EHRAC

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Individual Communications to UN Treaty Bodies: Admissibility Issues

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Contents

INTRODUCTION

The European Human Rights Advocacy Centre (EHRAC) has prepared a guide to admissibility issues that arise during litigation before UN Treaty Bodies, in particular the Human Rights Committee (**HRCtee**), the Committee on the Elimination of Discrimination Against Women (**CEDAW Committee**), and the Committee on the Elimination of Racial Discrimination (**CERD Committee**).

For individual communications to be available under the International Covenant on Civil and Political Rights (**ICCPR**) and the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), the state concerned must ratify the relevant Optional Protocol. For individual complaints under the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**) to be available, the state concerned must make a declaration under Article 14 ICERD.

This Guide intends to assist practitioners new to bringing individual communications before the HRCtee, CEDAW Committee, and CERD Committee. Drawing on relevant Treaty Body decisions, General Comments/ Recommendations, and Rules of Procedure, this Guide addresses the following areas:

- Standing:
  - Who can submit a written complaint;
  - Victim status;
  - *Actio popularis;*
  - Representation and consent to act.
- Jurisdiction:
  - Subject matter jurisdiction (*ratione materiae*);
  - Temporal jurisdiction (*ratione temporis*);
  - Territorial jurisdiction (*ratione loci*);
- Exhaustion of domestic remedies
- Time limits
- Other admissibility issues:
  - Examination of the same matter by another procedure of international investigation or settlement;
  - Failure to sufficiently substantiate claims;
  - Abuse of the right of submission or incompatibility with the treaty.

The discussion under each of the above areas is separated by Treaty Body. Whilst the Treaty Bodies follow a common approach in many areas, there are some notable differences in the practice and procedure of each Treaty Body. It should be noted that the different Treaty Bodies also rely on each other's views and recommendations where relevant, so practitioners may find it useful to refer to the jurisprudence of the other Treaty Bodies where helpful in order to support their arguments.

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PART 1
Standing

1.1 WHO CAN SUBMIT A WRITTEN COMMUNICATION TO THE HRCTEE, THE CEDAW COMMITTEE AND THE CERD COMMITTEE?

HRCtee

Communications can be submitted by **individuals** or **groups of individuals** claiming to be victims of a violation of any rights guaranteed under the ICCPR.[1] The HRCtee has made clear that **only individuals** can complain to the Committee,[2] and has rejected legal entities such as NGOs,[3] political parties,[4] and corporations.[5]

Whilst communications **must not be submitted anonymously**, the author of the communication can request that their name be anonymised in any public documents. The HRCtee may then anonymise the parties when they publish their views on the communication.

CEDAW Committee

An **individual** or **groups of individuals** can submit a communication claiming to be victims of a violation of any rights guaranteed under CEDAW.[6] The CEDAW Committee has held that it is not, in principle, an obstacle to admissibility that the author of the communication is an **organisation**.[7]

As with the HRCtee, communications **must not be submitted anonymously**,[8] but the author of the communication can request that their name be anonymised in any public documents.

CERD Committee

An **individual** or **group of individuals** can submit a communication claiming to be victims of a violation of any rights guaranteed under the ICERD.[9] The CERD Committee has held that NGOs can have standing to apply in their own name.

In ***The Jewish community of Oslo v. Norway*** **(2003)** the Committee stated: "The Committee did not consider the fact that three of the authors are organizations posed any problem to admissibility. As has been noted, article 14 of the Convention refers specifically to the Committee's competence to receive complaints from 'groups of individuals'. The Committee considered that to interpret this provision in the way suggested by the State party, namely to require that each individual within the group be an individual victim of an alleged violation, would be to render meaningless the reference to 'groups of individuals'. The Committee had not hitherto adopted such a strict approach to these words. The Committee considered that, bearing in mind the nature of the organisations' activities and the classes of person they represent, they too satisfied the 'victim' requirement in article 14."[10]

Communications **must not be submitted anonymously**,[11] but the author of the communication can request that their name be anonymised in any public documents.

1 First Optional Protocol to the International Covenant on Civil and Political Rights (**ICCPR**), Article 2.

2 Human Rights Committee (**HRCtee**), General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, 29 March 2004, para 9.

3 HRCtee, *Hartikainen v Finland*, Communication No. 40/1978, 9 April 1981.

4 HRCtee, *JRT and the WG Party v Canada*, Communication No. 194/1981, 6 April 1983.

5 HRCtee, *A Newspaper Publishing Co v Trinidad and Tobago*, Communication No. 360/1989, 14 July 1989.

6 Article 2, Optional Protocol to the CEDAW.

7 Committee on the Elimination of Discrimination Against Women (**CEDAW**), *Polish Society of Anti-Discrimination Law v Poland*, Communication No. 136/2018, 10 September 2019.

8 Optional Protocol to CEDAW, Article 3.

9 ICERD, Article 14(6).

10 Committee on the Elimination of Racial Discrimination (**CERD**), *The Jewish community of Oslo* v. *Norway*, Communication No. 30/2003, 15 August 2005; see also, CERD, *Zentralrat Deutscher Sinti und Roma et al. v. Germany,* Communication No. 38/2006, 22 February 2008.

11 ICERD, Article 14(6)(a) .

1.2 VICTIM STATUS

HRCtee

According to the HRCtee's Rules of Procedure, an individual submitting a communication must demonstrate that they are "a **victim of a violation** by that State party of any of the rights set forth in the Covenant".[12] A person must be **actually and personally affected** to satisfy the victim requirement. The HRCtee has stated that this requirement is a matter of degree.[13] If the complained issue does not prejudice the enjoyment of an individual's rights under the Covenant, then they will not satisfy the requirement for victim status.[14]

In ***V.D* v *Seychelles* (2019)**, the HRCtee stated that "any person claiming to be a victim of a violation of a right protected under the Covenant must demonstrate either that a State party has, by act or omission, already impaired the exercise of his right or that such impairment is imminent, basing his arguments, for example, on legislation in force or on a judicial or administrative decision or practice".[15]

The HRCtee does not generally entertain hypothetical future violations;[16] however, in certain circumstances (particularly in extradition cases) where there is a 'real risk' that there will be a violation of the Covenant upon removal, victim status has been satisfied.[17]

The HRCtee has found that **legislation** itself may violate the Covenant even when it has not been enforced against the author, or enforced in general:

- In *Ballantyne et al v Canada*, the HRCtee stated that "where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as 'victims' within meaning of article 1 of the Optional Protocol".[18]
- In *Toonen v Australia*, concerning the criminalisation of sexual relations between consenting males, the author claimed to be a victim even though the laws had not been enforced for many years, on the basis of the impact of the existing laws on his private life. The HRCtee was satisfied that the author was a 'victim', noting that "the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally, and that they could raise issues under articles 17 and 26 of the Covenant."[19]

As regards rights that are enjoyed collectively – such as minority rights – the author of a communication must be able to demonstrate that they are personally and directly affected.

The HRCtee in ***G.I.* v *Greece* (2019)** considered a communication submitted by the author on behalf of the Roma people, recalling "its general comment No. 23 (1994) on the rights of minorities, in which it recognizes that 'although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion'."[20] However, the HRCtee declared the communication inadmissible as "the author does not specify why he considers that the State party violated his individual rights, considered in a collective dimension, to enjoy his own culture, profess his religion or use his language in community with other members of a minority group".[21]

12 HRCtee, Rules of Procedure, Rule 99(b).
13 HRCtee, *Mauritian Women's Case,* Communication No. 35/78, 9 April 1981.
14 See, e.g., HRCtee, *Poongavanam v Mauritius*, Communication No. 567/93, 9 August 1994.
15 HRCtee, *V.D* v *Seychelles*, CCPR/C/126/D/2401/2014, 26 July 2019, para 6.3.
16 See e.g. HRCtee, *ARS v Canada*, Communication No. 91/81, 28 October 1981.
17 See HRCtee, *Kindler v Canada*, Communication No. 470/91, 11 November 1993; and see HRCtee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, 29 March 2004, para 12.
18 HRCtee, *Ballantyne et al v Canada*, Communication Nos 359 and 385/89, 31 March 1993.
19 HRCtee, *Toonen v Australia*, Communication No. 488/92, 31 March 1994, para 5.1.
20 HRCtee, *G.I.* v *Greece*, Communication No. 2582/2015, 25 July 2019, para 8.5.
21 ibid, para 8.5.

CEDAW Committee

Communications can be submitted by individuals claiming to be **victims of a violation** of any of the rights set out in CEDAW. The CEDAW Committee in *J.M* v *Australia* (2023) noted that "victim status depends on whether the author has been **directly and personally affected** by the violation alleged. An author may claim to be a victim only if she is personally affected by the act or omission of the State party at issue".[22]

Victim status is **not limited to 'women'**. In *I.D.M. and A.M.M* v *Canada* (2022) the CEDAW Committee declared a communication submitted by a man to be admissible, recalling that "article 2 of the Optional Protocol establishes that communications may be submitted by or on behalf of "individuals", without limiting the victim status to 'women'".[23] The Committee considered the author (a man) and his children as victims as they "are all victims of violations in their capacity as descendants of an indigenous woman who lost her indigenous status and the right to determine her own identity, owing to gender inequalities in the Indian Act, which was unilaterally established by the State party".[24]

Victim status **may be lost** in certain circumstances:

- A number of cases have held that discrimination against mothers concerning their children ended, and the complainants lost victim status, when the children reached the age of majority, at which point the issue of concern passed to the hands of the adult children.[25]
- In the case of *AJ et al* v *United Kingdom of Great Britain and Northern Ireland* (2019), the Committee decided that the authors lost victim status "when they concluded the settlement in full and final satisfaction of their claims at the national level".[26] In deciding the case, the Committee considered the terms of the settlement agreement, the amount of the compensation awarded, payment of authors' legal costs and the text of public apology given by the State and whether the settlement was "unfair, manifestly inequitable or was the result of undue pressure or coercion".[27]
- A similar approach was taken in the case of *X v Austria* (2016) where the Committee decided that the author had lost her victim status as she reached a comprehensive settlement with the State, received compensation in full and final satisfaction of her claims and agreed to terminate all proceedings with final effect.[28]

CERD Committee

According to the CERD Committee's Rules of Procedure, an individual or group of individuals can submit a communication claiming to be victims of a violation of any rights guaranteed under the ICERD by a State party.[29] A person cannot claim to be a victim of a violation of any of the rights enshrined in ICERD unless he or she was **directly and personally affected** by the act or omission in question.[30]

The CERD Committee has considered the circumstances in which an individual can claim they are directly and personally affected by **legislation**, or **gaps in legislation**:

- In *D. F. v. Australia* (2008) the Committee found that the petitioner could be considered a victim under Article 14(1) ICERD, since he was affected by amendments to the legislation on social security benefits.[31]
- In the *Jewish community of Oslo and others v Norway* (2005), the petitioners "claimed that they were 'victims' of alleged violations of articles 4 and 6 of the Convention because of the general inability of Norwegian law to protect them against the dissemination of anti-Semitic and racist propaganda". The Committee found the petitioners to be 'victims' because they belonged to a class of persons which might

22 CEDAW, *J.M* v *Australia*, Communication No. 123/2017, 23 February 2023, para 9.3.
23 CEDAW, *I.D.M. and A.M.M* v *Canada,* Communication No. 68/2014, 14 February 2022, para 17.3.
24 ibid, para 17.3.
25 CEDAW, *Salgado v United Kingdom,* Communication No. 11/2006, 22 January 2007; *SOS Sexisme v France,* Communication No. 13/2007, 4 August 2009.
26CEDAW, *AJ et al* v *United Kingdom of Great Britain and Northern Ireland*, Communication No. 126/2018, 28 October 2019, para 6.5.
27 ibid, para 6.5.
28 CEDAW, *X* v *Austria*, Communication No. 67/2014, 11 July 2016, para 6.7.
29 CERD, Rules of Procedure, Rule 91(b).
30 See e.g. CERD, *Yaku Pérez Guartambel* v *Ecuador*, Communication No. 61/2017, 4 December 2019, para. 6.2.
31 CERD, *D.F.* v. *Australia*, Communication No. 39/2006, 22 February 2008, para. 6.3.

in the future be adversely "exposed to the effects of the dissemination of ideas of racial superiority and incitement to racial hatred, without being afforded adequate protection".[32]

In *Murat Er v Denmark* (2007) the Committee adopted a similar approach to the concept of "victim status".[33] The petitioner had suffered from the practice of excluding non-ethnic Danish students from traineeships at school. The Committee argued that all non-ethnic Danish students at the school be considered "potential victims" of this practice, irrespective of whether they qualify as trainees according to the school's rules. The mere fact that such a practice existed in the school would be, in the Committee's view, enough to consider that all non-ethnic Danish students, who were bound to be eligible for traineeships at some point during their study programme, be considered as potential victims under Article 14(1) ICERD.[34]

As regards discriminatory **public statements** and **publications**:

- The case of *Ahmed Farah Jama v. Denmark* (2009) concerned a public statement by a Member of Parliament regarding Somalis. Although no violation was found, the Committee considered that the victim requirement was satisfied, noting 'the petitioner's claim that the ongoing public statements against Somalis have a negative effect on his daily life'.[35]
- In *TBB-Turkish Union in Berlin/Brandenburg v Germany* (2013), the petitioner was an association complaining about the discriminatory statements of a politician in relation to Turkish and Arab migrants. The Committee considered that the nature of the petitioner's activities and its aims, coupled with the group of individuals it represented (namely persons of Turkish heritage in Berlin and Brandenburg) satisfied the victim requirement within the meaning of Article 14(1) ICERD. Further, the petitioner was able to substantiate that it was directly affected by the discriminatory statements.[36]
- However, in *A. S. v. Russian Federation* (2011), concerning leaflets inciting hatred and enmity against the people of the same origin as the petitioner, the Committee stated that the claim was inadmissible, as the leaflets had not directly and personally affected the petitioner: the leaflets were only found in one town (far from where the petitioner lived and worked) and were intended for local readership.[37]
- In *The Documentation and Advisory Centre on Racial Discrimination v Denmark* (2011), the Committee rejected a claim where the petitioner (a legal person) alleged that a published job advertisement was discriminatory.[38] The Committee recognised "the possibility that a group of persons representing, for example, the interests of a racial or ethnic group, may submit an individual communication, provided that it is able to prove that it has been an alleged victim of a violation of the Convention or that one of its members has been a victim".[39] However, it noted that no member of the board of trustees applied for or was interested in the job, nor did any members of the board or any other persons whose interests the petitioner was authorised to represent. Since no identifiable victims were personally affected by the advertisement, the petitioner had failed to substantiate their claim that it constituted or represented a group of individuals claiming to be the victim of a violation.

Where an individual complains of a violation of **collective rights**, they must demonstrate that they have been directly and personally affected. In *Yaku Pérez Guartambel* v *Ecuador* (2019) the petitioner submitted a claim to the Committee regarding the refusal to register his indigenous marriage and to grant his wife a visa.[40] The claim was submitted both in his own name and in the name of the organisation over which the petitioner presides to represent the interests of the indigenous people. The petitioner alleged that the collective right to marry under the customary law of the indigenous people had been violated. The Committee declared inadmissible the part of the communication concerning collective rights and reasoned that the petitioner had not specified what individuals or groups of individuals were directly and personally affected.[41]

32 CERD, *The Jewish community of Oslo* v. *Norway*, Communication No. 30/2003, 15 August 2005, para. 7.3.

33 CERD, *Murat Er* v *Denmark* , Communication No. 40/2007, 08 August 2007, para. 6.3.

34 ibid.

35 CERD, *Mr. Ahmed Farah Jama* v. *Denmark*, Communication No. 41/2008, 21 August 2009, para. 6.2.

36 CERD, *TBB-Turkish Union in Berlin/Brandenburg* v. *Germany*, Communication No. 48/2010, 26 February 2013, para. 11.3, referring to CERD, *Central Council of German Sinti and Roma et al. v. Germany*, Communication No. 38/2006, 22 February 2008, para. 7.2; and to CERD, *Jewish Community of Oslo et al.* v. *Norway* , Communication No. 30/2003, 15 August 2005, para. 7.4.

37 CERD, *A. S.* v. *Russian Federation*, Communication No. 45/2009, 26 August 2011.

38 CERD, *The Documentation and Advisory Centre on Racial Discrimination* v *Denmark*, Communication No. 28/2003, 26 August 2011, para. 6.7.

39 ibid, para 6.4.

40 CERD, *Yaku Pérez Guartambel* v *Ecuador*, Communication No. 61/2017, 4 December 2019.

41 ibid para. 6.2.

1.3 ACTIO POPULARIS

HRCtee

The HRCtee has long held that "no individual can, in the abstract, by way of an *actio popularis,* challenge a law or practice claimed to be contrary to the Convention".[42]

In the case of *Polat Bekzhan, Leon Weaver Jr. and Helmut Echtle* v *Kazakhstan* (2020), the HRCtee declared inadmissible the communication of the author who claimed 'on behalf of all Jehovah's Witnesses' in Kazakhstan.[43] The HRCtee considered the communication to be an *actio popularis* as the author did not "provide authorizations from the 17,500 Jehovah's Witnesses in the State party to act on their behalf, nor do the authors explain the reasons why they can represent these persons".[44]

CEDAW Committee

In the case of *SH* v *Bosnia and Herzegovina* (2020), the CEDAW Committee recalled "that a person can only be a victim in the sense that he or she is actually affected. This means that no person may, in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Convention".[45]

In the *Polish Society of Anti-Discrimination Law* v. *Poland* (2019) case, the Committee found the case inadmissible for non-exhaustion of domestic remedies as the author (an anti-discrimination NGO) did not, during domestic proceedings, act in its own name but on behalf of the public interest and did not allege that it had been a victim of a violation of the Convention.[46]

CERD Committee

In *A. S.* v. *Russian Federation* (2011), the CERD Committee emphasised that an individual has a right to submit a complaint provided he or she is directly and personally affected by an act or omission of the State; without this requirement, it would open the door to complaints of a general nature without identifiable victims (*actio popularis*).[47]

1.4 REPRESENTATION AND CONSENT TO ACT

HRCtee

The general rule is that a communication should be **submitted by the individual personally** or by that **individual's representative**.[48] As such, communications cannot generally complain about the interests of third parties. Where an individual consents to a representative acting on their behalf, a power of attorney must be attached to the communication; the HRCtee does not prescribe the form for this and does not require original copies (unlike the practice of the European Court of Human Rights).[49]

42 HRCtee, *Mauritian Women's Case,* Communication No. 35/78, 9 April 1981.
43 HRCtee, *Polat Bekzhan, Leon Weaver Jr. and Helmut Echtle* v *Kazakhstan,* Communciation No. 2661/2015, 30 October 2020, para 8.4.
44 ibid, para 8.4..
45 CEDAW, *SH* v *Bosnia and Herzegovina*, Communication No. 116/2017, 9 July 2020, para 7.2.
46 CEDAW, *Polish Society of Anti-Discrimination Law* v *Poland,* Communication No. 136/2018, 19 July 2019, para 6.5.
47 CERD, *A. S.* v. *Russian Federation*, Communication No. 45/2009, 26 August 2011, para. 7.2.
48 HRCtee, Rules of Procedure, Rule 99(b).
49 See HRCtee, *Gomez Vazquez v Spain*, Communication No. 701/1996, 11 August 2000.

In ***Georgiy Arkhangelskiy, Bakhtiyar Albani, Ruslan Dzhumanbayev, Zhan Kenzhegulov, Zhanar Sekerbayeva* v *Kazakhstan* (2023)**, the State party argued that the communication was inadmissible as the communication was submitted by a third party instead of by the authors themselves.[50] The HRCtee referred to Rule 99(b) and declared the communication admissible as "the alleged victims duly issued powers of attorney authorizing a NGO to represent them before the Committee".[51]

In certain circumstances, a communication can be submitted **on behalf of an alleged victim** without their consent "when it appears that the individual in question is unable to submit the communication personally"[52] (for example if they are deceased or in incommunicado detention) or where the author of the communication can otherwise justify acting on their behalf without their consent.[53] If a person was previously unable to submit the communication but is then able to communicate with the HRCtee (e.g. because they have been released from detention), they are expected to confirm their intention to continue the complaint.[54]

In the absence of a power of attorney or other form of written consent, another person may submit a communication on the victim's behalf if they can establish a **'sufficient link'** with the victim. The sufficient link test has been met, for instance, by family members.[55] For instance, in *María del Carmen Almeida de Quinteros et al.* v *Uruguay* (1983), the HRCtee found a communication submitted by the mother of a victim of enforced disappearance as admissible.[56] HRCtee noted that that "the author of the communication was justified in acting on behalf of the alleged victim".[57]

Whilst **children** can complain to the HRCtee in their own name, it is usually with a parent acting as their representative. Cases have been rejected as inadmissible by the HRCtee if the children were capable of consenting to representation, but the parent failed to obtain written consent.[58] On the other hand, if a parent was unable to obtain consent, then the HRCtee may consider a parent to have a sufficient link with the child to represent them without express consent.[59]

If an author has died whilst their communication is considered, a representative can continue the claim, so long as the heirs provide instructions to the HRCtee.[60]

CEDAW Committee

As with the HRCtee, the general rule is that a communication can be submitted by an individual or group of individuals who claim to be victims, and can only be submitted **on their behalf** with their **consent**, unless the author can justify acting on their behalf without such consent.[61] Rule 68 of the CEDAW Committee's Rules of Procedure makes clear that a communication can be submitted by a **designated representative**, or "by others on behalf of an alleged victim where the alleged victim consents".

In the case of ***VC (deceased)* v *Republic of Moldova* (2020)**, the CEDAW Committee clarified the circumstances where an author can justify submitting a communication without the victim's consent.[62] The Committee established two situations when a communication is admissible without the victim's consent:

"(a) it is impossible for the victim to submit a communication or to designate a representative, such as in the case of a deceased person; or

50 HRCtee, *Georgiy Arkhangelskiy, Bakhtiyar Albani, Ruslan Dzhumanbayev, Zhan Kenzhegulov, Zhanar Sekerbayeva* v *Kazakhstan,* Communication Nos 2538/2015, 2539/2015, 2544/2015, 2549/2015, 2550/2015, 10 March 2023.
51 ibid, para 7.4.
52 HRCtee, Rules of Procedure, Rule 99(b).
53 HRCtee, Rules of Procedure, Rule 91.
54 See, e.g., HRCtee, *Mpandanjila v Zaire*, Communication No. 138/1983, 26 March 1986.
55 See, e.g. HRCtee, P.S. v Denmark, Communication No. 397/1990, 22 July 1992
56 HRCtee, *María del Carmen Almeida de Quinteros et al. v Uruguay*, Communcation No. 107/1981, 21 July 1983, para 3.
57 ibid, para 3.
58 See e.g, HRCtee, *EB v New Zealand,* Communication No. 1368/2005, 16 March 2007.
59 See, e.g. HRCtee, *NT v Canada*, Communication No. 1052/2002, 20 March 2007.
60 See, HRCtee, *Wallen v Trinidad and Tobago*, Communication No. 576/1994, 4 April 1995.
61 Optional Protocol to CEDAW, Article 2.
62 CEDAW, *VC (deceased)* v *Republic of Moldova,* Communication No. 105/2016, 9 July 2020.

(b) when the author can justify the action on behalf of the victim, without express consent having been granted. In the latter case, the author must justify in writing the reasons for acting without consent".[63]

In the case of *Polish Society of Anti-Discrimination Law* v *Poland* (2018) the communication was held inadmissible, as the names of the affected individuals were not specified and the author organization did not provide authorisation forms indicating the affected individuals' consent to be represented by the organisation.[64]

CERD Committee

The CERD Committee Rules of Procedure provide that: "the communication should be submitted by the **individual** himself or by his **relatives** or **designated representatives**; the Committee may, however, in exceptional cases accept to consider a communication submitted by others on behalf of an alleged victim when it appears that the victim is **unable to submit the communication himself**, and the author of the communication justifies his acting on the victim's behalf". (Rule 91(b), emphasis added)

As noted in *Anne Nuorgam et al.* v. *Finland* (2018), where a communication is submitted on behalf of a victim, the petitioners must provide **written authorisation** from such a victim.[65]

63 ibid, para 6.3.

64 CEDAW, *Polish Society of Anti-Discrimination Law* v *Poland*, Communication No. 136/2018, 19 July 2019, para 6.3.

65 CERD, *Anne Nuorgam et al. v Finland*, Communcation No. 59/2016, 07 May 2018, para. 7.5.

PART 2
Jurisdiction

2.1 SUBJECT MATTER JURISDICTION (RATIONE MATERIAE)

HRCtee

An individual communication must concern a **violation of the substantive rights** set out in the ICCPR. The HRCtee has made clear that individual communications may only be presented with respect to the **rights set out in Part III of the ICCPR** (Articles 6-27), as interpreted in light of Parts I and II ICCPR.[66]

In light of this, the HRCtee has confirmed that **certain rights under the ICCPR cannot be the subject of an individual complaint** under the Optional Protocol. For example, in *Lubicon Lake Band v. Canada*, the HRCtee held that an individual cannot claim to be a victim of the right to self-determination under Article 1, since Article 1 deals with rights conferred upon "peoples".[67] In *Minogue v Australia*, the HRCtee held that Article 50 ICCPR – concerning the application of the Covenant to federal States – cannot give rise to a free-standing claim that is independent of a substantive violation of the ICCPR.[68]

The HRCtee will not examine complaints relating to **rights not included in the ICCPR** – including the right to property,[69] the right to asylum,[70] the right to strike,[71] and the right to appeal in civil matters.[72]

The HRCtee also **will not examine claims concerning violations of rights contained in another treaty**. For example, in *Z* v *Denmark* (2016), the HRCtee declared part of the communication concerning a violation of rights under CEDAW and the Convention on the Rights of the Child as inadmissible *ratione materiae* since "its competence is limited to the examination of communications claiming a violation of rights under the Covenant".[73]

CEDAW Committee

An individual communication must concern a **violation of the substantive rights** set out in CEDAW. The CEDAW Committee has found admissible issues that are not explicitly addressed in the Convention but which fall under the definition of discrimination against women under Article 1 CEDAW, including gender-based violence such as domestic violence.[74]

The CEDAW Committee will **not examine claims concerning violations of rights contained in another treaty**. For example, in the case of *X* v *Timor-Leste* (2018), the Committee held inadmissible *ratione materiae* the author's claim that there has been a violation of Article 14 of the ICCPR and proceeded with the other claims under CEDAW.[75] Similarly, in *SJA* v *Denmark* (2017), the Committee held that the author's claim under Article 3 of the European Convention on Human Rights was inadmissible as it was "not within the scope of the Committee" and thus incompatible with Article 4(2)(b) of the Optional Protocol to CEDAW.[76]

66 HRCtee, *Mahuika et al. v New Zealand*, Communication No. 547/1993, 27 October 2000, para. 9.2.
67 HRCtee, *Lubicon Lake Band v Canada,* Communication No. 167/1984, 26 March 1990, para. 13.3.
68 HRCtee, *Minogue v Australia*, Communication No. 954/2000, 2 November 2004, para. 6.9.
69 HRCtee, *OJ v Finland*, Communication No. 419/1990, 6 November 1990.
70 HRCtee, *V. M. R. B. v Canada*, Communication No. 236/1987, 18 July 1988.
71 HRCtee, *JB et al v Canada*, Communication No. 118/1982, 18 July 1986.
72 HRCtee, *IP v Finland*, Communication No. 450/1991, 26 July 1993.
73 HRCtee, *Z v Denmark,* Communication No. 2795/2016, 22 March 2023, para 6.4.
74 HRCtee, *N.S.F. v United Kingdom*, Communication No. 10/2005, 30 May 2007.
75 CEDAW, *X v Timor-Leste*, Communication No. 88/2015, 26 February 2018, para 5.4.
76 CEDAW, *SJA v Denmark*, Communication No. 79/2014, 6 November 2017, para 7.4.

CERD Committee

As with the HRCtee and CEDAW Committee, an individual communication to the CERD Committee must concern a **violation of the substantive rights** set out in CERD.

In *Mr. Ahmed Farah Jama* v *Denmark* (2008), the petitioner argued a violation of the right to an effective remedy on the basis that he was not given the opportunity to appeal a decision of the police commissioner. The Committee declared that this claim was inadmissible *ratione materiae*[77] noting that it "does not consider it within its mandate to assess the decisions of domestic authorities regarding the appeals procedure in criminal matters".[78]

2.2 TEMPORAL JURISDICTION (RATIONE TEMPORIS)

HRCtee

The HRCtee can only consider communications concerning a State Party to the ICCPR which is also a party to the Optional Protocol. The critical date for the purposes of the HRCtee's jurisdiction is the **date of ratification of the Optional Protocol**, and not the ratification of the ICCPR itself.[79] If the facts giving rise to a complaint occurred **before** the State Party became a party to the Optional Protocol, then the communication will not be considered by the HRCtee, unless a state has exceptionally waived its rights.[80]

An exception to this concerns violations that occurred before ratification of the Optional Protocol but which **continue** after its entry into force,[81] or which **produce continuing effects that themselves constitute discrete violations** of the ICCPR (even if the original violation is inadmissible *ratione temporis*).[82] The HRCtee considers a violation as "continuing" when there is "an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State Party".[83]

The issue of whether a violation is "continuing" has arisen in respect of **enforced disappearances**:

- In *Sarma v Sri Lanka* the HRCtee has considered that an enforced disappearance that occurred prior to the entry in force of the Optional Protocol was a continuing violation in respect of the disappeared, given that the state acknowledged the disappearance.[84]
- However, in other cases the HRCtee has held that disappearances occurring prior to the ratification of the Optional Protocol were inadmissible *ratione temporis*, given that the state did not undertake any act that would constitute a confirmation of the enforced disappearance.[85]
- It should be noted that in *Rizvanović v Bosnia and Hercegovina*, the HRCtee made no mention of the fact that a disappearance occurred prior to entry into force of the Optional Protocol, and found violations concerning the disappeared and their families.[86]

77 CERD, *Mr. Ahmed Farah Jama v Denmark*, Communication No. 41/2008, 21 August 2009, para 6.3.
78 ibid, para 6.3.
79 See, e.g., HRCtee, *Konye and Konye v Hungary*, Communication No. 520/1992, 7 April 1994.
80 The only case in which this occurred is HRCtee, *Parkanyi v Hungary*, Communication No. 410/1990, 27 July 1992.
81 HRCtee, *Konye and Konye v Hungary*, Communication No. 520/1992, 7 April 1994.
82 HRCtee, *Lovelace v Canada*, Communication No. 24/1977, 30 July 1981.
83 HRCtee, *Konye and Konye v Hungary*, Communication No. 520/1992, 7 April 1994, para 6.4.
84 HRCtee, *Sarma v Sri Lanka,* Communication No. 950/2000, 16 July 2003.
85 HRCtee, *Yurich v Chile*, Communication No. 1078/2002, 2 November 2005; See also *Cifuentes v Chile,* Communication No. 1536/2006, 28 July 2009.
86 See, e.g., *Rizvanović v Bosnia and Hercegovina,* Communication No. 1997/2010, 21 March 2014.

In ***F.A.J. and B.M.R.A. (acting on their own behalf and on behalf of their missing relatives, M.J.V. and A.A.M)* v *Spain* (2020)**, the HRCtee considered a Communication regarding enforced disappearances "with respect to the authors' relatives occurred in 1936, 41 years before the entry into force of the Covenant for the State party and 49 years before the entry into force of the Optional Protocol".[87] The Committee recalled that "article 2 (3) invoked in conjunction with articles 6, 7, 9 and 16 of the Covenant, **may give rise in exceptional circumstances to a continuing obligation to investigate continuing violations that occurred before the entry into force of the Covenant and the Optional Protocol for the State party**".[88] However, the Committee declared the Communication inadmissible *ratione temporis*: "in view of the **significant passage of time** since the principal events of the claim (which occurred almost 85 years ago) and the absence of a clear acknowledgment by judicial authorities of the violation of the authors' relatives' rights after 1985, the Committee cannot conclude that it has jurisdiction over a violation, even with certain continuing effects, stemming from events that occurred in 1936".[89] The HRCtee has come to a similar conclusion concerning claims from the family of victims of the Katyn massacre.[90]

CEDAW Committee

Under Article 4(2)(e) of the Optional Protocol to CEDAW, the CEDAW Committee is unable to decide on communications where the subject matter of the "communication **occurred prior to the entry into force of the present Protocol** for the State Party concerned unless those facts **continued** after that date" (emphasis added).

In the case of *NP* v *Ukraine* (2017), the CEDAW Committee held the communication inadmissible *ratione temporis* since the alleged violation of the author's rights occurred prior to the ratification by Ukraine of the Optional Protocol to the CEDAW and the Protocol cannot be applied retroactively.[91] The Committee also noted that the author had failed to establish that the alleged violation continued even after the entry of the Optional Protocol into force.[92]

The CEDAW Committee has considered there to be a **continuing violation** in a number of communications, including cases concerning forced sterilisation,[93] dismissal from being a civil servant (given its broader ongoing effects),[94] and domestic violence. In the case of *AT v Hungary*, the CEDAW Committee considered whether it had jurisdiction to examine incidents of domestic violence that occurred prior to the entry into force of the Optional Protocol in March 2001, with the petitioner arguing that such incidents were part of a "clear continuum of domestic violence". The Committee determined that it had jurisdiction to consider the communication in its entirety, as that the facts that were the subject of the communication "cover the alleged lack of protection/alleged culpable inaction on the part of the State party for the series of severe incidents of battering and threats of further violence that has uninterruptedly characterized the period beginning in 1998 to the present".[95]

The case of ***Natalia M. Alonzo and others* v *The Philippines* (2023)** concerned the complaint of 24 women relating to the failure of the Philippines to provide them with adequate social support and redress as survivors of the wartime sexual slavery system operated by the Japanese Army in the Philippines during the Second World War. The CEDAW Committee declared the communication admissible even though the principal events occurred prior to the entry into force of the Optional Protocol for the Philippines.[96] The Committee noted that "since 2003, when the Optional Protocol entered into force for the State party, [the State] has had the obligation to provide recognition and effective and adequate remedies and to promptly attribute redress for the **continuous discrimination** suffered by the authors".[97]

87 HRCtee, *F.A.J. and B.M.R.A., acting on their own behalf and on behalf of their missing relatives, M.J.V. and A.A.M* v *Spain,* Communication No. 3599/2019, 28 October 2020, para 7.6.; See also *K.K. and Others v Russia* Communication No. 2912/2016, 5 November 2019, concerning the Katyn Massacre.

88 *F.A.J. and B.M.R.A., acting on their own behalf and on behalf of their missing relatives, M.J.V. and A.A.M* v *Spain,* Communication No. 3599/2019, 28 October 2020, para 7.6, emphasis added.

89 ibid, para 7.

90 HRCtee, *K.K. and Others v Russia*, Communication No 2912/2016, 5 November 2019.

91 CEDAW, *NP* v *Ukraine*, Communication No. 95/2015, 6 November 2017, para 6.3 and para 6.4.

92 ibid, para 6.3.

93 CEDAW, *AS v Hungary*, Communication No. 4/2004, 14 August 2006.

94 CEDAW, *Rahime Kayhan v Turkey*, Communication No. 8/2005, 27 January 2006.

95 CEDAW, *AT v Hungary,* Communication No. 2/2003, 26 January 2005, para. 8.5.

96 CEDAW, *Natalia M. Alonzo v The Philippines*, Communication No. 155/2020, 17 February 2023.

97 ibid, para 8.5, emphasis added.

CERD Committee

Whilst the text of ICERD does not explicitly address the CERD Committee's temporal jurisdiction to examine individual complaints, the same general principles apply: the CERD Committee cannot examine communications concerning events that occurred prior to the acceptance of the individual communications procedure under Article 14 ICERD, unless the violation is of a **continuing nature**.

For example, in *Mr. Dragan Durmic v Serbia and Montenegro* (2006), the petitioner had been refused access to a public place on grounds of his national or ethnic origin. The incident took place before the State accepted the competency of the Committee under Article 14 ICERD. The Committee noted that what had to be considered about the State party's obligations was not the incident itself, which took place between individuals, but the shortcomings of the competent authorities in conducting an investigation and the absence of efforts made by the State party to guarantee an effective remedy to the petitioner, in accordance with Article 6 ICERD.[98] As the State party had failed to complete its investigations and to offer other remedies to the petitioner, the alleged **violations were ongoing and had continued** since the date of the incident itself and after the State party's declaration under Article 14. Consequently, the CERD Committee found that the communication was admissible *ratione temporis* under Article 14.[99]

In *Grigore Zapescu v the Republic of Moldova* (2021), the petitioner argued that he had been subject to racial discrimination when applying for a job, and that the State had *inter alia* failed to acknowledge the violation of his rights and provide redress. Whilst the facts of the case took place before the State party had accepted the CERD Committee's jurisdiction under Article 14, the claim was declared to be admissible as the decisions of the domestic courts were rendered after the State made a declaration under Article 14.[100] In coming to this conclusion, the CERD Committee held that the **judicial decisions** of the national authorities are to be considered as **part of the facts of the case** when they are the **result of procedures directly connected with the initial facts, actions or omissions that gave rise to the violation**, provided they are **capable of remedying the alleged violation**.[101]

2.3 TERRITORIAL AND EXTRATERRITORIAL JURISDICTION (RATIONE LOCI)

ICCPR

Article 2(1) ICCPR provides that each State Party undertakes "to respect and to ensure to all individuals **within its territory and subject to its jurisdiction** the rights recognized in the present Covenant". Further, Article 1 of the First Optional Protocol to the ICCPR provides that the HRCtee has competence to receive and consider communications from "**individuals subject to [a State Party's] jurisdiction**".

In ***Burgos Lopez*** / ***Delia Saldias de Lopez*** **v** ***Uruguay*** **(1981)** the HRCtee observed that the phrase "to all individuals within its territory and subject to its jurisdiction" under Article 2(1) ICCPR did not mean that state parties cannot be held accountable for violations of rights under the ICCPR committed by their agents on the territory of another state.[102] On the phrase "individuals subject to its jurisdiction" in Article 1 of the Optional Protocol 1 to the ICCPR, the HRCtee stated that this refers "not to the place where the violation occurred, but rather to **the relationship between the individual and the State in relation to a violation of any of the rights** set forth in the Covenant, **wherever they occurred**".[103] The HRCtee found that the kidnapping of Burgos Lopez by Uruguayan agents in Argentina was in contravention of the ICCPR, noting that it would be unconscionable to assert that a State can violate its ICCPR obligations on another state's territory.[104]

98 CERD, *Mr. Dragan Dumic v Servbia and Montenegro*, Communcation No. 29/2003, 6 March 2006, para. 6.4.

99 ibid.

100 CERD, *Grigore Zapescu v the Republic of Moldova*, Communication No. 60/2016, 22 April 2021, para. 7.3.

101 ibid.

102 HRCtee, *Delia Saldias de Lopez v Uruguay,* Communication No. 52/1979, 29 July 1981, paras 12.1-13 (this case is also known as *López Burgos v Uruguay*).

103 ibid para 12.2.

104 ibid, para 13.

The International Court of Justice (ICJ) has also examined the extraterritorial scope of the ICCPR in the *Wall Opinion* (2004), finding that the ICCPR[105] applies when a State Party is acting in foreign territories,[106] and holding that the ICCPR: 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.[107]

The HRCtee has since clarified the ICCPR's extraterritorial application in its General Comments:

- **General Comment No. 31 (2004)** regarding the obligations of State parties provides that States "must respect and ensure the rights laid down in the Covenant to anyone **within the power or effective control of that State Party**, even if not situated within the territory of the State Party". This also 'applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'.[108]
- **General Comment No. 36 (2018)** regarding the right to life confirms that States must "respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control".[109] This includes "persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a **direct and reasonably foreseeable manner**".[110] The HRCtee has also emphasised that States must take appropriate measures "to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but **having a direct and reasonably foreseeable impact** on the right to life of individuals outside their territory" are consistent with Article 6 ICCPR.[111]

In light of the HRCtee's jurisprudence, an individual outside the territory of the State Party may be subject to that State's jurisdiction for the purposes of Article 1 of the First Optional Protocol to the ICCPR where (i) a State exercises jurisdiction abroad through **effective control** over territory, (ii) a State exercises **power and authority** over an individual via its agents acting abroad, and (iii) a State exercises power or effective control over an individual's enjoyment of rights, where the enjoyment of rights is impacted by the State's activities in a **direct and reasonably foreseeable manner**.

There have been a number of recent important decisions from the HRCtee in relation to extraterritorial jurisdiction. Two such decisions relate to actions taken by States in connection with asylum seekers:

In April 2021, the HRCtee published decisions in relation to two communications against Italy and Malta: ***A.S. and others* v *Italy* (2021)**[112] and ***A.S. and others v Malta* (2021)**.[113] The authors claimed that both Italy and Malta had failed to take appropriate measures to render assistance to their relatives, who were asylum seekers in distress at sea, in violation of their relatives' right to life under Article 6 ICCPR. As regards the complaint against Italy, the events occurred outside the State's territorial waters. However, the HRCtee found that "a special relationship of dependence had been established between the individuals on the vessel in distress and Italy", including as a result of contact between the vessel and the Italian rescue centre, and the involvement of the Italian rescue centre in the rescue operation. As such, individuals on the vessel in distress "were **directly affected by the decisions taken by the Italian authorities in a manner that was**

105 The ICJ has also confirmed extraterritorial applicability of the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child: ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) (ICJ Rep.2004, p.136), paras 112 and 113.

106 In para 109 the ICJ referred to HRCtee cases *López Burgos v Uruguay* (also known as *Delia Saldias de Lopez v Uruguay,* referred above), Communication No. 52/1979, 29 July 1981 and *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29 July 1981 and to one of the passports cases: *Montero v Uruguay*, Communication No. 106/1981, 31 March 1983.

107 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) (ICJ Rep.2004, p.136), para 111. It found so after noting Article 2(1) ICCPR and the meaning of the phrase 'within its territory and subject to its jurisdiction' and observing that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory" (para 109). It also observed that the "drafters of the ICCPR did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory" (para 109).

108 HRCtee, General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para 10.

109 HRCtee, General Comment No. 36, Article 6 (Right to Life), 3 September 2019, para 63.

110 ibid.

111 ibid, para 22.

112 HRCtee, *A.S., D.I., O.I. and G.D* v *Italy,* Communication No. 3042/2017, 28 April 2021.

113 HRCtee, *A.S., D.I., O.I. and G.D* v *Malta,* Communciation No. 3043/2017, 28 April 2021.

reasonably foreseeable in the light of the relevant legal obligations of Italy, and that they were **thus subject to the State party's jurisdiction** for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus concurrently subject to the jurisdiction of Malta".[114]

In January 2025, the HRCtee handed down two decisions in communications against Australia: ***M.I. et al. v Australia* (2025)**,[115] and ***Nabhari v Australia* (2025)**.[116] The cases concerned refugees and asylum seekers who were intercepted at sea by Australia whilst fleeing persecution, and eventually transferred to the Regional Processing Centre in Nauru for processing. Whilst in Nauru they experienced prolonged and arbitrary detention in unsanitary conditions. The authors claimed various violations of the ICCPR, including arbitrary detention under Article 9, arguing that they remained within the power or effective control of Australia after their transfer to Nauru. The State disputed that the alleged violations had occurred within Australia's jurisdiction. The Committee **recalled the principle of "power or effective control"** when establishing the exercise of jurisdiction, and noted that Australia "funded the detention operations in Nauru, was authorized to manage them, participated in monitoring them, selected companies which would be responsible (directly or through subcontractors) for construction, security, garrison, health and other services at the detention centre and provided police services to Nauru to help manage the detention operations".[117] In light of these factors, the Committee **considered that the State party "exercised numerous elements of effective control over the detention operations"** whilst the authors were detained there, and that **"those elements of control went beyond a general situation of dependence and support"**.[118] As such, the Committee found that Australia exercised jurisdiction for the purposes of the ICCPR, and that the physical transfer of the authors to Nauru did not extinguish Australia's obligations towards them under the Covenant.[119]

Effective control and occupied territories

State parties are obliged to respect and protect the right to life of people situated in areas that "are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant".[120] The HRCtee is yet to apply a test to establish whether or not a state has effective control over an area. In the recent case of *Bratsylo v Russia* (2024),[121] concerning violations in Crimea, the question of whether effective control was established was not in dispute by the parties.

In concluding observations for Georgia (with respect to Abkhazia and Tskhinvali/South Ossetia) and Moldova (with respect to Transniestra), the HRCtee has also noted the difficulties for States in fulfilling their responsibilities under the ICCPR in territory that is under effective control by another state; however, the HRCtee nevertheless requires that States take all possible measures to enhance protection for those in these territories,[122] noting that a State retains their obligations 'within the limits of its effective power'[123].

CEDAW

Article 2 of the Optional Protocol to CEDAW provides that "communications may be submitted by or on behalf of individuals or groups of individuals, **under the jurisdiction of a State Party**, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party". The CEDAW Committee has confirmed in its General Recommendation No. 28[124] that State parties are obliged to respect, protect and fulfill the rights guaranteed under CEDAW to all women within its jurisdiction,[125] which encompasses those within their territory or effective control: "although subject to international law, States primarily exercise territorial jurisdiction. The

114 HRCtee, *A.S., D.I., O.I. and G.D* v *Italy,* Communication No. 3042/2017, 28 April 2021, para 7.8.

115 HRCtee, *M.I. et al.* v *Australia*, Communication No. 2749/2016, 23 January 2025.

116 HRCtee, *Nabhari* v *Australia*, Communication No. 3663/2019, 22 January 2025.

117 ibid, para 7.15. See also HRCtee, *M.I. et al.* v *Australia*, Communication No. 2749/2016, 23 January 2025, paras 9.6-9.9.

118 HRCtee, *Nabhari* v *Australia*, Communication No. 3663/2019, 22 January 2025, para 7.15.

119 ibid.

120 HRCtee, *A.S., D.I., O.I. and G.D* v *Italy,* Communication No. 3042/2017, 28 April 2021, para 63.

121 HRCtee, *Bratsylo v Russia*, Communication No. 3022/2017, 27 March 2024.

122 HRCtee, Concluding Observations on Georgia (2007) UN Doc CCPR/C/GEO/CO/3, para 6.

123 HRCtee, Concluding Observations on the Republic of Moldova (2009) UN Doc CCPR/C/MDA/CO/2, para 5.

124CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010.

125 ibid, para 39.

obligations of States parties apply, however, without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, **within their territory or effective control**, even if **not situated within the territory**. States parties are **responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory**".[126]

The case of ***V v. Denmark* (2016)** concerned a woman who sought asylum in Denmark, claiming that her return to India – where she had been subject to gender-based violence by her family – would put her at risk of being the victim of an honour killing. The CEDAW Committee had to consider whether, by deporting the petitioner to India, the State party's responsibility would be engaged for the consequences of such deportation, even though they would occur outside its territory. The Committee reaffirmed that States have an obligation "to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, **irrespective of whether such consequences take place outside the territorial boundaries** of the sending State party. If a State party takes a decision relating to a person within its jurisdiction, the necessary and foreseeable consequence of which is that that person's rights under the Convention will be violated in another jurisdiction, then the State party itself may be in violation of the Convention".[127] However, in the circumstances of the case, the Committee held that the petitioner had failed to sufficiently substantiate that her removal from Denmark to India would expose her to a real, personal and foreseeable risk of serious gender-based violence.

The CEDAW Committee has further clarified the territorial scope of State party obligations under CEDAW in subsequent General Recommendations:

- **General Recommendation No. 30 (2013)**, which addresses the human rights of women in conflict prevention, conflict and post-conflict situations, makes clear that State obligations under CEDAW continue to apply even "during conflict or states of emergency without discrimination between citizens and non-citizens within their territory or effective control, even if not situated within the territory of the State Party".[128] The CEDAW Committee emphasises that the treaty applies wherever a State exercises jurisdiction, such as occupation and other forms of administration of foreign territory, or where persons are detained by agents of a State outside its territory.[129]
- **General Recommendation No. 35 (2017)** on gender-based violence confirms that "gender-based violence against women can result from acts or omissions of State or non-State actors, **acting territorially or extraterritorially**, including extraterritorial military actions of States, individually or as members of international or intergovernmental organizations or coalitions, or extraterritorial operations of private corporations".[130] The CEDAW Committee further states that the acts or omissions of private actors empowered to exercise elements of governmental authority are attributed to the State, as are the acts or omissions of private actors acting under the direction or control of the State, including when operating abroad.[131]

ICERD

ICERD does not include a general clause that refers to the territorial scope of the treaty as a whole but refers to jurisdiction in specific clauses of the Convention. For instance, Article 3 ICERD provides that "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature **in territories under their jurisdiction**".

The CERD Committee clarified the **extraterritorial application of ICERD** in the case *Anne Nuorgam et al.* v. *Finland* (2018):[132]

126 ibid, para 12.
127 CEDAW, *V* v *Denmark*, Communication No. 57/2013, 11 July 2016, para 8.4 and 8.7.
128 CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, 1 November 2013, para 2.
129 ibid para 9.
130 CEDAW, General Recommendation No. 35 on gender-based violence, 26 July 2017, para 20.
131 ibid, para 24.
132 CERD, *Anne Nuorgam et al. v Finland*, Communication No. 59/2016, 7 May 2018 (dec. on admissibility), para 7.3.

In ***Anne Nuorgam et al.* v. *Finland* (2018)**, the CERD Committee noted that "(a)ccording to international law, a State party's jurisdictional competence is primarily territorial"[133] but, referring to case law of the European Court of Human Rights (ECtHR), Inter-American Court of Human Rights and HRCtee, the Committee observed that "some **acts performed** or **producing effects outside its territory** could exceptionally constitute an exercise of jurisdiction".[134] This includes situations where acts by State authorities produce effects outside a State's territory, and where a State party exercises effective control over an area outside its territory or over persons in the territory of another State.[135] Regarding the meaning of 'effective control', the CERD Committee referred to the ECtHR's approach and stated that "effective control takes place in situations such as military occupation or military intervention, the use of force by a State outside its territory, or when a State has military, political and economic influence in another State".[136]

The International Court of Justice has also clarified the extraterritorial application of Articles 2 and 5 of ICERD in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, stating that "these provisions of [ICERD] generally appear to apply, like other provisions of instruments of that nature, **to the actions of a State party when it acts beyond its territory**".[137]

133 ibid, paras 7.2 and 7.3.

134 ibid par. 7.3, referring to HRCtee, *Hicks v Australia*, Communication No. 2005/2010, 5 November 2015, para. 2.5; ECtHR, *Al-Skeini et al v United Kingdom,* Application No. 55721/2007, 7 July 2011, para. 131; Inter-American Court of Human Rights, Advisory Opinion on Environment and Human Rights (OC-23/17), 15 November 2017, para. 81.

135 CERD, *Anne Nuorgam et al. v Finland*, Communication No. 59/2016, 7 May 2018 (dec. on admissibility), para 7.3.

136 ibid.

137 ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Order, Request for the Indication of Provisional Measures, ICJ, General List No 140, 15 October 2008, para 109.

PART 3
Exhaustion of Domestic Remedies

HRCtee

Before submitting a communication to the HRCtee, the author must have exhausted all domestic remedies.[138] According to the HRCtee's Rules of Procedures, authors are required to exhaust all available domestic remedies "in conformity with the generally recognised principles of international law" (Rule 82). Whilst authors **must raise the substance of the violation at the national level**, they are not required to do so by reference to specific articles of the ICCPR.[139]

An **exception to the obligation to exhaust domestic remedies** is set out in in Article 5(2)(b) of the Optional Protocol to the ICCPR, where the application of remedies is "**unreasonably prolonged**". There is no explicit amount of time that constitutes unreasonable prolongation – this will be a question of fact based on the particular case. However, to give some indication, the HRCtee has found that a delay of two years was not unreasonably prolonged,[140] but that a delay of three years for a first instance decision met the threshold.[141]

The requirement to exhaust domestic remedies concerns only remedies that are **available** (both *de jure* and *de facto*) and **effective**.[142]

In terms of what constitutes an **effective remedy**, the HRCtee has held that authors must make use of all judicial or administrative avenues that **offer a reasonable prospect of redress**:[143]

- The primary remedies to be exhausted are **judicial remedies** (particularly if both judicial and administrative remedies are available)[144] but this depends on the nature of the violation. With serious violations, such as the right to life, "purely administrative and disciplinary measures cannot be considered adequate and effective".[145] It is generally not necessary to exhaust other **non-judicial remedies that cannot provide redress**.[146]
- Other **non-effective remedies** include 'extraordinary remedies' which are outside the mainstream of the State's justice system[147] or are highly discretionary, such as presidential pardons,[148] petitions of mercy,[149] or humanitarian and compassionate remedies.[150]
- Remedies must be of **binding effect**, such that remedies that only provide recommendations that the Executive can disregard are not considered effective.[151]
- Remedies that may put an author at fear of **reprisals** may also be considered ineffective.[152]

Authors are not obliged to exhaust remedies that "**objectively have no prospect of success**".[153] However, the HRCtee has emphasised that authors "must exercise due diligence in the pursuit of available remedies" and that "mere doubts or assumptions about the effectiveness of domestic remedies do not absolve authors from exhausting them".[154] For example, an author would need to show that a positive result is impossible by citing relevant domestic decisions; for instance, that a highest tribunal has decided the matter at issue in a manner that would eliminate any prospects of success.[155]

As regards the question of whether a remedy is **available**, the HRCtee has made clear that the **availability** of an

138 ICCPR - Optional Protocol I, Article 2; HRCtee, Rules of Procedure, Rule 99(f).
139 HRCtee, *BDB v Netherlands,* Communication No 273/1989, 30 March 1989.
140 HRCtee, *RL et al v Canada*, Communication No 358/1989, 5 November 1991.
141 HRCtee, *Fillastre and Bizouarn v Bolivia*, Communication No 336/1988, 5 November 1991.
142 HRCtee, *Dermit Barbato et al v Uruguay*, Communication No. 84/1981, 21 October 1984, para 9.4.
143 HRCtee, *Patino v Panama*, Communication No. 437/1990, 21 October 1994, para 5.2.
144 HRCtee, *RT v France*, Communication No. 262/1987, 30 March 1989.
145 HRCtee, *Vicente et al v Colombia*, Communication No. 612/1995, 29 July 1997.
146 HRCtee, *AS v Nepal*, Communication No. 2077/2011, 6 November 2015.
147 HRCtee, *Muhonen v Finland*, Communication No. 89/1981, 8 April 1985.
148 HRCtee, *Singarasa v. Sri Lanka*, Communication No. 1033/2001, 21 July 2004.
149 HRCtee, *Ellis v Jamaica*, Communication No. 276/1988, 28 July 1992.
150 HRCtee, *Y v Canada*, Communication No. 2280/2013, 22 July 2015.
151 HRCtee, *C v Australia*, Communication No. 900/1999, 28 October 2002.
152 HRCtee, *Phillip v. Trinidad and Tobago*, Communication No. 594/1992, 20 October 1998, para. 6.4.
153 HRCtee, *Pratt and Morgan v Jamaica,* Communication Nos 210/1986, 225/1987, para 12.3.
154 HRCtee, *J.S* v *Netherlands*, Communication No. 3210/2018, 22 March 2023, para 7.3.
155 HRCtee, *Hew Raymond Griffiths v Australia*, Communication No. 1937/2010, 26 March 2015.

alleged remedy must be "reasonably evident".[156] A remedy may be considered "unavailable" if an author can prove that they cannot afford the remedy or were denied legal aid.

> In ***Quelch v. Jamaica* (1992)**, the State party argued that the author had not made use of available constitutional remedies. The HRCtee noted that "a constitutional motion is not an available remedy for an author who has no means of his own to pursue it", and that it was "the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol".[157]

However, the HRCtee has held that "financial considerations" do not in themselves excuse an author from exhausting domestic remedies, where the author has not made an attempt to pursue judicial remedies. In *P.S. v. Denmark*, the HRCtee noted that "the author has refused to avail himself of [judicial review of administrative regulations and decisions], because of considerations of principle and in view of the costs involved" and held that this did not absolve the author from exhausting such remedies.[158]

CEDAW Committee

For a communication to be admissible under the Optional Protocol of the CEDAW, the author must **exhaust all available domestic remedies** unless such remedies are **unreasonably prolonged** or **unlikely to bring effective relief**.[159] The Committee has explained that "authors of an individual communication are not obliged to exhaust all available remedies but must give the State party the opportunity, through a relevant chosen mechanism, to remedy the matter within its jurisdiction".[160]

As with the HRCtee, authors must **raise the substance of a violation** in domestic courts,[161] and meet all necessary formal requirements for domestic remedies.[162]

In terms of whether a remedy is **available**, the CEDAW Committee has accepted that a domestic remedy was unavailable because the author was in a situation of protracted domestic violence and threats of violence.[163]

As regards the question of whether a remedy is **likely to bring effective relief**, the CEDAW Committee has emphasized that "mere doubts about the effectiveness of the remedies do not absolve an individual from exhausting them".[164]

- In the case of *KK* v *Russian Federation* (2019), the CEDAW Committee referred to the jurisprudence of ECtHR and the HRCtee and decided that submitting a complaint to "an ombudsperson institution does not constitute an effective remedy".[165]
- It appears (although the CEDAW Committee has not been conclusive on the matter), that remedies that are unlikely to bring relief (both for personal and/or jurisprudential reasons) need not be exhausted.[166]

The CEDAW Committee has considered what constitutes an **unreasonably prolonged delay** within the meaning of Article 4 (1) of the Optional Protocol. In *AT v Hungary*, the CEDAW Committee considered that a delay of over three years amounted to an "unreasonably prolonged delay".[167] In *SH* v *Bosnia and Herzegovina* (2020), the Committee considered the investigations carried out by the State party were unduly prolonged, noting that the Constitutional Court had recognised that the investigative process had been slow.[168]

156 HRCtee, *C.F. et al. v Canada,* Communication No. 113/1981, 12 April 1985, paras. 6.2 and 10.1; HRCtee, *Croes v Netherlands*, Communication No. 164/1984, 07 November 1988, para. 10.
157 HRCtee, *Quelch v. Jamaica*, Communication No. 292/1988, 23 October 1992, para. 8.1-8.2.
158 HRCtee, *P.S. v. Denmark*, Communication No. 397/1990, 22 July 1992, para. 5.4.
159 CEDAW - Optional Protocol, Article 4.
160 CEDAW, *S.F.M* v *Spain,* Communication No. 138/2018, 28 February 2020, para 6.3.
161 CEDAW, *Salgado v United Kindom,* Communication No. 11/2006, 22 January 2007.
162 CEDAW, *B-J v Germany*, Communication No. 1/2003, 14 July 2004.
163 CEDAW, *Sahide Goecke v Austria,* Communication No. 5/2005, 6 August 2007.
164 CEDAW, *GMNF* v *Netherlands*, Communication No. 117/2017, 17 February 2020, para 9.4.
165 CEDAW, *KK* v *Russian Federation*, Communication No. 98/2016, 25 February 2019, para 8.4.
166 See, e.g. CEDAW, *AT v Hungary*, Communication No. 2/2003, 26 January 2005.
167 ibid, para 8.4.
168 CEDAW, *SH* v *Bosnia and Herzegovina*, Communication No. 116/2017, 9 July 2020, para 7.3.

CERD Committee

According to Article 14(7)(a) ICERD, a petitioner must **exhaust all available domestic remedies**. In *POEM and FASM* v *Denmark* (2003) the CERD Committee emphasised that it is a 'basic requirement' that 'the **petitioners themselves**, and no other organizations or individuals', exhaust domestic remedies.[169]

The requirement to exhaust domestic remedies does not apply where the application of the remedies is **unreasonably prolonged**.[170]

In ***Mr. Dragan Durmic v Serbia* (2006)**, the CERD Committee declared the complaint admissible despite the non-exhaustion of domestic remedies, because it considered that the application of remedies was unreasonably prolonged. The petitioner had made a complaint to the Federal Constitutional Court on 30 January 2002, and the complaint had not been considered by that Court before it was replaced by the new Court of Serbia and Montenegro. The Committee noted that the petitioner 'had sought to have his claims of violations of the Convention by the State party adjudicated for over four and a half years, since the incident in February 2000', and that 'the State party itself had conceded that the prospect of an early review was unlikely, given that the new Court of Serbia and Montenegro had not even been constituted'.[171]

The CERD Committee only requires exhaustion of remedies that are of **binding effect** on the State party, as opposed to remedies that have merely a recommendatory effect.[172]

Petitioners are exempted from exhausting all available domestic remedies where the remedies '**objectively have no prospect of success**'.[173] Futile remedies need not be exhausted where "under applicable domestic law, the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result".[174]

However, the CERD Committee has emphasised that mere doubts about the effectiveness of domestic remedies, or the belief that the resort to them may incur costs, do not absolve a petitioner from pursuing them.

- In Kenneth Moylan v. Australia (2013) and D.S. v Sweden (1998) the CERD Committee stated that it was incumbent upon the petitioners to pursue the remedies available, even though they had reservations about the effectiveness of the mechanism concerned. Only after attempting to do so could the petitioners conclude that such a remedy was indeed ineffective or unavailable.[175]
- Where there are multiple remedies available, complaints can be found inadmissible when the complainant does not pursue a remedy with a higher prospect of success.[176]

In ***Yaku Pérez Guartambel v Ecuador* (2019)**, the petitioner claimed a discriminatory violation of his right to a family life, on the basis of the non-recognition of his indigenous ancestral marriage, The State claimed that the petitioner had not exhausted all available domestic remedies because he did not file an application for a special protective remedy with the Constitutional Court. The Committee stressed that the petitioner, who initiated the constitutional protection proceedings and appealed against the refusal of his request, exhausted the ordinary remedies available to him.[177] A special protective remedy was established to be unavailable and ineffective since an application for the remedy would take approximately five years to process and would unduly prolong the petitioner's separation from his wife.[178] Thus, the Committee concluded that the author had exhausted all domestic remedies that could reasonably be considered available and effective, in accordance with Article 14 of the Convention.[179]

169 CERD, *POEM and FASM* v *Denmark*, Communication No. 22/2002, 15 April 2003, para. 6.3.
170 ICERD, Article 14(7)(a); CERD, Rules of Procedure, Rule 91(e).
171 CERD, *Mr. Dragan Dumic* v *Serbia and Montenegro*, Communication No. 29/2003, 6 March 2006, para. 6.5.
172 CERD, *D.R. v. Australia* Communication No 42/2008, 14 August 2009, para. 6.4.
173 ibid., para. 6.5.
174 ibid.
175 CERD, *Kenneth Moylan* v. *Australia*, Communication No. 47/2010, 27 August 2013, para. 6.5; CERD, *D.S. v Sweden*, Communication No. 9/1997, 17 August 1998, para. 6.4.
176 CERD, *Sadic v Denmark,* Communication No 25/2002, 19 March 2003.
177 CERD, *Yaku Pérez Guartambel* v *Ecuador*, Communication No. 61/2017, 04 December 2019, para. 6.3.
178 ibid.
179 ibid.

PART 4
Time Limits

HRCtee

Whilst there is **no fixed time limit** for the submission of communications under the Optional Protocol, Rule 99(c) of the HRCtee Rules of Procedure effectively sets a time limit where it states that "a communication may constitute an **abuse of the right of submission**, when it is submitted **five years** after the exhaustion of domestic remedies by the author of the communication, or, where applicable, **three years** from the conclusion of another procedure of international investigation or settlement, unless there are **reasons justifying the delay**, taking into account all the circumstances of the communication."

Subject to the above, the HRCtee has emphasised that mere delay in bringing a communication does not of itself involve an abuse of the right of submission,[180] although in certain circumstances the HRCtee expects a reasonable explanation justifying a delay.[181] For example, in In *M.R* v *Russian Federation* (2020) the HRCtee declared a communication inadmissible as an abuse of the right of submission.[182] In the case, the HRCtee considered that the author failed to demonstrate "due diligence and initiative in pursuing his claims regarding the protection of his human rights" as he "submitted his initial communication to the Committee with a notable delay, more than 21 years".[183] HRCtee also noted that the author did not provide "persuasive explanations" as to the delay.[184]

In ***H.R v. Uzbekistan*, (2021)**, the author claimed that he was arbitrarily detained and tortured between April 2003 and May 2004. The author later fled Uzbekistan, fearing for his life, after surviving the Andijan massacre. His communication to the HRCtee was submitted in May 2014. He argued that this did not constitute an abuse of the right of submission, noting that he did not have any support after fleeing Uzbekistan and was initially not aware of any avenues for complaints. When he did receive legal assistance, he required significant psychological support to prevent retraumatisation, which took time to secure.[185]

However, the HRCtee found the communication to be inadmissible under Article 3 of the Optional Protocol and Rule 99(c) of the Rules of Procedure because the author did not provide sufficient information in his submissions to suggest that he demonstrated due and timely diligence and initiative such as to claim the protection of his rights before the domestic authorities or the HRCtee.[186] The HRCtee noted that the author's initial communication to the HRCtee was presented eight years after his purported arbitrary detention and torture, and the HRCtee considered that the author had 'failed to provide a convincing explanation for the delay'.[187]

Two members of the HRCtee dissented and jointly expressed their opinion that the Committee made an error in relying on the passage of time between the events forming the basis of the claims (between 2003-2005) and the date of the initial submission to the Committee (2014), instead of considering the exhaustion of domestic remedies as stipulated by Rule 99(c).[188] They argued that the author thoroughly and convincingly clarified why his communication "does not constitute an abuse of right" since there were no formal domestic remedies to exhaust in relation to his claims and given the sequence of events that subsequently took place including the Andijan massacres and his experience of fleeing Uzbekistan.[189] Considering the author's extraordinary situation, where he was compelled to flee his country and remained deeply traumatised, they believed that the Committee should have found the communication admissible.[190]

180 HRCtee, *Polacková and Polacek v Czech Republic,* Communication No. 1445/2006, 24 July 2007, para 6.3; HRCtee, *H.R v Uzbekistan,* Communication No. 2479/2014) 16 March 2021, para 6.4; HRCtee, *D.S. v Russian Federation,* Communication No. 2705/2015) 14 July 2017, para 6.4.

181 HRCtee, *Gobin v Mauritius,* Communication No. 787/1997 16 July 2001, para 6.3.

182 HRCtee, *M.R* v *Russian Federation*, Communication No. 2427/2014, 23 July 2020.

183 ibid para 8.7.

184 ibid.

185 HRCtee, *H.R v Uzbekistan,* Communication No. 2479/2014 16 March 2021, para. 2.14.

186 HRCtee, *H.R v Uzbekistan* Communicatiom No. 2479/2014, 16 March 2021, para 6.4; See also e.g. HRCtee, *Fillacier v. France*, Communication No. 1434/2005, 27 March 2006, para. 4.3, where the HRCtee found: "In the present case, the Council of State handed down its ruling on 8 June 1990, over 15 years before the communication was submitted to the Committee, but no convincing explanation has been provided to account for such a delay. In the absence of an explanation, the Committee considers that submitting the communication after such a long delay amounts to an abuse of the right of submission"; HRCtee, *Gobin v Mauritius*, Communication No. 787/1997, 16 July 2001, para. 6.3, where the Committee decided that the alleged violation took place at periodic elections held five years before the communication was submitted and was therefore considered an abuse of right; HRCtee, *A.K. and M.K. v. Russian Federation,* Communication Nos 2895/2016, 2896/2016, 19 July 2023, paras 6.5-6.10.

187 HRCtee, *H.R v Uzbekistan* Communicatiom No. 2479/2014, 16 March 2021, para 6.5.

188 HRCtee, *H.R v. Uzbekistan,* Communication No. 2479/2014, 6 March 2021, (Dissenting Opinion), para 3 and 6.

189 ibid.

190 ibid.

The HRCtee also takes into consideration "special circumstances"[191] in cases of **continuing violations**, such as enforced disappearances. In *Salah Drif and Khoukha Rafraf v. Algeria*, the Committee found the submission admissible despite the passage of five years from the exhaustion of domestic remedies, emphasising that "the continuous nature of enforced disappearance implies a continuous obligation to investigate such cases".[192] Similarly, in *Serna et al. v. Colombia,* the HRCtee found the communication admissible, despite the fact that the communication was submitted 16 years after the dismissal order. It reached its conclusion considering the violation still persisted, on account of the lack of official information on the fate and whereabouts of the disappeared persons and the consequent absence of truth, justice and redress for their disappearance.[193]

CEDAW Committee

There is **no formal time limit** under the Optional Protocol to CEDAW and the CEDAW Committee Rules of Procedure for individuals to submit their communications to the CEDAW Committee. However, a significant delay (for example, more than five years after the exhaustion of domestic remedies) could be considered an **abuse of the right to submission** by the Committee, and a communication could be found inadmissible on this basis.[194]

CERD Committee

According to Article 14 ICERD, a petitioner has to submit a Communication to the CERD Committee within **six months** after all available domestic remedies have been exhausted, except in the case of duly verified **exceptional circumstances**.[195]

As regards what constitutes 'exceptional circumstances', in *S.H. v Switzerland* (2024) the petitioner argued that the delay in submitting his communication was caused by the State denying him access to its territory. However, the CERD Committee stated that this could not be accepted as an exceptional circumstance for the purposes of the Committee's Rules of Procedure and that the petitioner had provided no further justification for the delay.[196]

191 HRCtee, *Salah Drif and Khoukha Rafraf v Algeria,* Communication No. 3321/2019, 8 July 2022, para 7.5.
192 ibid; see also HRCtee, *Tripathi v Nepal*, Communication No. 2111/2011, 29 October 2014, paras 6.3-6.4.
193 HRCtee, *Rosa Maria Serna et al v Colombia,* Communication No. 2134/2012, 9 July 2015, para 8.3.
194 See Individual opinion of Committee member Patricia Schulz (dissenting) in *M.S. v The Philippines*, Communication No. 30/2011, 15 August 2014.
195 CERD, Rules of Procedure, Rule 91(f).
196 CERD, *S.H. v Switzerland*, Communication No. 79/2021, 2 May 2024, para 6.4.

PART 5
Other admissibility issues

5.1 EXAMINATION OF THE SAME MATTER BY ANOTHER PROCEDURE OF INTERNATIONAL INVESTIGATION OR SETTLEMENT (LIS PENDENS)

HRCtee

Under Article 5(2)(a) of the First Optional Protocol to the ICCPR, the HRCtee will not consider any communication until it has ascertained that "the **same matter is not being examined** under another procedure of international investigation or settlement".[197] Note, this provision explicitly concerns the consideration of the same matter by another international procedure *at the same time* as the communication to the HRCtee.[198] Therefore, if a case was sent to another international procedure in the past and proceedings have concluded, this does not necessarily preclude the HRCtee from considering the communication.[199] However, petitioners should be aware that if their case has already been positively considered by another international procedure, they should be able to demonstrate that they still have victim status for the purposes of their complaint before the HRCtee.[200]

In *Fanali v. Italy* the HRCtee explained that the "**same matter**" should be understood as referring to 'the **same author, the same facts and the same substantive rights'**.[201] If other individuals have brought claims relating to the same event, this does not constitute the 'same matter'.[202]

In terms of what constitutes "**another procedure of international investigation or settlement**", this does not include procedures or mechanisms established by the UN Human Rights Council[203] (such as thematic and country-specific Special Rapporteurs, Independent Experts and Working Groups[204]), with the exception of the Working Group on Arbitrary Detention, given its adversarial character. Generally, other 'international procedures' include the UN treaty bodies and regional human rights institutions (e.g. European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and Peoples' rights). The HRCtee does not consider studies by inter-governmental organisations, or procedures by NGOs as other 'international procedures'.[205]

In a 2017 decision, the HRCtee declared that the **active examination** of a matter during **implementation proceedings** at the Council of Europe's **Committee of Ministers** precluded its review of the matter, stating "it would be contrary to both the letter and spirit of this principle to consider a matter which is still subject to a follow-up procedure before another procedure of international investigation or settlement unless exceptional circumstances exist, such as unreasonable delays in the follow-up procedure or its patent ineffectiveness".[206]

A number of European countries have made a **reservation** to Article 5(2)(a) of the First Optional Protocol to **exclude the competence of the HRCtee** to consider matters that have **been examined in the past** by other international mechanisms.[207] The purpose of this reservation is to ensure that the HRCtee is not used as an appeal court for judgments of the European Court of Human Rights ('ECtHR').

Due to these reservations, there is a question as to **when a case is considered to have been 'examined'**. In the case of *W.E.O.* v. *Sweden* (2020) the author claimed that the State party had discriminated on the grounds of religion.[208] The author submitted two applications to the ECtHR, which declared these inadmissible. The HRCtee

197 HRCtee, Rules of Procedure, Rule 99(e).

198 This approach differs from the other treaty bodies, and from the approach taken by the European Court of Human Rights.

199 See, e.g., HRCtee, *Wright v Jamaica,* Communication No. 349/1989, 27 July 1992.

200 HRCtee, *Smirnova v Russia*, Communication No. 712/1996, 5 July 2004, para 9.3.

201 HRCtee, *Fanali v Italy*, Communication No. 75/1980, 31 March 1983, para. 7.2; see also e.g. HRCtee, *Aarrass v Spain*, Communication No. 2008/2010, 30 September 2014, para 9.4.

202 HRCtee, *Fanali v Italy*, Communication No. 75/1980, 31 March 1983.

203 HRCtee, *Tharu et al v Nepal,* Communication No. 2038/2011, 3 July 2015, para 9.2; HRCtee, *Celis Laureano v Peru*, Communication No. 540/1993, 25 March 1996.

204 As at the date of publication there are 46 thematic mandates (available here: https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en) and 14 country-specific mandates (available here: https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?lang=en).

205 HRCtee, *Baboeram et al v Suriname,* Communication Nos 146, 148-154/1983, 10 April 1984.

206 HRCtee, *Nekvedavicius v Lithuania*, Communication No. 2802/2016, 09 November 2017. See also *Paksas v. Lithuania*, Communication No. 2155/2012, 25 March 2014.

207 Information about which countries have made a reservation to Article 5(2)(a) is available here: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-5&chapter=4&clang=_en. As at the date of publication, the following countries have made a reservation: Austria, Croatia, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Malta, Norway, Poland, Moldova, Romania, Slovenia, Spain, Sweden and Turkey.

208 HRCtee, *W.E.O. v Sweden*, Communication No. 2741/2016, 23 July 2020, para. 1.1.

considered that where a complaint to another international procedure, such as the ECtHR, is dismissed on procedural grounds **without examination of the merits**, it cannot be said to have been 'examined'.[209] Therefore, the Committee examined the author's claims.

> *In **Aarass v Spain*** **(2014)**, the author had previously submitted an application to the ECtHR, which was declared inadmissible. The HRCtee clarified: 'when the European Court of Human Rights bases a finding of inadmissibility not only on procedural grounds, but also on grounds arising from some degree of **consideration of the substance of the case**, the matter should be **deemed to have been examined** within the meaning of the relevant reservations to article 5, paragraph 2 (a), of the Optional Protocol; and the Court should be deemed to have **gone beyond a consideration of purely formal criteria of admissibility** when it finds an application inadmissible because it "**does not disclose any violation** of the rights and freedoms set out in the Convention or its Protocols"' (emphasis added).[210]

Given the succinct nature of ECtHR single judge inadmissibility decisions, it can be difficult to determine whether the decision was made for procedural or substantive reasons. In these circumstances, the HRCtee has appeared to give the petitioner the benefit of the doubt.

> In ***Yaker v France*** **(2018)**, the HRCtee noted that the petitioner's ECtHR application had been declared inadmissible; however, it appeared from the letter from the ECtHR that the application had not been declared inadmissible on purely procedural grounds. The HRCtee noted that 'from the succinct nature of the reasoning by the Court, no argument or clarification regarding the inadmissibility decision had apparently been provided to the author to justify a rejection of the application based on the merits' and as such 'it was not possible for [the HRCtee] to determine with certainty that the case presented by the author had already been the subject of a consideration, even limited, of the merits'. As such, the HRCtee determined that France's reservation to Article 5(2) of the Optional Protocol was not, in itself, an obstacle to consideration of the merits by the HRCtee.[211]

In terms of whether another body has considered the '**same matter**', where the ECtHR has considered a matter inadmissible *ratione materiae* (e.g. concerning a right not protected under the European Convention on Human Rights ('EHCR'), such as the freestanding right to non-discrimination), the HRCtee has found that the ECtHR had not considered the same matter such as to preclude the HRCtee's competence.[212] In some instances, a communication to the HRCtee may concern both rights under the ICCPR which converge with ECHR rights, and also rights where there is no ECHR equivalent. To the extent that the ECtHR has already examined the equivalent rights, these claims will be inadmissible before the HRCtee if the State has made a reservation precluding a repeat consideration of the same matter.[213]

CEDAW Committee

Article 4 of the Optional Protocol to CEDAW provides that a communication is inadmissible where the **same matter** has **already been examined by the CEDAW Committee** or **has been or is being examined** under **another procedure** of international investigation or settlement. Unlike the Optional Protocol to the ICCPR, this provision expressly excludes matters previously considered by another international procedure.

The CEDAW Committee adopts the same approach as the HRCtee, interpreting the 'same matter' to mean the **same author, the same facts and the same substantive rights.**[214] The CEDAW Committee will not find a case inadmissible if a similar case has been lodged concerning a different individual,[215] or where it concerns different substantive rights.[216]

209 ibid, para.9.2.
210 HRCtee, *Aarrass* v *Spain*, Communication No. 2008/2010, 30 September 2014, para 9.3.
211 HRCtee, *Yaker v France*, Communication No. 2747/2016, 17 July 2018, para 6.2.
212 HRCtee, *Peterson v Germany,* Communication No. 1115/2002, 1 April 2004.
213 HRCtee, *Mahabir v Austria,* Communication No. 944/2000, 26 October 2004, para 8.5.
214 CEDAW, *Rahime Kayhan v Turkey*, Communication No. 8/2005, 27 January 2006, para 7.3.
215 ibid.
216 CEDAW, *X and Y* v *Georgia*, Communication No. 24/2009, 25 August 2015, para 6.6.

In terms of whether the same matter has already been '**examined**' by another international procedure, a communication may be admissible before the CEDAW Committee where it has been declared inadmissible by another international procedure on purely procedural grounds. In *ST* v *Russian Federation* (2019), the State party argued that the communication was inadmissible as the author has submitted an application to the ECtHR regarding the same issue.[217] The CEDAW Committee observed that the ECtHR had dismissed the application of the author as it was inadmissible under Articles 34 and 35 of the ECHR, and the inadmissibility decision of the ECtHR was based on procedural issues and not on the merits of the case.[218]

CERD Committee

Article 14 ICERD **does not preclude** the CERD Committee from considering a communication where the 'same matter' has been or is being considered by another international mechanism. The CERD Committee has explicitly recognised that there is no 'same matter' exclusion either in ICERD or its Rules of Procedure.[219] However, the CERD Committee Rules of Procedure empower the Secretary-General to clarify from the petitioner the extent to which the same matter is being examined under another procedure of international investigation or settlement (Rule 84(1)(g))

When accepting the individual communications procedure under Article 14 ICERD, a number of states have made a reservation which excludes the CERD Committee's competence where the 'same matter' has been or is being considered by another international mechanism.[220] In *Anne Nuorgam et al. v Finland* (2018), the Committee considered that a complaint will be qualified as "the same matter" if it relates to the same parties, the same events and the same substantive rights.[221]

5.2 FAILURE TO SUFFICIENTLY SUBSTANTIATE CLAIMS

HRCtee

According to Article 5 of the Optional Protocol to the ICCPR, the Committee shall consider every communication in the light of all written information made available to it by the individual and by the State Party concerned. Under Rule 99(b) of the HRCtee's Rules of Procedure, the author's claim must '**sufficiently substantiated**, to be a victim of a violation by that State party of any of the rights set forth in the Covenant'. The HRCtee commonly relies upon this provision to find a claim inadmissible.

To substantiate a claim, the petitioner must make out a ***prima facie* case of a violation** of the ICCPR, which the State must then specifically rebut.[222] Where evidence corroborating the claims is exclusively in the hands of the authorities, the burden of proof is reversed. In *Bousroual v. Algeria*, the HRCtee noted that the petitioner and the State party do not always have equal access to the relevant information, and 'in cases where the allegations are corroborated by evidence submitted by the author and where further clarification of the cases depends on information exclusively in the hands of the State party, the Committee may consider the author's allegations as substantiated in the absence of satisfactory evidence and explanation to the contrary submitted by the State party'.[223]

CEDAW Committee

As with communications to the HRCtee, the author of a communication to the CEDAW Committee must **establish a *prima facie* case by referring to all available evidence**. The CEDAW Committee will accept a communication only when there is sufficient evidence to show that there is a violation of the rights of the author guaranteed

217 CEDAW, *ST* v *Russian Federation,* Communciation No. 65/2014, 25 February 2019, para 8.3.

218 ibid.

219 CERD, *Anne Nuorgam et al.* v *Finland*, Communication No. 59/2016, 7 May 2018.

220 At the date of publication, 17 States have made such a reservation – see: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&clang=_en

221 CERD, *Anne Nuorgam et al.* v *Finland*, Communication No. 59/2016, 7 May 2018, para. 7.8.

222 HRCtee, *Lanza v Uruguay* Communication No. 8/1977, 3 April 1980.

223 HRCtee, *Bousroual v Algeria* Communication No. 992/2001, 30 March 2006.

by CEDAW. For example, in the case of *KK* v *Russian Federation* (2019), the CEDAW Committee declared the communication inadmissible as the author's alleged claims were not corroborated with sufficient evidence and thus were insufficiently substantiated.[224]

In ***M.S. v Philippines* (2014)**, a sexual harassment case, the petitioner claimed that the State party had failed to protect her right to non-discrimination in the workplace, on the grounds that that the domestic courts relied heavily on discriminatory gender myths and stereotypes in failing to uphold her complains. The CEDAW Committee found that 'even if it could be argued that some aspects of gender-based stereotypes may appear to be indicated in the Court's decision, they do not suffice, per se, to demonstrate that they have negatively affected the Court's assessment of the facts and the outcome of the trial, or to corroborate the author's claims'. It therefore declared the communication to be inadmissible on the basis that it was insufficiently substantiated.[225]

CERD Committee

Whilst both ICERD and the CERD Committee Rules of Procedure are silent on this issue, the CERD Committee has held that the **petitioner should sufficiently substantiate their complaint** in accordance with the relevant articles of ICERD. For instance, in *Yaku Pérez Guartambel v Ecuador* (2017), the Committee stated that the petitioner had not provided any information or evidence demonstrating that there was a lack of judicial autonomy in the appeal process. The CERD Committee, therefore, concluded that the petitioner had not sufficiently substantiated his claim that there was a violation of due process.[226]

5.3 ABUSE OF THE RIGHT OF SUBMISSION OR INCOMPATIBILITY WITH THE TREATY

HRCtee

Article 3 of the First Optional Protocol of the ICCPR states that the HRCtee shall consider inadmissible any communication which it considers to be **an abuse of the right of submission** or to be **incompatible with the provisions of the ICCPR**.

The most common reason for a communication to be considered to be an **abuse of the right** of submission is where there has been a **delay** in submission. As discussed above, Rule 99(c) of the HRCtee Rules of Procedure states that a communication may constitute an abuse of the right of submission when it is submitted five years after the exhaustion of domestic remedies, or, where applicable, three years from the conclusion of another procedure of international investigation or settlement.

Other circumstances in which a communication has been found to constitute an abuse of the right of submission include where petitioners have used **insulting and abusive language**, have submitted **multiple claims without substantiation**, or have raised **late claims without justification**. For instance, in *KL v Denmark*, the HRCtee considered there to be an abuse of the right of submission on the basis that (i) the petitioner had already lodged a similar complaint that was previously declared inadmissible, (ii) the current complaint was 'devoid of any substantiation of facts or law', and (iii) the petitioner indicated that he still intended to pursue further domestic remedies.[227]

As regards declarations of inadmissibility on the grounds of **incompatibility with the provisions of the ICCPR**, the HRCtee uses this as a broad catch-all category including for communications concerning rights not covered by the ICCPR, communications based on a clearly erroneous interpretation of the ICCPR, and communications where the violation occurred prior to the entry into force of the First Optional Protocol to the ICCPR.[228]

224 CEDAW, *KK* v *Russian Federation,* Communication No. 98/2016, 25 February 2019, para 8.6.
225 CEDAW, *MS v Philippines*, Communication No. 30/2011, 16 July 2014, para 6.5.
226 CERD, *Yaku Pérez Guartambel* v *Ecuador*, Communication No. 61/2017, 4 December 2019, para. 6.5.
227 HRCtee, *KL v Denmark*, Communication No. 72/1980, 31 July 1980.
228 Ghandi, P.R. *The Human Rights Committee and the Right of Individual Communication: Law and Practice*, pp. 460-461 (Routledge, 1998).

CEDAW Committee

Under Article 4(2)(d) of the Optional Protocol to CEDAW, a communication is declared inadmissible where it is an **abuse of the right to submit a communication**. However, it does not appear that the CEDAW Committee has relied upon this admissibility criteria in order to find a communication inadmissible.

According to Article 4(2)(b) of the Optional Protocol to CEDAW, a communication is also inadmissible if 'it is **incompatible with the provisions of the Convention**'. This includes all the substantive obligations under the Convention.

CERD Committee

Under Rules 91(c) and 91(d) of the CERD Committee Rules of Procedure, a communication will also be declared inadmissible if it is **incompatible with the provisions of ICERD** or where it is considered to be **an abuse of the right to submit a communication**. However, it does not appear that the CERD Committee has relied upon these admissibility criteria in order to find a communication inadmissible.[229]

229 See the Individual opinion of Committee member Régine Esseneme (dissenting) in *Breleur v France*, Communication No. 66/2018, 30 August 2022, who disagreed with the majority decision and considered the communication to be an abuse of the right to submit a communication.

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