 27/55, 1 Yearbook of the European Convention on Human Rights, p. 138; X v. Federal Republic of Germany, Application 254/57, 1 Yearbook of the European Convention on Human Rights, p.150; X v. Federal Republic of Germany, Application 605/59, 3 Yearbook of the European Convention on Human Rights, p.296; A. et al v. Federal Republic of Germany, Application 899/60, 5 Yearbook of the European Convention on Human Rights, p.136; X. and Y. v. Austria, Application 2854/66, 26 Collections p.54; X v. Austria, Application 1135/61, 11 Collections p. 22; X v. Austria, Application 2370/64, 22 Collections, p. 101; Soltikow v. Federal Republic of Germany, Application 2257/64, 27 Collections, p. 24; X. v. Federal Republic of Germany, Application 4046/69, 35 Collections, p. 115.

- 31 Inter-American Commission on Human Rights, Report No. 51/03, Petition 11.819, Domínguez Domenichetti v. Argentina (October 22, 2003), para. 45.
- 32 See Inter-American Commission on Human Rights, Report No. 51/03, Petition 11.819, Domínguez Domenichetti v. Argentina (October 22, 2003), para. 45: “[i]t is not the purpose of an extraordinary appeal to remedy alleged irregularities in the investigative or charging stages of a criminal case, nor are there arguments on record suggesting that these issues would be susceptible to extraordinary review” (emphasis added); Report No. 68/01, Petition 12.080, Schiavini and Schnack v. Argentina (February 27, 2002), para. 53: “[i]t is worth noting that in Argentina an appeal challenging the applicability of a law is an extraordinary remedy, as stated in Article 362 of the Code of Criminal Procedure of the Province of Buenos Aires .... It is not the purpose of such an appeal to remedy alleged serious irregularities in the investigative stage of a criminal case. The jurisprudence of the system has established that while in some cases these extraordinary remedies may be suitable for addressing human rights violations, as a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right.” (Citations omitted) (emphasis added). See also Report No. 83/01, Petition 11.581, Tarazona Arriate et al. v. Peru (October 10, 2001), para. 24.
- 33 Communication No. 4/2004, A.S. v. Hungary.
- 34 See, e.g., Committee Against Torture, Communication No. 273/2005, Thu Aung v. Canada (published in UN Doc.A/61/44 (2006)): “[f]or the State party, the humanitarian and compassionate consideration application is also an effective remedy which should be exhausted, contrary to the Committee’s jurisprudence. The State party argues that the simple fact that a remedy is discretionary does not necessarily mean that it is not effective. It invokes a judgment of the European Court of Human Rights in which the court determined that a discretionary remedy available to unsuccessful refugee claimants in Germany to prevent removal to a substantial risk of torture was adequate to fulfill Germany’s obligations under article 3 of the European Convention on Human Rights. Furthermore, while the decision adopted in humanitarian and compassionate applications is technically discretionary, it is in fact guided by defined standards and procedures and must be exercised in a manner consistent with the Canadian Charter of Rights and Freedoms and Canada’s international obligations. In the event that the application is refused, the person can make an application for leave to apply for judicial review to the Federal Court on the standard of ‘reasonableness simpliciter’, which means that the ‘discretion’ is far from absolute. [Para. 4.4, citations omitted] ... In the view of the Committee, the decisions of the Federal Court support the contention that applications for leave and judicial review are not mere formalities, but that the Federal Court may, in appropriate cases, look at the substance of a case. [Para. 6.3] ... [T]he Committee is satisfied with the arguments of the State party that, in this particular case, there was a remedy which was both available and effective, and which the complainant has not exhausted. [Para. 6.4].” (Emphasis added).
- 35 See, e.g., European Commission Human Rights, Ringeisen v. Austria, Application 2614/65, 27 Collections, p. 53.
- 36 See, e.g., Human Rights Committee, Communication No. 1175/2003, Lim Soo Ja v. Australia, Decision adopted 25 July 2006, para. 6.2: “the authors did not apply for review by the Migration Review Tribunal of their applications for permanent residence, and thus became time-barred. They also attribute responsibility for the failure of the permanent residency process to the incorrect advice of a migration agent, whose location could no longer be determined. The Committee observes that, according to its jurisprudence, an author is required to abide by reasonable procedural requirements such as filing deadlines, and that the default of an author’s representative cannot be held against the State party, unless in some measure due to the latter’s conduct;” Communication No. 1283/2004, Calle Seigny v. France, Decision adopted 28 October 2005, para. 6.3: “the author has not availed herself of the internal remedies available under criminal law, [by] appealing against the decisions [in two instances] or, civil law, [by] appealing against the rulings [in two instances], these having been delivered in adversarial proceedings where the author was assisted by counsel.... As regards the author’s argument that the lawyer assigned to her under the legal aid system did not keep her informed, even of the opportunities for appeal, it is clear from the case file that the author at no point during the proceedings challenged the aid her counsel was giving her or asked for a replacement. The Committee thus finds her complaints inadmissible.” (emphasis added); Communication No. 1403/2005, Gilberg v. Germany, Decision adopted 25 July 2006, para. 6.5: “any failure of the author’s privately retained counsel to inform him of the requirement, under [Article 5(2)(b)], to exhaust domestic remedies must be attributed to the author rather than to the State party.”
- 37 See, e.g., Committee on the Elimination of Racial Discrimination, Communication No. 172/2000, Dimitrijevic v. Serbia and Montenegro, para. 6.2 (published in UN Doc. A/61/18 (2006)): “the insurmountable procedural impediments faced by the complainant due to the inaction of the competent authorities made recourse to a remedy that may bring effective relief to the complainant highly unlikely.”
- 38 Communication No. 1/2003, B.J. v. Germany.
- 39 See, e.g., Human Rights Committee, Communication No. 1249/2004, Immaculate Joseph, et al. v. Sri Lanka (Views adopted on 21 October 2005), para. 6.2: “[t]he Committee observes that there may in any event be issues as to the effectiveness of this remedy, given the requirement that complex constitutional questions, including relevant oral argument, be resolved within three weeks of a challenge being filed, the challenge itself coming within a week of a Bill’s publication in the Order paper.” Committee on the Elimination of Racial Discrimination, Communication No. 34/2004, Gelle v. Denmark, para. 6.4 (published in UN Doc. A/61/18 (2006)): “[a]s to the State party’s argument that the petitioner could

- have challenged the decision of the Regional Public Prosecutor not to initiate a criminal investigation under section 266 (b) of the Criminal Code before the courts, in accordance with article 63 of the Danish Constitution, the Committee notes the petitioner's uncontested claim that *the statutory deadline for initiating criminal proceedings under section 266 (b) would have expired by the time the courts refer the matter back to the police*. Against this background, the Committee considers that judicial review of the Regional Public Prosecutor's decision under article 63 of the Constitution would not have provided the petitioner with an effective remedy." (Emphasis added).
- 40 Communication 11/2006, Constance Ragan Salgado v. The United Kingdom of Great Britain and Northern Ireland.
  - 41 Human Rights Committee, Communication No. 222/1987, M. K. v France; Communication No. 1356/2005, Antonio Parra Corral v. Spain; Communication No. 1420/2005, Eugene Linder v. Finland.
  - 42 Communication 8/2005, Rahime Kayhan v. Turkey.
  - 43 See, e.g., Human Rights Committee, Communication No. 1010/2001, Lassaad v. Belgium, Views adopted 17 March 2006, para. 8.3: "while complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee."
  - 44 European Commission on Human Rights, Ringeisen v. Austria, Application 2614/65, 27 Collections, p. 55.
  - 45 Quoting Human Rights Committee, Communication No. 1235/2003, Celal v. Greece, para. 6.3.
  - 46 See, e.g., Communication No. 11/2006, Constance Ragan Salgado v. United Kingdom of Great Britain and Northern Ireland: "[i]n accordance with [article 4(1)], the Committee *shall not* consider a communication unless it has ascertained that all available domestic remedies have been exhausted..."; Communication No. 8/2005, Kayhan v. Turkey: "Article 4... *precludes* the Committee from declaring a communication admissible unless it has ascertained that "all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief"; Communication No. 2/2003, A. T. v. Hungary: the Committee was not "precluded" by Article 4(1) from considering the communication.
  - 47 Both the Inter-American Court of Human Rights and the Inter-American Commission "have maintained on repeated occasions that 'under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means.'" Inter-American Commission of Human Rights, Report 98/06[1], Petition 45-99, Rita Ortiz v. Argentina (October 21, 2006), para. 27 (quoting Inter-American Court of Human Rights, Viviana Gallardo et al., Advisory Opinion, Decision of November 13, 1981 (Ser. A), No. G 101/81, para. 26).
  - 48 This model communication form was developed by the Division for the Advancement of Women when it was the Secretariat for the CEDAW Committee. It may be revised in the future by the Office of the High Commissioner for Human Rights (OHCHR), since responsibility for servicing the Committee was transferred from the Division for the Advancement of Women to the OHCHR as of January 2008. Individuals preparing communications should consult the website of the OHCHR: <http://www.ohchr.org>.
  - 49 See, e.g., Human Rights Committee, Communication No. 1159/2003, Sankara v. Burkina Faso, Views adopted 28 March 2006, para. 6.4: "[t]he effectiveness of a remedy also depended, to a certain extent, on the nature of the alleged violation. In the present case, the alleged violation concerned the right to life, and was linked primarily to the alleged failure to conduct an inquiry and to initiate proceedings against the guilty parties, and secondarily to the alleged failure to correct the victim's death certificate, as well as to the failure of the appeals initiated by the authors in order to remedy the situation. In these circumstances, the Committee considered that the non-contentious remedies mentioned by the State party ...could not be considered effective for the purposes of [Article 5(2)(b) of the First Optional Protocol.]" (Citing Communication No. 612/1995, Vicente v. Colombia, Views adopted 29 July 1997; Communication No 778/1997, Coronel et al. v. Colombia, Views adopted 24 October 2002); CERD, Sefic v. Denmark, Communication No. 32/2003, UN Doc. A/61/18 (2006), para. 6.2: "the Committee recalls its jurisprudence that the types of civil remedies proposed by the State party may not be considered as offering an adequate avenue of redress. The complaint, which was filed with the police department and subsequently with the Public Prosecutor, alleged the commission of a criminal offence and sought a conviction of the company Fair Insurance A/S under the Danish Act against Discrimination. The same objective could not be achieved by instituting a civil action, which would result only in compensation for damages awarded to the petitioner"; Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, (Ser. C) No. 4 (1988), para. 64: "[i]f a remedy is not adequate in a specific case, it obviously need not be exhausted...For example, a civil proceeding specifically cited by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty."
  - 50 See, e.g., African Commission on Human and Peoples' Rights, Communication No. 275/2003, Article 19 v. Eritrea, Twenty-Second Annual Activity Report (2006-2007), para. 48: "the local remedies rule is not rigid. It does not apply if: ... (iii) recourse to local remedies is made impossible; (iv) from the face of the complaint there is no justice or there are no local remedies to exhaust, for example, where the judiciary is under the control of the executive organ responsible for the illegal

act; and (v) the wrong is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts”; Communication No. 251/2002, *Lawyers for Human Rights v. Swaziland*, Eighteenth Annual Activity Report (2005), para. 27: “[t]he African Commission has considered this matter and realises that for the past 31 years the Kingdom of Swaziland has had no Constitution. Furthermore, the Complainant has presented the African Commission with information demonstrating that the King is prepared to utilise the judicial power vested in him to overturn court decisions. As such, the African Commission believes that taking into consideration the general context within which the judiciary in Swaziland is operating and the challenges that they have been faced with especially in the recent past, any remedies that could have been utilised with respect to the present communication would have likely been temporary. In other words, the African Commission is of the view that the likelihood of the Complainant succeeding in obtaining a remedy that would redress the situation complained of in this matter is so minimal as to render it unavailable and therefore ineffective.” (Citation omitted)

On a number of occasions, the African Commission has found that remedies were unavailable and/or ineffective due to ouster clauses stripping the courts of jurisdiction; in general, the Commission characterized remedies as “unavailable” in these circumstances but this criterion clearly overlaps with that of effectiveness. See, e.g., Communication Nos. 140/94, 141/94, 145/95, *Constitutional Rights Project, Civil Liberties Organisation, and Media Rights Agenda v. Nigeria*, Thirteenth Annual Activity Report (1999-2000), para. 26; Communication Nos. 143/95, 150/96, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Thirteenth Annual Activity Report (1999-2000), para. 18; Communications 106/93, 128/94, 130/94 & 152/96, *Media Rights Agenda and Others v. Nigeria* (Nigerian media case), Twelfth Annual Activity Report (1998-1999), paras. 50-51; Communications 147/95 & 149/96, *Jawara v. The Gambia* (Gambian coup case), Thirteenth Annual Activity Report (1999-2000), para. 38; Communication No. 102/93, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Twelfth Annual Activity Report (1998-1999), para. 43.

- 51 See, e.g., African Commission on Human and Peoples’ Rights, Communication Nos. 25/89, 47/90, 56/91 & 100/93, *World Organisation Against Torture and Others v. Zaire*, Ninth Annual Activity Report (1995-1996), para. 55; Communication Nos. 48/90, 50/91, 52/91 & 89/93, *Amnesty International and Others v. Sudan*, Thirteenth Annual Activity Report (1999-2000), para. 33; Communication Nos. 54/91, 61/91, 98/93, 164/97, 210/98, *Malawi African Association v. Mauritania*, Thirteenth Annual Activity Report (1999-2000), para. 85.
- 52 See African Commission on Human and Peoples’ Rights, Communication Nos. 54/91, 61/91, 98/93, 164/97, 210/98, *Malawi African Association v. Mauritania*, Thirteenth Annual Activity Report (1999-2000), para. 85. See also Communication Nos. 48/90, 50/91, 52/91 & 89/93, *Amnesty International and Others v. Sudan*, Thirteenth Annual Activity Report (1999-2000), para. 39. In *Amnesty International v. Sudan*, the Commission noted that in complaints concerning massive violations, it “does not hold the requirement of exhaustion of local remedies to apply literally, especially in cases where it is ‘impractical or undesirable’ for the complainants or victims to seize the domestic courts.” *Ibid.*, at para. 38.
- 53 African Commission on Human and Peoples’ Rights, Communication No. 275/2003, *Article 19 v. Eritrea*, Twenty-Second Annual Activity Report (2006-2007), para. 71 (citing its earlier decisions in Communication Nos. 16/88, 25/89, 47/90, 56/91, 100/93, 27/89, 46/91, 49/91, 99/93).
- 54 African Commission on Human and Peoples’ Rights, Communication No. 275/2003, *Article 19 v. Eritrea*, Twenty-Second Annual Activity Report (2006 - 2007), para. 75 (citation omitted).
- 55 See, e.g. European Court of Human Rights, *Akdivar et al v. Turkey*, Judgment of 16 Sept.1996, Reports of Judgments and Decisions 1996 IV, p.1210; *Aksoy v. Turkey*, Judgment of 18 Dec.1996, Reports of Judgments and Decisions 1996 IV, p. 2275; *Mentes et al v. Turkey*, Judgment of 28 Nov. 1997, Reports of Judgments and Decisions 1997 VIII, p. 2693. The Court treated these cases as exceptions to the exhaustion requirement based on special circumstances rather than exceptions based on the existence of administrative practices obstructing access to justice.
- 56 Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (2d edition 2004), at pp. 335-36.
- 57 See, e.g., Inter-American Commission on Human Rights, Report No. 32/06, *Petition 1175-03, Paloma Angélica Escobar Ledezma et al. v. Mexico* (March 14, 2006), para. 30: “the Mexican State maintains that petitioners must ‘file for *amparo* relief for the failure to take criminal action.’ Here, the Commission underscores the principle, recognized by jurisprudence, *that once a publicly prosecutable crime has been committed, the State is obliged to pursue and promote the criminal proceedings to their final consequences. Consequently, in the instant case, that burden cannot be transferred to the petitioner*” (emphasis added); Inter-American Commission on Human Rights, Report No. 14/06, *Petition 617-01, Raquel Natalia Lagunas and Sergio Antonio Sorbellini v. Argentina* (March 2, 2006), para. 46: “[t]he State’s claim that the petitioners did not bring a civil suit for damages and injuries carries no weight since a civil suit cannot remedy the irregularities in the criminal investigation and cannot guarantee that the facts of the case will be solved and criminal responsibilities assigned.” On the adequacy of civil remedies as a substitute for criminal prosecution in other circumstances, see Committee on the Elimination of Racial Discrimination, Communication No. 34/2004, *Gelle v. Denmark*, para. 6.6 (published in UN Doc. A/61/18 (2006)): “the Committee observes that by instituting a civil action the petitioner would not have achieved the objective pursued with his complaint under section 266 (b) of the Criminal Code to the police and subsequently to the Regional Public Prosecutor, i.e. Ms. Kjærsgaard’s conviction by a criminal tribunal. It follows that the institution of civil proceedings under section 26 of the Torts Act cannot be considered an effective remedy that needs to be exhausted for purposes... of the Convention, insofar as the petitioner seeks a full criminal investigation of Ms. Kjærsgaard’s statements.” (Citations omitted).



- 58 See, e.g., Human Rights Committee, *Chonwe v. Zambia*, Communication No. 821/1998 (2000); Human Rights Committee, *Atachahua v. Peru*, Communication No. 540/1993 (1996); Human Rights Committee, *Vicente et al v. Colombia*, Communication No. 612/1995 (1997); Human Rights Committee, *Bautista v. Colombia*, Communication No. 563/1993 (1995); *Paniagua Morales et al. v. Guatemala*, (the White Van Case) (Merits), Judgment of 8 Mar. 1998, Inter-American Court of Human Rights (Ser. C) No. 37; *Genie Lacayo v. Nicaragua* (Merits), Judgment of 29 January 1997, Inter-American Court of Human Rights (Ser. C) No. 30; *Blake v. Guatemala* (Merits), Judgment of 24 Jan. 1998, Inter-American Court of Human Rights (Ser. C) No. 36; *Bámaca Velásquez Case*, Judgment of 25 Nov. 2000, Inter-American Court of Human Rights (Ser. C) No. 70; *McCann et al. v. United Kingdom*, Judgment of 27 September 1995, European Court of Human Rights (Ser. A) No. 324; *Mentes et al v. Turkey*, Judgment of 28 November 1997, European Court of Human Rights, Reports of Judgments and Decisions 1997-VIII; *Aksoy v. Turkey* Judgment of 18 December 1996, European Court of Human Rights, Reports of Judgments and Decisions 1996-VI; *Aydin v. Turkey*, Judgment of 25 September 1997, European Court of Human Rights, Reports of Judgments and Decisions, 1997-VI.
- 59 See, e.g., African Commission on Human and Peoples' Rights, Communication No. 275/2003, Article 19 v. Eritrea, Twenty-Second Annual Activity Report (2006-2007), para. 72: "whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion. In such cases, one cannot demand that the Complainants, or the victims or their family members assume the task of exhausting domestic remedies when it is up to the State to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards."
- 60 See, e.g., Committee Against Torture, Communication No. 238/2003, Z.T. (No. 2) v. Norway, para. 8.1 (published in UN Doc. A/61/44 (2006)): "the question of whether a complainant had exhausted domestic remedies that are available and effective..., could not be determined *in abstracto*, but had to be assessed by reference to the circumstances of the particular case."
- 61 See, e.g., Inter-American Commission on Human Rights, Report No. 65/05, Petition 777/01, Rosendo Radilla Pacheco v. Mexico (October 12, 2005), para. 20: "[t]he parties' submissions refer to the requirements set in Mexican law for *amparo* remedies to be filed and processed. The Inter-American Commission holds, for the purposes of admissibility, that the fact that *in this specific case it was impossible to meet those requirements* makes that remedy ineffective in providing the protection that it could, in other circumstances, possibly provide." (emphasis added); Inter-American Commission on Human Rights, Report No. 68/01, Petition 12.080, Schiavini and Schnack v. Argentina (February 27, 2002), para. 52: "[u]nder the rules of criminal procedure in effect at the time of the events in the Province of Buenos Aires, the family of Sergio Schiavini *did not have the legal standing necessary to file a challenge*. That standing was reserved for the Public Prosecutor. However, the latter did not challenge the decision even though it disregarded his indictment. The Commission considers that the admissibility of the present petition cannot be conditioned on the exhaustion of *remedies that lacked efficacy because the petitioners were themselves procedurally barred from exercising them*." (emphasis added).
- 62 See, e.g., Committee Against Torture, Communication No. 250/2004, A.H. v. Sweden, para. 7.2 (published in UN Doc. A/61/44 (2006)): "nor is the Committee persuaded that remedies such as petitions to the Government or the Parliamentary Ombudsman absolved the complainant from pursuing available judicial remedies before the ordinary courts against the judgment which had ordered his expulsion."
- 63 See, e.g., Inter-American Commission on Human Rights, Report No. 96/06, Petition 4348-02, Capote et al. v. Venezuela (October 21, 2006), para. 72: "[the Commission] does not have hard-and-fast rules as to what period of time would constitute an 'unwarranted delay.' Instead, the Commission examines the circumstances of the case and does a case-by-case assessment to determine whether there has been an unwarranted delay.... To determine whether an investigation [in a criminal case] has been carried out 'promptly,' the Commission takes a number of factors into account, such as the time that has passed since the crime was committed, whether the investigation has moved beyond the preliminary stage, the measures the authorities are adopting, and the complexity of the case." (Citations omitted).
- 64 See, e.g., Inter-American Commission on Human Rights, Report No. 31/06, Petition 1176-03, Silvia Arce et al. v. Mexico (March 14, 2005), paras. 26-28: "on the date of the acceptance of the present complaint, eight years have elapsed since the day on which Silvia Arce disappeared and that this event was reported to the competent authorities.... to date the events that were reported have not been completely clarified nor has it been determined whether responsibility has been imputed to public officials, as reported by the petitioners.... [T]he State has not provided specific information about progress in this investigation in particular that would clarify the facts and punish those responsible.... [the Commission] finds, for the purpose of admissibility, that there has been unwarranted delay in taking decisions by the Mexican jurisdictional bodies regarding the events reported."
- 65 See, e.g., Inter-American Commission, Report No. 21/06, Petition 2893-02, Admissibility, Workers Belonging to the Association of Fertilizer Workers (FERTICA) Union v. Costa Rica (March 2, 2006), para. 37: "[t]he Commission believes that petitioners availed themselves of all the necessary remedies to deal with this delay of justice, which is unwarranted in view of the failure to demonstrate the level of complexity alleged by the State to explain the average of 10 years delay in justice;" Inter-American Commission on Human Rights, Report No. 88/06, Petition 1306-05, Nueva Venecia Massacre v. Colombia (October 21, 2006), paras. 26-27: "according to the facts alleged in the petition, some 70 civilians were said to be involved as direct perpetrators of the massacre. Of these, the investigation conducted by the State B which six years

after the events was still in the examining phase - had implicated only 19. Of the persons implicated in the investigation, only eight were under some form of custody, although 18 arrest warrants were said to have been issued .... [A]s a general rule, a criminal investigation must be conducted rapidly, in order to protect the victims' interests, preserve the evidence and even safeguard the rights of any person who becomes a suspect in the course of the investigation. As the Inter-American Court has written, while every criminal investigation has to comply with a number of legal requirements, the rule of prior exhaustion of local remedies must never lead to a halt or delay that would render international action in support of a defenseless victim ineffective." (Citing Inter-American Court of Human Rights, Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987 (Ser. C) No. 1, para. 93).

- 66 See, e.g., Inter-American Commission on Human Rights, Report No. 96/06, Petition 4348-02, Capote et al. v. Venezuela (October 21, 2006), para. 72: "[g]enerally, the Commission finds that "a criminal investigation should be carried out promptly to protect the interests of the victims and to preserve evidence." (citations omitted); Human Rights Committee, Communication No. 1153/2003, Karen Noelia Llantoy Huamán v. Peru, Views adopted 24 October 2005, para. 5.2: "[t]he Committee also takes note of her arguments to the effect that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to *guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases*. The Committee recalls its jurisprudence to the effect that a remedy which had no chance of being successful could not count as such and did not need to be exhausted ... In the absence of a reply from the State party, due weight must be given to the author's allegations. Consequently, the Committee considers that [the exhaustion requirement has been met.]" (Citing Human Rights Committee, Communication No. 701/1996, Gómez Vázquez v. Spain, Views adopted 20 July 2000, para. 6.2) (emphasis added).
- 67 See, e.g., Human Rights Committee, Communication No. 1293/2004, Maximino de Dios Prieto v. Spain, Views adopted 25 July 2006, para. 6.3; Inter-American Commission on Human Rights, Petition No. 434-03, Report No. 26/06, Isamu Carlos Shibayama et al. v. United States, para. 48, Annual Report of the Commission 2006. For discussion of the test of effectiveness and additional citations, see Section VI (C) (6)(b)(vii).
- 68 For discussion and additional citations, see Section VI (C) (6)(b)(vii).
- 69 See, e.g., Human Rights Committee, Communication No. 1403/2005, Gilberg v. Germany (Decision adopted 25 July 2006), para. 6.5: "the prospect of success of a domestic remedy must be assessed from an ex ante perspective to serve as a justification for not exhausting domestic remedies"; Committee Against Torture, Communication No. 238/2003, Z.T. (No. 2) v. Norway, para. 8.1 (published in UN Doc. A/61/44 (2006)): "[the] apre-condition of effectiveness, however, was the ability to access the remedy, and, in this case, as the complainant had not pursued an application for legal aid, he had not shown that judicial review was closed, and therefore unavailable...."; Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, (Ser. C) No. 4 (1988), para. 67: "the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion."
- 70 See, e.g., Human Rights Committee, Communication No. 1159/2003, Sankara v. Burkina Faso, Views adopted 28 March 2006, para. 6.4: "'domestic remedies' must be understood as referring primarily to judicial remedies. *The effectiveness of a remedy also depended, to a certain extent, on the nature of the alleged violation*. In the present case, the alleged violation concerned the right to life, and was linked primarily to the alleged failure to conduct an inquiry and to initiate proceedings against the guilty parties, and secondarily to the alleged failure to correct the victim's death certificate, as well as to the failure of the appeals initiated by the authors in order to remedy the situation. *In these circumstances, the Committee considered that the non-contentious remedies mentioned by the State party in its submission could not be considered effective....*" (Citing Human Rights Committee, Communication No. 612/1995, Vicente v. Colombia, Views adopted 29 July 1997; Communication No. 778/1997, Coronel et al. v. Colombia, Views adopted 24 October 2002) (emphasis added).
- 71 See, e.g., Inter-American Commission on Human Rights, Report No. 75/03 Petition 42/02, Cañas Cano et al. v. Colombia (October 22, 2003), para. 31: "[to the apparent delay in the State's investigation] must be *added the environment in which the investigation has been conducted*, including the fact that Elizabeth Cañas Cano was assassinated and the officer of the court in charge of the first phase of the proceeding fled the country. In cases similar to this one, the Commission has regarded circumstances of this kind as indicative of the fact that the judicial investigation is unlikely to provide an effective remedy that petitioners must exhaust prior to resorting to international protection of human rights." (Citations omitted) (emphasis added). See also European Court of Human Rights, Akdivar et al v. Turkey, Judgment of 16 September 1996, Reports of Judgments and Decisions 1996 IV, p.1210, para. 73 (climate of insecurity following the destruction of the victims' homes in a region marked by civil strife).
- 72 See, e.g., Human Rights Committee, Communication No. 1184/2003, Brough v. Australia, Views adopted 17 March 2006, para. 8.10: "[t]he decisive question is therefore whether or not effective judicial remedies were available to, and have not been exhausted by, the author. In this regard, the Committee recalls the State party's contention that Australian courts will not interfere with administrative decisions of prison authorities, if such decisions are found to

have been bona fide and if they constitute a reasonable use of power of management. It also recalls that *the State party has argued, and the author has conceded, that most of the measures imposed on the author were consistent with the relevant domestic law. It is therefore hardly conceivable that the author could successfully have challenged the decisions of the Parklea authorities at court.*" (emphasis added); Human Rights Committee, Communication No. 1403/2005, *Gilberg v. Germany*, Decision adopted 25 July 2006, para. 6.5: "[a]s regards the effectiveness of an appeal against the decision of the ... Higher Administrative Court in the first set of proceedings, the Committee recalls that the Court, in its decision of 13 July 1999, denied leave to appeal, informing the author that this denial could only be challenged on the basis of higher jurisprudence supporting his claims, procedural flaws, or if the general importance of his case could be substantiated. The Committee further recalls that the Court confirmed the Ministry's refusal to appoint the author to a civil servant post, *inter alia*, by reference to two cases decided by the Federal Administrative Court. It considers that the author has sufficiently substantiated the similarity between these cases and his own case. It was therefore reasonable for him to expect that an appeal against the decision of the ... Higher Administrative Court would have been futile, after that Court had dismissed his claim on similar grounds. The author was therefore not required to challenge the Court's denial to grant leave to appeal for purposes of preparing an appeal to the Federal Administrative Court..." (emphasis added); Human Rights Committee, Communication No. 1313/2004, *Castaño v. Spain*, Decision adopted 25 July 2006, para. 6.3: "[t]he Committee notes the State party's affirmation that the communication is inadmissible because domestic remedies have not been exhausted, as the author did not invoke the violation of the right to equality before the Constitutional Court. The Committee notes, however, that *the Court had already ruled negatively on that issue in a similar case*. The Committee reiterates its jurisprudence that when the highest domestic court has ruled on the subject of a dispute, thereby eliminating any prospect of a successful appeal to the domestic courts, the author is not required to exhaust domestic remedies for the purposes of the Optional Protocol" (emphasis added); Human Rights Committee, Communication No. 1293/2004, *Maximino de Dios Prieto v. Spain*, Decision adopted 25 July 2006: "with regard to the complaints concerning the absence of a court of appeal for criminal cases, the author points out that the remedy of *amparo* is useless since, according to the established case-law of the Constitutional Court, the absence of such a court is not in violation of [Article 14(5) of the ICCPR]. [Para. 2.4]... The Committee recalls its established jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success. An application for *amparo* had no prospect of success in relation to the alleged violation ..., and the Committee therefore considers that domestic remedies have been exhausted." [Para. 6.3] (citations omitted); Inter-American Commission on Human Rights, Petition No. 434-03, Report No. 26/06, *Isamu Carlos Shibayama et al. v. United States* (March 16, 2006): "[t]he Commission observes that according to its jurisprudence and that of other human rights bodies, remedies may be considered ineffective when it is demonstrated that any proceedings raising the claims before domestic courts would appear to have no reasonable prospect of success, for example because the State's highest court has recently rejected proceedings in which the issue posed in a petition had been raised. In order to meet this standard, however, *there must be evidence before the Commission upon which it can effectively evaluate the likely outcome should a claim be pursued by the Petitioners. Mere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies*. [Para. 48] In the present complaint, the record indicates that the Petitioners have pursued some, but not all, of the domestic remedies potentially pertinent to the claims raised before the Commission. At the same time, the information available calls into question the possibility that further proceedings in respect of the Petitioners' claims under the Civil Liberties Act or under the U.S. Constitution, civil rights law or international humanitarian law might reasonably be successful.... [Para. 49] With respect to the Petitioners' non-CLA claims under the U.S. Constitution, civil rights law, and international humanitarian law, the record indicates that individuals similarly situated to the Petitioners had raised these claims unsuccessfully before the U.S. Court of Appeals for the Ninth Circuit and that the U.S. Supreme Court denied certiorari review of those findings in October 2001. Moreover, the Petitioners have indicated that they may have faced the prospect of penalties had they pursued such claims in the face of the existing precedents. The State has not disputed these allegations and *has not otherwise indicated why the same courts might have reached a different conclusion in the circumstances of the Petitioners' claims*. Accordingly, based upon the information presented the Commission concludes that the Petitioners would have no reasonable prospect of success in pursuing [their] claims before the U.S. courts." [Para. 51] (citations omitted) (emphasis added); Inter-American Commission on Human Rights, Report No. 52/07, Petition 1490-05, *Jessica Gonzales and Others v. United States*, (July 24, 2007), paras. 48-49: "[t]he State in this case has not indicated how the alternative legal and administrative remedies it mentions could have provided Ms. Gonzales with a different outcome for her claims or how these could have been adequate and effective in remedying the violations alleged. Furthermore, both parties highlight precedent that limits the likelihood of success of any of these remedies, including the Supreme Court ruling in the *Town of Castle Rock, Colorado v. Gonzales* case, the Supreme Court cases establishing that the government has no obligation to protect an individual from acts committed by non-State actors, and existing immunity laws protecting state officials from liability.... [A] petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim would have no reasonable prospect of success in light of prevailing jurisprudence of the state's highest courts." (Citations omitted). See also European Court of Human Rights, *De Wilde, Ooms and Versyp* Cases, 10 June 1971, ECHR Ser. A, Vol. 12, paras. 37, 62; European Court of Human Rights, *Avan Oosterwijck v. Belgium*, Judgment (Preliminary Objections), 6 November 1980, Case No. 7654/76, para. 37; Permanent Court of International Justice, *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)*, 1939 (Ser. A/B) No. 76, at 18.

- 73 See, e.g., Human Rights Committee, Communication No. 1152 & 1190/2003, *Ndong et al. and Mic Abogo v. Equatorial Guinea*, Views adopted 31 October 2005, para. 5.4: “it is only necessary to exhaust those remedies that have some prospect of success. The Committee takes note that the authors filed such remedies as the law permits against their conviction, but that these were not even allowed within the deadline established for the purpose under domestic procedural laws....the Committee considers that the authors have exhausted domestic resources ....”
- 74 In a communication challenging mass expulsions, the African Commission on Human and Peoples’ Rights held that complainants are not required to exhaust remedies that are “found to be, as a practical matter, unavailable or ineffective.” Communication 71/92, *Rencontre Africaine pour la Défense de Droits de l’Homme v. Zambia*, Ninth Annual Activity Report (1995-1996), para. 11. The circumstances of their collective deportation prevented the victims from accessing the courts: they were held in detention prior to deportation and the expulsions were carried out so rapidly that they had no opportunity to seek redress in the courts. *Ibid.*, para. 14. See also Communication 212/98, *Amnesty International v. Zambia*, Twelfth Annual Activity Report (1998 -1999), para. 20 (finding that deportation prevented the complainant from exhausting domestic remedies), Communication 159/96, *Union Inter-Africaine des Droits de l’Homme and Others v. The Gambia*, Eleventh Annual Activity Report (1997-1998), para. 12 (finding that the detentions and subsequent expulsion of complainants rendered remedies inaccessible). But see Communication No. 73/92, *Diakit  v. Gabon*, Thirteenth Annual Activity Report (1999 - 2000) (finding that domestic remedies had not been exhausted because the complainant never contested the order of expulsion); Communication 219/98, *Legal Defence Centre v. The Gambia*, Thirteenth Annual Activity Report (1999 - 2000), para. 17 (finding that deported complainant should have sought access to remedies through counsel).

In these decisions by the African Commission and others by the Inter-American Commission on Human Rights, important factors in determining whether deportation prevented access to remedies include whether: the deportations are carried out too rapidly to seek redress; the petitioner is in detention pending deportation; the petitioner is able to re-enter the country after deportation; and the petitioner can obtain counsel and counsel can effectively access remedies on the petitioner’s behalf. The Inter-American Commission has found the exhaustion requirement inapplicable where the petitioner was deported under circumstances that prevented access to remedies as a practical matter and was unable subsequently to re-enter the country to seek recourse. See Report No. 95/06, *Petition 92-04, Jesus Tranquilino V lez Looz v. Panama* (October 23, 2006); Report No. 89/00, *Petition 11.495, Juan Ram n Chamorro Quiroz v. Costa Rica* (5 October 2000); Report No. 37/01, *Petition 11.529, Jos  Sanchez Guner Espinales et al. v. Costa Rica* (February 22, 2001). In *Chamorro Quiroz*, for example, the petitioners argued that: “Mr. Chamorro was not ‘materially’ able to invoke domestic legal remedies before leaving the country because he was taken directly from where he was captured to the place where he was deported. According to the petitioners, detaining undocumented immigrants for several hours before deporting them is an administrative measure, taken within highly summary, almost automatic, proceedings, that does not allow them the opportunity of filing or attempting to seek any domestic remedy, including habeas corpus. In addition, since they had no papers and no means of economic support, they were unable to re-enter Costa Rica to formulate complaints or invoke the applicable legal remedies....” Report No. 89/00, *Petition 11.495, Juan Ram n Chamorro Quiroz v. Costa Rica* (October 5, 2000), para. 35. In *V lez Looz*, the Commission noted that the petitioner “lacked the opportunity of invoking domestic remedies before leaving the country as he was driven to a detention center where he was not allowed any contact with the outside world. He alleges that he was not allowed to use the telephone or have any contact with consular agents from Ecuador. He furthermore asserts that he was only allowed access to one lawyer who was unable to visit him in person. Consequently, irrespective of whether the administrative or legal remedies could have been available to him, for practical purposes such remedies were out of his reach.” Report No. 95/06, *Petition 92-04, Jesus Tranquilino V lez Looz v. Panama*, (October 23, 2006), para. 42. See also Human Right Committee, Communication No. 155/1983, *Eric Hammel v. Madagascar*, Views adopted 3 April 1987 (holding that the petitioner had no effective remedy under the circumstances of his expulsion, since he was detained prior to receiving the expulsion order, which was effected within half a day, and he was forbidden all phone contact).

Victims who are refugees may argue that domestic remedies are inaccessible or unavailable as a practical matter, as well as inaccessible due to the danger of persecution or reprisal if they return to seek recourse. See, e.g., African Commission on Human and Peoples’ Rights, Communication No. 249/2002, *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea*, Twentieth Annual Activity Report (2006), paras. 32-36: “[c]oncerning the matter of exhausting local remedies, ... the Complainant argues that any attempt by Sierra Leonean refugees to seek local remedies would be futile for (3) three reasons: [Para 32] First, the persistent threat of further persecution from state officials has fostered an ongoing situation in which refugees are in constant danger of reprisals and punishment. When the authorities tasked with providing protection are the same individuals persecuting victims an atmosphere in which domestic remedies are available is compromised. Furthermore, according to the precedent set by the African Commission in Communication 147/95 and 149/96 *Sir Dawda K. Jawara v. the Gambia*, the need to exhaust domestic remedies is not necessarily required if the Complainant is in a life-threatening situation that makes domestic remedies unavailable. [Para 33]. Second, the impractical number of potential plaintiffs makes it difficult for domestic courts to provide an effective avenue of recourse. In September of 2000, Guinea hosted nearly 300,000 refugees from Sierra Leone. Given the mass scale of crimes committed against Sierra Leonean refugees - 5,000 detentions, mob violence by Guinean security forces, widespread looting - the domestic courts would be severely overburdened if even a slight majority of victims chose to pursue legal redress in Guinea. Consequently, the requirement to exhaust domestic remedies



is impractical. [Para 34]. Finally, exhausting local remedies would require Sierra Leonean victims to return to Guinea, the country in which they suffered persecution, a situation that is both impractical and unadvisable. According to precedent set by the Commission in Communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia*, victims of persecution are not necessarily required to return to the place where they suffered persecution to exhaust local remedies. [Para 35]. In this present case, Sierra Leonean refugees forced to flee Guinea after suffering harassment, eviction, looting, extortion, arbitrary arrests, unjustified detentions, beatings and rapes. Would it be required to return to the same country in which they suffered persecution? Consequently, the requirement to exhaust local remedies is inapplicable.” [Para 36].

The African Commission has held that complainants who received refugee status abroad constructively exhausted domestic remedies. See Communication 215/98, *Rights International v. Nigeria* (Nigerian torture case), Thirteenth Annual Activity Report (1999-2000), para. 24; *Ouko v. Kenya*, Communication 323/99, Fourteenth Annual Activity Report, (2000-2001), para. 19.

- 75 See Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of 29 July 1988, (Ser. C) No. 4 (1988): “[p]rocedural requirements can make the remedy of habeas corpus ineffective ... *if it presents a danger to those who invoke it*. [Para. 66] ... The evidence offered shows that lawyers who filed writs of habeas corpus were intimidated, that those who were responsible for executing the writs were frequently prevented from entering or inspecting the places of detention. [Para. 78] ... The testimony and other evidence received and not refuted leads to the conclusion that, during the period under consideration, although there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; ... because attorneys and judges were threatened and intimidated by those authorities.” [Para. 80] (emphasis added).

In a case alleging violations of the right to humane conditions of detention and freedom from cruel, inhuman and degrading treatment, the Human Rights Committee found that the author’s fear of reprisal in the particular circumstances of his case justified his failure to resort to domestic remedies: “[w]ith respect to the conditions under which Mr. Phillip is detained, counsel argues that the prison cell is underground, filthy, with bad ventilation and infested with cockroaches and rats. He sleeps on pieces of carpet and torn cardboard box on the cold concrete floor without any bedding. Food is inadequate. There are no toiletries or medication. The complaints, however, have not been reported to any authorities, *because the author fears reprisal from the warders and claims to be living in complete fear for his life*. [Para. 3.4] ... As regards the author’s claim that the conditions of his detention were cruel, inhuman and degrading, the Committee noted that the State party had so far not attempted to refute his claim nor had it provided information about effective domestic remedies available to the author. In these circumstances, given the author’s statement that he had not filed a complaint because of his fears of the warders,” [para. 6.4] the Committee decided that the exhaustion requirement did not bar admissibility. Communication No. 594/1992, *Phillip v. Trinidad and Tobago*, Views adopted 20 October 1998, (emphasis added).

The Inter-American Commission on Human Rights has held that threats against a victim prevented access to domestic remedies. See, e.g., Inter-American Commission on Human Rights, Report No. 20/02, *Petition 11.627, Galeas González v. Honduras* (February 27, 2002), paras. 24-25: “[i]n that connection, the petitioners denounced wiretapping and threats of death and imprisonment by agents of the State, referring concretely to three threats: the first by Colonel Amaya, a member of the Armed Forces of Honduras; later Mr. Galeas supposedly received a call from Mr. Gilberto Goldstein, First Secretary of the then-President of Honduras, who allegedly warned him to leave the country immediately; and the third, on Mr. Galeas’ return to Honduras in 1992, was purportedly proffered by Mr. Rodolfo Iriás Navas, who is said to have issued him similar warnings. The Commission finds that this situation of personal insecurity would have prevented Mr. Galeas from using the judicial mechanisms designed to protect his personal security and physical integrity”; Inter-American Commission on Human Rights, Report No. 31/99, *Petition 11.763, Plan de Sánchez Massacre v. Guatemala*, (March 11, 1999), para. 27: “[t]he Commission finds that the survivors and family members of the victims were prevented from invoking domestic remedies for a period of years due to the fear which affected them and the general community. *The rule of exhaustion of domestic remedies does not require the invocation of remedies where this would place the physical integrity of the petitioner at risk*, or where this offers no possibility of success. In addition to the information in the record, Commission reports from the period under study document *the vulnerability of populations in rural areas to human rights abuses, and the resulting climate of insecurity*, and further indicate that, at the time of the events denounced, the judiciary ‘had been stripped of its independence, autonomy and impartiality.’” (Citations omitted) (emphasis added).

In a case involving a former head of state of the respondent State who had been removed in a coup d’etat, the African Commission on Human and Peoples’ Rights held that domestic remedies are unavailable when the petitioner cannot return to his country to pursue them “because of generalised fear for his life.” Communications 147/95 & 149/96, *Jawara v. The Gambia*, Thirteenth Annual Activity Report (1999-2000), para. 35. The Commission noted that the complainant “had been overthrown by the military, he was tried in absentia, former Ministers and Members of Parliament of his government have been detained and there was terror and fear for lives in the country. It would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies.” *Ibid*, para. 36. See also European Court of Human Rights, *Akdivar et al v. Turkey*, Judgment of 16 September 1996, Reports of Judgments and Decisions 1996 IV, p.1210, para. 74 (risk of reprisals against the victims if they sought to initiate legal proceedings against security forces for the destruction of their homes).

- 76 Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of 29 July 1988, (Ser. C) No. 4 (1988), para. 68: “[t]he exhaustion requirement need not be met where] there is proof of the existence of a practice or policy ordered or tolerated by the government, the *effect of which is to impede* certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality.” (Emphasis added). See also African Commission on Human and Peoples’ Rights, Communication No. 97/93, Modise v. Botswana, Tenth Annual Activity Report (1996-1997), paras. 20-21 (complainant had been repeatedly subjected to summary deportation in the course of his efforts to secure redress).
- 77 Inter-American Court of Human Rights, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, (Ser. A) No. 11, 10 August 1990: “[i]t follows therefrom that where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation, the exception set out in Article 46(2)(b) is fully applicable and the individual is exempted from the requirement to exhaust domestic remedies. [Para. 35] ...In addressing this issue it is clear that the test to be applied must be whether legal representation was necessary in order to exhaust the appropriate remedies and whether such representation was, in fact, available.” Para. 38. See also Inter-American Commission on Human Rights, Report No. 65/05, Petition 777/01, Rosendo Radilla Pacheco v. Mexico (October 12, 2005), para. 21: “[t]he Commission must take into account the reports drawn up on the general situation in the region; the claimed general impossibility of securing access to justice in this specific case; the establishment of the FEMOSSP; the State’s exclusive control over the means and evidence in the investigation; and the various attempts made by the alleged victim’s next-of-kin to report the alleged incident to the authorities. With that in mind, and without prejudging the merits of the matter, the [Commission] believes that at the time of Rosendo Radilla Pacheco’s alleged forced disappearance *there was, among the population, a grounded fear that could justify the impossibility of reporting the facts of this particular case to the competent authorities*. In that context, the efforts made by Rosendo Radilla Pacheco’s relatives and representatives to secure justice through domestic channels are deemed reasonable.” (Citations omitted) (emphasis added).
- 78 See, e.g., Committee Against Torture, Communication No. 238/2003, Z.T. v. Norway, paras. 8.1- 8.3 (published in UN Doc. A/61/44 (2006)): “[t]he Committee noted that a pre-condition of effectiveness, however, was the ability to access the remedy.... In the present case, the complainant had since been denied legal aid. Had legal aid been denied because the complainant’s financial resources exceeded the maximum level of financial means triggering the entitlement to legal aid, and he was thus able to provide for his own legal representation, then the remedy of judicial review could not be said to be unavailable to him. Alternatively, in some circumstances, it might be considered reasonable, in the light of the complainant’s language and/or legal skills, that he/she represented himself or herself before a court. In the present case, however, *it was unchallenged that the complainant’s language and/or legal skills were plainly insufficient to expect him to represent himself, while, at the same time, his financial means, as accepted by the State party for purposes of deciding his legal aid application, were also insufficient for him to retain private legal counsel*. If, in such circumstances, legal aid was denied to an individual, the Committee considered that it would run contrary to both the language of [Article 22(5)], as well as the purpose of the principle of exhaustion of domestic remedies and the ability to lodge an individual complaint, to consider a potential remedy of judicial review as ‘available.’” (Emphasis added).
- 79 Inter-American Court of Human Rights, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, August 10, 1990, para. 30. The Court noted that the American Convention specifies minimum due process guarantees for criminal proceedings and that in civil, labour or fiscal proceedings (for which the Convention does not set out minimum standards), the individual has a right to a fair hearing. Ibid. paras. 24, 28. It concluded that the Convention requires legal counsel “only when that is necessary for a fair hearing. *Any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted*.” Ibid, para. 26 (emphasis added).
- 80 Inter-American Court of Human Rights, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, August 10, 1990, para. 28.
- 81 See, e.g., Human Rights Committee, Communication No. 230/1987, Henry v. Jamaica, Views adopted 1 November 1991: “the Committee ... took note of the State party’s contention that the communication was inadmissible because of the author’s failure to pursue constitutional remedies available to him under the Jamaican Constitution. In the circumstances of the case, the Committee found that recourse to the Constitutional Court under Section 25 of the Constitution was not a remedy available to the author within the meaning of [Article 5 (2)(b)] of the Optional Protocol. [Para. 5.1] ...The Committee recalls that by submission of 10 October 1991 in a different case, the State party indicated that legal aid is not provided for constitutional motions. In the view of the Committee, this supports the finding made in its decision on admissibility, that a constitutional motion is not an available remedy which must be exhausted for purposes of the Optional Protocol. In this context, the Committee observes that it is not the author’s indigence which absolves him from pursuing constitutional remedies, but the State party’s unwillingness or inability to provide legal aid for this purpose. [Para. 7.3] The State party claims that it has no obligation under the Covenant to make legal aid available in respect of constitutional motions, as such motions do not involve the determination of a criminal charge, as required by article 14, paragraph 3(d), of the Covenant. But the issue before the Committee has not been raised in the context of article 14, paragraph 3(d),

but only in the context of whether domestic remedies have been exhausted. [para. 7.4]”; Communication No. 445/1991, *Champagnie, Palmer & Chisholm v. Jamaica*, Views adopted 18 July 1994, para. 5.2: “[w]ith respect to the authors’ possibility of filing a constitutional motion, the Committee considered that in the absence of legal aid, a constitutional motion did not constitute an available remedy in the case”; Communication No. 662/1995, *Lumley v. Jamaica*, Views adopted 31 March 1999, para. 6.2: “[t]he Committee notes the State party’s argument that the communication is inadmissible for non-exhaustion of domestic remedies. The Committee observes, however, that no legal aid was available to the author to petition the Judicial Committee of the Privy Council, and that in the circumstances no further remedies were available to him.” See also Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (23 August 2007), paras. 10-11: “[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with [article 14(1)], in conjunction with the right to an effective remedy as enshrined in [article 2(3)] of the Covenant.... Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under [article 14(1)].”

- 82 See Human Rights Committee, Communication No. 420/90, *G.T. v. Canada*, Decision adopted 23 October 1992, paras. 6.3-6.4: “[t]he Committee observes that the author has not sought judicial review of the decision of the Divisional Court to the Court of Appeal of Ontario, and that he appears to have made no effort to apply for legal aid under the Ontario Legal Aid Act. Moreover, the author has not availed himself of procedures under the Ontario Human Rights Code, which he could have done without incurring expenses.... In the light of the above, the Committee concludes that the author has not met the requirement of exhaustion of domestic remedies...”; Communication No. 397/1990, *P.S. v. Denmark*, Decision adopted 22 July 1992: “the author states, *inter alia*, that he does not want to seize the courts because of the unnecessary expenditure of taxpayers’ money [para. 4.5 ] ... The Committee notes that the author has refused to avail himself of these remedies, because of considerations of principle and in view of the costs involved. The Committee finds, however, that financial considerations and doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them” [para. 5.4]; Communication No. 340/88, *R.W. v. Jamaica*, Decision adopted 21 July 1992, para. 6.2: “[t]he Committee further observes that the author appears to have means to secure legal assistance to file a constitutional motion. In the particular circumstances of the case, the Committee finds that the constitutional remedy referred to by the State party constitutes a remedy within the meaning of [Article 5(2)(b)] of the Optional Protocol, which the author has failed to exhaust.”
- 83 *X v. Federal Republic of Germany*, Application No. 181/56, 1 Yearbook of the European Convention on Human Rights, p.139.
- 84 African Commission on Human and Peoples’ Rights, Communication No. 207/97, *Africa Legal Aid v. The Gambia*, Fifteenth Annual Activity Report (2001), para 33.
- 85 African Commission on Human and Peoples’ Rights, Communication No. 241/2001, *Purohit and Moore v. The Gambia*, Sixteenth Annual Activity Report (2002-2003), para. 37. The Commission’s conclusion apparently hinged on the vulnerable status of the group affected, as well as their indigence: “the Respondent State has informed the African Commission that no legal assistance or aid is availed to vulnerable groups to enable them access the legal procedures in the country. Only persons charged with Capital Offences get legal assistance in accordance with the Poor Persons Defence (Capital Charge) Act. [Para. 34] In the present matter, the African Commission cannot help but look at the nature of people that would be detained as voluntary or involuntary patients under the Lunatics Detention Act and ask itself whether or not these patients can access the legal procedures available (as stated by the Respondent State) without legal aid. [Para. 35]. The African Commission believes that in this particular case, the general provisions in law that would permit anybody injured by another person’s action are available to the wealthy and those that can afford the services of private counsel. However, it cannot be said that domestic remedies are absent as a general statement - the avenues for redress are there if you can afford it. [Para. 36]... If the African Commission were to literally interpret Article 56 (5) of the African Charter, it might be more inclined to hold the communication inadmissible. However, the view is that, even as admitted by the Respondent State, the remedies in this particular instance are not realistic for this category of people and therefore not effective and for these reasons the African Commission declares the communication admissible.” [Para. 38].
- 86 See Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, (Ser. A) No. 11, August 10, 1990, para. 20: “[i]n addressing the issue of indigency, the Court must emphasize that merely because a person is indigent does not, standing alone, mean that he does not have to exhaust domestic remedies.... Whether or not an indigent has to exhaust domestic remedies will depend on whether the law or the circumstances permit him to do so.”
- 87 Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, August 10, 1990, para. 30.

- 88 Ibid (Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies*), para. 29.
- 89 See, e.g., Human Rights Committee, Communication No. 1034-1035/2001, *Dusan Soltes v. Czech Republic and Slovakia*, Decision adopted 28 October 2005, para. 7.4: “[t]he Committee recalls its jurisprudence that the fact of being unaware, as a foreigner or otherwise, of the existence of a constitutional court does not exempt an individual from the duty to exhaust available domestic remedies, save in cases where the specific circumstances would have made it impossible to obtain the necessary information or assistance. Given that the author had legal representation throughout the Czech legal proceedings and that the Constitutional Court had jurisdiction over the fair trial issues raised, the Committee considers that neither exception applies to the author’s case” (citing Communication No. 724/1996, *Mazurkiewiczova v. the Czech Republic*, Decision adopted 26 July 1999). See also Human Rights Committee, Communication No. 669/1995, *Malik v. The Czech Republic*, Decision adopted 21 October 1998; European Commission of Human Rights, *Weichert v. Federal Republic of Germany*, Application 1404/62, 15 Collections, at p. 23; *X v. U.K.*, Application 5006/71, 39 Collections, at p. 93.
- 90 See, e.g., European Commission of Human Rights, *X v. U.K.*, Application 6840/74, 10 D & R, pp. 15 ff. See also Committee Against Torture, Communication No. 250/2004, *A.H. v. Sweden*, para. 7.2 (published in UN Doc. A/61/44 (2006)): the complainant, facing an expulsion order, argued that “his decision not to appeal to the ... Court of Appeal was based on the extreme stress, trauma and shock he was experiencing at that moment.... [The Committee found that his] alleged mental and emotional problems at the time of the second ... expulsion order (in 1997) also did not absolve him from the requirement to exhaust domestic remedies.”
- 91 See, e.g., Human Rights Committee, Communication No. 437/1990, *Patiño v. Panama*, para. 5.2; Human Rights Committee, Communication No. 511/1992, *Lansman et al. v. Finland*, Views adopted 14 October 1993, para. 6.3; Human Rights Committee, Communication No. 1095/2002, *Gomaritz v. Spain*, Views adopted 26 August 2005, para. 6.4; Human Rights Committee, Communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted 3 November 2004, para. 6.5; Human Rights Committee, Communication No. 1293/2004, *Maximino de Dios Prieto v. Spain*, Views adopted 25 July 2006, para. 6.3; Inter-American Commission on Human Rights, Report No. 26/06, *Petition No. 434-03, Isamu Carlos Shibayama et al. v. United States*, para. 48, Annual Report of the Commission 2006; Inter-American Commission on Human Rights, Report 104/05, *Petition 65/99, Victor Nicholas Sanchez et al. v. United States*, para. 67, Annual Report of the Commission 2005; Inter-American Commission on Human Rights, Report No. 51/00, *Petition 11.193, Gray Graham v. United States*, para. 60, Annual Report of the Commission 2000; Inter-American Commission on Human Rights, Report No. 108/00, *Petition 11.753, Ramón Martínez Villareal v. United States*, para. 70, Annual Report of the Commission 2000; Inter-American Commission on Human Rights, Report No. 19/02, *Petition 12.379, Mario Alfredo Lares-Reyes et al. v. United States*, para. 61, Annual Report of the Commission 2002.
- 92 For discussion, see Chittharanjan Felix Amerasinghe, *Local Remedies in International Law*, (2d edition 2004), at pp. 337-339. In some communications, the Human Rights Committee has referred to the “futility” of a remedy in describing the application of an exception to the exhaustion rule, but it is clear that its general practice is to apply the less strict test (“reasonable prospect of success”). The Committee Against Torture and the Committee on the Elimination of Racial Discrimination have used the standard of “futility” but not “obvious futility.” See Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (2d edition 2004), at p. 339, note 94. See also *Theory and Practice of the European Court of Human Rights*, Fourth Edition, Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak (editors) (2007), pp. 147-148.
- 93 See African Commission on Human and Peoples’ Rights, Communications 147/95 & 149/96, *Jawara v. The Gambia*, Thirteenth Annual Activity Report (1999-2000), paras. 32, 35, 38. See also Communications 48/90, 50/91, 52/91 & 89/93, *Amnesty International and Others v. Sudan*, Thirteenth Annual Activity Report (1999-2000), para. 37.
- 94 See, e.g., African Commission on Human and Peoples’ Rights, Communication 135/94, *Kenya Human Rights Commission v. Kenya*, Ninth Annual Activity Report (1995-1996), para. 16.
- 95 See, e.g., Committee on the Elimination of Racial Discrimination Communication No. 34/2004, *Gelle v. Denmark*, para. 6.6 (published in UN Doc. A/61/18 (2006)): “[m]ere doubts’ about the effectiveness of available civil remedies do not absolve a petitioner from pursuing them...”; Human Rights Committee, Communication No. 1374/2005, *Kurbogaj v. Spain*, Decision adopted 14 July 2006, para. 6.3: “[t]he Committee recalls that mere doubts about the effectiveness of judicial remedies or the prospect of substantial costs of pursuing such remedies do not absolve a complainant from his/her obligation to attempt to exhaust them...”; Human Rights Committee, Communication No. 1103/2002, *Castro v. Colombia*, Decision adopted 28 October 2005, para. 6.3: “[t]he Committee observes that the author ... does not, however, deny that judicial remedies offered in the ordinary labour courts were available to him, nor does he explain why such a remedy would have been ineffective in his case. These doubts about the effectiveness of judicial remedies do not absolve an author from exhausting them.” See also Human Rights Committee, Communication No. 397/1990, *P.S. v. Denmark*, Decision adopted 22 July 1992, para. 5.4; European Commission of Human Rights, *X and Y v. Belgium*, Application 1661/62, 10 Collections, p. 19.
- 96 See, e.g., Communication No. 8/2005, *Kayhan v. Turkey*: “[t]he Committee notes that the State party drew attention to other remedies that would have been available of which the author did not make use ....However, the Committee considers that the information provided to it on the relief that might reasonably have been expected from the use of the remedies is insufficiently clear to decide on their efficacy....”



- 97 Citations omitted.
- 98 Human Rights Committee, Communication No. 1184/2003, *Brough v. Australia*, Views adopted 17 March 2006, paras. 8.11- 8.12.
- 99 See, e.g., Inter-American Commission on Human Rights, Report No. 52/07, Petition 1490-05, *Jessica Gonzales and Others v. United States* (July 24, 2007), para. 47: “[f]or purposes of admissibility, the standard of analysis used for the *prima facie* assessment of the adequacy and effectiveness of the remedies under domestic law is not as high as the one required to determine whether a violation of Convention-protected rights has been committed.” (citing Inter-American Commission on Human Rights, Report No. 08/05, Petition 12.238, *Miriam Larrea Pintado v. Ecuador* (February 23, 2005), para. 31); Report No. 75/03, Petition 42/02 *Cañas Cano et al. v. Colombia* (October 22, 2003), para. 33: “[t]he invocation of the Article 46(2) exceptions to the rule requiring exhaustion of local remedies is closely related to the determination of possible violations of certain rights upheld in the Convention, such as the guarantees of access to the courts. However, given its nature and purpose, Article 46(2) is, content-wise, quite independent of the Convention’s substantive norms. Hence, the determination of whether the exceptions to the prior exhaustion rule apply to the case in question must be undertaken prior to and separate from the analysis of the merits, since the standard that must be met is quite different from the standard that must be met to determine the possible violation of Articles 8 and 25 of the Convention”; Report No. 88/06, Petition 1306-05, *Nueva Venecia Massacre v. Colombia* (October 21, 2006), para. 29: “[i]nvolving the exceptions allowed under Article 46.2 to the rule requiring exhaustion of local remedies is closely connected to the determination of possible violations of certain rights contained in the Convention, such as the guarantees of access to justice. However, Article 46.2 of the Convention, by its nature and purpose, has a content that is independent of the substantive norms of the Convention. Therefore, the determination as to whether the exceptions to the local remedies rule apply to the case in question must be made prior to and separate from the examination of the merits, since it hinges on a standard of assessment different from the one used to determine the violation of Articles 8 and 25 of the Convention. The factors that prevented exhaustion of local remedies and their effects will be examined in the report the Commission adopts on the merits of the case, in order to determine whether they constitute violations of the American Convention.”
- 100 Communication No. 6/2005, *Yildirim, Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice, B. Akbak et al. v. Austria*.
- 101 Citing Human Rights Committee, Communication No. 1085/2002, *Taright et al v. Algeria*, Views adopted 15 March 2006, para. 7.3; Communication No. 925/2000, *Kuok Koi v. Portugal*, Decision adopted 22 October 2003, para. 6.4.
- 102 Human Rights Committee, Annual Report, UN Doc. A/A/54/40 (1999), para. 417 (citing Communication No. 4/1977, *Torres Ramírez v. Uruguay*). See, e.g., Human Rights Committee, Communication No. 1159/2003, *Sankara v. Burkina Faso*, Views adopted 28 March 2006, para. 6.5: “[w]ith regard to the State party’s claims relating to the non-use of certain contentious remedies concerning the denial of justice, the Committee noted that the State party had confined itself to a mere recital of remedies available under Burkina Faso law, without providing any information on the relevance of those remedies in the specific circumstances of the case or demonstrating that they would have constituted effective and available remedies;” Communication No. 862/1999, *Hussain & Hussain v. Guyana*, Views adopted 25 October 2005, para. 5.3: “the Committee notes that the alleged victims appealed their convictions to the Court of Appeal, the court of final appeal in the State party, although the outcome of the appeal is not apparent from the material before the Committee. In the absence of arguments from the State party to the effect that domestic remedies had not in fact been exhausted, it follows that the Committee is not precluded from ...consideration of the communication.”
- 103 See, e.g., Human Rights Committee, Communication No. 1238/2003, *Jongenburger-Veerman v. Netherlands*, Views adopted 1 November 2005, para. 6.3: “[t]he Committee has taken note of the State party’s objection to the admissibility of the author’s claim ... for failure to exhaust domestic remedies in this respect. The Committee further notes that the author in her comments has not raised any arguments to show that these domestic remedies were not available or not effective. The information before the Committee shows that the author has not raised the question of the lack of impartiality or the lack of competence of the Council of State at the time that her appeal was heard. The Committee finds therefore that this part of the communication is inadmissible [for the failure to exhaust domestic remedies].”
- 104 Human Rights Committee, Annual Report, UN Doc. A/54/40 (1999), para. 421 (citing Human Rights Committee, Communication No. 610/1995, *Nicholas Henry v. Jamaica*; Communication No. 647/1995, *Pennant v. Jamaica*; Communication No. 663/1995, *McCordie Morrison v. Jamaica*; Communication No. 752/1997, *Allan Henry v. Trinidad and Tobago*; Communication No. 800/1998, *D. Thomas v. Jamaica*).
- 105 See Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, (Ser. C), No. 1, para. 88: “the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.” Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, (Ser. C), No. 4, para. 60: “[c]oncerning the burden of proof, the Court did not go beyond the conclusion cited in the preceding paragraph. The Court now affirms that if a State which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46 (2).” See also *Fairén Garbí and Solís Corrales*, Preliminary Objections, Judgment of June 26, 1987, (Ser. C), No. 2, para. 87; and *Godínez Cruz*, Preliminary Objections, Judgment of June 26, 1987 (Ser. C), No. 3, para. 90. On the practice under the European Convention, see *Theory and Practice of the European Court of Human Rights*, Fourth Edition, Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak (editors) (2007), pp. 154-55.

- 106 Article 46(2) stipulates that the requirement does not apply when the domestic legal system does not afford due process of law to protect the right in question, or when the alleged victim does not have access to the remedies under domestic law, or when there is an unwarranted delay in rendering a final judgment under the aforementioned remedies.
- 107 Inter-American Commission on Human Rights, Report No. 102/06, Petition 97-04, Miguel Ricardo de Arriba Escolá v. Honduras (October 21, 2006), para. 27 (citations omitted).
- 108 African Commission on Human and Peoples' Rights, Communication No. 275/2003, Article 19 v. Eritrea, Twenty-Second Annual Activity Report (2006-2007), para. 51 (citation omitted). See also Communication No. 71/92, Rencontre Africaine pour la Défense de Droits de l'Homme v. Zambia, Annual Activity Report (1996-1997), para. 11.
- 109 See, e.g., African Commission on Human and Peoples' Rights, Communication No. 127/94, Dumbaya v. The Gambia, Eighth Annual Activity Report (1994-1995), paras. 2-3; See also Communication 230/99, Sakwe v. Cameroon, Fourteenth Annual Activity Report (2000-2001), para. 19; Communication No. 209/97, Africa Legal Aid v. The Gambia, Thirteenth Annual Activity Report (1999-2000), para. 15; Communication 201/97, Egyptian Organisation for Human Rights v. Egypt, Thirteenth Annual Activity Report, (1999-2000), para. 15; Communication No. 139/94, International Pen (on behalf of Senn and Another) v. Côte d'Ivoire, Eighth Annual Activity Report (1994-1995), para. 3; Communication 43/90, Union des Scolaires Nigeriens and Another v. Niger, Seventh Annual Activity Report (1993-1994), para. 8. But see Communication No. 155/96, Social & Economic Rights Action Center (SERAC) v. Nigeria, Fifteenth Annual Activity Report (2001-2002) (finding the communication admissible although it did not contain any information on domestic remedies sought by complainants, based on the fact that the Commission had on numerous occasions brought the complaint to the attention of the respondent government without receiving any response to its requests).
- 110 Inter-American Court of Human Rights, Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987 (Ser. C), No. 1, para. 88.
- 111 Inter-American Commission of Human Rights, Report No. 102/06, Petition 97-04, Miguel Ricardo de Arriba Escolá v. Honduras (October 21, 2006), para. 28. See also Inter-American Commission of Human Rights, Report No. 93/01, Petition 12.259, Alberto Dahik Garzozzi v. Ecuador (October 10, 2001), para. 32: "[o]ne requirement of juridical stability is that 'an objection to admissibility on the ground of non-exhaustion of local remedies is to be raised only in *limine litis*, to the extent that the circumstances of the case so permit. If that objection, which benefits primarily the respondent State, is not raised by this latter at the appropriate time, that is, in the proceedings on admissibility before the Commission, there comes into operation a presumption of waiver-albeit tacit-of that objection by the respondent Government.' Similarly, the petitioner has the obligation of submitting his comments at the appropriate point in the proceedings. If the petitioner fails to explain why he did not exhaust the domestic remedies identified by the State or why those remedies are not effective, there comes into operation a presumption of waiver, albeit tacit, on the part of the petitioner."
- 112 See Inter-American Commission on Human Rights, Report No. 39/03, Petition P 136/2002, Abu-Ali Abdur Rahman V. United States (June 6 2003), para. 27: "the requirement is thus considered a means of defense and, as such, waivable, even tacitly. Further, *a waiver, once effected, is irrevocable*. In the face of such a waiver, the Commission is not obliged to consider any potential bars to the admissibility of a petitioner's claims that might have properly been raised by a state relating to the exhaustion of domestic remedies." (Citation omitted) (emphasis added).
- 113 Inter-American Commission on Human Rights, Report No. 93/01, Petition 12.259, Alberto Dahik Garzozzi v. Ecuador (October 10, 2001), para. 32: "the petitioner has the obligation of submitting his comments at the appropriate point in the proceedings. If the petitioner fails to explain why he did not exhaust the domestic remedies identified by the State or why those remedies are not effective, there comes into operation a presumption of waiver, albeit tacit, on the part of the petitioner."
- 114 Human Rights Committee, Annual Report, UN Doc A/54/40 (1999), para. 417.





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