The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures

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1 Introductory Remarks

The rule of prior exhaustion of domestic remedies (also known as the "domestic remedies" rule) essentially stipulates that claims of violations of an individual's rights cannot be brought before an international adjudicative body or procedure unless the same claim has first been brought before the competent tribunals of the alleged wrongdoing State, and these judicial remedies have been pursued, without success, as far as permitted by local law and procedures.[1]

The rule is well established in international law and can be considered part of the body of customary international law.[2] Originally, it was applied solely in the context of the espousal of claims and diplomatic protection, acting as a limitation

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[1] In the ELSI case, the rule was succinctly defined by the International Court of Justice. "For an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success" (ICJ: Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment (20 July 1989), para 59.

[2] Ibidem, para 50. See also ICJ: Interhandel (Switzerland v. United States), Judgment (21 March 1959), p. 27. The International Law Commission has said as much while codifying the customary international law on diplomatic protection. International Law Commission, Draft Articles on Diplomatic Protection, Articles 14 and 15.

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to States' right to diplomatically protect their nationals. However, starting with the second half of the twentieth century, the rule has been applied in a related but substantially different context of disputes between individuals and States (usually the petitioner's State of nationality) within the framework of international human rights procedures.

Nowadays, the rule of exhaustion of domestic remedies is an admissibility criterion of most, and surely every major, human rights adjudicative procedure. Amongst the few exceptions are the Complaints Procedure (Article 26) of the International Labour Organisation,[3] and the Collective Complaints Procedure under the European Social Charter.[4] The rule of prior exhaustion of domestic remedies is also likely to be the most important admissibility criterion.[5] Indeed, as every international human rights practitioner knows, whenever a new case looms on the horizon, the first questions to be asked are: Has the case been brought before a national court? What was the result? Was it appealed? Is there any remedy that could be pursued which was not? In sum, have domestic remedies been exhausted? At the same time, a petitioner's failure to exhaust domestic remedies is usually a State's immediate position and first line of defense. In an overwhelming majority of cases before any human rights body or procedure, States' agents argue that a petition is inadmissible because some domestic remedies have not been exhausted.

A comprehensive overview of the scope of the rule of the exhaustion of domestic remedies, its many exceptions, and the interpretation and implementation of this rule by human rights bodies, at the regional and global level, is beyond the scope of this short essay. Although there is already a fairly substantial bibliography on the issue, we are still missing a completely up-to-date and comprehensive treatise on the matter.[6] This short essay will rather offer a few quick considerations on some selected questions, drawing mostly from the law and practice of the Inter-American Court of Human Rights and the Inter-American Commission, the European Court of Human Rights, and the UN Human Rights Committee, which, collectively, represent the overwhelming majority of international jurisprudence on the matter.

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[3] See Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organisation to examine observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany, para 255.

[4] See ECSR: Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France, 26/2004, Decision (7 December 2004), para 12.

[5] In the case of some courts and procedures, such as, for instance, the European Court of Human Rights, the petition must be filed within a certain period (usually 6 months) from the date on which the latest decision has been handed down by the national court. While probably equally paramount, the time-limit rule is in the end subordinate to the rule of the exhaustion of domestic remedies because the time limit only lapses after the remedies have been exhausted.

[6] E.g. Crawford and Grant 2011; Amerasinghe 2004; Cançado Trindade 1983, 2003; Burgorgue-Larsen 2011; Santulli 2005; Schermers 2002; D'Ascoli and Scherr 2006; Gandhi 2001; Pisillo Mazzeschi 2000, 2004; Udombana 2003.

2 The Rationale and Importance of the Rule of Prior Exhaustion of Domestic Remedies

In essence, the domestic remedies rule makes international judicial remedies complementary and subsequent to national ones. In legal theory, the rule could be explained as a corollary of the principle of sovereignty, the ordering principle of the international community. In practice, by sequentially ordering national and international remedies, and only allowing access to international remedies after the exhaustion of domestic remedies, the rule establishes the actual primacy of national remedies.

Furthermore, international judicial remedies are not only subordinate to national ones, but are also structurally separated from them. The reason for their separation has been succinctly stated by the Inter-American Court of Human Rights when it stated that international human rights bodies are not a "fourth level of jurisdiction", seamlessly linked to the usual three levels of jurisdiction in which many national legal systems are structured.[7] Indeed, international bodies cannot review judgments delivered by national courts acting within their own sphere of competence and applying their own appropriate domestic judicial guarantees. They can do so only to the extent that a State has failed in its responsibility to comply with some of its international obligations. Yet, while separate, the two legal realms—the national and the international—are connected by the domestic remedies rule.

Rarely can international judicial bodies be resorted to directly and immediately.[8] There are some steps that almost always need to be taken before that can happen. For instance, and to pick an example outside the human rights sphere, in the case of State-to-State disputes on any matters of international law admissibility is often conditional upon the exhaustion of transactional and negotiated forms of settlement.[9] In sum, international remedies are only contingent, that is to say they are only available after the exhaustion of domestic remedies and their activation is never a certainty.

The subsidiarity of international courts to domestic ones is not only a structural matter, made inevitable by the nature of the international legal system, but also a matter of logical and practical convenience. Logically, it ensures that claims are always first addressed at the lowest possible level of complexity. Without the

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[7] See, e.g. IACtHR: Chaparro Álvarez y Lapo Íñiguez v. Ecuador, Judgment (21 November 2007), paras 19–23. For the ECtHR, see Kemmache v. France (no. 3), 17621/91, Judgment (24 November 1994), para 44.

[8] Besides the above-mentioned exception of the ILO Article 26 procedure, it should be mentioned that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are not complementary to national courts but rather enjoy primacy over them and can therefore formally require them to relinquish a particular case at any stage of the proceedings. See Statute of the ICTY, Article 9.2; Statute of the ICTR, Article 8.2.

[9] See, e.g., ICJ: Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment (11 June 1998), paras 56–59.

domestic remedies rule an essentially domestic matter would become prematurely internationalized. Practically, domestic courts are generally better placed to determine the facts of, and the law applicable to, any given case, and, where necessary, to enforce an appropriate remedy. Clearly, the local judge is the natural judge. Moreover, having a case pass through the various filters of domestic remedies prior to being adjudicated internationally ensures that the international jurisdiction has all the necessary information on the matter under consideration.[10]

Lastly, the rule has been designed by and for the "benefit of the State", as the Inter-American Court of Human Rights explained in the *Viviana Gallardo* case.[11] It affords the State a fair opportunity of quashing or setting right the alleged violations before those allegations are submitted to an international adjudicative body.[12] Once domestic remedies have been exhausted there is nothing more the State can do to remedy the situation without an external injunction. The eventual finding of a breach can, thus, reliably rest on the finality of the State's actions, which makes it possible to clearly identify the final binding obligations of the State.

3 A Low and Porous Obstacle …

Given the centrality of the domestic remedies rule, one would expect it to be a significant barrier to international adjudication, making international litigation a relatively rare occurrence and preventing most cases from reaching the merits stage. However, in practice it is a rather low and porous obstacle, more a sandbar than a dam.

The rule is riddled with many far-reaching exceptions that have gradually formed a rather ponderous—and somewhat still jumbled—body of law. Most of these exceptions are jurisprudential constructs, as opposed to statutory rules, and,

[10] "(…) [I]t is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries" (ECtHR: Burden v. the United Kingdom [GC], 13378/05, Judgment (28 April 2008), para 42; see also ECtHR: Varnava and Others v. Turkey [GC], 16064/90 and others, Judgment (19 September 2009), para 164.

[11] ACtHR: Viviana Gallardo et al. v. Costa Rica, Judgment (13 November 1981), para 26; Velásquez Rodríguez v. Honduras, Judgment (29 July 1988), para 61.

[12] E.g. ECtHR: Kudła v. Poland [GC], 30210/96, Judgment (26 October 2000), para 152; Selmouni v. France [GC], 25803/94, Judgment (28 July 1999), para 74. Of course, the assumption is that there is an effective remedy available with respect to the alleged breach at the national level (ibidem, and see also Akdivar and Others v. Turkey [GC], 21893/93, Judgment (16 September 1996), para 65. See also Council of Europe, Recommendation (2004) 6 of 12 May 2004 of the Committee of Ministers to Member States on the Improvement of Domestic Remedies.

time after time, international adjudicatory bodies have shown a propensity to apply it in favor of the petitioners.

Provisions on the domestic remedies rule in international legal instruments tend to be very concise. For instance, the European Convention on Human Rights succinctly states on the topic: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of inter-national [sic] law (…)".[13] The same concise formula can be found verbatim in all other major international human rights treaties.[14] However, some add to this an important qualifying exception: the rule does not apply when the "application of domestic remedies is unreasonably prolonged".[15]

Of all international human rights instruments the American Convention of Human Rights is the one that goes into the most detail on the exceptions to the rule. Thus, Article 46.2 adds to the aforementioned "unreasonably prolonged"—also referred to as "unwarranted delay"—exception, and includes two more grounds for the exclusion of the rule: when the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have been allegedly violated, and when the party alleging a violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.[16]

The considerable statutory vagueness of the domestic remedies admissibility criterion has, thus, left international human rights bodies with a large area in which to maneuver. This opportunity has given them the chance to elaborate over the years on the exact scope of the rule and, even more so, on its exceptions, resulting in a sizeable amount of jurisprudence.

Thus, by now, it is universally accepted that domestic remedies must be "available", "effective" and "sufficient". If any of the aforementioned criteria are not met the individual may be excused from the duty to exhaust them. There is also considerable jurisprudence elaborating what those three adjectives, which are nowhere to be found in statutory provisions, exactly mean. Yet, at the same time, while international human rights bodies have gradually specified the exact scope of the rule and created a long and expanding list of exceptions, they have also resisted

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[13] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010, Article 35.

[14] E.g. American Convention on Human Rights (San José, 22 November 1969), entered into force on 18 July 1978, Article 46.1.a.

[15] E.g., International Covenant on Civil and Political Rights (New York, 16 December 1966), entered into force on 23 March 1976, Article 41.1.c (for state v. state communications); Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966), entered into force on 23 March 1976, Articles 2 and 5.2.b (individual communication). African Charter on Human and Peoples' Rights (Banjul, 27 June 1981), entered into force on 21 October 1986, Article 50 (proceedings before the Commission) and Article 56.5.

[16] American Convention on Human Rights, Articles 46.2, a and b.

over-regulating the rule, ultimately waiting to apply it in light of the general legal and political context as well as the personal circumstances of the applicant.[17]

At first sight, the case of the Inter-American system seems to suggest that the domestic remedies rule is not a tremendous obstacle to international adjudication. There, States routinely argue before the Inter-American Court of Human Rights that domestic remedies have not been exhausted. However, after more than 25 years of activity and approximately 150 cases decided, the Court has yet to dismiss a single case based on that argument. Invariably, the Court finds that at least one of the exceptions it has jurisprudentially developed over the years applies.

It is important to note that cases where domestic remedies might indeed not have been exhausted are usually dismissed by the Inter-American Commission and are never heard before the Court. And when cases do reach the Court, the admissibility requirements have already been closely scrutinized and ruled upon by the Commission. However, the Court has long insisted, since its very early days, that when it considers a case, it considers it *in toto*, including reconsidering admissibility questions.[18] Still, it has never found a case inadmissible on the grounds that domestic remedies have not been exhausted.

There are no exact figures available as to how often the Inter-American Commission finds cases inadmissible due to the lack of the exhaustion of remedies. However, one can engage in some extrapolation. Data published in the Commission's 2010 annual report on admissibility and inadmissibility reports published over the period 1997–2010 show that, on average, for every 43 petitions found admissible only 12 are found inadmissible (in 2010, the ratio was 73 admissible to 10 inadmissible).[19] Aside from the exhaustion of domestic remedies, the only other significant admissibility requirement is the filing of the petition within six months from the date on which the party alleging a violation of his rights was notified of the final judgment of the national court (the so-called "six-month" rule). Because the six-month rule is a much more straightforward admissibility criterion and it is relatively easy to predict when a case would fail because of that, thus thwarting filing in the first place, one could reasonably

[17] The European Commission of Human Rights and the Court have frequently underlined the need to apply the rule with some degree of flexibility and without excessive formalism, given the context of protecting (is it supposed to be "protecting petitioners" or "proceedings"?). ECmHR: Lehtinen v. Finland, 39076/97, Decision (14 October 1999), Section 1, "Concerning the search and seizure", citing ECtHR: Cardot v. France, 11069/84, Judgment (19 March 1991), para 34; Van Oosterwijck v. Belgium, 7654/76, Judgment (6 November 1980), para 35; and Akdivar and others, supra n. 12, paras 65–68.

[18] E.g. IACtHR: Velasquez Rodriguez v. Honduras, Judgment (26 June 1987), para 84; Fairén-Garbi and Solís-Corrales v. Honduras v. Honduras, Judgment (26 June 1987), paras 34 and 83; Godínez-Cruz v. Honduras, Judgment (26 June 1987), para 86; Juan Humberto Sánchez v. Honduras, Judgment (23 June 2003), paras 64–69; Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion (10 August 1990), para 39.

[19] Annual Report of the Inter-American Commission on Human Rights (2010), Doc. OEA/Ser.L/V/II, Doc. 5, rev. 1 (7 March 2011), hereinafter IACmHR, 2010 Annual Report, p. 37.

conclude that most of those cases found inadmissible were exactly for violations of the domestic remedies rule.[20] Even so, considering that States in the Inter-American system almost always invoke the rule—and some have argued that they abuse the right to invoke it—[21] it seems that States have a success rate of less than 25 % or significantly lower. Not negligible but not a prodigious obstacle either.

That being said, one should not read too much into the number of complaints dismissed on admissibility over the total number of complaints filed (or decided on the merits). Applicants might simply apply a good measure of self-restraint and ethical lawyering and wait to submit a complaint until there is a strong *prima facie* case that domestic remedies have indeed been exhausted.

4 ... But a Wayward Obstacle Nonetheless

Indeed, in practice, the domestic remedies rule is, if not a prodigious obstacle to the international litigation of human rights cases, a wayward obstacle nonetheless. It inhibits the submission of petitions beforehand, rather than thwarting them once they reach the adjudicating body. Most of the exceptions are an international jurisprudential construct, not clearly codified, and because jurisprudence is constantly evolving and shifting, for the petitioner it is often difficult to tell exactly when domestic remedies have been exhausted and whether any exceptions are applicable.

De jure, in international human rights procedure the State has the burden of proving that there are effective and available remedies that could have been pursued by the petitioner but which the petitioner did not pursue. Thus, the Rules of Procedure of the Inter-American Commission, as amended in 2002, provide: "When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this Article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record".[22]

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[20] Other grounds for inadmissibility are an anonymous submission; that the violation did not take place at a time when the Convention (or relevant protocol) was in force with respect to the state in question; the same matter is pending for consideration before another international dispute settlement procedure; and that the alleged violation cannot be attributable or imputable to the State in question.

[21] See, Burgorgue-Larsen 2011, p. 136 ff.

[22] Rules of Procedure of the Inter-American Commission on Human Rights, as approved by the Commission at its 109th special session (4–8 December 2000) and amended at its 116th regular period of sessions (7–25 October 2002); hereinafter Inter-American Rules of Procedure, Article 31.3. Substantially, same procedures can be found in the various international human rights procedures. Thus, for instance, in the case of the Rules of Procedure of the Committee of the Convention on the Elimination of Discrimination against Women, Rule 69.6 provides: "If the State party concerned disputes the contention of the author or authors (…) that all available domestic remedies have been exhausted, the State party shall give details of the remedies available to the alleged victim or victims in the particular circumstances of the case."

Similarly, the European Court of Human Rights has, through its jurisprudence, placed the burden to raise non-exhaustion on the State, by asking States contesting exhaustion to point to a domestic remedy which, in the circumstances of the particular case, should have, but had not, been resorted to.[23] Moreover, the European Court of Human Rights has specified that the State must not only satisfy the Court that the remedy was effective, available both in theory and practice at the relevant time, but also frequently asks the State to provide examples of the alleged remedy having been successfully utilized by persons in similar positions to that of the applicant.[24] Placing the burden of proof on the State makes logical sense. The domestic remedies rule exists for the benefit of the State, and, if the State decides to invoke it, the burden should be on the State.

However, the burden of both exhausting the remedies and proving that they have been exhausted, or that the exceptions to the rule are applicable, is first and foremost de facto on the petitioner. Indeed, every human rights body requires petitioners to explain, in detail, in their initial application what steps have been taken at the national level to exhaust remedies. The European Court of Human Rights even has an online tool to help potential applicants assess whether they have an apparently admissible case.[25] Unless the domestic remedies rule has been complied with, at least prima facie, the petition will likely languish in a bureaucratic limbo or face an early and sudden death. The amount of detail and information that is often requested by the secretariats of human rights bodies while processing a petitioner's application can be daunting.

In the case of the Inter-American system, the Commission itself, or its Secretariat, may either decide not to process the petition at all, or to request additional information and documentation until it is satisfied that at least a prima facie case of the exhaustion of domestic remedies, or the applicability of the exceptions, can be made.[26] Only at that point is the petition processed and transmitted to the State for a reply, which will then have an opportunity to raise, in *limine litis*, an objection to admissibility on the grounds of non-exhaustion. And it is only then that the State will have to satisfy the burden of proof. For instance, in 2010 the Inter-American Commission received 364 petitions against Peru, but a decision to process was taken only in 86 of those petitions (about 23 %).[27] In 2010, a total of 1,676 petitions were evaluated by the Commission but there was a decision to process,

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[23] E.g. ECtHR: De Wilde, Ooms and Versyp v. Belgium, 2832/66-2835/66-2899/66, Judgment (18 June 1971), para 60; Deweer v. Belgium, 6903/75, Judgment (27 February 1980), para 26; Kozacioğlu v. Turkey [GC], 2334/03, Judgment (19 February 2009), para 39; Akdivar, supra n. 12, para 68; Dalia v. France, 26102/95, Judgment (19 February 1998), para 38; McFarlane v. Ireland [GC], 31333/06, Judgment (10 September 2010), para 107.

[24] E.g. ECtHR: Kangasluoma v. Finland, 48339/99, Judgment (20 January 2004), paras 46–48.

[25] ECHR, Applicant Check List, www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Checklist/. Accessed 2 January 2012.

[26] Inter-American Rules of Procedure, Articles 26 and 29.

[27] IACmHR, 2010 Annual Report, supra n. 19, Chapter III.B.1.(d) and (e).

that is to say to proceed, in only 275 of those petitions (about 16 %).[28] While the Commission does not explain why it declines to process, or why it postpones a decision to process, it is likely that many, if not most, of those petitions are unripe because proceedings are still pending at the national level or some remedies at the national level have not been pursued.

In the case of the Human Rights Committee, to date, out of a total of 2,034 communications considered over its history, about 27 % have been declared inadmissible.[29] Until the late 1980s, the domestic remedies rule was the principal ground for declaring communications inadmissible.[30] Nowadays, the insufficient substantiation of claims has "gradually replaced the exhaustion of domestic remedies as the most frequently applied ground for inadmissibility", but it still comes in as a close second.[31] However, many more applications are simply stalled or not processed because they do not pass the prima facie admissibility screening.[32]

The European Court of Human Rights, which is overwhelmed with tens of thousands of cases, has even less patience. It simply rejects most petitions. In 2010, 84 % of all new applications to the European Court of Human Rights were declared inadmissible (a total of 41,184).[33] Of those, 15 % were rejected precisely because domestic remedies had not been exhausted (a total of 5,144 applications).

5 Conclusion

The rule of the exhaustion of domestic remedies serves important purposes. Besides the important theoretical and systemic considerations at its core, without this modest filter international judicial bodies would be flooded by hundreds of thousands of cases, leading to the collapse of the system.

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[28] Ibidem, (c) and (f).

[29] Human Rights Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (6 April 2011), www2.ohchr.org/english/bodies/hrc/docs/SURVEYCCPR101.xls. Accessed 2 January 2012.

[30] Tyagi 2011, p. 498. The other grounds for inadmissibility in the case of the Human Rights Committee are that the violation did not take place at a time when the Covenant and First Optional Protocol were in force for the relevant state; claims are not substantiated; that the petition was filed anonymously, or could be considered to be an abuse of the right of submission or is otherwise incompatible with the provisions of the Covenant; and that the same matter is simultaneously pending before any another international procedure of investigation.

[31] Tyagi 2011, p. 498; Möller and de Zayas 2009, p. 91.

[32] "A high number of communications are received per year in respect of which complainants are advised that further information would be needed before their communications could be registered for consideration by the Committee, or that their cases cannot be dealt with by the Committee (…). A record of this correspondence is kept by the secretariat of OHCHR." (Report of the Human Rights Committee (2010–2011), A/66/40 (Vol. I), para 99.

[33] ECtHR, Applicant Check List: Facts and Figures.

However, international human rights bodies have gradually lengthened the list of exceptions, thereby limiting the rule's practical import. They have applied it with a considerable degree of flexibility, taking into consideration specific circumstances, and in general favoring petitioners. Yet, it is debatable whether the net effects are entirely desirable and whether the rule, as it is currently interpreted in general by international human rights bodies, is optimally tuned. Most of all, there is a dire need for greater clarity as to the exact scope of the rule and its exceptions. This problem is rapidly becoming evident to everyone working with and within these bodies.

During February 2010, a High Level Conference on the Future of the European Court of Human Rights was convened in Interlaken, Switzerland to address the concern of the constant growth of an already massive docket of cases. In the final declaration, the Conference "stresse[d] the importance of ensuring the clarity and consistency of the Court's case-law",[34] calling for, in particular, "a uniform and rigorous application of the criteria concerning admissibility" and inviting the Court to "make maximum use of the procedural tools (…) at its disposal".[35] Recognizing that there is confusing and ponderous case-law on the point, the Conference, under the heading "Filtering", called upon the "State Parties and the Court to ensure that comprehensive and objective information is provided to potential applicants on the Convention and the Court's case-law, in particular on the application procedures and admissibility criteria".[36] The follow-up conference, in Izmir, Turkey, in 2011, repeated the call, adding that "(…) admissibility criteria are an essential tool in managing the Court's caseload and in giving practical effect to the principle of subsidiarity".[37]

Recently, the High Level Conference on the Future of the European Court of Human Rights invited the European Court to "(…) develop its case law on the exhaustion of domestic remedies (…)".[38] Yet, as we have seen, jurisprudential elaboration is not the solution to the problem but probably a cause.

In response to the Interlaken prompt, at the end of 2011 the Registrar of the Court issued a revised Practical Guide on Admissibility Criteria,[39] with the explicitly stated aim of reducing the number of clearly inadmissible cases that reach the Court, and to ensure that those applications that warrant examination on

[34] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration (19 February 2010), p. 2, (4). See also ibidem Action Plan, E.9.(b).

[35] Ibidem, at 2, (5).

[36] Ibidem, Action Plan, C.6.(a).

[37] High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration (27 April 2011), p. 2, para 4.

[38] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (20 April 2012), para 15. g.

[39] European Court on Human Rights, Practical Guide on Admissibility Criteria (2009, rev. 2011), www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Admissibility+guide/. Accessed 2 January 2012.

the merits pass the admissibility test.[40] The 92-page guide covers all aspects of admissibility, dedicating only six of them to the rule of the exhaustion of domestic remedies. It makes extensive reference to the Court's decisions on the aspects of the rule. While the Guide is well documented, it does little to dispel the doubts as to the scope of the rule and its exceptions. It is at the same time both too concise and too thick. Moreover, the Guide has been penned by the Department of the Jurisconsult of the Court, and its legal value is on a par with scholarly literature and, for that matter, adds very little clarification to the rule and its exceptions.[41] Steps like these could help, but what really is needed here is greater certainty. This certainty must come at the risk of less flexibility in the application of the rule, and only with documents of a higher legal value can international bodies provide parties with a sufficient level of confidence so as to be able to predict how the body would decide on the rule of the exhaustion of domestic remedies in any given case.[42]

Thus, for instance, in the case of the Inter-American system, the Inter-American Court of Human Rights could be asked to issue an advisory opinion on the matter. This would not be entirely unprecedented. In 1989, the Commission requested an Advisory Opinion on the "Exceptions to the Exhaustion of Domestic Remedies".[43] However, that request was limited to asking whether indigent persons and persons who are unable to find legal representation due to a general fear in the legal community are still required to exhaust domestic remedies.

Likewise, the Human Rights Committee should consider issuing a General Comment on Article 2 of Protocol 1, which enshrines the domestic remedies rule. Thus, far it has adopted 34 general comments in 30 years, including comments on procedural issues such as the reporting obligations of States, and it could again contribute by clarifying this important aspect of human rights law. In the end, an amendment to the rules of procedure of these bodies, spelling out clearly the scope of the rule and its exceptions, would be the best option. It does not necessarily need to become a straitjacket. A clause leaving the body a certain margin of discretion, in special circumstances, could be written in. However, the rule in its current incarnation is neither an effective filter, letting way too many cases

[40] Ibidem, p. 7, para 3.

[41] It is well known that in international jurisprudence there is no strict rule similar to the *stare decisis* principle that binds courts in Common Law countries to precedents. International courts rather follow the notion of *jurisprudence constante*, typical of the Civil Law legal tradition. The Louisiana Supreme Court, the Court of a hybrid common law–civil law state, holds that the principal difference between the two legal doctrines is that while a single decision can provide sufficient foundation for *stare decisis*, it takes a series of cases, *all in accord*, to form the basis for *jurisprudence constante*. See Louisiana Supreme Court: Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n., 903 So.2d 107, at n. 17 (La. 2005) (Opinion no. 2004-C-0473).

[42] For a contrary opinion, and a pleading for greater flexibility, at least in the case of the African Commission on Human and Peoples' Rights, see Udombana 2003.

[43] IACtHr: Exceptions to the Exhaustion of Domestic Remedies, cit.

through, nor an obstacle clearly delineated, making it impossible for the parties, individuals or State, to responsibly approach it.

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