

UiO • Faculty of Law
University of Oslo

The Principle of Exhaustion of Domestic Remedies in the Inter-American System of Human Rights

A reasonable obstacle or an impossible barrier?

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Table of contents

1	INTRODUCTION.....	1
1.1	Background and research question	1
1.1.1	The Inter-American system	2
1.2	Methodology	4
1.3	Goal, scope and roadmap	4
2	THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS.....	5
2.1	The Inter-American Commission on Human Rights	5
2.2	The Inter-American Court of Human Rights	7
3	THE PRINCIPLE OF EXHAUSTION OF DOMESTIC REMEDIES	8
3.1	The principle in international law	8
3.1.1	Short history	8
3.1.2	Reasons for the principle in international law	9
3.1.3	The principle as customary international law	11
3.2	The principle in human rights law	12
3.2.1	Short history	12
3.2.2	Reasons for the principle in human rights	13
3.3	Substantial rule or rule of procedure?	15
3.3.1	The three positions	15
3.3.2	The position of the rule in human rights law	16
3.4	The consequence of non-fulfilment of the principle in the Inter-American system of human rights.....	17
4	APPLICATION OF EXHAUSTION OF DOMESTIC REMEDIES IN INTER-AMERICAN HUMAN RIGHTS LAW	18
4.1	Strict or flexible application?	18
4.1.1	The case-by-case approach	19
4.1.2	Summary.....	20
4.2	What is a “domestic remedy” that needs to be exhausted?	20
4.2.1	Judicial remedies	21

4.2.2	Administrative remedies	23
4.2.3	Extraordinary remedies.....	25
4.3	How to exhaust domestic remedies.....	27
4.3.1	Normal use of the remedy	27
4.3.2	Final decision.....	28
4.3.3	Substance of the claim	29
4.4	Time aspects and waivers	30
4.4.1	When must domestic remedies be exhausted?	30
4.4.2	The claim of non-exhaustion and waivers of the exhaustion requirement	31
4.5	Burden of proof.....	33
4.6	Exceptions to the rule of prior exhaustion of domestic remedies	35
4.6.1	No remedy	36
4.6.2	No access	38
4.6.3	Unwarranted delay.....	40
5	CASE-STUDY OF THE PRACTICE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS	41
5.1	Petitions received and evaluated by the Commission.....	42
5.1.1	New petitions and initial evaluation	42
5.1.2	Petitions considered on admissibility	43
5.2	Case-study of cases deemed inadmissible in the last 5 years	44
5.2.1	Number of cases rejected for non-exhaustion	44
5.2.2	Reasons for non-fulfilment.....	46
5.2.3	The type of cases rejected due to non-exhaustion	47
5.3	Summary	48
6	CONCLUSION	49
	TABLE OF REFERENCE	52
	ANNEX.....	62

1 Introduction

Human rights are an important concept and tool for change. No one denies their existence, or that they should be upheld and defended. Still, it is a fact that human rights are violated in all parts of the world, and violations often go unnoticed or are plainly ignored by states, if not committed by the states themselves. This is why we have regional and international human rights systems. They have the task of monitoring compliance with human rights, and when seized by individuals, pass judgment on states efforts and violations.

The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR or “the Court”), issue binding judgments on states.¹ The Human Rights Committee (HRC) and the Committee against Torture (CtAT) issue views which are not strictly binding. Together they are some of the most influential of their kind, and receive thousands of petitions a year,² on a huge variety of rights, all from the right to life, work and personal freedom.

An important question to ask is whether the international and regional systems are able to monitor human rights violations effectively. The first question being whether victims get access to the justice these bodies are envisioned to provide.

1.1 Background and research question

In the American Convention on Human Rights (ACHR or “the Convention”)³, the European Convention on Human Rights (ECHR)⁴, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁵, the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)⁶, the International Convention

¹ The Inter American system also has a Commission, while the European system abolished its Commission in 1994, see Council of Europe Protocol no.11.

² The Inter-American system alone received more than 2000 petitions in 2013, see annual report: <http://www.oas.org/en/iachr/docs/annual/2013/TOC.asp>

³ Organization of American States, *Pact of San Jose, Costa Rica*, 1969.

⁴ Council of Europe, 1950

⁵ United Nations General Assembly, 1984

⁶ United Nations General Assembly, 1966

on the Elimination of All Forms of Racial Discrimination (CERD)⁷ and the African Charter on Human and Peoples' Rights (ACHPR)⁸ individual complaints are accepted, meaning individuals can bring cases to the body, commission or court entitled to hear such cases under the relevant law. Some systems can even order the State to make reparations for victims if a violation is found.⁹

The thesis looks at the function and application of the principle of exhaustion of domestic remedies in the Inter-American system of human rights, to see if an effective protection of human rights is achieved here. Or, have the states set a procedural bar, intentionally or unintentionally, higher than most individuals can reach with the requirement of exhaustion of domestic remedies?¹⁰

1.1.1 The Inter-American system

The focus for this thesis will be the ACHR, developed by the Organization of American States (OAS), and enforced by the Inter-American Commission on Human Rights (IACmHR or “the Commission”) and the IACtHR. The Convention tries to balance the international wish for states to uphold human rights, with their right to have control in their own territory. With accepting a new convention states give up some of their power, and submit to external scrutiny and judgment. They undertake international legal obligations, which then must be kept. States do not take this lightly, nor do they give up such power without making restraints. One such restraint on international and regional scrutiny of human rights is the internationally recognized principle of exhaustion of domestic remedies.

⁷ United Nations General Assembly, 1965

⁸ Organization of African Unity, *the Banjul Charter*, 1981.

⁹ ACHR art 63 (1), CAT art 14. See Gina Donoso, *Inter-American Court of Human Rights' reparation judgments; Strengths and challenges for a comprehensive approach*, Revista IIDH, vol 49, 2009; Bridget Mayeux and Justin Mirabal, *Collective and Moral Reparations in the Inter-American Court of Human Rights*, Human Rights Clinic, University of Texas School of Law, November 2009.

¹⁰ The principle is sometimes referred to as the principle of exhaustion of *local* remedies. There is no difference except in the wording. In this thesis, domestic will be used consistently, except when quoting others.

The rule serves many purposes, but the perhaps most important is to prohibit petitions from reaching a regional level, before having tried to resolve the matter within the country concerned. States wanted the right to have primary jurisdiction over allegations against itself, and that regional jurisdiction be secondary. The IACtHR has stated numerous times, that the principle is mainly there for the benefit of the state,¹¹ and states therefore allege this principle frequently.¹²

The rule however is not without exceptions, and the Inter-American system has three; where there is no remedy, no access to remedies or where there are unwarranted delays. Exceptions are necessary to protect the individual, because the state itself has control over domestic remedies. Without exceptions to the rule there could be a danger of abuse, and it must “be borne in mind that the international protection of human rights is founded on the need to protect the victim from the arbitrary exercise of governmental authority.”¹³ It is also important that the rule and its exercise does not lead to regional protection being illusory or without function.¹⁴

In the last 10 years on average 10% of petitions, in total 29 petitions, have been rejected due to failure to exhaust domestic remedies by the Commission.¹⁵ In the same period, the Court rejected no cases on exhaustion of domestic remedies.¹⁶ So does this mean that exhaustion of domestic remedies work as it should? Is the principle in practice able to balance the state’s wish for primary jurisdiction against the protection of individual from states arbitrary exercise of power? Does the principle uphold order between the domestic system and the international one, or is it becoming a hindrance for petitioners seeking access to regional justice?

¹¹ IACtHR, *Viviana Gallardo et al. v. Costa Rica*, 1981, para 26.

¹² Ajit Singh, “American Convention on Human Rights Articles 46 (1)(a) and 46 (2)(c): Achilles Heel or Trojan Horse ?,” *Inter-American and European Human Rights Journal*, Vol. 5, No. 1-2, 5 (2013) p. 17.

¹³ IACtHR, *Velásquez-Rodríguez v . Honduras*, preliminary objections, 1987, para 90, IACtHR, *Fairén-Garbi and Solís-Corrales v . Honduras*, preliminary objections, 1987, para 92.

¹⁴ IACtHR, *Velásquez-Rodríguez v . Honduras*, Merits, 1988, para 64

¹⁵ See chapter 11.

¹⁶ Only two cases were rejected at the preliminary stage, both in 2004 and on jurisdiction issues.

The thesis will look into these numbers and try to find tendencies and possible recurring difficulties in the principle of exhaustion of domestic remedies to answer the most important question of the principle; “Is the rule of exhaustion of domestic remedies an acceptable obstacle or an impossible barrier for the individual seeking access to the Inter-American human rights system?”

1.2 Methodology

Articles and books describing the Inter-American regional system of human rights and ACHR art 46, its history and functions, will be the main sources for this thesis, in combination with several cases heard before the IACmHR and the IACtHR. Further, as the rule is similar throughout all major regional and international conventions, examples will also be drawn from other bodies’ practices and theory, when relevant.

1.3 Goal, scope and roadmap

ACHR article 46, contains admissibility requirements a petition must fulfil. The thesis will only discuss the rule of exhaustion of domestic remedies, and will not deal with other rules for admissibility. The goal is to draw out the scope, highlight how it works, and see if it hinders cases being heard. In short, to show the principles strengths and weaknesses, and how they affect the individuals access to justice.

The thesis will begin with a short description of the Inter-American system of human rights, to put the principle in its structural context. A general background of the principle will follow, with history and reasons for the principle, both in international and human rights law, as well as an introduction to the discussion on the nature of the principle. This will give an introduction to the topic and of the principles importance. The thesis will then describe the different aspects of the application of the principle, from how to exhaust and when, the burden of proof and its exceptions, to show the reality of the principle and the demands on the petitioner and state.

Last will be a case-study of all the cases rejected¹⁷ before the IACmHR in the last five years to shed light on the cases rejected for non-exhaustion, how many there are and why they could not fulfill. The conclusion will sum up the findings and try to answer the thesis question, and contemplate why it seems to be an acceptable procedural bar and not an impossible one.

2 The Inter-American system of Human Rights

The Inter-American system for protecting human rights consists of several bodies, conventions and mechanisms. In this thesis only two will be highlighted; the IACmHR and IACtHR.

2.1 The Inter-American Commission on Human Rights

The Commission was established in 1959, by mandate from the Fifth Meeting of Consultation of Ministers of Foreign Affairs, and the OAS adopted its statute in 1960. It worked as an autonomous entity of the OAS promoting human rights, until 1970 when the Protocol of Buenos Aires came into force, making the Commission a formal OAS organ.¹⁸ As an OAS organ, the Commission is set the task of promoting the observance and protection of human rights.¹⁹

With the adoption of the ACHR in 1969, the Commission was also set the task of promoting and defending the human rights set forth in the convention, and is therefore both an official OAS charter organ and a convention organ, unlike the IACtHR, which is only a convention organ. This means that the Commission has a wider jurisdiction than the IACtHR, as it has jurisdiction over both the Convention and the American Declaration of the Rights and Duties of Man (the Declaration),²⁰ while the Court only has jurisdiction over the Convention.

¹⁷ All available cases online, three cases could not be accessed.

¹⁸ OAS, Charter of the Organization of American States, 1967, art 53 (e).

¹⁹ OAS Charter art 106; The International Justice Project, *The Inter-American Commission on Human Rights: How Can it be Utilized in a Capital Case?*

²⁰ Organization of American States, *American Declaration of the Rights and Duties of Man*, 1948.

Consisting of seven members, elected in their personal capacity from the member states of the OAS, the Commission sits in Washington D.C, USA. It performs a variety of functions, ranging from promotional and educational activities, to considering specific situations, countries and individual petitions. It has helped draft human rights instruments, consults the OAS Permanent Council and General Assembly and produced human rights documents and pamphlets.²¹ It has further done on-site investigations, prepared studies on observance and advised states on their practices.²² For this thesis, the most important function is the ability to consider individual petitions.²³

The Commission has the ability to receive both individual and inter-state complaints, but only one inter-state complaint has been received.²⁴ In contrast the Commission receives on average 1.500 individual petitions a year, with approximately 250 cases being opened and 70 deemed admissible.²⁵ The individual complaint mechanism is mandatory with ratification of the convention, as is the jurisdiction of the Commission. The inter-state complaints mechanism however, is optional and has to be specifically accepted by OAS member states. When dealing with a petition the Commission will first consider its admissibility, including exhaustion of domestic remedies. If a case is found inadmissible this is a quasi-judicial decision which cannot be appealed.²⁶

After a ruling on the merits, the Commission can refer the case to the IACtHR, if the state is party to the Convention and has accepted the jurisdiction of the Court. The Commission then takes the position as prosecutor of legal order before the Court, arguing its views on the case.

²¹ Buergenthal, Shelton and Stewart, "International Human Rights in a nut shell", West Publishing, 4th edition, 2009, p. 268-269.

²² Felipe González, *The Experience of the Inter-American Human Rights System*, 40 VUWLR, p. 103-126, 2009.

²³ Convention, art 41 (f).

²⁴ Buergenthal, p. 287. The complaint (Nicaragua v. Costa Rica) was found inadmissible due to non-exhaustion of domestic remedies by the individuals of the applicant state.

²⁵ Lisa J. Reinsberg, *Advocacy before the Inter-American System: A Manual for Attorneys and Advocates*, second edition, 2014, p. 25-26.

²⁶ Buergenthal, p. 293.

2.2 The Inter-American Court of Human Rights

The Court was established with the adoption of the ACHR in 1969. It is charged with the power to consider violations by states of the convention, as well as give advisory opinions and interpret its own judgments.²⁷ It consists of seven judges, elected in their personal capacity, and sits in San José, Costa Rica.²⁸

For the Court to hear a case the proceedings before the Commission must have been fulfilled,²⁹ and only the Commission or the relevant state can submit the case to the Court.³⁰ Individuals cannot take a case to the Court but, have standing before the Court, once it has been submitted by the Commission or the state.³¹ In the considerations of the case the Court has power to fully review the Commission's findings of fact, law and admissibility.³² This means that the Court for example can review whether an applicant had exhausted all the domestic remedies, or whether it agrees with the Commission on the application of an exception to exhaustion. According to art 67 of the Convention, a judgment from the Court is final and there are no appeals. Art 67 also gives the Court jurisdiction to give an interpretation of its own judgments, if there is a dispute over the meaning or scope. Any non-compliance with judgments from states shall be reported to the General Assembly of the OAS, which can determine sanctions to be applied.³³

The Court can render advisory opinions according to the Conventions art 64. This jurisdiction is very wide, and includes not only the convention but any treaty concerning the protection of human rights in the Americas, and can be requested by any member of OAS, not only those party to the Convention. The Court can further, in cases of extreme gravity or urgency, adopt

²⁷ Convention, chapter VIII; González, p. 123.

²⁸ OAS, Statute of the IACtHR, Resolution No. 448, October 1979, art 3 and 4.

²⁹ IACtHR, *Viviana Gallardo*, para 25.

³⁰ Convention, art 61.

³¹ IACtHR, Rules of Procedure of the IACtHR, approved November 2000, partially amended January 2009, art 24; González, p. 120.

³² Buergethal, p. 298; IACtHR, *Herrera-Ulloa v. Costa Rica*, 2004, para 79.

³³ Convention art 73.

provisional measures.³⁴ This can be done to any case pending before the Court, or, by request from the Commission, to a case pending before the Commission.

The jurisdiction of the Court is optional when ratifying the American Convention and a state can at any time declare that it recognizes its jurisdiction.³⁵ So far, 20 of the 23 states members to the Convention have accepted the jurisdiction of the Court.³⁶

3 The principle of exhaustion of domestic remedies

3.1 The principle in international law

3.1.1 Short history

According to Trindade, the principle of exhaustion of domestic remedies dates back to as early as the ninth century, when states and sovereign territories settled matters between each other themselves. If an alien was injured or suffered loss in a state, he would ask his home state for help to regain what was lost. This could happen with diplomacy or with the notion of reprisals. Reprisals was a right given by the ruler to the wronged person to claim goods from any person from the injuring state, until the value of what was lost had been regained.³⁷ With both reprisals and diplomatic intervention a principle developed, stating that before the home state would involve itself in the conflict, the person had to try to resolve the matter with the injuring state. Only if he failed to obtain justice in the appropriate courts would the home state consider the case, and if found just, intervene. Even exceptions to the rule were developed, similar to the ones we have today.³⁸

In international law, state practice has been reasonably clear throughout the years, developing and affirming the principle of exhaustion of domestic remedies. The principle however does

³⁴ Convention, art 63 (2).

³⁵ Convention, art 62.

³⁶ Reinsberg, p. 8.

³⁷ A A C Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, *RBDI*, No. 2 (1976), 499–527.

³⁸ Trindade, *Origin*, p. 517.

not apply in all contexts. If a dispute arises between two states, it does not come into play, as it would be hard to expect one states to take the conflict to the domestic remedies of the other state.

Exhaustion of domestic remedies developed from the principle of non-intervention and state sovereignty, meaning that one state should not intervene in the matters of another state.³⁹

Only when ones nationals did not get justice could and should the national's state step in to try to resolve the situation. In international law today, we have international bodies and courts for conflict resolution, but the principle remains the same.

3.1.2 Reasons for the principle in international law

There are many reasons for the principle of exhaustion of domestic remedies, but one main reason is state sovereignty. In state sovereignty lies that each state has responsibility for what goes on in their own territory, and should be free from intervention from others. It gives the state a chance to address the alleged claim, if needed, make compensation for an injury, and thus avoiding international responsibility. Judge Córdova, supports state sovereignty by saying that the main reason for the existence of the principle of exhaustion of domestic remedies is “the indispensable necessity to harmonize the international and the national jurisdictions - assuring in this way the respect due to the sovereign jurisdiction of States”.⁴⁰ This is based on the assumption that the state is capable of administering justice and has available effective remedies to do so.⁴¹

Judge Córdova also draws out another important reason for the rule in his statement, the necessity to harmonize international courts and bodies with domestic remedies. In international law international remedies have been made secondary to domestic remedies, meaning that the international mechanisms should come second, therefore *after* the domestic ones. Otherwise, there could easily be confusion as to where one should, and could, take ones case first. With the rule that international mechanisms are secondary it clarifies that one must

³⁹ Trindade, *Origin*, p. 521

⁴⁰ International Court of Justice (ICJ), *Case of Interhandel (United States of America v. Switzerland)* Preliminary objections, separate opinion of Judge Cordova, 1959, p.45.

⁴¹ ECtHR, Key case-law issues; Exhaustion of Domestic Remedies, 2006, LVI, 1–5, para 4.

start at the domestic level, and only if justice is not obtained therein, can one take the case to the international level. In this way, the principle of exhaustion gives a certain order to the international procedure.⁴²

The principle is also based on the logic that when there is an available judicial remedy for the dispute to be resolved, it should be sought, and that foreigners are presumed to take into account the local law and means of addressing wrongs.⁴³

Every system has its limitations, and one reason for the principle of exhaustion of domestic remedies is based on this. International bodies and courts have limited time and resources, and if all cases from all countries could freely be filed, the international mechanisms would be quickly overwhelmed and overworked. By making cases go through domestic remedies first, a large number are solved there and the pressure on the international systems is reduced.

Lastly, the principle tries to avoid unnecessary diplomatic conflict. In international law cases are between two, or more, states. One conflict can easily lead to further diplomatic disputes between the parties, and by forcing them to try to resolve it on the domestic level, the rule of exhaustion of domestic remedies tries to avoid the necessity of cases reaching the international level, and thereby limiting or altogether avoiding diplomatic disputes.⁴⁴

In short, there are numerous reasons for the principle of exhaustion of domestic remedies. It protects state sovereignty, gives meaning to the secondary nature of international mechanisms, works to keep international mechanisms from being overwhelmed with cases, and tries to limit disputes between states.

⁴² Silvia D' Ascoli and Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection*, EUI Working Papers, 2007. p. 9.

⁴³ Mr. John R. Dugard, Special Rapporteur, Doc A7CN.4/514, Second report on Diplomatic Protection, 2001, para 2, citing Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, pp. 817-818.

⁴⁴ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, preliminary objections, 2007.

3.1.3 The principle as customary international law

As seen in section 3.1.1, the rule of prior exhaustion of domestic remedies has a long and consistent history in international law. D'Ascoli and Scherr write that the principle with “its frequent application by international courts, its recognition in inter-state practice, and its extensive scholarly analysis allow for the assumption that the existence or general validity of the rule do not have to be questioned.”⁴⁵ Trindade takes it further and states that “by the end of the nineteenth century, as the rule had become consistently relied upon by States in their frequent insistence on settlements within the framework of their own internal legal system, it became difficult to deny that it had gradually crystallized into a customary rule of international law, as undisputedly acknowledged by State practice nowadays.”⁴⁶

That the principle of exhaustion of domestic remedies forms a part of current customary international law is supported by both literature⁴⁷ and international cases. The two most important cases to mention are the *Interhandel* case⁴⁸ and the *ELSI* case⁴⁹ before the International Court of Justice (ICJ). In the *Interhandel* case the ICJ stated that the rule was “a well-established rule of customary international law”⁵⁰ because it had been generally observed in cases. In the *ELSI* case the ICJ described the principle not only as a rule of customary law, but as “an important principle of customary international law”.⁵¹ There can therefore be no doubt that the principle of exhaustion of domestic remedies is part of customary international law.

⁴⁵ D'Ascoli and Scherr, p. 2.

⁴⁶ Trindade, *Origin*, p. 526

⁴⁷ ECtHR, *Key case-law issues*; Dugard; Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press, 2010, p. 102.

⁴⁸ *Interhandel (United States of America vs Switzerland)*, preliminary objections, 1959.

⁴⁹ *Eletronica Sicula S.p.A (ELSI) (United States of America vs Italy)*, 1989, para 50.

⁵⁰ *Interhandel*, p. 27

⁵¹ *ELSI*, para 50.

3.2 The principle in human rights law

3.2.1 Short history

The principle of exhaustion of domestic remedies used to apply only to the relationship between a state and foreigners, meaning nationals fell outside its scope.⁵² However, as international law came to recognize the individual as a subject, with rights and duties during the 20th century,⁵³ the principle grew accordingly, including nationals in dispute with their own state. It has been debated whether the principle grew from diplomatic protection, became a separate object or absorbed diplomatic protection.⁵⁴ This is outside of this thesis and will not be discussed. The important for the subject of this thesis is that when human rights developed in its current form, the principle of exhaustion of domestic remedies was included.

With the first attempts of codification of human rights in international treaties, the principle of exhaustion of domestic remedies was not included,⁵⁵ except for the Central American Court of Justice.⁵⁶ But, when new attempts were made at international human rights conventions after the Second World War, with the ICCPR and the ECHR, the rule of exhaustion of domestic remedies was debated in length in the preparatory works with regards to the possibility of individual complaints.⁵⁷

⁵² Trindade, *Origin*, p. 525

⁵³ Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994; Kate Parlett, *The Individual and Structural Change in the International Legal System*, Cambridge Journal of International and Comparative Law (1)3: 60–80, 2012; Rhona Smith, *Textbook on International Human Rights*, Oxford University press, fifth edition, 2012.

⁵⁴ Anna Maria Helena Vermeer-Künzli, *The Protection of Individuals by means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument*, PrintPartners Ipskamp, 2007.

⁵⁵ Trindade, A.A.C., *The Application of the Rule of Exhaustion of Local Remedies in International Law - Its rationale in the international protection of individual rights*, Cambridge University Press, 1983, p. 2.

⁵⁶ Convention for the Establishment of a Central American Court of Justice, 1907, art 2.

⁵⁷ Trindade, *The Application*, p. 3.

From being a principle for foreigners in conflict with another state, it now includes every individual in dispute with any state. Today the principle has an important place in human rights law, and is a part of all major international and regional human rights instruments, including CAT, ICCPR (in the First Optional Protocol), ECHR, CERD, ACHPR and ACHR. “Although the wording of exhaustion provisions in these treaties varies, their interpretations are substantially similar.”⁵⁸

3.2.2 Reasons for the principle in human rights

The reasons for the principle of exhaustion of domestic remedies are mostly the same throughout the different human rights conventions. Three of the reasons mentioned under general international law are the same under human rights law; to harmonize domestic and international processes, limit the number of cases at the international or regional level as to not overwhelm the systems and the principle that international or regional scrutiny is secondary to the domestic level. For the first two of these reasons, what is written above is the same under human rights law, and will not be repeated. But, when it comes to the secondary, or complementary, nature of international review of a case, some extra considerations must be taken into account when dealing with human rights.

Human rights is an area of international law with separate and sometimes different interests and situations from those for which the rule was originally intended, meaning some interest must weigh different in human rights law than in general international law. In the area of diplomatic protection, the main interest to protect is the state sovereignty. In human rights however, the main interest is the individual and the human rights of individuals. This means that in human rights law there is a clear competition of interests between the state, who wishes to protect its sovereignty, and the individual, who wishes to have the alleged wrong remedied quickly and efficiently. According to D’Ascoli and Scherr, it is therefore not convincing to apply the rule in the same form and meaning for the fields of diplomatic protection and human rights, as they are based on different perspectives and premises.⁵⁹

⁵⁸ Donna J Sullivan, *Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW*, OP-CEDAW Technical Papers No. 1, 2008. p. 1.

⁵⁹ D’Ascoli and Scherr, p. 17

These two competing interests must be weighed against each other. If the principle is applied too strictly, it might be used “to over-protect the interests of the State at the expense of the protection of the individual.”⁶⁰ It is important to remember that the reason for the international and regional instruments is the protection and promotion of human rights. The conventions must therefore be interpreted as to realise this aim.⁶¹ Without the existing exceptions to the rule, the government could easily stall domestic remedies, making international access to the case impossible. And, “the rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenceless victim ineffective.”⁶²

If, on the other hand, there was no principle of exhaustion of domestic remedies, then respect for state sovereignty would be lost, and the state would in some cases lose the chance to remedy the situation on its own. That is, assuming the state is able to provide effective remedies to the alleged wrong. Human rights treaties are built on the assumption that each state will and can remedy its own mistakes.⁶³ This is why the international system is secondary. It is there to rectify when the state commits violations, and to check that the remedies in each state fulfil the requirements on domestic remedies in the treaty concerning access to justice. In a way, the exhaustion rule helps international bodies check whether the state is upholding its duty of having an effective judicial system, able to rectify human rights breaches.⁶⁴

The balance between the interests of the state and those of the individual is an important reason for the rule, and its flexible application in human rights law.⁶⁵ Another reason for the principle is that domestic remedies are often cheaper, more accessible and quicker than international remedies, an important feature as victims of human rights violations are often without many resources and wish to resolve their claims as quickly as possible. This along with the need for limiting cases at the international level and the need to harmonize between

⁶⁰ D’Ascoli and Scherr, p. 8.

⁶¹ ECtHR, *Wemhoff v. Germany*, Application no 2122/64, 1968; United Nations General Assembly, Vienna Convention on the law of treaties (VCLT), 1969, art 31.

⁶² IACtHR, *Velásquez Rodríguez*, preliminary objections, para 93.

⁶³ A.A.C. Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2012, p. 99.

⁶⁴ ECtHR, *Akdivar and Others v. Turkey*, Application no. 21893/93, 1996. para 65.

⁶⁵ See below section 4.1.

domestic and international remedies make up the reason for the principle of exhaustion of domestic remedies in human rights law.

3.3 Substantial rule or rule of procedure?

3.3.1 The three positions

In international law, there has been much dispute over the nature of the principle of exhaustion of domestic remedies, over what type of rule it is, whether it is a rule of substance, a procedural prerequisite for admissibility, or both.⁶⁶ The question is from which moment international responsibility is generated. This dispute has enjoyed much attention and discussion, with different scholars taking different positions. In this thesis, only a summary of the different alternatives will be presented.

There are three positions in the discussion. The first is that it is a rule of substance, meaning that the international responsibility for the wrongful act does not occur until local remedies have been exhausted without success.⁶⁷ The second position is that the principle is one of procedure, simply a barrier for admissibility, and international responsibility is generated at the moment of the incident giving basis for the claim, before trying domestic remedies.⁶⁸

According to special rapporteur for the International Law Commission, Mr. John Dugard, a third alternative has emerged.⁶⁹ This third option distinguishes between an injury under domestic and international law. For an injury under only domestic law, then the principle is one of substance, and international responsibility occurs with denial of justice. If the injury on the other hand, also is a breach of international law, then international responsibility occurs

⁶⁶ Scherr and D'Ascoli; Dugard.

⁶⁷ Dugard, para 32; Judge Morelli's dissenting opinion in *Case Concerning The Barcelona Traction, Light and Power Company Limited*, Preliminary Objections, Belgium vs. Spain, 1970, p. 114; Judge Hudson's dissenting opinion in *Panevezys-Saldutikis Railway Case* (Estonia v. Lithuania), Permanent Court of International Justice (PCIJ) Series A/B, No. 76, 1939, para 181.

⁶⁸ Scherr and D'Ascoli p.4; Dugard, para 32; dissenting opinion of Judge Armand-Ugon, *Interhandel case*, ICJ, 1959, p. 88; dissenting opinion of Judge Tanaka, *The Barcelona Traction, Light and Power Company Limited*, ICJ Reports 1970 p. 143; PCIJ, *Phosphates in Morocco Case (France vs Italy)*, Series A/B, No. 74 (1938), para 48.

⁶⁹ Dugard, para 32.

immediately with the injury, and exhaustion of domestic remedies is merely a procedural precondition.⁷⁰ In this position the nature of the rule depends on the law it breaches, domestic or international.

No conclusion to the discussion of whether the violation of exhaustion of domestic remedies is of procedural or substantive nature exists. As Dugard states, most attempts of codification of the rule of exhaustion of domestic remedies avoid a clear commitment to either or, and state practice is unreliable as states tend to advocate the nature which would serve their views in the relevant case.⁷¹ Still, there are some signs that the procedural nature is favoured, at least with the ICJ, as “no ICJ decision gives support to the view that the local remedies rule is substantive in nature. While clear judicial support for the procedural view is not forthcoming either, there are some signs that this approach is preferred.”⁷²

3.3.2 The position of the rule in human rights law

The discussion about the nature of the rule also exists in human rights law. Although no clear answer exists, there seems to be many indications that the rule as procedural is preferred.⁷³

The first indication is the texts of human rights conventions, which place the principle of exhaustion of domestic remedies under considerations for admissibility.⁷⁴ Secondly, all international human rights bodies deal with the claim of non-exhaustion as a preliminary objection, when considering the admissibility of a case. If the rule was substantive, then the violation and failure of justice would be the same issue, and should be dealt with together. If the rule is procedural however, the issues are separate, exhaustion only important for admissibility, and should logically be dealt with first, as is done in practice.⁷⁵

⁷⁰ Dugard, para. 32.

⁷¹ For example did Italy rely strongly on the substantive approach in the *Phosphates in Morocco* case, while 50 years later, in the *ELSI* case, suddenly argued that it was a procedural rule.

⁷² Dugard, para. 49.

⁷³ ECtHR cases: *Ireland v. the United Kingdom*, Application no. 5310/71, 1978, para. 9; *Foti and others vs Italy*, Application no. 7604/76; 7719/76; 7781/77; 7913/77, 1982; *Zimmerman and Steiner vs Switzerland*, Application no. 8737/79, 1983.

⁷⁴ ECHR art. 35; ACHR art. 46

⁷⁵ IACtHR, *Chocrón Chocrón vs Venezuela*, 2011.

The IACtHR also showed support for the procedural nature of the rule in the *Velásquez Rodríguez* case.⁷⁶ Here the Court stated that when exceptions were invoked, not only was the petitioner excused from exhausting domestic remedies, but the state was also indirectly charged with a new, additional violation. If having an ineffective judicial system is a new offence of the state, than the alleged violation is a violation on its own, and was considered such before trying domestic remedies.

For one prominent scholar, Trindade, there is no doubt, in human rights “the rule has clearly operated as a dilatory objection or temporal bar of a procedural nature.”⁷⁷

3.4 The consequence of non-fulfilment of the principle in the Inter-American system of human rights

In the Inter-American system of human rights, the rule of exhaustion of domestic remedies is one of admissibility. “Article 46(1)(a) of the American Convention provides that a petition’s admissibility depends directly on whether the available remedies under a State’s domestic laws have been pursued and exhausted.”⁷⁸ Unless one of the exceptions in paragraph two of art. 46 is applicable,⁷⁹ art 47 states that the Commission shall consider the petition inadmissible.

This means that where the domestic remedies are not exhausted, and no exception is applicable, the case shall be rejected and no consideration of the merits shall be done. This is why the rule of exhaustion of domestic remedies is so important to understand for the petitioners pledging their case, and the Commission and Court considering the case.

⁷⁶ Preliminary objections, para 91.

⁷⁷ Trindade, *Origin*, p. 526.

⁷⁸ IACmHR, *Marcela Andrea Valdez Diaz vs Chile*, Report No. 57/03, petition 12.337, 2003, para 39.

⁷⁹ The three exceptions to the rule in the Inter-American system are as mentioned; where there is no remedy, no access to a remedy or there has been an excessive delay in rendering a final judgement.

4 Application of exhaustion of domestic remedies in Inter-American human rights law

4.1 Strict or flexible application?

Trindade is a prominent voice for a flexible application and interpretation of the rule.⁸⁰ He compares the underlying differences between diplomatic and human rights protection and states that “a less rigorous and more realistic application of the rule (...) would seem appropriate”⁸¹ in human rights law. He further claims that “there are sufficient elements (...) warranting a flexible application.”⁸² Trindade believes that much of the general critique of the principle is based on its rigid application.⁸³

Sullivan also voices support for a flexible application, and states that jurisprudence from human rights bodies and courts indicate a flexible use.⁸⁴ This, she writes, is a consequence of the fact that each case is examined on the circumstances in the case.⁸⁵ By not having a strict application, and rather apply the principle according to the facts of the case, it gives recognition of the underlying purpose of the rule, which is to find a balance between giving states an opportunity to solve the matter on its own and providing effective redress for alleged victims. Sullivan thus claims that a flexible application and interpretation of the principle, rather than a strict one, is better in accordance with the purposes of the principle in human rights law, and the human rights treaties.

The Inter-American Court also voices support for a flexible application. In the *Velásquez Rodríguez* case it states that “A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or

⁸⁰ As well as former president of the IACtHR, professor in international law and current judge the ICJ.

⁸¹ Trindade, *The Application*. p. 52

⁸² *Ibid.* p. 53

⁸³ *Ibid.* p. 48. See also Trindade, *The Access*, p. 103.

⁸⁴ ECtHR, *Ringeisen v. Austria*, merits, Application no. 2614/65, 1971, para 89. ECtHR, *Akdivar and others v. Turkey*, para 69.

⁸⁵ Sullivan, p. 28.

unreasonable.”⁸⁶ A strict application could easily lead to unwanted and unjust results, giving the state an unfair opportunity to exploit the principle of exhaustion of domestic remedies. By rather focusing on the purpose of the principle, the Inter-American Court seeks to find a result that seems in line with the object and purpose of the Convention.⁸⁷

4.1.1 The case-by-case approach

A flexible application is often expressed as a case-by-case approach, where the application of the principle depends on the circumstances of each case. Since no two cases are alike, the application of the principle should not automatically be the same. Each case needs to be examined on its own, with the facts and circumstances of the specific case compared with the purpose of the principle.

Paulsson voices support for this approach, and states that whether a remedy is available needs to be determined on a case-by-case basis.⁸⁸ The Court has stated that it must examine an issue in its specific context,⁸⁹ meaning that an approach taken in one case might not be the same in the next. An example of this is found in *Fairén-Garbi and Solís-Corrales v. Honduras*. Here the Court stated that the conduct of the state normally would imply a waiver of exhaustion of domestic remedies, but that one must not rule without taking into account the specific circumstances of the case.⁹⁰ This implies a flexible and case-by-case application of the principle, to best realize distribution of justice in the individual case, not just in general.

Another example of this is which remedies that have been seen as available and effective. In *Velasquez Rodriguez* (merits), the Court considered remedies to be unavailable and ineffective even though they existed in theory, based on the specific circumstances of the case. The case concerned enforced disappearances, for which the Court considered the remedies would

⁸⁶ Merits, para 64. See also IACtHR *Fairén-Garbi and Solís-Corrales v. Honduras*, merits, 1989, para 88.

⁸⁷ See VCLT, art 31.

⁸⁸ Paulsson, p. 116.

⁸⁹ IACtHR, *Godínez-Cruz v. Honduras*, preliminary objections, 1987, para 86; IACmHR, *Alicia Alvarez Trinidad v. Peru*, Report No. 5/10, petition 12.118, 2010, para 29; IACmHR, *María Mercedes Zapata Parra v. Peru*, Report No. 45/09, petition 12.079, 2009, para 34; IACmHR, *Ciro Abdías Boderó Arellano v. Peru*, Report No. 44/09, petition 12.161, 2009, para 28.

⁹⁰ Preliminary objections, para 89.

have no effect, but it was not said that they would be without effect in general. The Court considered them in the specific context, not in general. Similarly, in the case of *Durand and Ugarte v. Peru*⁹¹ the Court held that one remedy, although not generally deemed ineffective or unavailable, was not suitable in the *specific circumstances* of the case, as it was not suited to achieve what was sought in the case.

Lastly, support for the case-by-case application is found in an advisory opinion.⁹² Here the Court states that whether one is exempt from exhausting domestic remedies, depends on the circumstances of the case. The fact that a petitioner is for example indigent will not automatically make him or her exempt from exhaustion, it will depend on the case.⁹³

4.1.2 Summary

There is much support from both literature and jurisprudence for a flexible and case-specific application of the principle of exhaustion of domestic remedies in human rights, to best realize the purpose of the principle.⁹⁴ As Sir Hersch Lauterpacht has stated, the rule of exhaustion of domestic remedies is not purely technical, but one which has been applied with considerable elasticity.⁹⁵

4.2 What is a “domestic remedy” that needs to be exhausted?

“Article 46(1)(a) of the American Convention provides that a petition’s admissibility depends directly on whether the available remedies under a State’s domestic laws have been pursued and exhausted”.⁹⁶ So what are the remedies included in the term “domestic remedies”, making them obligatory to pursue and exhaust?

⁹¹ Preliminary objections, 1999.

⁹² IACtHR, Advisory Opinion OC-11 / 90 Exceptions to the Exhaustion of Domestic Remedies (Art . 46 (1) , 46 (2) (a) and 46 (2) (b) American Convention on Human Rights), 1990.

⁹³ Ibid. para 19 and 20.

⁹⁴ D’Ascoli and Scherr, p. 15.

⁹⁵ ICJ, *Certain Norwegian Loans (France v. Norway)*, separate opinion of Judge Lauterpacht, 1957, p. 39.

⁹⁶ IACmHR, *Valdez Diaz vs Chile*, para 39.

Generally, remedies have been divided into three categories; judicial, administrative and extraordinary remedies. Sullivan says which remedies must be exhausted, is evaluated on a case-by-case basis.⁹⁷ What must be exhausted in one case, might not need be exhausted in another. It is the ordinary means of obtaining justice in *that* domestic system, for *that* type of injustice that needs to be exhausted.⁹⁸ What this is, depends on the state concerned and which remedies it has for obtaining justice and if they are available, adequate and effective.⁹⁹ As the IACtHR puts it, “a number of remedies exist in the legal system of every country, but not all are applicable in every circumstance.”¹⁰⁰

It is therefore hard to say with certainty what remedies are obligatory to exhaust in a particular case and which are not, but as Pasqualucci writes, “the Court has been able to articulate a few general principles that allow for more certainty as to the remedies that need or need not be exhausted in the case.”¹⁰¹ Decisive is whether the remedy is an adequate and effective remedy in the specific case, that is whether it is suitable to address an infringement of a legal right and capable of producing a result resolving the alleged wrong.¹⁰²

4.2.1 Judicial remedies

The IACmHR restated in *Escher vs. Brazil* that one was not required to exhaust all remedies available under domestic law, but rather that if the petitioner tries to resolve the matter by using a valid, *judicial* remedy, and the state had an opportunity to remedy the issue, then the purpose of the principle was fulfilled.¹⁰³ This means that, the exhaustion rule is interpreted to

⁹⁷ Sullivan, p. 3.

⁹⁸ Paulsson, p. 112.

⁹⁹ See below section 4.6.

¹⁰⁰ IACtHR, *Velazques Rodriguez*, para 64. IACtHR *Fairén-Garbi and Solís-Corrales v. Honduras*, merits, para 88.

¹⁰¹ Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Second edition, 2013, p. 96.

¹⁰² IACtHR, *Velasquez Rodríguez*, merits, para 64 and 66.

¹⁰³ Report no. 18/06, petition 12.353, 2006, para 28. See also IACmHR cases; *Valdez Diaz vs Chile*, para 40; *Naranjo Cardenas vs Venezuela*, Report no. 70/04, petition 667/01, 2004, para 52 and *Rolando Ernesto Gómez García and Bernarda Liliana Gómez García v. Honduras*, Report No. 121/12, petition 764-03, 2012, para 25.

refer principally to ordinary *judicial* remedies.¹⁰⁴ This is because judicial remedies are seen as the most effective means of addressing a violation of legal rights.¹⁰⁵

It is the normal judicial recourse for the type of case concerned that must be used, which normally is taking the case up through the domestic court system, from the first, all the way up to the highest court. How far the case needs to be taken, is however also a consideration of their ability of effect.¹⁰⁶ For example in *Escher vs. Brazil* the petitioners were not required to take the case to the Supreme Court, as it would have no possibility of stopping the alleged violation.

Exhaustion of legal remedies includes both civil and criminal proceedings,¹⁰⁷ but not always both in the same case. For example have the Court and Commission numerous times stated that if the alleged breach is a criminal act, the responsibility is on the state to investigate, and a civil suit is not an adequate remedy for the violation, and need not be pursued.¹⁰⁸ The important question is whether the judicial remedy is capable to “directly repair the harm, hold the state accountable, or require the State to provide reparation”¹⁰⁹ If it is not, then it is not a remedy one need to exhaust.

In many Latin-American countries,¹¹⁰ a common civil law procedure is *amparo*, analogue to habeas corpus. This is a form of constitutional relief, a complaint a person can file claiming a government agency is violating a constitutionally protected human right. It is a simple,

¹⁰⁴ Sullivan, p. 4. See also Reinsberg, p. 17.

¹⁰⁵ Sullivan, p. 4, see also Dugard, para 12; “There is strong support for the view that all legal remedies that offer the injured individual a prospect of success must be exhausted.”

¹⁰⁶ IACtHR, Advisory Opinion, para 36; IACtHR, *Velásquez Rodríguez*, para 63; IACmHR, *Santos Soto Ramírez et al., Mexico*, Report No. 68/01, petition 12,117, 2001, para 14; IACmHR, *Zulema Tarazona Arriate et al., Peru*, Report No. 83/01, petition 11,581, 2001, para 24; IACmHR *Valdez Diaz vs Chile*, para 41.

¹⁰⁷ Reinsberg, p. 17.

¹⁰⁸ Pasqualucci, p. 96. See also IACmHR, *Cañas Cano et al. v. Colombia*, Report No. 75/03, petition 42/02, 2003, para 27-28; IACmHR, *Márcia Cristina Rigo Leopoldi v. Brazil*, Report No. 9/12, petition 11.996, 2012, para 27; IACtHR, *Fairén-Garbi and Solís-Corrales v. Honduras*, merits, para 110, IACmHR, *Arges Sequeira Mangas v. Nicaragua*, Report No. 52/97, petition 11.218, 1998, para 96.

¹⁰⁹ Reinsberg, p. 17.

inexpensive remedy, available to everyone, often not requiring legal counsel.¹¹¹ According to the Court, this procedure has the necessary characteristics for protecting human rights, and has generally been accepted as a remedy one is obligated to exhaust.¹¹²

In short, all judicial remedies that are capable of redress must be exhausted. When dealing with other types of remedies however, like administrative and extraordinary ones, the matter gets more uncertain. The important aspect of both these types of remedies, is however also their ability to efficiently and fully remedy the alleged violation.

4.2.2 Administrative remedies

The first question is whether administrative remedies are included in general. Support for their inclusion has been stated by Dugard¹¹³ and Reinsberg,¹¹⁴ and the HRC stated in *Brough v. Australia*¹¹⁵ that the term “domestic remedies” not only includes judicial remedies, but also administrative ones.¹¹⁶ Support for acceptance in general is also found in *Reyes v. Chile*.¹¹⁷ Although the suggested administrative remedy was not accepted, this was because it was not adequate or effective in *that case*. The Commission gives specific reasons for why the administrative remedy was not applicable in the case, and does not reject administrative

¹¹⁰ Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela, according to Gloria Orrego Hoyos, *The Amparo Context in Latin American Jurisdiction: an approach to an empowering action*, April 2013.

¹¹¹ Hoyos.

¹¹² Pasqualucci, p. 97; IACmHR, *Ojo de Agua v. Mexico*, Report No. 73/99, petition 11.701, 1999, para 17; IACmHR, *Naranjo Cardenas vs Venezuela*, para 53; IACmHR, *Colmenares Castillo vs Mexico*, Report No. 36/05, petition 12.170, 2005, para 33.

¹¹³ Dugard, para 14.

¹¹⁴ Reinsberg, p. 13.

¹¹⁵ Communication No. 1184/2003, 2006 para 8.6.

¹¹⁶ See also Trindade, *The Applicaton*, p. 61

¹¹⁷ IACmHR, Report No. 60/03, petition 12.108, 2003, para 51. See also IACmHR, *Jorge Teobaldo Pinzas Salazar vs Peru*, report 107/06, petition 12.318, 2006, para 28 and IACmHR, *José Adrián Mejía Mendoza et al. v. El Salvador*, Report No. 119/12, petition 185-03, 2012, para 33.

remedies as a whole. If the Commission meant that administrative remedies as a whole were excluded it would have been easier to state that, rather than find specific reasons as to why it was not applicable in the specific case. This shows support for a general inclusion of administrative remedies as remedies that must be exhausted to fulfil the principle of exhaustion of domestic remedies.

The question is what types of administrative remedies are included? This is again decided by whether a remedy is available, adequate and effective.¹¹⁸ It depends on a number of factors like the bodies independence, if the decisions are enforceable, if the proceedings give a due process of law and if the remedies it gives are adequate and correct for the circumstances of the particular case and relief sought.¹¹⁹ Trindade writes that administrative remedies that are judicial in nature fall within the remedies that must be exhausted, whilst administrative remedies, and other remedies, that are of a non-judicial character, fall outside the scope of the principle of exhaustion of domestic remedies.¹²⁰

An example of an administrative remedy that has been much discussed but rarely accepted is national human rights commissions or ombudsmen.¹²¹ In both *Colmenares Castillo v. Mexico* and *Ojo de Agua v. Mexico* the Commission stated that the remedy was not a suitable one for the violations in question,¹²² and the petitioners were not required to exhaust it. In *Lara Preciado v. Mexico*¹²³ the ombudsman in Mexico was described as a quasi-judicial body that issues recommendations, they have moral value but are non-enforceable. Any remedy that is not enforceable is not effective,¹²⁴ and once again the remedy of ombudsmen was exempt from exhaustion.

¹¹⁸ Sullivan, p. 5; IACmHR, *Juan Echeverría Manzo and Mauricio Espinoza González v Chile*, Report no. 108/13, petition 4636-02, 2013, para 51.

¹¹⁹ Sullivan, p. 5. See also IACtHR cases: *19 Merchants v. Colombia*, merits, 2004, para 192; *Baena-Ricardo et al (270 workers) v. Panama*, competence, 2003, para. 77; “*Five Pensioners*” v. *Peru*, merits, 2003, para. 126; *Las Palmeras v. Colombia*, merits, 2001, para. 58.

¹²⁰ Trindade, *The Application*, p. 62.

¹²¹ HRC, *Brough v. Australia*, para 8.7.

¹²² Delay in judicial proceedings and disappearances of people

¹²³ IACmHR, Report No. 45/96, petition 11.492, 1996, para 24.

¹²⁴ IACtHR, *Acevedo-Jaramillo et al. v. Peru*, 2006, para 220.

If an administrative remedy has previously been shown effective by others, it will generally be accepted.¹²⁵ This even if the remedy was not successful for the plaintiff, if this is due to wrong or untimely use, or other reasons that cannot be attributed to the state.¹²⁶ Similarly, if a remedy has previously been shown ineffective, this will generally be upheld.¹²⁷ Using administrative remedies instead of judicial ones, or ineffective ones instead of available effective ones cannot fulfil nor excuse the exhaustion principle.¹²⁸ Neither will refusal to use judicial remedies, in favour of administrative ones, because of the costs involved.¹²⁹

In sum, administrative remedies are accepted as a part of “domestic remedies” that need to be exhausted when they are adequate and effective, and have the possibility to give appropriate relief to the alleged violation. They cannot however take the place of judicial remedies, which will need to be exhausted also, unless they are exempt.¹³⁰

4.2.3 Extraordinary remedies

The last question is, what about those remedies that are neither judicial, nor administrative? Such remedies have been categorized as extraordinary remedies, and include all remedies a state has, that are not ordinary judicial or administrative ones. A wide array is possible, all from presidential pardons, to challenges of the legality or constitutionality of a law. “The [case-law] of the [Inter-American human rights] system has established 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

¹²⁵ IACmHR, *Luis Edgar Vera Flores v. Peru*, Report No. 86/05, petition 4416-02, 2005.

¹²⁶ IACmHR, *Salazar v. Peru*.

¹²⁷ IACmHR, *José Maria Guimarães v. Brazil*, Report No. 60/13, petition 1242-07, 2013, para 16.

¹²⁸ IACmHR, *Colmenares Castillo v. Mexico*; CtAT, *A.H. v. Sweden*, Communication No. 250/2004, 2006, para 4.10; HRC, *P.S. v. Denmark*, Communication No. 397/1990, 1992, para 5.4.

¹²⁹ HRC, *R.T. v. France*, Communication No. 262/1987, 1989, para 7.4. See also IACtHR Advisory Opinion; IACmHR, *Alicia Alvarez Trinidad v. Peru*, para 29.

¹³⁰ IACmHR, *La Granja, Ituango vs Colombia*, Report 57/00, Petition 12.050, 2000.

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.”¹³¹

As with the previous categories, it is not their categorization as “extraordinary” rather than “ordinary” that decides if they are applicable, but whether they can offer an effective and sufficient means of remedying the violation.¹³² This means again a case-by-case assessment, but some general tendencies have emerged. For example has the Commission stated that in criminal proceedings, only ordinary remedies are required exhausted.¹³³

One category are those dependent on discretion. This can be presidential pardons, or intervention by an organisation or the community. Here the decision-maker is not obliged to act, nor to act impartially, and rules of a fair procedure does not apply. In short, the decision does not depend on legal principles, but rather the grace of the decision maker. Such a remedy cannot be expected to be exhausted, as their chance of success is unpredictable and follow no legal standard, their purpose is to obtain a favour and not to vindicate a right.¹³⁴

Another category are those that challenge the constitutionality or legality of a law. This would be a way of changing the law and then possibly change the outcome of ones claim. According to Pasqualucci one is not required to challenge the constitutionality of a law, when the remedy sought is a review of a judgment.¹³⁵ A constitutional challenge of a law would normally follow a judgment one was unsatisfied with, and would therefore usually be to review a judgment, meaning one would rarely need to take steps to exhaust this remedy.¹³⁶

¹³¹ IACmHR, *Domínguez Domenichetti v. Argentina*, Report No. 51/03, petition 11.819, 2003, para 45. See also IACmHR, *Víctor Eladio Lara Bolívar v. Peru*, Report No. 18/11, petition 871-03, 2011, para 27.

¹³² Trindade, *The Application*, p. 90.

¹³³ IACmHR, , Report No. 157/10, petition 696-03, 2010, para 40.

¹³⁴ Dugard, para 14. See also Trindade, *The Application*, p. 62; European Commission on Human Rights (ECmHR), *Fadele Emanuel, Fadele Kehinde, Fadele Taiwo, Fadele Victor v. United Kingdom*, Application No. 13078/87, 1990.

¹³⁵ Pasqualucci, p. 97

¹³⁶ IACtHR, *Herrera Ulloa v. Costa Rica*, preliminary objections, para 85

In general extraordinary remedies are just that, extraordinary, and as Paulsson writes, one is not required to exhaust improbable remedies, nor those that go beyond the ordinary path of rectifying a wrong within a state.¹³⁷ The point of the rule is to give the state a chance to rectify the wrong at the national level, but this should not mean that an individual needs to go above and beyond to try and exhaust every probable and improbable remedy that might potentially exist in a state.¹³⁸

4.3 How to exhaust domestic remedies

The above section discusses which remedies are included in the exhaustion principle. The next question to clarify the scope of the principle is how one exhausts a remedy. The word “exhaust” implies that the remedy should be fully used, having tried all its possibilities, leaving nothing. The Commission and Court, as well as the other human rights bodies, have further clarified this in a rather consistent case law.

4.3.1 Normal use of the remedy

One should use a remedy in its normal way.¹³⁹ This includes complying with procedural requirements, such as time limits, representation, fees etc.,¹⁴⁰ as long as they are reasonable.¹⁴¹ Failure to exhaust a remedy due to procedural faults by oneself or ones counsel will not absolve from failure of exhaustion.¹⁴² Where the state provides counsel, the council is assumed adequately equipped for the job, and if not, this issue should be raised at an appropriate time by the petitioner.¹⁴³ If an applicant is expected to exhaust domestic remedies, he or she is also expected to do so properly. If such was not the case it would be the simplest

¹³⁷ Paulsson, p. 113.

¹³⁸ IACtHR, *Velasquez Rodriguez*, merits, para 64.

¹³⁹ ECmHR, *M.A.R. v. United Kingdom*, Application 28038/95, 1997.

¹⁴⁰ Sullivan, p. 8; Trindade, *The Application*, p. 98, IACmHR, *Alfredo Aresse et al. v. Argentina*, Report No. 107/13, petition 89-00, 2013, para 45.

¹⁴¹ IACmHR, *Víctor Eladio Lara Bolívar v. Peru*, para 27.

¹⁴² IACmHR, *Francisco José Magi v. Argentina*, Report No. 106/13, petition 951-01, 2013, para 33; IACmHR, *Workers of the Empresa Nacional de Telecomunicaciones (ENTEL) v. Argentina*, Report No. 116/12, Petition 374-97, 2012, para 32.

¹⁴³ HRC, *Lim Soo Ja v. Australia*, Communication No. 1175/2003, 2006, para 6.2; HRC, *Calle Sevigny v. France*, Communication No. 1283/2004, 2005, para 6.3.

way out, and would result in the state not being afforded the benefit the rule gives; to review the matter on its own first. Over time the rule would lose its point, as all petitioners would commit a procedural error, and be freed from exhausting domestic remedies.

One example of this is found in *Fairén-Garbi and Solís-Corrales v. Honduras*,¹⁴⁴ where the Court stated that an unfavourable result, because the petitioner had not invoked the domestic remedy in a timely fashion, did not in itself demonstrate that the remedy was ineffective or unavailable.

The petitioner is expected to pursue domestic remedies in a timely fashion, and comply with procedural requirements.¹⁴⁵ Only if the state is somehow responsible for the procedural difficulties, or procedural requirements were unreasonable or otherwise inaccessible in the particular case can the petitioner be absolved from exhausting the remedy.¹⁴⁶ Examples of this is can be where letters are not sent on time causing deadlines to expire, or faulty information comes from otherwise reliable government offices.

4.3.2 Final decision

Petitioners are further required to have a final decision from the domestic legal system. Within a domestic system, there is a system of review of decisions. They are set up in different levels so that the higher can supervise the lower, and rectify when they make mistakes, as they normally have the power to change or nullify a lower court's decisions.¹⁴⁷ One purpose of the principle is that a state should have a chance to rectify the situation itself, and the requirement of a final decision helps give meaning to this purpose. Therefore, petitioners are required to take their cases through the entire domestic judicial system.

¹⁴⁴ IACtHR, merits, para 92.

¹⁴⁵ IACmHR, *Luis Edgar Vera Flores vs Peru*, para 37.

¹⁴⁶ IACtHR, *Castañeda Gutman v. Mexico*, 2008, para 94; IACtHR, *The Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, 2006, para 126; IACmHR, *José Adrián Mejía Mendoza et al. v. El Salvador*, para 30.

¹⁴⁷ Convention art 8(2)(h)

The requirement of a final decision can also be seen by the Conventions art 46(2)(c), that claims an exception from exhaustion when there has been an unwarranted delay in rendering a *final* decision, and art 46(1)(b) that states that a petitioner must lodge its complaint within 6 months of the *final* decision. This shows that an applicant must have a final decision, not just any decision from the domestic system.

With petitioners required to take their case to the highest possible Court of the state it means that they are required to appeal an unfavourable judgment all the way to the top.¹⁴⁸ If an appeal is denied, it has reached its final judgement. If there are several claims joined in one case, all must be taken to the highest possible level.¹⁴⁹ This however only applies as long as the appellant remedy is available, adequate and effective.¹⁵⁰

4.3.3 Substance of the claim

For the state to be given a chance to rectify the violation itself, the situation claimed before the IACmHR or IACtHR must be the same that was brought before the domestic system.¹⁵¹ If it is not the same, or the claimant has not alleged the violation before the domestic courts, the state has not had a chance to remedy the situation, and domestic remedies have not been utilized and exhausted.¹⁵²

This does not however mean that the claim before the regional bodies must be identical to the one before domestic courts. According to Sullivan, it must be considered whether the substance of the claim is the same as the one raised at the domestic level. The important question is whether the state, at the domestic level, had a chance to address the essence of the situation and violations that are now at the regional level.¹⁵³ It is not necessary to have

¹⁴⁸ IACtHR, *Durand and Ugarte v. Peru*, preliminary objections, para 37; IACtHR, *Cantoral Benavides v. Peru*, preliminary objections, 1998, para 32 and 33: «With the judgment of the Supreme Court, domestic remedies were exhausted” and Reinsberg, p. 17.

¹⁴⁹ Sullivan, p. 8.

¹⁵⁰ IACmHR, *Escher v. Brazil*.

¹⁵¹ Dinah Shelton, *The Rules and the Reality of petition Procedures in the Inter-American Human Rights System*, “The Future of the Inter-American Human Rights System”, Working Paper #2, The Center for Civil and Human Rights, University of Notre Dame, May 2014, p. 23.

¹⁵² Dissenting opinion of Judge Schwebel, *ELSI* case.

articulated the claim as a violation on human rights, nor having articulated which articles of the Convention the alleged breach concerns.¹⁵⁴ Neither, is it required that the domestic system dealt with the claims, what is important is that they were brought forward, and that the petitioner gave the state a chance to address them.¹⁵⁵

4.4 Time aspects and waivers

4.4.1 When must domestic remedies be exhausted?

Exhaustion of domestic remedies is not only a question of actually exhausting such remedies, but also exhausting them at the right time. The Convention art 46(1) states that admission of a petition depends on that domestic remedies “have been” pursued and exhausted. This means that the remedies must have been exhausted *before* the case is brought before the Commission.

Pasqualucci points out that the Commission cannot consider the case until domestic remedies have been exhausted, meaning that procedures before domestic courts etc. are finished. But it does not mean that they have to be exhausted at the time of filing a complaint.¹⁵⁶ “If the Commission receives a petition before domestic remedies have been exhausted, it may not begin consideration of the matter. It may, however, hold the petition until the final judgment is made in the State and then process it.”¹⁵⁷ This is illustrated by the case *Castillo Petruzzi et al. v. Peru*,¹⁵⁸ where the case was filed before the final judgment of the military tribunal. The Court rejected the states preliminary objection of failure of exhaustion of domestic remedies, because the Commission had not acted on the case until after the final judgment in Peru. One should not confuse the receipt of a case with its admission and processing, and only with the last, must domestic remedies be exhausted.¹⁵⁹

¹⁵³ Sullivan, p. 10. See also Trindade, *The Application*, p. 80.

¹⁵⁴ HRC, *Lassaad Aouf v. Belgium*, Communication No. 1010/2001, 2006, para 8.3.

¹⁵⁵ HRC, *Lassaad Aouf v- Belgium*, para 8.3. See also Trindade, *The Application*, p. 81.

¹⁵⁶ See also Sullivan, p. 24.

¹⁵⁷ Pasqualucci, p. 93.

¹⁵⁸ IACtHR, preliminary objections, 1998.

¹⁵⁹ *Ibid*, para 54-55. See also ECtHR, *Ringeisen v. Austria*, 1971.

This position takes into account practical considerations of the system, and makes it less formalistic, to not discourage petitioners from using it.¹⁶⁰ Although one should not count on the Commission to hold the petition for a long time without processing it whilst one exhausts domestic remedies, it gives the Commission the possibility of holding a case that is soon finished, instead of dismissing it and forcing the petitioner to re-lodge it shortly after. In a system that sometimes can draw out in time, this can be a positive contribution to potentially save time and effort for the petitioners.

4.4.2 The claim of non-exhaustion and waivers of the exhaustion requirement

4.4.2.1 Specific, timely claims and its effects if not completed

Non-exhaustion must be raised by the state in specific terms, listing available remedies, and give reports of their availability, adequacy and effectiveness.¹⁶¹ A general reference to non-exhaustion is not enough.¹⁶²

The state must further raise the claim of non-exhaustion in a timely manner, at a procedurally correct moment. According to the Court in *Chocrón Chocrón v. Venezuela*, exhaustion of domestic remedies is a defence available to the state, and therefore the procedural moment of objection is important. “If the objection is not presented during the admissibility proceedings before the Commission, the State will have forfeited the possibility of using this means of defence before the Court.”¹⁶³ When the claim of non-exhaustion is not raised at the appropriate time, the possibility of raising it is lost, because the Commission and Court will view the state’s silence as a tacit waiver of the principle.¹⁶⁴ This has been the jurisprudence of

¹⁶⁰ Pasqualucci, p. 93.

¹⁶¹ IACtHR, *Vélez Loor v. Panama*, 2010, para 19; IACtHR, *Herrera-Ulloa v. Costa Rica*, para 81.

¹⁶² IACmHR, *Mangas vs Nicaragua*, para 95; IACtHR, *Fairén-Garbi and Solís-Corrales v. Honduras*, preliminary objections.

¹⁶³ Para 21. See also Pasqualucci, p. 93. See also IACtHR cases; *Herrera-Ulloa v. Costa Rica*, para 81. *Acevedo-Jaramillo et al. v. Peru*, para 124; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, preliminary objections, 2000, para 53.

¹⁶⁴ IACtHR cases: *Fairén-Garbi and Solís-Corrales v. Honduras*, merits, para 109; *Vélez Loor v. Panama*, para 20; *Acevedo-Jaramillo et al. v. Peru*, para 124 and *Usón Ramírez v. Venezuela*, 2009, para 22. See also Pasqualucci, p. 94.

the Commission and Court for over 20 years, and the procedural deadline is in accordance with international law, and particularly ECtHR practice.¹⁶⁵

In several cases, the state has failed to raise the objection at the appropriate time, in some cases as late as when the case reached the Court. For example in *Gomes Lund v. Brazil*, the objection was first raised more than 9 years after the Commission ruled on admissibility of the case. In other cases the objection first appeared long into the case, and was therefore rejected with the statements that the objections should have been interjected at an earlier stage and more clearly.¹⁶⁶ As the Court has stated several times, “it does not fall to the international organs to rectify the lack of precision in the States arguments.”¹⁶⁷

4.4.2.2 More about waivers of the exhaustion requirement

According to the above subsection, the principle of exhaustion of domestic remedies can be presumed waived by the state. The principle can also be expressly waived, as there is a long established practice of this practice in international law.¹⁶⁸ According to the Court, the principle exists for the benefit of the state, as a means of defence, and can therefore be waived by the state, even tacitly.¹⁶⁹ A waiver once in effect though, cannot be revoked.¹⁷⁰

The Commission stated in *Abu-Ali Abdur Rahman v. USA* that once faced with an irrevocable 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

¹⁶⁵ Pasqualucci, p. 94; ECtHR, *De Wilde, Ooms and Verpsy Cases (“Vagrancy”) v. Belgium*, 1971; IACtHR, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, 2010, para 38; IACtHR, *Chocrón Chocrón v. Venezuela*, para 22 and IACtHR, *Usón Ramírez v. Venezuela*, para 22.

¹⁶⁶ IACtHR cases; *Chocrón Chocrón v. Venezuela*, para 22; *Fairén-Garbi and Solís-Corrales v. Honduras*, preliminary objections; *Vélez Loor v. Panama*, para 21.

¹⁶⁷ IACtHR cases; *Chocrón Chocrón v. Venezuela*, para 23; *Usón Ramírez v. Venezuela*, para 22 and *Reverón Trujillo v. Venezuela*, 2009, para 23.

¹⁶⁸ Pasqualucci, p. 94; D’Ascholi and Scherr, para 1; ECtHR, *De Wilde, Ooms and Verpsy Cases (“Vagrancy”) v. Belgium*.

¹⁶⁹ IACtHR, *Vivana Gallardo v. Costa Rica*, 1981

¹⁷⁰ IACtHR, *Velasquez Rodriguez*, preliminary objections, para 88; IACtHR, *Fairén-Garbi*, preliminary objections, para 87.

domestic remedies”.¹⁷¹ A waiver, expressly given or tacitly implied, therefore comes with the great consequence that a petition can be considered admissible.

4.5 Burden of proof

Burden of proof is the question of who has to prove exhaustion or failure. This points to the party that must provide evidence for their allegation.¹⁷² The IACmHR and IACtHR regards the burden of proof with exhaustion of domestic remedies, as shifting,¹⁷³ as it shifts between the petitioner and the state, each providing proof of their claims.¹⁷⁴

The burden of proof starts with the petitioner when submitting the claim to the Commission. According to the IACmHR’s Rules of Procedure art 28(8) petitions shall contain “any steps taken to exhaust domestic remedies, or the impossibility of doing so”. This means that a petitioner should provide detailed information about which domestic remedies have been tried or why it was not possible to make use of them.¹⁷⁵

There is an extra rule for the Commission when it comes to exhaustion of domestic remedies and the burden of proof. The Regulations of the IACmHR art 37(3) states that when a petitioner is unable to prove exhaustion of domestic remedies, the burden of proof shifts directly to the state, which has to prove non-exhaustion, unless it is clear from the information in the petition. For the Commission, remedies will therefore often be presumed exhausted without any proof thereof. This is because the Commission has a principle of accepting as true what the petitioner alleges and the state does not contest, provided there is no evidence to the contrary.¹⁷⁶

¹⁷¹ Report 39/03, petition 136/02, 2003, para 27.

¹⁷² Trindade, *The Application*, p. 134.

¹⁷³ Sullivan, p. 25.

¹⁷⁴ Trindade, *The Application*, p. 144; Smith.

¹⁷⁵ Pasqualucci, p. 92-93.

¹⁷⁶ Reinsberg, p. 69.

After the arguments of the petitioner, the burden of proof shifts to the state, which has to specifically claim non-exhaustion of domestic remedies before the Commission, specify which remedies remain and provide information about their effectiveness, adequacy and availability.¹⁷⁷ Merely showing their existence is not enough.¹⁷⁸ It is important to note that neither the Court nor the Commission has a responsibility to identify *ex officio* remedies that remain to be exhausted; it is incumbent upon the state.¹⁷⁹

If the state proves existing available and effective remedies that should have been utilized by the petitioner, the burden of proof shifts back to the petitioner.¹⁸⁰ He or she then has the burden of that proving the specified remedies were exhausted, or that the remedy falls within one of the exceptions in art 46(2).¹⁸¹ If the petitioner invokes one of the exceptions in art 46(2), it is up to the petitioner to demonstrate that such exceptions apply, and for the state to disclaim the reasons given by the petitioner and prove available remedies.¹⁸²

The petitioner must generally give some information on exhaustion or reason for non-exhaustion.¹⁸³ If evidence is hard to find in the specific case, showing a pattern or practice of systematic human rights violations of similar type can help persuade the Commission or Court.¹⁸⁴ They “interpret the law according to the *pro homine* principle, which requires the interpretation most favourable to the protection of human rights”.¹⁸⁵ Even so, the

¹⁷⁷ See IACtHRs cases: *Velazques Rodriguez v. Honduras*, preliminary objections, para 87; *Fairén-Garbi and Solís-Corrales v. Honduras*, preliminary objections, para 87; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, preliminary objections, para 53; *Herrera-Ulloa v. Costa Rica*, para 81; *Cantoral Benavides v. Peru*, para 31; *Durand and Ugarte v. Peru*, preliminary objections, para 33. See also IACmHR *Mangas v. Nicaragua*, para 85.

¹⁷⁸ Pasqualucci, p. 94; IACtHR *Las Palmeras v. Colombia*, merits, para 58.

¹⁷⁹ IACtHR cases: *Vélez Loor v. Panama*, para 24. *Chocrón Chocrón v. Venezuela*, para 23. *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, para 38.

¹⁸⁰ Reinsberg, p. 69; Sullivan, p. 25.

¹⁸¹ IACtHR, *Velasquez Rodriguez*, merits, para 60; IACtHR *Fairén-Garbi and Solís-Corrales v. Honduras*, merits, para 84.

¹⁸² IACmHR, *Miguel Ricardo de Arriba Escola v Honduras*, Report No. 102/06, Petition 97-04, 2006, para 27. IACmHR, *José Maria Guimarães v. Brazil*, Report No. 60/13, petition 1242-07, 2013, para 18.

¹⁸³ IACmHR, *Miguel Ricardo de Arriba Escola v. Honduras*, para 30.

¹⁸⁴ Reinsberg, p. 69.

Court has stated that “It must not be rashly presumed that a State Party to the Convention has failed to comply with its obligations to provide effective domestic remedies.”¹⁸⁶ This means, that even though the Commission and Court give the favour of the doubt to the petitioner, one should not take one's burden of proof lightly.

4.6 Exceptions to the rule of prior exhaustion of domestic remedies

There are three exceptions to the principle of exhaustion of domestic remedies, spelled out in art 46(2). They are; where there is no due process of law or no remedy to exhaust (art 46(2)(a)), where there is no access to the remedies (art 46(2)(b)) and where there has been an unwarranted delay in the proceedings of the remedies (art 46(2)(c)). Art 46(2) provides exceptions from the principle, where remedies exist in the domestic system, but pursuit of such remedies would be a futile exercise in vindicating the rights of the Convention,¹⁸⁷ to make sure the principle of domestic remedies never leave a victim defenceless.¹⁸⁸ According to Sing, the most commonly advanced by petitioners is the third, unwarranted delay, while the other two are rarely invoked.¹⁸⁹ Often however, a petitioner will advance more than one exception, or even all three.

When an exception is accepted by the Commission or Court, the petitioner is under no obligation to pursue such remedies. In fact, the state is not only barred from the preliminary objection of non-exhaustion, it is charged with a new violation under the Convention.¹⁹⁰ If however, there are other available, effective and adequate remedies in the domestic system, the petitioner will not be exempt from trying those, only the ones to which the exception applies. In practice though, if an exception exists for one remedy, it often affects the rest, and an exception to the principle is accepted.

¹⁸⁵ Ibid.

¹⁸⁶ IACtHR, *Velasquez Rodriguez*, merits, para 60; *Fairén-Garbi v. Honduras*, merits, para 84.

¹⁸⁷ Sing, p. 10.

¹⁸⁸ IACtHR, *Velasquez Rodriguez*, preliminary objections, para 93.

¹⁸⁹ Sing, p. 8.

¹⁹⁰ IACtHR, *Velasquez Rodriguez*, preliminary objections, para 91; IACmHR, *Mangas v. Nicaragua*, para 100; IACtHR, *Fairén-Garbi and Solís-Corrales v. Honduras*, preliminary objections, para 90.

4.6.1 No remedy

Art 46(2)(a) states that the principle of domestic remedies shall not be applicable when the domestic legislation of the state does not afford due process of law for the right that has allegedly been violated. This means that when there is no remedy that corresponds to the alleged wrong, or that the remedy does not function as it should, it needs not be exhausted.

The exception corresponds to the obligations the state has under the Convention to provide effective judicial remedies to victims of human rights violations (art 25), and that remedies must be in accordance with the rules of due process of law (art 8(1)), to guarantee the free and full exercise of the rights in the Convention.¹⁹¹ This has often been expressed with the words that a remedy must be adequate and effective.

4.6.1.1 Adequate

“Adequate domestic remedies are those which are suitable to address an infringement of a legal right.”¹⁹² If a remedy is not adequate in the specific case, it needs not be exhausted.¹⁹³ To address an infringement, the remedy must be capable of redressing the alleged harm in the case.¹⁹⁴ This means that the remedy must have the possibility of actually giving the relief sought by the applicant, which is a consideration of the type of relief the remedy can give in a successful outcome. What relief sought in the case, depends on the nature of the alleged violation. An adequate remedy should further assist in ascertaining the facts of the case, and establish individual responsibility for the violation.¹⁹⁵

An example of an inadequate remedy is a presumptive finding of death for a person who is disappeared, for the purpose of allowing heirs to dispose of the belongings, when the remedy sought is to find such person or obtain his or her liberty.¹⁹⁶ The remedy does not do what the

¹⁹¹ IACmHR, *Mangas v. Nicaragua*, para 101.

¹⁹² IACtHR, *Velasquez Rodriguez*, merits, para 64.

¹⁹³ IACtHR, *Velasquez Rodriguez*, merits, para 64; IACtHR, *Godínez-Cruz v. Honduras*, merits, para 67.

¹⁹⁴ D’Ascoli and Scherr, p. 13.

¹⁹⁵ Pasqualucci, p. 95; IACtHR, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, para 46.

¹⁹⁶ IACtHR, *Velasquez Rodriguez*, merits, para 64.

violation of enforced disappearances calls for, nor what the petitioners wish as a result, hence, it is not an adequate remedy for the situation and needs not be exhausted. If there are no other remedies that fit the relief sought, no due process of law exists, and no remedy needs to be exhausted.

4.6.1.2 Effective

“A remedy must also be effective, that is, capable of producing the result for which it was designed.”¹⁹⁷ Many reasons can make a remedy ineffective, for example if it is powerless to compel the authorities, it presents a danger to those who invoke it or if it is not impartially applied.¹⁹⁸ Further it can be denied for trivial reasons, without examination of merits or there can be a practice to prevent certain people from invoking remedies that would normally be available to others, and it is proven tolerated by the state.¹⁹⁹ However, the mere fact that a remedy in a specific case does not produce a favourable result does not mean it is ineffective, other factor can intervene, like timeliness of use.²⁰⁰

“Domestic remedies that prove illusory due to the circumstances of the case or the general situation in the State cannot be considered effective”.²⁰¹ An example of this is the *Constitutional Court v. Peru* case, where the Court stated that at unjustified delay of six months for the domestic courts to reject the application for the remedy of *amparo*, made the remedy illusory and ineffective.²⁰²

A remedy is effective if it both exists and offers a reasonable prospect of success. It must be capable in practice to provide redress for the alleged wrong, not just in theory, and it must be able to do so in the particular case.²⁰³ If there are serious reasons to believe the petitioner in

¹⁹⁷ IACtHR, *Velasquez Rodriguez*, merits, para 66.

¹⁹⁸ Ibid.

¹⁹⁹ IACtHR, *Velasquez Rodriguez*, merits, para 68.

²⁰⁰ Ibid. para 67; IACtHR, *Fairén-Garbi and Solís-Corrales v. Honduras*, merits, para 92.

²⁰¹ Pasqualucci, p. 96; IACtHR, *Las Palmeras v. Colombia*, para 58.

²⁰² IACtHR, *Constitutional Court v. Peru*, merits, reparations and costs, 2001, para 93.

²⁰³ D’Ascoli and Scherr, p. 12; IACmHR, *Gray Graham v. United States*, Report No. 51/00, petition 11.193, 2000, para 60; IACmHR, *Ramón Martínez Villareal v. United States*, Report No. 108/00, petition 11.753, 2000, para 70.

the case have no real prospect of success, then the remedy is not effective in that particular case.²⁰⁴ Similarly, the remedy must not seem futile or unhelpful.²⁰⁵ However, there must be some evidence to its ineffectiveness, a mere doubt or a subjective belief that a remedy is ineffective is not sufficient.²⁰⁶ The test of effectiveness of a remedy, is to avoid exhaustion becoming a senseless formality, where it has no likelihood of success.

4.6.2 No access

The second exception from the principle of exhaustion of domestic remedies, is where there is no access to the remedy, often called a lack of availability (art 46(2)(b)). This has two parts; the first is that the remedy exists at the time when the petition is filed with the Commission and is capable of being applied, the second that the victim or next of kin is the appropriate one to use the remedy.²⁰⁷ A remedy is available if it can be pursued by the petitioner without difficulties or impediments.²⁰⁸ If circumstances of the case, or in general in the state, makes access to the remedy very difficult, it cannot be considered available, and need not be exhausted.²⁰⁹ Reasons that can make a remedy not available can be age, mental capacity, language difficulties or that the petitioner has been deported from the state.²¹⁰

The IACtHR in an advisory opinion has discussed two examples where domestic remedies are not available.²¹¹ The first question of the advisory opinion was whether a petitioner is required

²⁰⁴ D'Ascoli and Scherr, p. 13.

²⁰⁵ D'Ascoli and Scherr, p. 12; IACmHR, *Mario Alfredo Lares-Reyes et al. v. United States*, Report No. 19/02, petition 12.379, 2002, para 61; HRC, *Brough v. Australia*, para 8.6.

²⁰⁶ Sullivan, p. 19; Committee on the Elimination of Racial Discrimination, *Gelle v. Denmark*, Communication No34/2004, 2006, para 6.6; IACmHR, *Isamu Carlos Shibayama et al v. United States*, report No. 26/06, petition 434-03, 2006, para 48. IACmHR, *Victor Nicholas Sanchez et al v. United States*, Report No. 104/05, petition 65/99, 2005, para 67; IACmHR, *Alicia Alvarez Trinidad v. Peru*, para 29.

²⁰⁷ IACtHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para 46; Pasqualucci, p. 95

²⁰⁸ D'Ascoli and Scherr, p. 12.

²⁰⁹ D'Ascoli and Scherr, p. 13.

²¹⁰ HRC, *Brough v. Australia*, para 8.9; IACmHR, *Jesus Tranquilino Vélez Loor v. Panama*, Report No. 95/06, petition 92-04, 2006, para 43; IACmHR, *Juan Ramón Chamorro Quiroz v. Costa Rica*, Report No. 89/00, petition 11.495, 2000, para 35; IACmHR, *José Sánchez Guner Espinales et al. v. Costa Rica*, Report No. 37/01, petition 11.529, 2001, para 44.

²¹¹ IACtHR, Advisory opinión.

to exhaust domestic remedies where he cannot afford legal assistance or obligatory filing fees. The Court saw that a strict use of the exhaustion principle in such circumstances might breach the principle in the Conventions art 1(1) for discrimination based on “social condition”.²¹² This because a strict application of the principle in this case effectively would exclude an entire group of people from using the regional system due to their economic status, and it is the duty of states to organize the governmental apparatus in such a way so they ensure the enjoyment of human rights for everyone.²¹³

Free legal aid can sometimes repair the petitioner’s lack of resources, but is not always given or available in the state. So, where “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 exempt from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee.”²¹⁴ It is important however to show that legal services are needed, and not just preferred.²¹⁵ Also important is it that the petitioner has tried to bring to the attention of the state his or hers inability to utilize remedies due to economic difficulties, for example by seeking free legal aid.²¹⁶

The second question of the advisory opinion regarded a general fear in the legal community. The Court stated that “where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation, the exceptions set out in Article 46(2)(b) is fully applicable and the individual is exempt from the requirement to exhaust domestic remedies.”²¹⁷

²¹² IACtHR, Advisory opinión, para 22

²¹³ IACtHR: Advisory opinion, para 23; *Velasquez Rodriguez*, merits, para 166; *Godinez Cruz*, para 175.

²¹⁴ IACtHR, Advisory opinion, para 30.

²¹⁵ *Ibid.* para 31.

²¹⁶ IACmHR, *Jorge Portilla Ponce v. Ecuador*, Report No. 106/09, petition 12.323, 2009, para 24-25; IACmHR, *María Mercedes Zapata Parra v. Peru*, Report No. 45/09, petition 12.079, 2009, para 34.

²¹⁷ IACtHR, Advisory opinion, para 35.

In short, a domestic remedy is available if it exists in the law, is capable of being applied in practice by authorities and is applicable by the petitioner in the specific case.²¹⁸ If it is impossible to access due to for example indigence, it is not available.

4.6.3 Unwarranted delay

The third exception to the principle of exhaustion of domestic remedies is where there has been an unwarranted delay in rendering a final judgement.²¹⁹ In *Mangas v. Nicaragua* the Commission summarized the jurisprudence on delay by first stating that in the Inter-American system, justice for human rights violations should be given within reasonable time.²²⁰ If a case is not solved before the domestic courts within a reasonable time, the petitioner is released from the obligation to exhaust the remedies.²²¹ That is, if the delay is not justified.

Both the Inter-American System and the European System of Human Rights have developed a series of criteria for considering whether the delay in justice is justified.²²² It depends on the complexity of the case, the conduct of the damaged party in terms of cooperation, how the investigative stage of the cases evolves and the actions of the judicial authorities.²²³ The deliberations must be made on an objective basis, but with considerations to the special circumstances of each case.²²⁴

To consider the complexity of the case it is important to look at the factual setting of the case, and the type of right that has been allegedly violated.²²⁵ In *Mangas v. Nicaragua* for example, the case involved a single criminal act and a single victim, and it was considered

²¹⁸ Sullivan, p. 14.

²¹⁹ Art 46(2)(c) of the Convention.

²²⁰ IACmHR, *Mangas v. Nicaragua*, para 118; IACtHR, “*White Van*” (*Paniagua-Morales et al.*) v. *Guatemala*, merits, 1998, para 155; IACtHR, *Gomes Lund et al. (“Guerrilha do Araguaia”)* v. *Brazil*, para 42; IACtHR, *Suárez-Rosero v. Ecuador*, merits, 1997, para 73.

²²¹ IACmHR, *Mangas v. Nicaragua*, para 120.

²²² *Ibid.* para 121

²²³ *Ibid.* para 122

²²⁴ *Ibid.* Para 123.

²²⁵ IACtHR, *Genie-Lacayo v. Nicaragua*, merits, 1997, para 80-81.

non-complex. If on the other hand, the case is complex and complicated, involving several parties and events, a longer delay can be justified.²²⁶ It is important to note however, that the complexity of the case can only justify the delay, if it actually contributed to the delay.²²⁷

If the delay can be attributed to acts of the petitioner, then the delay is justified, and the exception is not applicable.²²⁸ An example of this is *José Xavier Gando Chica v. Ecuador* where the delay in the criminal case was due to the petitioner having fled the country and was living as a fugitive from justice.²²⁹

Exactly how much time must have passed for a delay to be unwarranted depends on the case and its considerations. Generally, however, the Court has held that when about five years has passed since the initiation of the proceedings and the case is brought to the Commission without a final judgement, there has been an unwarranted delay, and the petitioner is excused from exhausting domestic remedies.²³⁰

5 Case-study of the practice of the Inter-American Commission on Human Rights

After having established the basic features of the principle of exhaustion of domestic remedies in the Inter-American system of human rights, the thesis will now review the case-law for the last 5 years. This part builds on the annual rapports of the Commission and Court, and all the available cases deemed inadmissible at the IACmHR in the last 5 years.²³¹ The goal is to look for trends, and whether there seems to be undue hardships with the principle of exhaustion of domestic remedies.

²²⁶ IACmHR, *Mario Eduardo Firmenich v Argentina*, Report No. 17/89, petition 10.037, 1989.

²²⁷ IACmHR, *Mangas v. Nicaragua*, para 127, citing ECmHR.

²²⁸ IACmHR, *César Verduga Vélez v. Ecuador*, Report No. 18/02, Petition 12.274, 2002, para. 29

²²⁹ IACmHR, Report No. 22/12, petition 398-02, 2012, para 33

²³⁰ Pasqualucci, p. 97; IACtHR, *Genie-Lacayo v. Nicaragua*, Merits, para 81; IACtHR, *Las Palmeras v. Colombia*, preliminary objections, para 38.

²³¹ In total 62 cases were deemed inadmissible by the Commission in this period, but only 59 of the cases were available on the Commissions webpages.

This part builds on the case-law of the Commission and not the Court because the Commission considers the cases first. Even though the Court can reject the Commission's consideration of admissibility, it is clear that it rarely does so after having reviewed all the annual reports from the Court for the last 10 years, where no cases have been rejected due to failure of exhaustion of domestic remedies.

5.1 Petitions received and evaluated by the Commission

5.1.1 New petitions and initial evaluation

The figure below shows how many petitions the Commission has received in the last 10 years, in total 15,437 petitions; which is well over a thousand each year. The number of petitions is increasing, with 2013 giving the highest number to date.

Figure 1: Petitions received and considered for processing

Year	Petitions received	Petitions evaluated per year	Petitions not accepted for processing	% not accepted	Petitions accepted for processing	% accepted
2013	2061	736	613	83 %	123	17 %
2012	1936	1011	874	83 %	137	17 %
2011	1658	1051	789	75 %	262	25 %
2010	1598	1676	1401	84 %	275	16 %
2009	1431	2064	1942	94 %	122	6 %
2008	1323	1668	1550	93 %	118	7 %
2007	1456	1331	1205	91 %	126	9 %
2006	1325	1315	1168	89 %	147	11 %
2005	1330	1187	1037	87 %	150	13 %
2004	1319	1024	864	84 %	160	16 %
Total	15437	13063	11443	88 %	1620	12 %

The figure further shows how many petitions are evaluated by the Commission each year. The number of petitions evaluated differs greatly from year to year, with 2009 as a top year and 2013 as the low. Only three years have the Commission managed to evaluate more petitions than received, most years evaluating far less. This creates a backlog of cases, and the trend seem to be worsening in the last few years, with less and less cases being evaluated each year.

Initial evaluation comes before the consideration on admissibility, and is the first filter for petitions.²³² This is however where most of the petitions are rejected, with an average of 88% of the petitions denied for processing.²³³ From the view point of the petitioners, 2011 was their best year, as 25% of the petitions that year was accepted for processing, while in 2009, only a marginal 6% made it through the initial evaluation.

5.1.2 Petitions considered on admissibility

As shown in the figure below, of the 13,063 petitions evaluated in the last 10 years, only 667 were considered on admissibility. This means that even out of the 1620 that made it through the first evaluation,²³⁴ only 41% made it to the admissibility considerations, and of all the petitions evaluated, only 5% make it to the preliminary stages where exhaustion of domestic remedies are considered. This means that a staggering 95% of the petitions the Commission evaluates are rejected even before considering their admissibility, such as jurisdiction and exhaustion of domestic remedies.

Figure 2: Petitions evaluated vs considered for admissibility

Year	Petitions evaluated per year	Petitions considered for admissibility	% petition considered for admissibility
2013	736	53	7 %
2012	1011	59	6 %
2011	1051	78	7 %
2010	1676	83	5 %
2009	2064	77	4 %
2008	1668	59	4 %
2007	1331	65	5 %
2006	1315	70	5 %
2005	1187	69	6 %
2004	1024	54	5 %
Total	13063	667	5 %

²³² Shelton, p. 14.

²³³ See also Human Rights Clinic, *Maximizing Justice, Minimizing Delay: Streamlining Procedures of the Inter-American Commission on Human Rights*, The University of Texas School of Law, December 2011, who found similar numbers.

²³⁴ See figure 1 above.

So with 95% of the petitions already eliminated, how many are then rejected at the admissibility stage?

Figure 3: Petitions admissibility

Year	Total petitions	Petitions admissible	% admissible	Petitions inadmissible	% inadmissible
2013	53	44	83 %	9	17 %
2012	59	42	71 %	17	29 %
2011	78	67	85 %	11	15 %
2010	83	73	88 %	10	12 %
2009	77	62	81 %	15	19 %
2008	59	49	83 %	10	17 %
2007	65	51	78 %	14	22 %
2006	70	56	80 %	14	20 %
2005	69	53	77 %	16	23 %
2004	54	45	83 %	9	17 %
Total	667	542	81 %	125	19 %

According to the numbers of the last 10 years, most of the petitions that make it through the initial evaluation before the Commission make it through the admissibility consideration. Only about 19% are rejected at this stage, while an average of 81% are considered admissible. But, as admissibility is not only about exhaustion of domestic remedies, cases can be rejected at this stage for other reasons such as timeliness of the petition, the question is; how many are rejected for non-exhaustion?

5.2 Case-study of cases deemed inadmissible in the last 5 years

5.2.1 Number of cases rejected for non-exhaustion

In total 125 cases were rejected on admissibility in the last 10 years, 62 in the last 5 years. To see how many cases were rejected on the basis of non-exhaustion, as opposed to other reasons, each of the available cases in the last 5 years have been examined.²³⁵ The figure below shows how many of the cases the Commission deemed inadmissible were for failure of exhaustion of domestic remedies and how many were for other reasons.²³⁶

²³⁵ Out of the 62 cases, only 59 were available on the Commissions pages. For the full list of considered cases, see annex 1.

²³⁶ Other reasons include art 46(1)(b), 47(b) and 47(d).

Figure 4: Cases deemed inadmissible

Year	Total cases per year	Inadmissible due to non-exhaustion*	% inadmissible exhaustion	Inadmissible due to other reasons	% inadmissible other reasons
2013	7	6	86 %	1	14 %
2012	17	6	35 %	11	65 %
2011	10	4	40 %	6	60 %
2010	10	5	50 %	5	50 %
2009	15	8	53 %	7	47 %
Total	59	29	49 %	30	51 %

* When more than one reason was given, it was counted as inadmissible due to exhaustion and not in the column "other reasons".

Of the 59 cases reviewed, only 29 (49%) for non-exhaustion, while 30 were rejected based on other reasons. The numbers vary greatly from year to year, with non-exhaustion being the reason for rejection in a staggering 86% of the cases in 2013, while only 35% the year before.²³⁷

On average, about 21% of the cases at the admissibility stages have been rejected in the last 5 years. With about half of these for other reasons, only around 10% are in fact rejected by the Commission for failure to exhaust domestic remedies. Of the cases rejected for other reasons, 25 had fulfilled the requirement of exhaustion, in 4 cases exhaustion was not considered, and in the last the Commission was inconclusive. This shows that in the majority of the cases, even when the case is ultimately rejected due to other reasons, exhaustion of domestic remedies is fulfilled.

Exhaustion of domestic remedies can seem like a daunting task for a petitioner, but according to the case-law of the last 5 years, the Commission have declared it fulfilled in about 90% of the cases. The question then is, are there any trends in why the remaining 10% have not fulfilled this requirement?

²³⁷ For a breakdown according to country, see annex 2.

5.2.2 Reasons for non-fulfilment

Why are some cases rejected for non-exhaustion? Are there some reasons that come up more than others? The figure below shows in a simplified manner the reasons for non-exhaustion in the relevant 29 cases from the last 5 years.

Figure 5: Reasons for non-exhaustion, Commission 2009-2013

Reasons	#	%
<i>Still remaining remedies (shown by state or Commission)</i>	10	35 %
<i>Procedural requirements in domestic system</i>	6	21 %
<i>Tried for an exception but insufficient information*</i>	5	17 %
<i>No/not sufficient information from petitioner on exhaustion</i>	3	10 %
<i>Did not appeal, or follow through on appeal</i>	3	10 %
<i>Mistaken procedural route in domestic system</i>	2	7 %
Total	19	100 %

* 1 for belief of ineffectiveness and costs, 2 for economic situation

The most common reason for non-exhaustion, is that the state completes its burden of proof, and shows available, effective and adequate remedies still to be exhausted. This is not so surprising, as states would have an interest in fulfilling its part. Nor is it surprising that 10% is because of insufficient information from the petitioner and that 17% tried for an exception but failed due to lack of information. Many petitioners might not know how to show exhaustion of domestic remedies, and therefore provide none or little information on the subject. They might also be unaware of how important this is for their case.

Of the five that tried for an exception but failed, one petitioner did not exhaust domestic remedies due to a belief of ineffectiveness and high costs, but did not offer any proof of her beliefs or economic situation. Further two claimed insufficient funds to use domestic remedies, but neither proved their economic situation, nor that they had tried to obtain free legal aid or similar. One petitioner tried for unwarranted delay in justice, but was denied as the Commission saw the delay as justified from the state, due to the fact that the criminal trial was paused because the petitioner had fled the country.

What is surprising is that 21% of the cases are rejected because the petitioner did not complete domestic remedies due to procedural errors in the domestic system. This can be a failure to use remedies in a timely fashion, but has the serious consequence of excluding the petitioner from exhausting that remedy, now and in the future. Effectively, a failure of procedural requirements in the domestic system can bar a case from ever reaching the regional level, because one can never fulfil domestic remedies. Where the state shows remedies still to be exhausted, the petitioner can sometimes go back and use such remedies, and file a petition again at a later point in time. But, when one is barred from using such domestic remedies due to procedural requirements, a regional petition is barred altogether.

As the figure shows, a large number of petitioners fail the exhaustion requirement on lack of information, and a large number due to problems navigating their own domestic system. It can be questioned whether the Commission gives the sufficient information on the importance when they send petitioners request for more information. It can also be questioned whether a consideration of the complexity of navigation of the domestic system should be considered as an exception, considering the large number of petitioners who fail to navigate it correctly.

5.2.3 The type of cases rejected due to non-exhaustion

So what type of cases are linked with failure to exhaust domestic remedies? The figure below shows the general type of claim alleged violated in the 29 inadmissible cases. It is important to note, that each case has only been put in one category dependent on the main claim of the case.

Figure 6: Type of claim, Commission 2009-2013

<i>Type of claim</i>	<i>Inadmissible due to exhaustion</i>	<i>%</i>
<i>Job, unlawful termination of job</i>	9	31 %
<i>Payment, salary, debt and social benefits</i>	7	24 %
<i>Detention and criminal law</i>	4	14 %
<i>Non-compliance with a judgment</i>	3	10 %
<i>Discrimination</i>	2	7 %
<i>Procedural guarantees</i>	2	7 %
<i>Loss of investment or savings</i>	2	7 %
Total	6	100 %

The clear majority of the cases are work related, and a high number have to do with alleged unlawful terminations. Another large group has to do with salary and other money related issues, including problems with social benefits and debts from the state to the petitioner. Although these can be serious cases, one can fortunately say that they are in a different category than for example enforced disappearances, for which there are no cases denied in the last 5 years.

Only four cases have to do with direct threats to life and freedom, as they deal with detention and criminal law, one of these being the case of the fugitive from law claiming delay in his criminal proceedings mentioned above. Other potentially serious cases are discrimination and failure of procedural guarantees, for which there are two cases each.

In general however one can say that fortunately most of the cases deal with alleged violations of a less serious type, although clearly serious to the petitioners, and only a very few have to do with the more grave breaches, such as torture and ill-treatment. This could suggest that the Commission is more lenient on graver breaches of the Convention, although without a greater case study this cannot be said for sure. It could simply be that petitioners with graver allegations generally are better at bringing their cases forward.

5.3 Summary

In the period between 2004 and 2013, the Commission received 15.437 petitions and evaluated 13.063 for processing. Of these 13.063, only 667 (5%) were considered for admissibility, meaning that 95% of petitions were rejected before the admissibility considerations. At the admissibility stage, an average of 10% were rejected for non-exhaustion, while another 11% for other reasons.²³⁸ This means that of all the petitions evaluated, only about 0,5% were rejected due to non-exhaustion.²³⁹

In the last 5 years only 29 cases have been rejected on this ground, compared to the 288²⁴⁰ cases that have been accepted. Reasons for non-exhaustion varies, with states showing

²³⁸ In the period 2009-2013

²³⁹ In comparison 4,1% of evaluated petitions were accepted after admissibility considerations.

²⁴⁰ Cases accepted at admissibility stage between 2009 and 2013, se figure 3.

remaining remedies and procedural difficulties in the home state at the top of the list. Further, the cases rejected are fortunately rarely allegations of the graves human rights violations, but rather work related issues, which seems surprising coming from a region historically plagued with grave human rights violations, such as enforced disappearances and torture.

6 Conclusion

This thesis reviews the principle of exhaustion of domestic remedies in the regional protection of human rights in the Americas. It summarizes the components of the principle, through literature and case law, with the purpose to see how the rule functions in practice, and if it completes the intent of the Convention of effective protection of human rights,²⁴¹ or if it acts as an unjust barrier for petitioners in need.

There are many components to the principle, which makes it complex and complicated to understand. One must know to fulfil domestic remedies, to use it correctly in the domestic system, within time limits and other procedural requirements and one must try the correct remedies for the violation. Further, one must have a final decision and have proclaimed in substance the same claim before both the domestic and regional system. Finally, one must have exhausted the remedies at the right time, before the petition is considered by the Commission, but not too long before either.²⁴²

If one wishes to try for an exception to the rule, one must show ineffectiveness or unavailability of remedies, or in the case of delay, prove that it is attributable to the state, and unjust. It is important to have proof and explanations for all one has done, and not done, while the state tries to prove the contrary. Often detailed information is required from the petitioner, to either fulfil the rule or be eligible for an exception. It is no wonder this principle seems to have a potential for procedural massacre of petitions.²⁴³ At least, so it may seem from the onset. However, case law shows a different picture.

²⁴¹ IACtHR, *Velasquez Rodriguez*, preliminary objections, para 30.

²⁴² Art 46(1)(b)

²⁴³ Trindade, *The Application*, p. 52.

The Inter-American system seems to have acknowledged the difficulties petitioners face, and have adjusted their practice accordingly. The Commission and Court have shown a flexible application of the principle, and instead of holding firm to general principles, have adopted a case-by-case consideration, considering the circumstances of the particular case and petitioner. In addition, they seem to show a lenient use of the exceptions, with for example the advisory opinion on the subject widening its use considerably with the inclusion of indigence and fear in the legal community as accepted excuses. This flexibility might be why so few cases fail the test of exhaustion, and exceptions to the rule seems to be in frequent use.

The case-study of the inadmissible petitions in the last 5 years, show that only around 10% of petitions failed the test of exhaustion, which considering the potential difficulties faced by petitioners, seems like a low number. However, when considering that these are the ones who have been fortunate enough to make it all the way to the admissibility considerations, the number seems more significant. Many fail due to lack of sufficient information from the petitioner, which again stresses the importance of information about this principle to those trying to access the system. Another big group fail due to the state proving effective and available remedies yet to be exhausted, which is not surprising due to the states privileged position on information about its system for justice, and information is not always equally accessible to the petitioners. From the numbers it seems evident that information on the importance of exhaustion of domestic remedies, how to exhaust and ones burden of proof might go some way to avoid petitioners failing the requirement. Information to petitioners should stress that information, such as attempts to access or reasons for non-exhaustion, can be important for one's admissibility, although such information might not seem important to the petitioner.

More worrying might be the number of petitioners who fail the exhaustion principle due to problems with procedural requirements in their domestic systems. The Commission and Court have required that the procedural requirements must be reasonable to be accepted, but one might question whether this consideration works, since it is given little space in the cases deemed inadmissible in the last five years. It might be that the Commission is wanting information on why the requirements are not reasonable, information the petitioners might not know they need to give.

Fortunately, the majority of the cases rejected are not of the gravest kind, and one might question whether the Commission and Court are more lenient with petitioners alleging such violations, like enforced disappearances or right to life. More likely is it however that they fulfil due to the fact that most of these cases fall under criminal law, an area generally covered by the states obligation to investigate and prosecute, and where a civil lawsuit would not be adequate nor necessary to fulfil domestic remedies. Cases more frequently rejected, like the right to job stability, are civil cases, where the burden to exhaust domestic remedies fall on the petitioner.

Overall, the Commission and Court seem to apply the principle in such a manner as to not let it become an unjust barrier for petitioners, but rather a part of the system, a hurdle to overcome but a possible one. The ones that are rejected due to non-exhaustion, are so by the Commission, as the Court has not rejected a single case due to failure of exhaustion in the last 10 years. Flexibility and a willingness to expand upon the exceptions by both the Commission and Court seems to contribute greatly, and is probably the reason why not more petitions fail exhaustion of domestic remedies.

Even though some petitioners do fail this requirement, it seems like a small drop in the case-load ocean, compared to all the cases rejected before admissibility considerations. This might be where one should focus the attention; why so many petitions fail at the early stages of processing. Why are 95% of cases processed rejected early on? Moreover, what can be done to help these petitioners get their case heard?

Table of reference

Literature:

- Buergenthal, T., Shelton, D., Stewart, D.P, "International Human Rights in a nutshell", 4th edition, West Publishing, 2009.
- Donoso, Gina, "Inter-American Court of Human Rights' reparation judgments; Strengths and challenges for a comprehensive approach", Revista IIDH, vol 49, 2009. Available at: <http://www.corteidh.or.cr/tablas/r24577.pdf>
- Dugard, J.R, Special Rapporteur, Doc A7CN.4/514, Second report on Diplomatic Protection, February 28, 2001.
- European Court of Human Rights, Key case-law issues; Exhaustion of Domestic Remedies, April 28, 2006.
- González, Felipe, "The Experience of the Inter-American Human Rights System", 40 VUWLR, p. 103-126, 2009. Available at: http://www.victoria.ac.nz/law/nzacl/PDFS/Vol_14_2008/Gonzalez.pdf
- Higgins, Rosalyn, "Problems and Process: International Law and How We Use It", Clarendon Press, Oxford, 1994
- Hoyos, Gloria Orrego, "The Amparo Context in Latin American Jurisdiction: an approach to an empowering action ", April 2013, available at: <http://www.nyulawglobal.org/globalex/Amparo.htm>
- Human Rights Clinic, *Maximizing Justice, Minimizing Delay: Streamlining Procedures of the Inter-American Commission on Human Rights*, The University of Texas School of Law, December 2011. Available at: http://www.utexas.edu/law/clinics/humanrights/work/Maximizing_Justice_Minimizing_Delay_at_the_IACHR.pdf
- The International Justice Project, "The Inter-American Commission on Human Rights: How Can it be Utilized in a Capital Case", available at: <http://www.internationaljusticeproject.org/pdfs/oas.pdf> (accessed 15.11/14)
- Mayeux, Bridget and Mirabal, Justin, "Collective and Moral Reparations in the Inter-American Court of Human Rights", under the supervision of Prof. Ariel Dulitzky, Human Rights Clinic, University of Texas School of Law, November 2009. Available at: http://www.utexas.edu/law/clinics/humanrights/work/HRC_F09_CollectiveReparations.pdf
- Parlett, Kate, "The Individual and Structural Change in the International Legal System", Cambridge Journal of International and Comparative Law (1)3: 60–80, 2012. Available at: <http://joomla.cjicl.org.uk/journal/article/60>

- Paulsson, Jan, "Denial of Justice in International Law", Cambridge University Press, 2010.
- Pasqualucci, Jo M, "The Practice and Procedure of the Inter-American Court of Human Rights, second edition, Cambridge University Press, 2014.
- Reinsberg, L.J, "Advocacy before the Inter-American System: A Manual for Attorneys and Advocates", second edition, 2014.
- Scherr, Kathrin Maria, D' Ascoli, Silvia, "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection," EUI Working Papers, LAW 2007/02, European University Institute, 2007.
- Shelton, Dinah, "The Rules and the Reality of petition Procedures in the Inter-American Human Rights System", "The Future of the Inter-American Human Rights System", Working Paper #2, The Centre for Civil and Human Rights, University of Notre Dame, May 2014
- Singh, Ajit, "American Convention on Human Rights Articles 46 (1)(a) and 46 (2)(c): Achilles Heel or Trojan Horse ?," *Inter-American and European Human Rights Journal*, Vol. 5, No. 1-2, 2013, available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753329
- Smith, Rhona K.M, "Textbook on International Human Rights", Oxford University press, fifth edition, 2012.
- Sullivan, Donna J, "Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW," *OP-CEDAW Technical Papers No. 1*, 2008.
- Trindade, A A C, "Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law," *RBDI*, No. 2, pp. 499–527, 1976.
- Trindade, A.A.C, "The Application of the Rule of Exhaustion of Local Remedies in International Law - Its rationale in the international protection of individual rights", Cambridge University Press, 1983.
- Trindade, A.A.C., "The Access of Individuals to International Justice ", Oxford University Press, 2012.
- Vermeer-Künzli, Anna Maria Helena, "The Protection of Individuals by means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument", PrintPartners Ipskamp, 2007. Available at:
<https://openaccess.leidenuniv.nl/bitstream/handle/1887/12538/proefschrift%20overmeer%20binnenwerk.pdf?sequence=2>

Treaties/Conventions:

OAS, *American Convention on Human Rights, Pact of San Jose Costa Rica*, 1969.

OAS, *American Declaration of the Rights and Duties of Man*, 1948.

OAS, *Statute of the Inter-American Court of Human Rights*, Resolution No. 448, October 1979.

OAS, *Statute of the Inter-American Commission on Human Rights*, Resolution No. 447, October 1979.

OAS, *Charter of the Organization of American States*, 1967.

IACmHR, *Regulations of the Inter-American Commission on Human Rights*, 1992.

IACtHR, *Rules of Procedure of the Inter-American Court of Human Rights*, approved November 2000, partially amended January 2009.

Council of Europe, *European Convention on Human Rights*, 1950.

United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984.

United Nations General Assembly, *First Optional Protocol to the International Covenant on Civil and Political Rights*, 1966.

United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965.

Organization of African Unity, *African Charter on Human and Peoples' Rights, the Banjul Charter*, 1981.

Central American Court of Justice, *Convention for the Establishment of a Central American Court of Justice*, December 20, 1907.

United Nations General Assembly, *Vienna Convention on the law of treaties*, 1969.

Inter-American Court of Human Rights:

IACtHR, 19 Merchants v. Colombia, merits, reparations and costs, July 5, 2004

IACtHR, Advisory Opinion OC-11 / 90 Exceptions to the Exhaustion of Domestic Remedies (Art . 46 (1), 46 (2)(a) and 46 (2)(b) American Convention on Human Rights), August 10, 1990.

IACtHR, Acevedo-Jaramillo *et al.* v. Peru, preliminary objections, merits, reparations and costs, February 7, 2006.

IACtHR, Baena-Ricardo *et al.* (270 workers) v. Panama, Competence, November 28, 2003.

IACtHR, Cantoral Benavides v. Peru, preliminary objections, September 3, 1998.

IACtHR, Castillo-Petruzzi *et al.* v. Peru, preliminary objections, September 4, 1998.

IACtHR, Castañeda Gutman v. Mexico, Preliminary Objections, Merits, Reparations and Costs, August 6, 2008.

IACtHR, Chocrón Chocron v . Venezuela, preliminary objectons, merits, reparations and costs, July 1, 2011.

IACtHR, Constitutional Court v. Peru, merits, reparations and costs, January 31, 2001.

IACtHR, The Dismissed Congressional Employees (Aguado Alfaro *et al.*) v. Peru, preliminary objections, merits, reparations and costs, November 24, 2006.

IACtHR, Durand and Ugarte v . Peru, preliminary objections, May 28, 1999.

IACtHR, Fairén-Garbi and Solís-Corrales v . Honduras, merits, March 15, 1989.

IACtHR, Fairén-Garbi and Solís-Corrales v . Honduras, preliminary objections, March 15, 1987.

IACtHR, “Five Pensioners” v. Peru, Merits, reparations and costs, February 28, 2003

IACtHR, Genie-Lacayo v. Nicaragua, merits, reparations and costs, Januray 29, 1997.

IACtHR, Godínez-Cruz v . Honduras, preliminary objections, June 26, 1987.

IACtHR, Gomes Lund *et al.* (“*Guerrilha do Araguaia*”) v. Brazil, preliminary objections, merits, reparations and costs, November 24, 2010.

IACtHR, Herrera-Ulloa v. Costa Rica, preliminary objections, merits, reparations and costs, July 2, 2004.

IACtHR, Las Palmeras v . Colombia, merits, December 6, 2001.

IACtHR, *Reverón Trujillo v. Venezuela*, preliminary objections, merits, reparations and costs, June 30, 2009.

IACtHR, *Suárez-Rosero v. Ecuador*, merits, November 12, 1997.

IACtHR, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, preliminary objections, February 1, 2000.

IACtHR, *Usón Ramírez v. Venezuela*, preliminary objections, merits, reparations and costs, November 20, 2009.

IACtHR, *Velásquez-Rodríguez v. Honduras*, merits, July 29, 1988.

IACtHR, *Velásquez-Rodríguez v. Honduras*, preliminary objections, June 26, 1987.

IACtHR, *Vélez Loor v. Panama*, preliminary objections, merits, reparations and costs, November 23, 2010.

IACtHR, *Viviana Gallardo et al. v. Costa Rica*, November 13, 1981.

IACtHR, “White Van” (*Paniagua-Morales et al.*) v. Guatemala, merits, March 8, 1998.

IACtHR, Annual report 2013, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2013.pdf

IACtHR, Annual report 2012, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf

IACtHR, Annual report 2011, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2011.pdf

IACtHR, Annual report 2010, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2010.pdf

IACtHR, Annual report 2009, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2009.pdf

IACtHR, Annual report 2008, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2008.pdf

IACtHR, Annual report 2007, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2007.pdf

IACtHR, Annual report 2006, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2006.pdf

IACtHR, Annual report 2005, available at:
http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2005.pdf

IACtHR, Annual report 2004, available at:

http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2004.pdf

Inter-American Commission on Human Rights:

IACmHR, Abu-Ali Abdur Rahman v. USA, Report 39/03, petition 136/02, 2003.

IACmHR, Alfredo Aresse et al. v. Argentina, Report No. 107/13, petition 89-00, 2013.

IACmHR, Arges Sequeira Mangas vs Nicaragua, Report No. 52/97, petition 11.218, 1998.

IACmHR, Alicia Alvarez Trinidad v. Peru, Report No. 5/10, petition 12.118, 2010.

IACmHR, Cañas Cano et al. v. Colombia, Report No. 75/03, petition 42/02, 2003.

IACmHR, César Verduga Vélez v. Ecuador, Report No. 18/02, Petition 12.274, 2002.

IACmHR, Colmenares Castillo v. Mexico, Report No. 36/05, petition 12.170, 2005.

IACmHR, Ciro Abdías Boderó Arellano v. Peru, Report No. 44/09, petition 12.161, 2009.

IACmHR, Domínguez Domenichetti v. Argentina, Report No. 51/03, petition 11.819, 2003.

IACmHR, Escher v. Brazil, Report no. 18/06, petition 12.353, 2006.

IACmHR, Fransisco José Magi v. Argentina, Report No. 106/13, petition 951-01, 2013.

IACmHR, Gray Graham v. United States, Report No. 51/00, petition 11.193, 2000.

IACmHR, Isamu Carlos Shibayama et al v. United States, Report No. 26/06, petition 434-03, 2006.

IACmHR, Jesus Tranquilino Vélez Lóor v. Panama, Report No. 95/06, petition 92-04, 2006.

IACmHR, José Maria Guimarães v. Brazil, Report No. 60/13, petition 1242-07, 2013.

IACmHR, José Xavier Gando Chica v. Ecuador, Report No. 22/12, petition 398-02, 2012.

IACmHR, José Adrián Mejía Mendoza et al. v. El Salvador, Report No. 119/12, petition 185-03, 2012.

IACmHR, José Maria Guimarães v. Brazil, Report No. 60/13, petition 1242-07, 2013.

IACmHR, José Sánchez Guner Espinales et al. v. Costa Rica, Report No. 37/01, petition 11.529, 2001.

IACmHR, Jorge Portilla Ponce v. Ecuador, Report No. 106/09, petition 12.323, 2009.

IACmHR, Jorge Teobaldo Pinzas Salazar vs Peru, Report No. 107/06, petition 12.318, 2006.

IACmHR, Juan Ramón Chamorro Quiroz v. Costa Rica, Report No. 89/00, petition 11.495, 2000.

IACmHR, Juan Echeverría Manzo and Mauricio Espinoza González v Chile, Report no. 108/13, petition 4636-02, 2013.

IACmHR, La Granja, Ituango v. Colombia, Report No. 57/00, petition 12.050, 2000.

IACmHR, Lara Preciado v. Mexico, Report No. 45/96, petition 11.492, 1996.

IACmHR, Luis Edgar Vera Flores vs Peru, Report No. 86/05, petition 4416-02, 2005.

IACmHR, María Mercedes Zapata Parra v. Peru, Report No. 45/09, petition 12.079, 2009.

IACmHR, Marcela Andrea Valdez Diaz vs Chile, Report no 57/03, petition 12.337, 2003.

IACmHR, v Argentina, Report No. 157/10, petition 696-03, 2010.

IACmHR, Márcia Cristina Rigo Leopoldi v. Brazil, Report No. 9/12, petition 11.996, 2012.

IACmHR, Mario Eduardo Firmenich v Argentina, Report No. 17/89, petition 10.037, 1989.

IACmHR, Mario Alfredo Lares-Reyes et al. v. United States, Report No. 19/02, petition 12.379, 2002

IACmHR, Miguel Ricardo de Arriba Escola v Honduras, Report No. 102/06, Petition 97-04, 2006.

IACmHR, Naranjo Cardenas vs Venezuela, Report no. 70/04, petition 667/01, 2004.

IACmHR, Ojo de Agua v. Mexico, Report No. 73/99, petition 11.701, 1999.

IACmHR, Ramón Martínez Villareal v. United States, Report No. 108/00, petition 11.753, 2000.

IACmHR, Reyes v. Chile, Report No. 60/03, petition 12.108, 2003.

IACmHR, Rolando Ernesto Gómez García and Bernarda Liliana Gómez García v. Honduras, Report No. 121/12, petition 764-03, 2012.

IACmHR, Santos Soto Ramírez et al., Mexico, Report No. 68/01, petition 12,117, 2001.

IACmHR, Victor Nicholas Sanchez et al v. United States, Report No. 104/05, petition 65/99, 2005.

IACmHR, Víctor Eladio Lara Bolívar v. Peru, Report No. 18/11, petition 871-03, 2011.

IACmHR, Workers of the Empresa Nacional de Telecomunicaciones (ENTEL) v. Argentina, Report No. 116/12, Petition 374-97, 2012.

IACmHR, Zulema Tarazona Arriate et al., Peru, Report No. 83/01, petition 11,581, 2001.

IACmHR, Annual report 2013, available at:

<http://www.oas.org/en/iachr/docs/annual/2013/TOC.asp>

IACmHR, Annual report 2012, available at:

<http://www.oas.org/en/iachr/docs/annual/2012/TOC.asp>

IACmHR, Annual report 2011, available at:

<http://www.oas.org/en/iachr/docs/annual/2011/TOC.asp>

IACmHR, Annual report 2010, available at:

<http://www.cidh.org/annualrep/2010eng/TOC.htm>

IACmHR, Annual report 2009, available at:

<http://www.cidh.org/annualrep/2009eng/TOC.htm>

IACmHR, Annual report 2008, available at:

<http://www.cidh.org/annualrep/2008eng/TOC.htm>

IACmHR, Annual report 2007, available at:

<http://www.cidh.org/annualrep/2007eng/TOC.htm>

IACmHR, Annual report 2006, available at:

http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2006.pdf

IACmHR, Annual report 2005, available at: <http://www.cidh.org/annualrep/2005eng/toc.htm>

IACmHR, Annual report 2004, available at: <http://www.cidh.org/annualrep/2004eng/toc.htm>

European Court of Human Rights:

ECtHR, Case of Akdivar and Others v. Turkey, Application no. 21893/93, September 16, 1996.

ECtHR, De Wilde, Ooms and Verpsy Cases (“Vagrancy”) v. Belgium, June 18, 1971.

ECtHR, Wemhoff v. Germany, Application no 2122/64, June 27, 1968.

ECtHR, Ireland v. the United Kingdom, Application no. 5310/71, January 18, 1978.

ECtHR, Foti and others v. Italy, Application no. 7604/76; 7719/76; 7781/77; 7913/77, December 10, 1982.

ECtHR, Ringeisen v. Austria, merits, Application no. 2614/65, July 16, 1971.

ECtHR, Zimmerman and Steiner v. Switzerland, Application no. 8737/79, July 13, 1983.

ECmHR, M.A.R. v. United Kingdom, Application 28038/95, 16 January 1997, available at: <http://www.refworld.org/docid/3ae6b696c.html>

ECmHR, Fadele Emanuel, Fadele Kehinde, Fadele Taiwo, Fadele Victor v. United Kingdom, Application No. 13078/87, 12 February 1990, available at: <http://www.refworld.org/docid/3ae6b678c.html>

Council of Europe, Protocoll No. 11, 1994.

International Court of Justice:

ICJ, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), preliminary objections, May 24, 2007.

ICJ, Elettronica Sicula S.p.A (ELSI) (United States of America vs Italy), July 20, 1989.

ICJ, Elettronica Sicula S.p.A (ELSI) (United States of America vs Italy), dissenting opinion of Judge Schwebel , July 20, 1989.

ICJ, Case of Interhandel, (United States of America v. Switzerland) Preliminary objections, March 21, 1959.

ICJ, Case of Interhandel (United States of America v. Switzerland) Preliminary objections, separate opinion of Judge Cordova, 1959.

ICJ, Case of Interhandel (United States of America v. Switzerland) Preliminary objections, separate opinion of Judge Armand-Ugon, 1959.

ICJ, Certain Norwegian Loans (France v. Norway), Separate opinion of Judge Lauterpacht, July 6, 1957.

ICJ, Case Concerning The Barcelona Traction, Light and Power Company Limited, Preliminary Objections, (Belgium vs. Spain), separate opinion of Judge Morelli's, 1970.

ICJ, Case Concerning The Barcelona Traction, Light and Power Company Limited, Preliminary Objections, (Belgium vs. Spain), separate opinion of Judge Tanaka, 1970.

Permanent Court of International Justice:

PCIJ, Panevezys-Saldutikis Railway Case (Estonia v. Lithuania), Series A/B, No. 76, Judge Hudson's dissenting opinion, February 28, 1939.

PCIJ, Phosphates in Morocco Case (France vs Italy), Series A/B, No. 74, June 14, 1938.

Human Rights Committee:

HRC, Brough v. Australia, Communication No. 1184/2003, March 2006.

HRC, Calle Sevigny v. France, Communication No. 1283/2004, 2005.

HRC, Lassaad Aouf v. Belgium, Communication No. 1010/2001, 2006.

HRC, Lim Soo Ja v. Australia, Communication No. 1175/2003, 2006.

HRC, P.S. v. Denmark, Communication No. 397/1990, 1992.

HRC, R.T. v. France, Communication No. 262/1987, 1989.

Other:

CtAT, A.H. v. Sweden, Communication No. 250/2004, 2006.

Committee on the Elimination of Racial Discrimination, Gelle v. Denmark, Communication No34/2004, 2006.

Annex

Annex 1: Inadmissible cases Commission 2009-2013

	Year	Report No	Petition No	Country	Inadmissible due to art.
1	2013	107/13	89-00	Argentina	art 46 (1) (a)
2	2013	60/13	1242-07	Brazil	art 46 (1) (a)
3	2013	11/13	157-06	Chile	art 46(1) (a)
4	2013	12/13	692-04	Honduras	art 46(1) (a)
5	2013	13/13	670-01	Venezuela	art 46(1) (a)
6	2013	108/13	4636-02	Chile	art 46 (1) (b)
7	2013	106/13	951-01	Argentina	art 46(1) (a)
8	2012	30/12	736-03	Peru	art 47 (b)
9	2012	31/12	12.222	Peru	art 47 (b)
10	2012	32/12	170-00	Peru	art 46(1) (a)
11	2012	33/12	12.202	Peru	art 46(1) (a)
12	2012	24/12	859-03	Mexico	art 47 (b)
13	2012	60/12	513-04	Mexico	art 46 (1) (b)
14	2012	119/12	185-03	El Salvador	art 46(1) (a)
15	2012	22/12	398-02	Ecuador	art 46(1) (a)
16	2012	9/12	11.996	Brazil	art 47 (b)
17	2012	25/12	700-04	Mexico	art 46(1) (a)
18	2012	23/12	1180-04	Guatemala	art 47 (b)
19	2012	120/12	1119-06	Guatemala	art 47 (b)
20	2012	121/12	764-03	Honduras	art 47 (b)
21	2012	118/12	12.297	Peru	art 47 (b)
22	2012	116/12	374-97	Argentina	art 46(1) (a)
23	2012	117/12	86-07	Brazil	art 47 (b)
24	2012	21/12	P-885-03	Brazil	art 47 (b)
25	2011	165/11	492-02	Mexico	art 47 (b)
26	2011	174/11	342-02	Mexico	art 46 (1) (b)
27	2011	166/11	970-06	Peru	art 46(1) (a)
28	2011	118/11	182-03	Peru	art 47 (b)
29	2011	120/11	55-05	Peru	art 46 (1) (a) and 47 (b)
30	2011	16/11	12.074	Peru	art 46(1) (a)
31	2011	119/11	648-98	Peru	art 46(1) (a)
32	2011	17/11	277-01	Peru	art 46 (1) (b)
33	2011	18/11	871-03	Peru	art 46 (1) (b)
34	2011	15/11	222-03	Peru	art 47 (b)
35	2010	157/10	696-03	Argentina	art 46 (1) (a) and 47 (b)
36	2010	44/10	473-03	Mexico	art 47 (b)
37	2010	159/10	1250-06	Uruguay	art 46 (1) (b)
38	2010	89/10	12.499	Paraguay	art 46(1) (a)
39	2010	158/10	167-99	Peru	art 46(1) (a)
40	2010	80/10	12.280	Peru	art 46(1) (a)

41	2010	79/10	12.119	Peru	art 46 (1) (b) and 47 (b)
42	2010	13/10	480-00	Peru	art 47 (b)
43	2010	14/10	2576-02	Peru	art 46 (1) (b)
44	2010	5/10	12.118	Peru	art 46(1) (a)
45	2009	39/09	717-00	Argentina	art 46(1) (a)
46	2009	134/09	1133-04 and 115-05	Brazil	art 47 (b)
47	2009	133/09	989-04	Brazil	art 47 (b)
48	2009	132/09	644-05	Brazil	art 47 (b)
49	2009	119/09	398-04	Brazil	art 47 (b)
50	2009	118/09	397-04	Brazil	art 46 (1) (b)
51	2009	63/09	544-03	Brazil	art 47 (b)
52	2009	40/09	442-05	Chile	art 47 (b)
53	2009	106/09	12.323	Ecuador	art 46(1) (a)
54	2009	41/09	459-03	Guatemala	art 46(1) (a)
55	2009	135/09	291-05	Peru	art 46(1) (a) and 47 (d)
56	2009	45/09	12.079	Peru	art 46(1) (a)
57	2009	44/09	12.161	Peru	art 46(1) (a)
58	2009	43/09	1166-04	Peru	art 46(1) (a)
59	2009	42/09	443-03	Peru	art 46(1) (a)

Annex 2: Cases deemed inadmissible according to country, 2009-2013

Year	Inadmissible petitions	Inadmissible due to non-exhaustion	% inadmissible due to non-exhaustion
Argentina	5	5	100 %
Brazil	10	1	10 %
Chile	3	1	33 %
El Salvador	1	1	100 %
Ecuador	2	2	100 %
Honduras	2	1	50 %
Guatemala	3	1	33 %
Mexico	6	1	17 %
Peru	24	14	58 %
Paraguay	1	1	100 %
Uruguay	1	0	0 %
Venezuela	1	1	100 %
Total	59	29	49 %