6

It's All Been Done?

Individual Communications, the Exhaustion Rule and a New Methodology Expanding and Evidencing Domestic Barriers to Justice

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6.1 Introduction

The application of admissibility criteria for the individual communication procedure of the UN treaty bodies (UNTBs) is not a topic that has received much attention. In 2021, however, international headlines did report on the inadmissibility of a communication which youth climate activists had lodged with the UN Committee on the Rights of the Child (CRC Committee). The authors had argued that by failing to address climate change, various states had breached their rights under the Convention on the Rights of the Child (CRC).[1] The CRC Committee was sympathetic to the merits of the claim,[2] but found the communication inadmissible for failure to exhaust domestic remedies. No domestic proceedings had been initiated. Why local actions had not been pursued is not entirely clear, but one may hypothesise on potential barriers to justice, as adolescents typically do not have the funds required to bring this expensive type of litigation. The youth climate activists argued before the CRC Committee that they should have been exempt from the requirement to exhaust as domestic remedies were too slow and ill-suited to the claim,

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[1] *Sacchi et al.* v. *Argentina*, CRC/C/88/D/104/2019, 22 September 2021.

[2] M. Wewerinke-Singh, 'Between Cross-Border Obligations and Domestic Remedies: CRC Committee Decision on *Sacchi v Argentina*', *Oxford Human Rights Hub* (blogpost dated 21 October 2021).

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particularly the urgent need for international cooperation.[3] The CRC Committee disagreed. Its rejection of the communication brings to the fore overlooked tensions in the individual communications procedure. Which types of barriers to domestic justice should be considered when assessing whether the requirement to exhaust domestic remedies should be lifted? Should this assessment be sensitive to the circumstances of the individual and institutional structures, as well the political, economic and sociocultural realities that shape the ability to access domestic forums? How should authors evidence that they were prevented from obtaining domestic justice?

This chapter argues that the UNTBs must take a generous approach to the exhaustion rule both in determining whether an exemption is warranted and in how individuals evidence the futility of pursuing domestic remedies. To do otherwise would compound the failures of the domestic justice system at the international level. To achieve this normative aim, the chapter proposes an analytical frame for the exhaustion assessment that is grounded in authors' individual identities and experiences while being attentive to how these identities and experiences are connected to systemic inequality and broader political, economic, and sociocultural realities. The individual-centred and contextual nature of the assessment positively influences the proof required to demonstrate obstacles to domestic justice, by recognising that producing evidence can be shaped by an array of identities, factors and structures.

In adopting this generous approach to admissibility, the treaty bodies will be fulfilling not only the aims of the individual communication procedure but the very core purpose of the exhaustion rule. Individuals are required to pursue local remedies to respect state sovereignty and the subsidiary role of international justice. States must be given an opportunity to address the alleged violation of human rights before a UNTB weighs in.[4] There are, however, a wide range of obstacles that can prevent an individual from being able to access accountability at the national level, including financial costs, fears of reprisal, geographic remoteness, linguistic differences, lack of knowledge or discriminatory biases within the justice system. Gaps in the law may prevent individuals from

[3] *Sacchi* (CRC), paras 10.15–10.20.

[4] C. Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in N. Boschiero, T. Scovazzi, C. Pitero and C. Ragni (eds), *International Courts and the Development of International Law: Essays in Honour of Trulio Treves* (Cham: Springer, 2013) 564; *M.A.* v. *Switzerland*, CEDAW/C/80/D/145/2019, 1 November 2021.

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obtaining legal remedies, legal action may be painfully slow, or hostile lines of jurisprudence may make the pursuit of justice futile. Women, children, racial and ethnic groups, migrants, refugees, asylum-seekers and people living in poverty or in rural and remote places are more likely to be confronted with these barriers and denied access to domestic justice.[5] To navigate these tensions, there is a partial acknowledgement of the barriers to domestic justice in the admissibility criteria. Some treaties and optional protocols hold that there is no requirement to exhaust domestic remedies when it would be unreasonably prolonged.[6] Others go a step further and craft exemptions for when domestic remedies would be unlikely to bring effective relief.[7] The exemptions are silent on other barriers, such as costs or fear of retaliation. The proposed approach to the application of the requirement to exhaust in this chapter is consistent with the normative aims of the exhaustion rule as it ensures admissibility only when there is no potential for the domestic system to remedy the alleged violation while simultaneously enriching the application of the rule by heightened awareness of the intricacies of barriers to domestic justice.

Using the guidance from the treaty bodies, Section 6.2 identifies common barriers to domestic justice systems. Section 6.3 argues that the purposes of the individual communications procedures, the exhaustion rule and its exemption point towards a generous application of admissibility criteria. Section 6.4 is doctrinal and normative. It is ambitious in that it pulls together all of the admissibility decisions from the nine UNTBs from 2012 to 2022. Undertaking this mapping exercise

[5] See Section 6.2.

[6] Article 5, Optional Protocol to the International Convenant on Civil and Political Rights 999 UNTS 171, adopted 19 December 1966, in force 23 March 1976, 999 UNTS 171; Article 3(1), Optional Protocol to the International Convention on Economic, Social and Cultural Rights, adopted 10 December 2008, in force 5 May 2013, 2922 UNTS 29; Article 14, Convention on the Elimination of All Forms of Racial Discrimination, adopted 7 March 1966, in force 4 January 1969, 660 UNTS 195; Article 31, International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, in force 23 December 2010, 2716 UNTS 3.

[7] Article 4, Optional Protocol to Convention on the Elimination of All Forms of Discrimination against Women, adopted 6 October 1999, in force 22 December 2000, 2131 UNTS 83; Article 7, Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure, adopted 19 December 2011, in force 14 April 2014, 2983 UNTS 135; Article 2, Optional Protocol to Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, in force 3 May 2008, 2518 UNTS 283; Article 20, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, in force 26 June 1987, 1465 UNTS 85.

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reveals how the treaty bodies are accounting for some barriers to justice, but others remain invisible and reveal how the treaty bodies continue to lapse into formalistic reasoning and unrealistic evidentiary requirements. To shift from this black-letter methodology, this chapter proposes an individual-centred, contextual approach to the exhaustion criteria and marks out how it can enrich the admissibility analysis. This approach takes seriously individuals' lived experiences, accounts for how identity characteristics are linked to systemic inequality and is cognisant of how realities on the ground interact with social norms and institutional structures. It weighs carefully how these combined forces shape domestic attempts to vindicate human rights and provides greater clarity on how individuals can evidence their inability to exhaust. An individual-centred, contextual application of the exhaustion rule will not address all the challenges that beleaguer the individual communications procedure, nor will it always guarantee the vindication of human rights, as many of the barriers to domestic justice are equally applicable to international justice. But greater attention to the relationship between individuals and the structures of domestic justice can ensure international justice does not ignore or silence the vulnerable, marginalised and oppressed.

6.2 Domestic Barriers to Justice

Access to justice is a process whereby individuals can turn to mechanisms to resolve allegations of rights violations.[8] This broad definition functions as a useful starting point for investigating common barriers to accessing mechanisms to resolve human rights complaints. The justice system is embedded in society and reflects its values.[9] The oppression, neglect and discrimination that permeate the state are replicated and reenforced in the domestic justice system.[10] Individuals do not have an equal ability to access justice in their domestic system nor consequentially an equal ability to meet the individual communications procedure admissibility criteria to exhaust domestic remedies. This section identifies

[8] F. Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (Cambridge MA: Harvard University Press, 2019).

[9] UN Special Rapporteur on the rights of persons with disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020); V. Shikhelman, 'Access to Justice in the UN Human Rights Committee', *Michigan Journal of International Law* 39 (2018): 453–531, 457.

[10] European Agency for Fundamental Rights, Access to Justice in Cases of Discrimination in the EU – Steps to Further Equality (2012).

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common domestic barriers to justice and reflects on what effective access to justice requires. It does so by borrowing from the General Recommendation on access to justice issued by the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee).[11] The necessary elements are justiciability, availability, accessibility, good quality, remedies and accountability. Each element is introduced before being utilised in Section 6.4 to develop the parameters of an individual-centred, contextual exhaustion assessment.

6.2.1 *Justiciability*

This element requires that individuals have 'unhindered access to justice' and recognises that not all 'rights and correlative legal protections are recognised and incorporated into the law'.[12] There are many examples of non-justiciability. Socioeconomic rights are still not consistently legally protected.[13] Racist hate speech is not prohibited in every state.[14] In these examples, individuals will not be able to remedy violations in domestic settings.

6.2.2 *Availability*

Availability requires the state to establish and maintain domestic accountability mechanisms.[15] This requires the building of the infrastructure needed for a functioning justice system. Geographic and ableist biases permeate the design of domestic justice. The clustering of courts in urban centres raises logistical and financial challenges for those living in rural or remote areas.[16] The facilities and services of the justice system also often fail to account for the needs of persons with disabilities.[17] Without

[11] CEDAW Committee, General Recommendation No. 33 on access to justice, CEDAW/C/GC/33, 3 August 2015.
[12] CEDAW Committee, General Recommendation No. 33, para. 15(a).
[13] UN Special Rapporteur on the right to food, Access to Justice and the Right to Food: The Way Forward, A/HRC/28/65, 12 January 2014, para. 28.
[14] CERD Committee, General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, CERD/C/GC/31, 2005, para. 4(a).
[15] CERD Committee, General Recommendation No. 31, para. 15(b).
[16] UN Special Rapporteur on the right to food, Access to Justice and the Right to Food, para. 31; CEDAW Committee, General Recommendation No. 33, paras. 13–14; UN Development Programme, Access to Justice: Practice Note (2004).
[17] UN Special Rapporteur on the rights of persons with disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities, p. 16.

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ensuring justice mechanisms are available in a manner that is mindful of how and where people live their lives, domestic justice is not equally available.

6.2.3 *Accessibility*

Accessibility demands that all accountability mechanisms be economically, socially, culturally and physically accessible.[18] Individuals may be unaware that accountability mechanisms exist.[19] Linguistic barriers can deter individuals from claiming justice.[20] Sociocultural accessibility can take many forms, but treaty bodies are increasingly concerned about negative repercussions, including violence against individuals who pursue domestic accountability.[21]

Economic accessibility is of primary concern to multiple UN actors. Challenging breaches of human rights is expensive.[22] The biggest financial obstacle to accessing domestic justice is the cost of legal representation. States are repeatedly urged to fund legal aid.[23] Despite consensus on the value of legal aid, the treaty bodies have different recommendations on its scope but uniting them is a recognition that states must address economic barriers to justice.[24]

Little attention has been paid to developing global best practices standards with respect to eligibility criteria for legal aid. There are a handful of exceptions. The CEDAW Committee warns that due to the imbalance in control over family resources between women and men, eligibility criteria for women to access legal aid in cases of family conflicts

[18] CEDAW, General Recommendation No. 33, paras. 3, 15(c).
[19] CMW, General Comment No. 5 on migrants' rights to liberty and freedom from arbitrary detention, CMW/C/32/R.2, 14 August 2020, para. 79.
[20] CMW, General Comment No. 5, para. 79.
[21] CEDAW, General Recommendation No. 33, paras. 9–10; UN Special Rapporteur on the human rights of migrants, Access to Justice, A/73/178/Rev.1, 25 September 2018, para. 33.
[22] CEDAW, General Recommendation No. 33, para 17(a); HRC, General Comment No. 32, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007, para. 10–11.
[23] CEDAW, General Recommendation No. 33, paras. 17(a), 36–37; CERD Committee, General Recommendation No. 31, para. 30.
[24] HRC, General Comment No. 32, para. 10; CERD, General Recommendation No. 31, para. 30; CRC, General Comment No. 24 on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, para. 51; CMW, General Comment No. 5, para. 79; CEDAW, General Recommendation No. 33, para. 36.

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should take account of 'real income or disposable assets of women'.[25] The UN Office on Drugs and Crime also recognises the somewhat arbitrary nature of income thresholds. If an individual exceeds the means tests but still is not in a position to afford a lawyer, they should not be excluded from assistance when the 'urgency or complexity of the case or the severity of potential penalties'[26] demand legal aid.[27]

6.2.4 *Good Quality*

This element reflects on the competence, efficiency, independence and impartiality of the justice system.[28] There are multiple components to a well-functioning justice system. Human and financial resources are needed so human rights claims do not stagnate but are resolved in a timely manner.[29] Justice officials must have knowledge of human rights law.[30] Domestic justice systems must be impartial and free of myths and biases. The CEDAW Committee points out that 'often judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to stereotypes'.[31] The CERD Committee observes the same with respect to racial discrimination.[32] The UN Special Rapporteur on the right to food highlights another threat to impartiality. She warns that close relations between the executive, legislative and judicial can undermine the independence of domestic accountability mechanisms.[33] The lack of good quality justice can make pursuing domestic remedies futile and should be accounted for when treaty bodies consider the exhaustion criteria. The treaty bodies have a long track record of assessing how the quality of the justice system

[25] CEDAW, General Recommendation No. 33, para. 37(e).
[26] UNODC, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013), p. 13.
[27] A. Zysset and B. Cali, 'Exhausting Domestic Remedies or Exhausting the Rule of Law? Revisiting the Normative Basis of Procedural Subsidiarity in the European Human Rights System', *Transnational Legal Theory* 14 (2023) 157–177.
[28] CEDAW, General Recommendation No. 33, para. 19(b).
[29] UN Special Rapporteur on the right to food, Access to Justice and the Right to Food, para. 36; CRC, General Comment No. 24, paras. 54–55; CEDAW, General Recommendation No. 33, para. 33(a).
[30] UN Special Rapporteur on the right to food, Access to Justice and the Right to Food, para. 35.
[31] CEDAW, General Recommendation No 33, para. 26.
[32] CERD, General Recommendation No. 31, para. 31.
[33] UN Special Rapporteur on the right to food, Access to Justice and the Right to Food, para. 36.

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impacts the admissibility to the individual communications procedure, particularly around issues of delay, a barrier that can be easily evidenced. There is less consideration of other aspects of quality, such as bias, which can be much more difficult to prove.

6.2.5 *Remedies*

Remedies for breaches of human rights are an element of access to justice. These must be effective, adequate and timely and holistically and proportionally redress the harm suffered.[34]

6.2.6 *Accountability*

Lastly, the justice system itself must be accountable and monitored.[35]

6.3 A Formal Accounting of Barriers to Justice

The UN individual communications procedure is, in part, designed to overcome the confluence of obstacles that prevents individuals from vindicating their rights. When justice is unattainable at the domestic level, individuals can turn to international mechanisms. The promise of international human rights accountability hinges, inter alia, on the exhaustion of domestic remedies. This section considers the purposes of the individual communication procedure, and the purpose of and formal exemptions to the exhaustion rule, providing the basis for arguing in Section 6.4 for an individual-centred, contextual application of this admissibility criterion.

6.3.1 *The Purpose of the Individual Communications Procedure*

An individual can lodge a communication with a treaty body alleging that the state has not fulfilled its human rights obligations under the respective treaty. If the communication meets the admissibility criteria, the treaty body will assess the communication on its merits and, if required, will recommend both individual and structural remedies to prevent future violations of human rights. The individual communications

[34] CERD, General Recommendation No. 31, para. 38(b); CMW, General Comment No. 5, para. 68; CEDAW, General Recommendation No. 33, para. 19(b).
[35] CEDAW, General Recommendation No. 33, para. 14(f).

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procedure serves multiple purposes.[36] First, it seeks to secure individual relief.[37] Second, the individual communications procedure also aims to spark structural reforms to strengthen human rights not only in the state under review but around the world.[38] And lastly, the communications are an opportunity for the treaty body to develop treaty obligations at a more granular level.[39] The multiple functions of the individual communications procedure provide a strong foundation for a non-technical application of admissibility criteria. The purposes of the procedure would be hamstrung if individual communications are too readily deemed inadmissible for failing to exhaust.

6.3.2 *Purpose of the Exhaustion Rule*

A close examination of the function of the exhaustion rule makes it clear why the rule should not be rigidly enforced. The requirement to exhaust domestic remedies has a long history originating in diplomatic relations.[40] In the modern era, exhaustion is ubiquitous in international human rights adjudication. A majority of regional human rights instruments require individuals to pursue domestic claims before accessing international or regional courts.[41] Courts and scholars have identified a number of reasons for the exhaustion rule. Its primary purpose is to respect state sovereignty. The state should be given an opportunity to evaluate the claim before it is taken to the global stage. D'Ascoli and Scherr explain that the state should have a chance to 'discharge its

[36] A. Byrnes, 'An Effective Complaint Procedure in the Context of International Human Rights Law' in Anne Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Leiden: Brill, 2000) p.139.

[37] Byrnes, 'An Effective Complaint Procedure'.

[38] G. Ulfstein, 'Individual Complaints' in H. Keller and G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2013), p. 75.

[39] M. Scheinin, 'International Mechanisms and Procedures for Monitoring' in C. Krause and M. Scheinin (eds), *International Protection of Human Rights* (Turku: Abo Akademi University Institute for Human Rights, 2009), p. 619.

[40] J. Crawford and T. Grant, 'Local Remedies, Exhaustion of' in *Max Planck Encyclopaedias of International Law* (Oxford: Oxford University Press, 2007).

[41] A. von Staden, 'Subsidiarity, Exhaustion of Domestic Remedies and the Margin of Appreciation in the Human Rights Jurisprudence of African Sub-regional Courts', *International Journal of Human Rights* 20 (2016): 1113–1131.

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responsibility and to redress the wrong committed'.[42] Exhaustion is also a method for preserving a relationship of subsidiarity between domestic and international human rights law. Requiring individuals to pursue domestic remedies protects the primacy of domestic accountability and avoids 'domestic courts being replaced by international courts'.[43]

6.3.3 *Purpose of the Recognised Exemptions to Exhaustion*

The purpose of the individual communications procedure and the purpose of the exhaustion rule seem to pull in different directions, and as argued below the individual, contextual approach is a bridge between these competing imperatives. On the surface there appears to be a tension as, on one hand, a literal application of the exhaustion rule could frustrate the purpose of international human rights accountability and 'over-protect the interests of the state at the expense of the protection of the individual'.[44] Ignoring the exhaustion rule, on the other hand, could upend the carefully crafted relationship between domestic and international accountability. In the UN system, there is an incomplete bridge built between the need to fully protect human rights and the desire to protect subsidiarity through the recognition of exemptions to the exhaustion rule. An individual does not have to exhaust domestic remedies when the domestic justice process would be either unreasonably prolonged and/or unlikely to bring effective relief.[45] All treaty bodies can assess whether a remedy is unreasonably prolonged, but technically, only the CEDAW, CRC, Committee on the Rights of Persons with Disabilities and Committee against Torture (CRPD and CAT Committee, respectively) can assess whether the remedy is effective. Regarding unreasonable delay, if achieving domestic accountability will take an excessive amount of time, then there is no obligation on the individual to pursue it before accessing the individual communications procedure.[46] Regarding effective relief, an effective or available remedy is one which is 'in direct relation with the events that initially gave rise to the claimed violation and that . . . may be reasonably considered as effective of remedying the

[42] S. D'Ascoli and K. Maria Scherr, 'The Rule of Prior Exhaustion of Legal Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection', *EUI Working Papers* 2 (2007) p.8.
[43] D'Ascoli and Scherr, 'The Rule of Prior Exhaustion'.
[44] D'Ascoli and Scherr, 'The Rule of Prior Exhaustion'.
[45] See (n 6) and (n 7).
[46] *Matson* v. *Canada*, CEDAW/C/81/D/68/2014, 14 February 2022, para. 17.5.

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claimed violations'.[47] There is no requirement to pursue domestic remedies when there is no reasonable prospect of success.[48] Treaty bodies examine an array of factors when assessing effectiveness, including the procedural activity of the claim and the nature and seriousness of the alleged breach of human rights.[49] On a plain reading of the admissibility rules, there is an acknowledgement that insufficient quality and/or remedial power of the justice system can frustrate domestic accountability. International human rights law recognises that these difficulties, if sufficiently pronounced, alleviate the obligation to seek domestic relief. This, however, amounts to a partial accounting since only two of the six elements of access to justice as identified above are referred to, with the other elements – justiciability, availability, accessibility and accountability – not recognised exemptions from the requirement to exhaust. As the analysis below demonstrates, the treaty bodies are aware of the need for a generous application of the exhaustion rule and interpreting it to address other elements of access to justice,[50] but have yet to consistently and coherently achieve this aim.

6.4 A Dynamic Accounting of Barriers to Justice

The narrow textual exemptions to the exhaustion requirement have evolved to partially account for the confluence of obstacles that prevent individuals from claiming their human rights. Thus, it appears the treaty bodies are applying the exhaustion rule in a flexible and non-technical manner. This evolution, however, is nascent. The jurisprudence is riddled with contradictions. Sometimes the high costs are recognised as creating obstacles and sometimes they are not. There is deep uncertainty around proving how different barriers to justice make it impossible to give domestic forums an opportunity to address the alleged breach of human rights. While it has been clarified that individuals cannot argue for exemptions to exhaustion based on 'mere doubts' or 'assumptions',[51] it nonetheless remains unclear what can/should in practice constitute positive, compelling or persuasive evidence of obstacles to justice that

[47] *Arellano Medina* v. *Ecuador*, E/C.12/63/D/7/2015, 26 March 2018, para. 8.7.
[48] *Leo* v. *Australia*, CRPD/C/22/D/17/2013, 30 October 2019, para. 7.5.
[49] *Y.* v. *Tanzania*, CRPD/C/20/D/23/2014, 31 August 2018, para. 7.3.
[50] *S.S.R.* v. *Spain*, E/C.12/66/D/51/2018, 11 October 2019; *S.C. and G.P.* v. *Italy*, E/C.12/65/D/22/2017, 7 March 2019.
[51] *J.I.* v. *France*, CCPR/C/117/D/2154/2012, 4 July 2016, para. 6.5.

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alleviate the need to exhaust. Analysing the admissibility jurisprudence of the treaty bodies over the past decade, this section identifies with greater precision where the inconsistencies lie and marks out how an individual-centred, contextual assessment can evolve the future relationship between domestic and international justice.

This section utilises the access to justice framework outlined in Section 6.3 to explore the dynamics of accounting for barriers to justice at the admissibility stage of the individual communications procedure. As mentioned in the introduction, this is a comprehensive review spanning across a decade. It argues that treaty bodies must account for a wide range of domestic barriers and examine multiple pieces of evidence – ranging from failed efforts at legislative reform to domestic criteria for legal aid, to the realities of poverty, gender stigmas and hostility towards refugees – when determining if the individual is required to pursue all available domestic remedies. The specific barrier and the evidentiary demands will be a function of the factual-legal matrix of the communication, but the guiding principle for the exhaustion assessment must be *individually and contextually centred.*

The assessment must understand how *individual* personal circumstances and identity characteristics, factors and experiences influence the ability to access domestic justice. The exhaustion assessment must be intersectional and account for how 'the dynamics of sameness and difference' across multiple and intersecting vectors shape access to justice.[52] The assessment should understand how the individual identity, factors and experience is connected to patterns of systemic inequality. Layered upon this, the exhaustion evaluation must also be *contextual*, taking account, at all levels, of the political, economic and sociocultural realities in which the individual is seeking accountability.[53] While the treaty bodies are dependent on the information provided by the parties, they can consider that evidence within its context – for example, understanding failure to exhaust in light of political inertia and animus, post-conflict tensions or community stigmas against sexual violence. Treaty bodies 'must be sensitive to the reality of the dilemma posed by the particular facts'.[54]

[52] S. Atrey, *Intersectional Discrimination* (Oxford: Oxford University Press, 2019), p. 37.
[53] C. Sheppard, *Inclusive Equality* (Montreal: McGill-Queen's University Press, 2010), Chapter 3.
[54] *Edmonton Journal* v. *Alberta (Attorney General)* [1989] 2 SCR 1326, para. 51 (Canadian Supreme Court).

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These two elements of the proposed approach to exhaustion should not be conceptualised in isolation from each other but should reinforce and inform each other. The exhaustion evaluation must be holistic, seeking to understand who the person is and the realities they face in trying to vindicate breaches of human rights. An individual-centred, contextual assessment does not demand that the individual produces specific pieces of evidence. Rather, it recognises limits that individuals encounter when trying to identify domestic barriers and looks at all evidentiary sources with probative value for illuminating whether seeking domestic justice is actually futile.

In taking an individual-centred, contextual approach, the UNTBs are not undermining the purpose of the exhaustion rule but are fulfilling it by a thorough investigation into whether the domestic system is able to address the alleged breach of human rights. It more fully identifies instances where domestic justice will never have a chance to assess and remedy the wrong and thus does not undermine subsidiarity. Analysing the jurisprudence of the UNTBs, this section demonstrates how this approach can both enrich and provide greater consistency in the exhaustion assessment so that domestic barriers to justice do not frustrate access to international human rights forums.

6.4.1 *Justiciability*

The exemptions to exhaustion are being used to account for the justiciability dimension of access to justice, but there is evidentiary confusion on how to prove justiciability. There are relatively straightforward cases. For example, NB was subjected to corporal punishment at kindergarten.[55] The CRC Committee deemed the communication admissible despite the individual not seeking civil remedies, as the state did not recognise corporal punishment as grounding a cause of action.[56] This is an uncomplicated example where domestic law precludes human rights accountability, but this was not a barrier to accessing international accountability.

Challenges arise in more complex cases. Individuals routinely point to hostile lines of jurisprudence as evidence of non-justiciability. When there is 'established jurisprudence of the highest domestic tribunals' that would result in the claim 'inevitably be[ing] dismissed', the individual

[55] *N.B.* v. *Georgia*, CRC/C/90/D/84/2019, 1 June 2022.
[56] *N.B.* (CRC), paras 5.1, 6.3.

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argues the communication should be deemed admissible.[57] States, however, hold that domestic courts can re-interpret, modify or even overturn law to ensure human rights compatibility. Drawing on the purpose of the exhaustion rule, the state can argue that the UNTBs should not admit communications that prevent the domestic system from redressing the claim. The treaty bodies must determine when the opportunity to internally reform the law is an illusion and identify when there is more than a mere doubt or assumption that a domestic claim will fail. Under the individual-centred, contextual assessment, the treaty bodies must expand beyond looking at domestic case law and examine multiple forms of evidence, such as legislative animus and lack of political will, to determine whether the claim is non-justiciable such that the individual should be exempt from pursuing domestic remedies.

6.4.1.1 Demanding Hostile Jurisprudence

The treaty bodies are more likely to conclude domestic remedies are inaccessible when the individual cites jurisprudence from apex courts that frustrate the ability to litigate the claim.[58] In *Gomaríz Valera* v. *Spain*, the Human Rights Committee (HRC) held 'when the highest domestic court has ruled on the matter ... thereby eliminating any prospect that a remedy ... may succeed, the author is not obliged to exhaust'.[59] Similarly, in *FKAG* v. *Australia*, the HRC held that it was not sufficient for the state to argue that there is a 'possibility' that the higher courts may 'someday' overrule a precedent.[60] Individuals should not have to expend time, energy and money merely because the state believes apex courts might uphold the individual's rights.

In *Ali* v. *Norway*, a father and a son did not appeal their immigration detention to the Supreme Court, as they argued that the Court had limited competence to review this decision.[61] The HRC, however, held that there was still a prospect. This conclusion was based on the lower courts expressing doubts on the individuals' detention. On the surface, *Ali* appeared to differ from *Gomaríz Valera* and *FKAG*, as the state could point to factors to prove that there was a prospect of success within the domestic system. However, applying an individual-centred, contextual

[57] *D.C.* v. *Germany*, CRC/C/83/D/60/2018, 4 February 2020, para. 6.5.
[58] *M.B.* v. *Czech Republic*, CCPR/C/106/D/1849/2008, 29 October 2012, para. 7.3.
[59] *Gomaríz Valera* v. *Spain*, CCPR/C/84/D/1095/2002, 22 July 2005, para. 6.4.
[60] *F.K.A.G. et al* v. *Australia*, CCPR/C/108/D/2094/2011, 26 July 2013.
[61] *Ali* v. *Norway*, CCPR/C/135/D/2926/2017, 14 July 2022.

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assessment destabilises this chance of success. None of the domestic courts gave serious weight to the fact that one of the individuals detained was a child, and the Supreme Court would not have jurisdiction to consider this crucial element of the claim. Moreover, as the dissenting members of the HRC pointed out, there were no positive facts that supported the conclusion that the Supreme Court would find the detention illegal. The Oslo District Court had repeatedly determined there was a factual basis to conclude that the individuals would abscond such that detention was the only option, and this finding was repeatedly upheld by the Borgarting High Court.[62] The state provided no positive evidence on why the Supreme Court would find differently. States must be given a chance to rectify human rights abuses, but that chance cannot rest on formalistic assessment of the jurisprudence; it must be deeply sensitive to the individual circumstances and the broader context of the jurisprudence.

In *DC* v. *Germany*, the CRC Committee also failed to examine the context of the hostile jurisprudence and did not account for insurmountable domestic barriers to children's access to justice. DC was a sixteen-year-old living in Germany who was prohibited from voting in local elections due to his age. The age limit was unsuccessfully challenged in the lower courts but not in the Constitutional Court of Saarland. DC argued that pursuing a constitutional remedy would be futile as the Constitution of Saarland only protects the right to vote for those over eighteen years old, and the Court would be bound to follow this provision. Moreover, he submitted that the Constitutional Court of Saarland would also rely on the Basic Law of Germany and on the jurisprudence of the Federal Constitutional Court, both of which prohibited those under eighteen from voting. The CRC Committee dismissed the claim, holding that 'a constitutional motion should not be considered bound to fail simply because of the current constitutional texts and a few general precedents'.[63] The Committee believed that the Constitutional Court of Saarland should be given a chance to bring domestic law in line with the CRC. The refusal to admit this communication goes to the heart of the purpose of the exhaustion requirement, that is giving the State an opportunity to resolve the alleged breach of human rights. However, the reasoning in DC implies that there is a degree of ambiguity in the

[62] *Ali* (HRC), dissenting opinion of Committee members Jose Manuel Santos Pais and Imeru Tamrat Yigezu.
[63] *D.C.* v. *Germany* (CRC), paras 6.5–6.6.

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constitutional texts that could potentially be re-interpreted by apex courts. Article 38(A) of the Basic Law holds, on a plain reading, that only those eighteen years or older have the right to vote. The explicit limits on the right to vote for children would seem to be a textbook example of a non-justiciability argument and providing the Constitutional Court of Saarland with an opportunity to re-interpret voting laws in line with the CRC would be doomed. Failing to give serious weight to the context of non-justiciability results in the CRC Committee misapplying the burden of proof, undercutting the purpose of the exhaustion rule. DC was forced to pursue a domestic remedy where there was no reasonable likelihood of success and was procedurally prevented from accessing justice at the international level.

6.4.1.2 Contextualising Non-justiciability

A stronger approach is to use the individual-centred, contextual approach to examine multiple pieces of evidence when assessing whether justiciability frustrates domestic accountability as there may not be hostile jurisprudence to use as evidence.[64] Clearly worded statutes that bar action should be considered strong evidence that the claim will inevitably fail.[65] The cumulative effect of different sources of evidence for non-justiciability should also be taken into account, such as the failure of the state to implement recommendations from national human rights bodies or expert domestic legal advice that the 'case would have no reasonable prospect for success'.[66] The CRPD Committee did this in *Lockrey* v. *Australia*.[67] Michael Lockrey, who was deaf, was informed that steno-captioning would not be provided for jury selection processes and duty. He provided three types of evidence to support his contention that his claim would have a poor chance of success in the domestic courts. First, he cited numerous examples from the case law; second, he mapped out how the State would rebut the claims of disability discrimination in jury service; and third, he obtained legal advice that this rebuttal would likely be accepted by the domestic courts. In light of these detailed arguments, the CRPD Committee concluded there was no obligation to

[64] *D.R.* v. *Australia*, CPRD/C/17/D/14/2013, 24 March 2017, para 6.6; *Moylan* v. *Australia*, CERD/C/83/D/47/2010, 27 August 2013; *P.E.E.P.* v. *Estonia*, CCPR/C/128/D/2682/2015, 13 March 2020, para. 7.3.

[65] *Noble* v. *Australia,* CRPD/C/16/D/7/2012, 2 September 2016, para. 7.7.

[66] *Nasir* v. *Australia*, CCPR/C/116/D/2229/2012, 29 March 2016, para. 6.3; *A.S.* v. *Australia*, CCPR/C/132/D/2900/2016, 2 July 2021, para. 7.3.

[67] *Lockrey* v. *Australia*, CRPD/C/15/D/13/2013, 1 April 2016.

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pursue these domestic remedies to access the individual communications procedure.[68]

Two communications are good examples of how to take account of the individual circumstances and macro-contextual factors that underpin non-justiciability. In *Ivanov* v. *Russian Federation*, the HRC exhaustion analysis was sensitive to the social and legal culture of homo- and transphobia. Ivanov was denied permission to hold a sexual orientation and gender identity pride parade in Moscow, and his various appeals failed.[69] In assessing whether the individual should have pursued a final avenue for appeal, the HRC observed that in a six-year period 'at least 252 public events on lesbian, gay, bisexual and transgender-related topics . . . could not be organized owing to persistent refusals by authorities'.[70] Referencing its own Concluding Observations on the Russian Federation, the HRC noted the laws that banned the promotion of non-traditional sexual activity were discriminatory and violated civil and political rights. The HRC concluded that 'the systematic application of this legislation to lesbian, gay, bisexual and transgender assemblies . . . and the support of this practice by the courts, in particular the Constitutional Court of the state party, render improbable a successful outcome' for any further appeals.[71] The animus to sexual orientation and gender identity equality was correctly used as contextual evidence of non-justiciability entitling the individual for an exemption from the requirement to exhaust.

The strengths of an individual-centred, contextual assessment were also evident in *Matson* v. *Canada*, as the CEDAW Committee took full account of the longstanding lack of political will to redress human rights violations.[72] Indigenous women in Canada were prohibited from passing their Indigenous status to their descendants when they married a non-Indigenous person.[73] Reforms from 1985, 2011 and 2019 failed to remedy this discrimination. Matson filed an individual communication, but the state responded that he should have pursued a domestic constitutional challenge to the law. A literal application of the exhaustion rule would have required deeming the communication inadmissible, as no

[68] *Lockrey* (CRPD), para. 7.3–7.4.
[69] *Vladimir Ivanov* v. *Russian Federation*, CCPR/C/131/D/2635/2015, 18 March 2021.
[70] *Vladimir Ivanov* (HRC), para. 6.5.
[71] *Vladimir Ivanov* (HRC), para. 6.5.
[72] *Matson* (CEDAW).
[73] *Matson* (CEDAW), paras 1–2.9.

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domestic court had examined the law in question. However, an individual-centred, contextual assessment reveals the futility of pursuing domestic remedies for discrimination against Indigenous people. Lower courts had found that the previous reform efforts continued to perpetuate inequality, yet this had not prompted the state to fully remedy the wrong. The CEDAW Committee, in fact, observed 'that three constitutional claims on the same issue resulted in three sets of legislative reforms . . . that allegedly maintain the provisions that are discriminatory on the basis of gender'.[74] There was a sustained track record of failing to redress Indigenous women's inequality. The CEDAW Committee therefore concluded that the communication was admissible as a further constitutional claim would be unlikely to bring effective relief. An individual and contextual analysis highlighted how discrimination against Indigenous people and political inertia intersected with legal accountability. In taking this generous approach to admissibility, the CEDAW Committee did not transgress the purpose of the exhaustion rule, as discrimination in Indigenous status laws had been repeatedly drawn to the state's attention. When evaluating whether the individual has exhausted domestic remedies, treaty bodies should not only account for obvious black-letter dead ends. Rather, as in *Matson*, *Ivanov* and the dissenting opinion in *Ali*, they should examine the individual circumstances of claimants and the broader context – including the nuances of hostile jurisprudence and the intersection between legal accountability and political animus and inertia – so the exhaustion rule does not cement insurmountable hostility towards human rights accountability.

6.4.2 *Availability*

The availability element of access to justice has not been extensively examined by the treaty bodies at the exhaustion stage of the admissibility consideration. The one exception is the case of a member of the Tharu Indigenous community in Nepal who had been sexually assaulted. She had not filed a complaint within the statutory time limit because, inter alia, she 'lived in a rural area where most inhabitants were illiterate' and thus did not know how to navigate the justice system.[75] Taking an individual-centred, contextual approach highlights how a range of identity factors, such as race and gender, interact with the larger context of

[74] *Matson* (CEDAW), paras 1–2.9.
[75] *Maya* v. *Nepal*, CCPR/C/119/D/2245/2013, 17 March 2017, para. 6.4.

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rural disadvantage to create obstacles that make domestic justice de facto unavailable. Inequalities in the state precluded domestic accountability mechanisms from having a chance to consider the claim. A technical application of the exhaustion rule would not fulfil the rule's purpose but only compound domestic inequalities. The HRC adopted this generous approach and concluded that domestic limitations meant domestic remedies were unavailable. This is an important recognition of both the practicalities of vindicating human rights and of how these practicalities connect to larger patterns of systemic inequality. The HRC's evidentiary demands furthered an individual-centred, contextual approach to exhaustion, as the individual did not have to provide concrete data on the distance to the police station, transport options or cost of travel, which may be difficult for a poor, rural, Indigenous woman to obtain. There was also no requirement to provide data on the links between literacy and knowledge of the justice system. The evidentiary burden regarding the availability of justice only required sensitivity to the relationship between access to justice, identity characteristics and geographic remoteness.

6.4.3 Accessibility

Under this element of access to justice, the treaty bodies are to assess when the individual is not required to exhaust domestic remedies due to ignorance of the latter's existence, language barriers, risk of backlash or costs. An individual-centred, contextual assessment gives the treaty bodies the tools to evaluate the accessibility of access to justice in a manner that ensures domestic barriers do not lock the individual out of international accountability.

6.4.3.1 Lack of Awareness

Lack of awareness of domestic remedies should not be automatically fatal to the communication. There are two examples from the jurisprudence where the UNTBs correctly applied an individual-centred, contextual approach to determining if lack of awareness precludes admissibility.

In *Suleymanova and Israfilova* v. *Azerbaij*an, when an individual was neither properly charged nor provided with a lawyer, the HRC held there was no obligation to challenge in domestic courts these breaches of his right to a fair trial.[76] The violations of his rights prevented him from

[76] CCPR/C/133/D/3061/2017, 3 February 2022 at para 6.3.

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being aware of domestic remedies. Exempting him from pursuing the latter ensured that the exhaustion requirement was not used as a shield to hide the State from accountability when the failure to initiate domestic remedies flowed from the alleged breaches of human rights.

In the second case, Rosanna Flamer-Caldera did not bring a petition for pre-enactment review of reforms that criminalised same-sex sexual activity for women as she was not aware of this mechanism.[77] Far from blaming her for this, the CEDAW Committee critiqued the non-availability of information on pre-enactment review. Treaty bodies should not accept at face value the state's claims on the accessibility of domestic remedies. Rather, taking the individual-centred, contextual approach, they should assess how the mechanism operates in practice. Holding *Flamer-Caldera* v. *Sri Lanka* admissible was consistent with the purposes of the individual communications procedure, as it gave the CEDAW Committee an opportunity to condemn the criminalisation of same-sex sexual activity for women – a significant evolution in international human rights law for the recognition and protection of gender and sexual orientation equality. At the same time, admitting *Flamer-Caldera* also did not offend the exhaustion rule, as the Supreme Court of Sri Lanka was prohibited under the Constitution from reviewing enacted legislation, so there was no possibility for a court to assess the law after it was passed.[78] The only accessible mechanism was the obscure pre-enactment review: not using it did not preclude admissibility.

6.4.3.2 Linguistic Barriers

There is only one communication whose author raised linguistic barriers as an explanation for failing to exhaust. AP, a Russian national, was unable to appeal the State's decision to deport him to a country where he faced a risk of torture, as he did not have a lawyer and did not speak Finnish. Thus, he was unable to submit the necessary paperwork in the required language. The CAT Committee found that the inability to participate in the legal process due to linguistic barriers alleviated the need to pursue an appeal before the Supreme Administrative Court.[79] Future admissibility assessments regarding language and access to justice should follow in the path of *AP* v. *Finland*.

[77] *Flamer-Caldera* v. *Sri Lanka*, CEDAW/C/81/D/134/2018, 21 February 2022, para 8.3.
[78] *Flamer-Caldera* (CEDAW), para 5.1.
[79] *A.P.* v. *Finland*, CAT/C/60/D/465/2011, 10 May 2017, para. 8.3.

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6.4.3.3 Backlash Risk

Seeking to vindicate human rights can expose individuals to severe social backlash, loss of employment, deportation, retaliation, criminal liability and even violence. For example, Maharjan was apprehended by the army and tortured. Upon release he did not make a claim within the statutory time limits as he went into hiding fearing reprisals. Using the individual-centred, contextual approach, he cited the CAT Committee's Concluding Observations against Nepal and several Amnesty International reports as evidence of the legitimacy of his fears of further state violence.[80] Given the danger in pursuing remedies, there was no obligation to exhaust. This is also a good example of how the treaty bodies' own work can provide the necessary context and evidence in which to assess exhaustion.

Backlash for championing human rights claims, however, does not always entail the high degree of severity seen in *Maharjan* v. *Nepal*. The treaty bodies must determine at what point backlash places the individual in a position of vulnerability that negates the obligation to seek domestic remedies. This subsection argues that the individual-centred, contextual assessment requires the treaty bodies to take account of either acute legal and sociocultural backlash or the risk of such backlash that the individual can prove beyond mere doubt or assumption.

This approach to the exhaustion analysis ensures that individuals do not have to pursue domestic remedies that will have negative legal repercussions.[81] An example can be seen in the HRC communication regarding Benattia Zerrougui, who was forcibly disappeared in 1995 by the Algerian state defence and security services. Anyone making an allegation against these actors was legally liable to prison and a substantial fine. The HRC concluded that Zerrougui's brother, who initiated the communication, did not have to undertake these risks to access the individual communications procedure.[82] In another communication against the Russian Federation, Kesmatulla Khakdar did not have a legal right to reside in the state but had married a citizen.[83] The State argued he should have pursued a legal right to reside on the basis of his marriage. This, however, would have required him to leave Russia and to return to his country of nationality, namely Afghanistan. There was no guarantee that he would be allowed back into the Russian Federation once he had

[80] *Maharjan* v. *Nepal*, CCPR/C/105/D/1863/2009, 19 July 2012, para. 7.6.
[81] *Cacho Ribeiro* v. *Mexico*, CCPR/C/123/D/2767/2016, 17 July 2018, para. 9.3.
[82] *Zerrougui* v. *Algeria,* CCPR/C/108/D/1796/2008, 25 July 2013, paras 4.5–4.6.
[83] *Khakdar* v. *Russian Federation,* CCPR/C/112/D/2126/2011, 17 October 2014, para. 10.6.

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left it, and he would have been at risk of ill-treatment by the Taliban regime. The HRC held he was not required to pursue this remedy. In *Yaker* v. *France*, Yaker was convicted for wearing a 'garment [the niqab] to conceal her face in public'.[84] She only raised her human rights claims at the appeal stage. The state argued that to exhaust domestic remedies, she should have raised these claims in the first instance. Yaker pointed out that she tried to attend the initial proceedings but was arrested and fined again for refusing to remove her niqab for a security check. The HRC concluded that where it would be a criminal offense to pursue a domestic remedy, there is no requirement to exhaust.

In all of these communications, the individuals could refer to specific elements of the legal architecture of the state to substantiate the argument that backlash should exempt them from the requirement to exhaust. This deeply contextual understanding of the state's domestic system does not offend the exhaustion rule, as domestic law prevents state institutions from addressing the alleged breach of human rights. A strict requirement to exhaust would be useless and place the individual in a position of extreme vulnerability. *Zerrougui*, *Khakdar* and *Yaker* are the straightforward communications in this regard. *Nakawunde* v. *Canada*, a decision by the CAT Committee, is more challenging. This communication also highlights that an individual-centred, contextual analysis cannot examine the elements of access to justice in isolation from each other. Nakawunde, who was not represented by counsel, did not appeal the decision to deport her to Uganda as she was 'afraid of being detected by Canadian authorities'.[85] UN actors have warned that asylum-seekers are often afraid that state officials will deport them and are reluctant to engage in any part of the justice system.[86] The CAT Committee was unsympathetic to these fears. It held that the author had not exhausted domestic remedies as there was a scheme in the state which would defer the deportation while the appeal was pending. The treaty body failed to show awareness of how her identity characteristics, particularly her migration status, created availability and accessibility hurdles to justice. While the state may have mechanisms in place to mitigate legal backlash, making it seem feasible for the individual to pursue domestic remedies, this surface-level analysis fails to account for how backlash and lack of knowledge are connected to the individual's

[84] *Yaker* v. *France*, CCPR/C/123/D/2747/2016, 17 July 2018, para 2.1.
[85] *Nakawunde* v. *Canada*, CAT/C/64/D/615/2014 3 August 2018, paras 6.5–6.8.
[86] UN Special Rapporteur on the human rights of migrants, Access to Justice, para. 33.

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status as an asylum-seeker. Nakawunde explained that she did not know of this deferral scheme. It is not difficult to surmise how an asylum-seeker, who is afraid of deportation and does not have a lawyer, is unaware of the complexities of the domestic legal system.[87] It is also incumbent on the treaty body to consider whether her lack of awareness was connected to her fears of backlash and her immigration status. The CAT Committee's assessment failed to grasp these lived realities. An individual-centred, contextual approach, however, brings to the fore these nuances and highlights how those with intersecting identity characteristics face multiple hurdles to accessing justice.

The proposed approach to the exhaustion rule would also account for other non-legal repercussions. The treaty bodies have not reflected on the degree of social or economic risk that should alleviate the need to exhaust, or how individuals can demonstrate these types of risks. A recent communication indicates how this could develop. In the context of a prolonged period of armed conflict, a Nepalese woman was unable to file a report of sexual assault within the statutory time frame. She did not seek justice as there was social stigma towards victims of sexual violence. She unsuccessfully appealed to have the time bar removed. Given the gravity of the alleged breaches of human rights, the HRC accepted, without requiring detailed evidence, that there was a practical limitation to pursuing domestic remedies.[88] This is a good example of an individual-centred, contextual assessment in practice. It establishes that other forms of backlash impact the ability to exhaust. The HRC did so by paying attention to the individual's identity characteristics, gender and the context of post-conflict and social stigma against sexual violence. Such a broad and holistic assessment of the relationship between backlash and exhaustion should be carried forward in the jurisprudence.

6.4.3.4 Costs

Legal proceedings invariably entail costs. As in cases of backlash, the treaty bodies must determine if there is a tipping point where costs preclude accessibility to the point of alleviating the exhaustion criteria. There is a line of decisions from the HRC, CEDAW, CRC and CERD Committees which have held that 'the author's weak financial situation in itself … does not absolve her from' challenging alleged violations of

[87] UN Special Rapporteur on the human rights of migrants, Access to Justice, para. 33.
[88] *Nyaya* v. *Nepal*, CCPR/C/125/D/2556/2015, 18 March 2019, para. 6.4.

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human rights.[89] In *Sacchi*, the CRC Committee gave no real consideration to how young people could fund the costs of climate change litigation and just blithely assumed legal aid was available for this type of legal claim.[90] This stringent position, which is anathema to the individual-centred, contextual assessment, is oblivious to the relationship between socioeconomic status and access to justice. Failing to account for the economics of domestic accountability limits international justice to those who can afford to access domestic justice. This further marginalises low- and moderate-income individuals, who are often women, children, disabled persons and members of racial and ethnic groups. An individual-centred, contextual assessment, however, would pay close attention to how income poverty relates to identity characteristics and how that interacts with the structures of the justice system. The strict approach of the treaty bodies also does not further the core aims of the exhaustion rule. Domestic courts never have an opportunity to adjudicate on a claim when the domestic system places severe economic hurdles in the way of the individual. A rigid assessment of the relationship between costs and exhaustion will only entrench zones of impunity for human rights violations.

There is an emerging understanding of how costs can impede access to justice. The HRC, CEDAW, CERD and CAT Committees have hinted that if individuals explain why it would be unreasonable to expend resources to pursue domestic remedies, they could be absolved from fulfilling the exhaustion criteria.[91] There is jurisprudence fleshing out how to demonstrate financial unreasonableness, although it is inconsistent. The proof of the cost of pursuing proceedings – such as financial data on the de facto resources under the individual's control, the rates of legal fees and the availability and eligibility criteria for legal aid – should be satisfactory evidence, under an individual-centred, contextual

[89] *M.A.M.N.* v. *UK*, CEDAW/C/76/D/141/2019, 6 July 2020, para. 6.7; *Kell* v. *Canada*, CEDAW/C/51/D/19/2008, 28 February 2012, Individual Opinion of Committee member Patricia Shulz (dissenting), paras 2.1, 2.5, 2.6; *E.I.G.R.* v. *Spain*, CCPR/C/130/D/3639/2019, 6 November 2020, para. 7.4; *Moylan* (CERD), para 6.4; *Z.S. and A.S.* v. *Switzerland*, CRC/C/89/D/74/2019, 10 February 2022, para. 6.5; *J.S.* v. *Canada*, CAT/C/62/D/695/2015 28 November 2017, para. 6.5; *F.O.F.* v. *Brazil*, CRPD/C/23/D/40/2017, 2 September 2020, para 8.8; *J.B.* v. *Canada*, CAT/C/D/529/2012, 10 August 2016, para. 8.3.

[90] *Sacchi* (CRC) , para. 10.15.

[91] *Moylan* (CERD), para. 6.5; *E.I.G.R.* (HRC), para. 7.4; *J.S.* v. *UK*, CEDAW/C/53/D/38/2012, 12 October 2012, para. 6.3.

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assessment, that costs block achieving domestic justice beyond a mere doubt or assumption.

Turning first to the cost of pursuing proceedings, MG's application for asylum in Switzerland was rejected. He was unable to pursue an appeal, and he filed a communication with the CAT Committee. MG, as an Eritrean asylum-seeker, was not permitted to work and relied exclusively on social welfare. The evidence indicated that during the relevant time, MG received between ten and fourteen francs per day. He did not have the resources to pay the fees of 600 francs to access the Federal Administrative Court. The CAT Committee concluded that since MG was 'destitute', it would be unfair and unreasonable to require him to pursue all domestic remedies.[92] Similarly, in *Abdulkarim* v. *Switzerland*, the CAT Committee held that it would be unfair for a Sudanese asylum-seeker to pay the legal application fee of 1,200 francs when the individual was not authorised to work and only received five francs per day from the State.[93] Given these dire financial circumstances, the CAT Committee held there was no obligation to appeal the deportation decision before the Federal Administrative Court. The evidence before the treaty body readily demonstrated that the mathematics of income and legal fees created insurmountable barriers to justice. Under an individual, contextual assessment, however, the treaty body could more fully engage with the economic accessibility. It is the intersection of poverty, race and migration status with the structures of the social welfare system and the justice system that denied MG and Abdulkarim access to domestic accountability. The exhaustion criteria should fully account for the totality of these obstacles.

An individual-centred, contextual assessment does not require that everyone who lives in poverty be able to provide sophisticated financial data. In a communication to the CRPD Committee, ANP argued he was entitled to a rebate on his municipal taxes as he was a disabled person on low to moderate income. He explained his income was 600 rand per month, while a South African lawyer charged between 2,000 and 3,000 rand per hour. The CRPD Committee characterised ANP's costs arguments as 'of a general nature'.[94] While this assessment of finances and costs was simple, it did reveal a significant obstacle. A more promising way forward comes from the HRC. A child was forced into domestic

[92] *M.G.* v. *Switzerland,* CAT/C/65/D/811/2017, 7 December 2018, paras 6.4–6.5.
[93] *Abdulkarim* v. *Switzerland*, CAT/C/62/D/710/2015, 6 November 2017, para 6.2.
[94] *A.N.P.* v. *South Africa,* CRPD/C/23/D/73/2019, 28 August 2020, para. 5.3.

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work due to his family's financial precarity. His employers accused him of theft. He could not afford bail, was detained in an adult prison, where he was tortured, and ultimately, he was convicted. The HRC held that appealing the verdict would have been a 'significant financial burden he could not afford due to his economic status'.[95] The extent of the burden was not evidenced through financial statements but through the individual's identity characteristics as a young, convicted person who lived in poverty.

An individual-centred, contextual analysis also enriches the exhaustion analysis when access to legal aid is at stake. The CRPD Committee has criticised individuals for not taking any steps to obtain low-cost or free legal aid.[96] This assumes that the legal aid system is adequately funded. The CEDAW Committee in *Matson* v. *Canada* examined the funding model of legal aid programmes, as the state argued that the Indigenous low-income individual should have funded constitutional litigation through the various pro bono and legal aid schemes. It concluded that these schemes did not have sufficient funding.[97] Scrutinising the legal aid system revealed a chronic lack of funding, and as such, there was no requirement for the individual to secure it and pursue domestic remedies. This stands in contrast to *Sacchi* v. *Argentina* where, although it is not clear whether the individuals offered any explanation as to costs, the CRC Committee seems to have accepted at face value the sufficiency of legal aid. A more generous approach to costs, legal aid and the requirement to exhaust would identify how the design of legal aid can cement barriers to domestic justice, particularly for disadvantaged groups.[98] For example, NB and MWJ decided not to pursue domestic remedies on restrictions placed on the UK's disability support fund, arguing that the remedies were 'prohibitively expensive'.[99] At the admissibility stage before the CRPD Committee, the state argued NB and MWJ should have sought out legal aid. An individual, contextual assessment would bring to the fore gender and disability biases embedded in the structures of legal aid. MJW's husband's earnings would be included in the eligibility assessment, furthering assumptions on gendered economic

[95] *Pharaka* v. *Nepal*, CCPR/C/126/D/2773/2016, 15 July 2019, para. 6.5.
[96] *A.N.P.* (CRPD), para. 5.3.
[97] *Matson* (CEDAW), para. 17.6.
[98] Section 6.2; CPRD Committee, Concluding Observations: United Kingdom, CRPD/C/GBR/CO/1, 3 October 2017, para 33.
[99] *N.B.* and *M.W.J.* v. *UK*, CRPD/C/22/D/43/2017, 6 September 2019, para. 5.2.

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dependency, and the assessment did not account for how much of their earnings were expended in relation to their respective disabilities. Various UN actors, as canvassed in Section 6.2, warned against this type of indirect discrimination in legal aid. The CRPD Committee applied a formalistic approach to the exhaustion requirement and deemed the communication inadmissible as NB and MWJ had not attempted to apply for legal aid.[100] A more sophisticated approach to exhaustion would identify how the individual circumstances of MWJ and NB interacted within a larger context of gender and disability inequality that had filtered into the design of the legal aid system. This would have revealed the significant economic barriers to accessing domestic justice. Udombana warns that the exhaustion rule should not focus on ticking boxes, as the ultimate point of the exhaustion rule is to ensure the most appropriate body redresses the 'wrong suffered'.[101] Forcing individuals to be rejected from legal aid so the treaty body can formally conclude remedies have been pursued loses sight of the '*raison d'être* of the rule'.[102]

In contrast to the CRPD Committee, a dissenting opinion from the HRC in *NE* v. *Denmark* and a majority opinion of the CRC Committee in *AS* v. *Denmark* placed the individual at the centre of the cost-exhaustion analysis. In both communications, the individual was rejected from legal aid schemes, but due to the high costs of legal proceedings, there was found to be no obligation to pursue remedies they could not afford.[103] Uniting these communications is a deep appreciation that the individuals were minors and thus less able to secure resources outside of the legal aid system. Using the individual-centred, contextual assessment, the UNTB should examine how the individual's circumstances – for example being a minor, disabled or from a racial minority – relate to contextual institutional structures, such as the design of legal aid and the costs of remedies.

[100] *N.B.* and *M.W.J. (CRPD)*, para. 6.6.

[101] N. Udombana, 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights', (2003) *The American Journal of International Law* 97(1) (2003): 1–37, 1, 6.

[102] Udombana, 'So Far, So Fair', 6.

[103] *N.E.* v. *Denmark*, CCPR/C/133/D/3325/2019, 27 October 2021, para. 7.6; Joint Opinion by Committee Members Wafaa Ashraf Moharram Bassim and Jose Manuel Santos Pais (dissenting), para. 15; Individual Opinion by Committee Member Hélène Tigroudja (dissenting), para. 3; *A.S.* v. *Denmark*, CRC/C/82/D/36/2017, 26 September 2019, para. 9.2.

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6.4.4 Good Quality

The final elements of access to justice – good quality and ineffective remedy – directly connect to the textual exemptions in the conventions and optional protocols and have been explored in various commentaries.[104] The first is an acknowledgement that the lack of quality of the domestic justice system can frustrate the individual's ability to meet the admissibility criteria. The most common quality issue is delay. This was unsuccessfully pleaded in *Sacchi* v. *Argentina*. However, despite the backlogs in courts, exacerbated by COVID-19, and the fact that novel and complex environmental claims can take decades to resolve, the CRC Committee held there was an effective remedy that the individuals should have pursued.[105] An individual-centred, contextual analysis can spotlight these larger contextual factors and ensure domestic delay does not preclude access to international accountability. As evidence of treaty body inconsistency, the CRC Committee, in relation to a different factual-legal matrix, was able to identify how individual identity characteristics and larger contexts should shape the exhaustion analysis. Within a two-year period, the state had not resolved disputes about a child's primary school registration. While on its face, two years is not an excessive period of time, it is significant in the context of a child's access to school, as the right to primary education for a minor must be realised immediately.[106] The CRC Committee therefore deemed the communication admissible. The larger political context was also relevant in *Abaida* v. *Libya*, a decision by the CEDAW Committee. Abaida had been repeatedly beaten, arrested and detained due to her campaigning for women's rights, but filing a complaint 'generated only an acknowledgement of receipt'.[107] The failure to investigate 'coincided with the breakdown of the rule of law in Libya'.[108] Despite there being no domestic investigation, the CEDAW Committee held, in light of these circumstances, that it was not precluded from considering the merits of the claim.

[104] M. Campbell and J. Connors, 'Optional Protocol' in P. Schulz and Others (eds), *CEDAW Commentary* (2nd edn.) (Oxford University Press: Oxford, 2022).
[105] D. Boyd and J. Knox, Amici Curiae Brief of Special Rapporteurs on Human Rights and Environment in Support of Admissibility (*C.S. et al.* v. *Argentina, Brazil, France, Germany and Turkey*) (2020).
[106] *A.E.A.* v. *Spain*, CRC/C/87/D/115/2020, 31 May 2021, para. 11.2.
[107] *Abaida* v. *Libya*, CEDAW/C/78/D/130/2018, 8 March 2017, para. 5.3.
[108] *Abaida* (CEDAW).

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Individuals have also challenged the impartiality of the domestic justice system. Again, the treaty bodies adopted an individual-centred, contextual analysis, examining multiple pieces of evidence, to assess if the quality of the domestic remedies exempted the individual from pursuing them. For example, in one case, the HRC decided that international and civil society reports on the lack of independence of the Sri Lankan judiciary meant there was no requirement to pursue a remedy to the apex court.[109] In another communication against Cameroon, a journalist covering a South Cameroon separatist movement was arrested and tortured numerous times. He argued that the judiciary would not provide effective remedies to individuals involved in the independence movement. In this communication, the state brought evidence of separatists charged with similar offences who had had their charges dismissed by the courts.[110] Examining all of the evidence, the HRC concluded the accusations of bias were presumptive and unsubstantiated, and that the accusations of impartiality amounted to mere doubt or assumption. This communication is an important reminder that an individual-centred, contextual analysis does not inherently mean the communication is admissible, but it does provide the treaty bodies with a fuller, more detailed picture when coming to a determination on exhaustion.

6.4.5 *Ineffective Remedy*

The treaty bodies do assess whether the domestic remedy is effective. For example, when the accountability body does not have the competence to order a remedy that addresses the breach of human rights, there is no requirement to initiate any action before that body. The same applies if the remedy does not address the underlying breach of the right. In *Sacchi* v. *Argentina*, the individuals argued there were no domestic remedies that could effectively address the international elements of the climate crisis, but the CRC Committee disagreed that domestic remedies would be unable to address international cooperation.[111] A remedy is ineffective if the time limit for obtaining a remedy is too short. Although in theory, thirty-five days might be ample time to seek a remedy, an individual-centred, contextual assessment, as done by the HRC, revealed the individual could not use the remedy as they had been hospitalised for months

[109] *Samathanam* v. *Sri Lanka*, CCPR/C/118/D/2412/2014, 28 October 2016.
[110] *S.N.A.* v. *Cameroon*, CCPR/C/107/D/1962/2010, 25 March 2013, para. 4.2.
[111] *Sacchi* (CRC), para. 10.18.

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after being tortured.[112] Determining whether a remedy is ineffective or not is enhanced through an individual-centred, contextual assessment, as the likelihood that the remedy will bring relief requires an understanding of on-the-ground realities that could help or hinder implementation of domestic remedies.

6.5 Conclusion

There is a plethora of reasons why individuals fail to bring their claims before domestic accountability bodies. Many of these reasons are rooted in systemic inequalities. Accountability via the individual communications procedure may be the only chance of vindicating grievous violations of human rights. Although little attention has been paid to the exhaustion criteria for admitting individual communications, the application of this rule can either compound the systemic failures of domestic justice, or it can acknowledge the lived experience of individuals. This chapter argues that a non-technical approach to exhaustion is required to both fulfil the purpose of the individual communications procedure and the goals of the exhaustion rule, and proposes an individual-centred, contextual approach be adopted. A generous approach should spillover into the evidencing of the domestic barriers to justice that frustrate the exhaustion rule. The UNTBs should not demand impossible proof from individuals but take into account how evidence can be shaped by identity characteristics, domestic structures and larger sociopolitical contexts.

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[112] *Pandey* v. *Nepal*, CCPR/C/124/D/2413/2014, 30 October 2018, para 7.4.

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