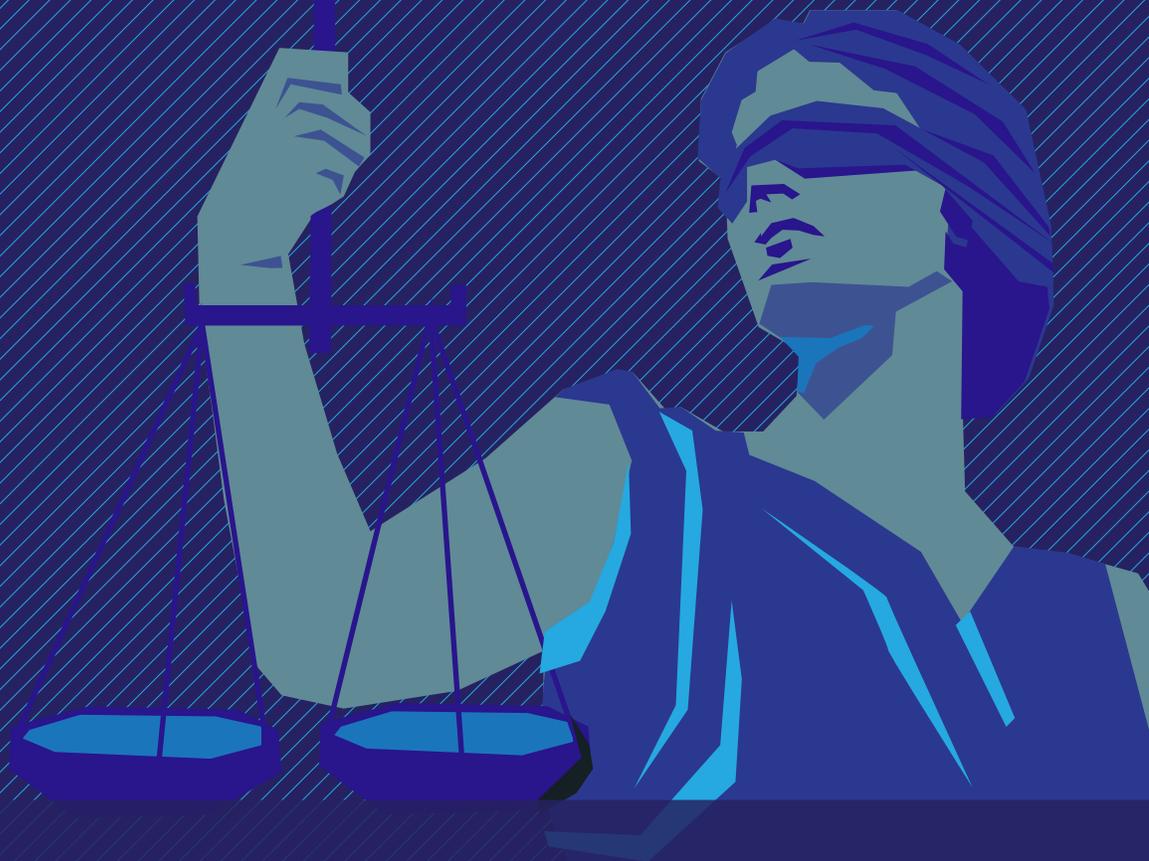


# **ACCESS TO INTERNATIONAL JUSTICE BY VICTIMS IN VENEZUELA**

**INAPPLICABILITY OF THE RULE OF EXHAUSTION OF LOCAL  
REMEDIES IN THE CASE OF VENEZUELA**



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Due to the exceptional situation existing in Venezuela, the unwillingness of the State to guarantee the right to judicial protection must in all instances give rise to an exception to the rule of exhaustion of domestic remedies that normally applies before international bodies.

## **THIS PAPER ANALYSES THE REASONS THAT PREVENT EX-ANTE EXHAUSTION OF DOMESTIC REMEDIES, WITH THE PURPOSE THAT THE EXCEPTIONS PROVIDED IN THE INTERNATIONAL LEGAL SYSTEM IN QUESTION ARE APPLIED.**

The principle of complementarity and its impact on the requirement of exhaustion of domestic remedies

The international jurisprudence has indicated that applying the principle of complementarity is the foundation of access to international jurisdiction and the rule of exhaustion of domestic remedies. Likewise, it has determined that, in those cases in which the occurrence of an internationally wrongful act has been verified, this determination by itself is not sufficient to establish the State's international responsibility. To the extent that the State itself has recognized its responsibility and fully repaired the violation through the internal mechanisms available to it, and before an eventual international condemnation has been produced, the international organization could not become valuate of the merits of the alleged violations in a specific case.

Considering the principle of complementarity, the exhaustion of domestic remedies must also be understood as an element intended for the benefit of individuals or groups of individuals subject to the protection of international human rights systems. Thus, access to international jurisdiction is intrinsically related to the possibility that domestic remedies or mechanisms can comprehensively remedy a violation or impairment of the human rights of those who are under the jurisdiction of a State. Consequently, the exhaustion of domestic remedies that, reasonably, are not going to be effective is not required.

## **LACK OF ABILITY OR WILLINGNESS OF THE STATE TO REPAIR A VIOLATION OF HUMAN RIGHTS (UNABLE AND UNWILLING)**

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In the case of *Dismissed Employees of Petroperu Al. vs Peru*, decided by the Inter-American Court of Human Rights (hereinafter the Inter-American Court) in 2017, it reiterated that “[...] the material exhaustion of local remedies must be evaluated as a real and effective possibility of a decision in accordance to law by the party of the national courts”. Although in almost all the countries of the region structural situations of lack of independence of the Judiciary can be identified, in some cases it is possible to recognize specific elements of how this context operates to hinder the access of victims of human rights violations to legal remedies. It should be considered as an impediment that works even ex- ante, by virtue of state policy, express or implicit, that operates for such purposes.

The formula of lack of willingness or lack of capacity has been applied within international law. For example, it is clearly contemplated as an exception to the rule of exhaustion of domestic remedies in the Rome Statute of the International Criminal Court, which establishes that cases will be admissible when the State is unwilling or unable to carry out the investigation of any of the crimes established in said Statute.

It is important to specify that this formula on lack of capacity or disposition of the State. However, it may start from a comprehensive analysis of the context that operates to cancel that capacity, and will foreseeably be related to situations of a structural nature, it would be applicable insofar it is possible to identify specific elements of that context that reasonably allow presuming the ex- ante impossibility of accessing internal remedies, in the particular case. In this sense, the determinations of international organizations within the framework of the monitoring and follow-up mechanisms of the human rights situation in a specific country are essential to carry out this analysis.

## **TOWARDS A CONSISTENT INTERPRETATION OF ADMISSIBILITY RULES**

Article 46 of the American Convention and Article 5.2.b of the Additional Protocol to the International Covenant on Civil and Political Rights cannot be interpreted in a way that makes access to justice impossible. The statement includes access to international justice when domestic law does not provide any mechanism other than for the victims to obtain justice. This conclusion is based on an interpretation in accordance with the rules established in the Vienna Convention on the Law of Treaties.

The fact that the rule of exhaustion of domestic remedies in both the Convention and the Covenant have wordings that seem to favor at least an attempt to exhaust a remedy, should not be interpreted in a way that impedes access to international justice. This can't become a protection for the State that rewards its unwillingness to comply with its human rights obligations.

## **CONSOLIDATION OF THE “UNWILLINGNESS” OF THE VENEZUELAN STATE TO GUARANTEE ACCESS TO JUDICIAL PROTECTION, THROUGH EFFECTIVE REMEDIES**

The Inter-American Commission on Human Rights has issued 3 country reports on Venezuela, and from 2002 to date, it has included the country in Chapter IV of its Annual Report. This means that, for almost two decades, the IACHR has considered, through its monitoring mechanism, a “deterioration of the human rights situation in Venezuela” and analyzed how this has seriously compromised “[...] the stability of the State of Right” in the country. Thus, consistently, the Commission has determined that Venezuela is framed in a situation that requires priority attention, and since 2017 it has intensified its efforts to monitor the human rights situation in the country. Specifically,

the Commission created that year the “Timely and Integrated Coordination and Response Room (CIDH) to articulate [its] different mechanisms [...] in its attention to the serious situation in Venezuela”. In 2019, the Inter-American Commission also announced the “installation of the Special Follow-up Mechanism for Venezuela (MESEVE), with the objective of strengthening the use of its protection and monitoring mechanisms, responding in a timely and effective manner to the new challenges that it requires. the serious human rights crisis in the country”.

Additionally, the United Nations System has had the opportunity to highlight the main problems related to the judiciary's independence in the country. On September 27th, 2019, through Resolution 42/25 of the United Nations Human Rights Council, the International Independent Fact-Finding Mission about Venezuela was created.

On September 16th, 2020, the Mission presented an exhaustive report in which it concluded that “[t]he Mission's investigations reveal an interference in the independence of the judiciary, which hinders the right to a fair trial by an independent and impartial tribunal”. On October 6th, 2020, through resolution 45/20, the United Nations Human Rights Council extended the mandate of the investigation mission until September 2022.

In the first place, since the National Assembly elected by popular vote in December 2015, took office, international human rights organizations began to warn of interference by the Supreme Court of Justice in the functioning of the legislative body. This interference in the functions of the National Assembly was aggravated in March 2017 when the Supreme Court issued decisions No. 155 and 156 by which the parliamentary immunity of the deputies of the National Assembly was lifted.

In addition to this, on May 1st, 2017, Nicolas Maduro ordered the creation of a National Constituent Assembly (ANC). In its Country Report for 2017, the Commission analyzed different issues regarding the legitimacy of this order and the serious objections to the election and integration process of the ANC that was formed that same year, with a majority of government follower's. Indeed, the fact-finding Mission questioned that the data stated that more than eight million people voted on July 30th, 2017 in favor of 545 members of the Constituent Assembly, according to the National Electoral Council, could not be confirmed.

It is important to highlight that the impact and scope of the action of the National Constituent Assembly was one of the central elements considered by the Inter-American Commission to establish that, as of 2017, there was “deterioration in the separation and independence of powers and the undermining of democratic institutions in Venezuela”. Likewise, the IACHR considered that the powers assigned to the Constituent Assembly made it possible for it to act as a “parallel power”, consolidating serious impact on the role of the National Assembly that had already been verified in accordance with the facts indicated above.

The International Fact-Finding Mission specified that, the National Constituent Assembly was created to take its place in the face of a blocked National Assembly.

Since its formation in August 2017, the National Constituent Assembly became a de facto legislative power, assuming the constitutionally mandated functions of the National Assembly. Many of the decisions taken by the National Constituent Assembly since 2017 have served to neutralize further the Venezuelan opposition.

Moreover, a relevant obstacle on the possibility of filing appeals in the domestic order against human rights violations refers to interference in the functioning of the two bodies that make up the “Citizen Branch” Power in Venezuela: The Prosecutor’s Office and the Ombudsman’s Office. Indeed, the Inter-American Commission has verified how the decisions adopted by the Constituent Assembly have moved away from the initial constitutional mandate for which it was established, with decisions such as those relating to the dismissal of the Attorney General of the Republic, Luisa Ortega Diaz. In this regard, the International Fact-finding Mission determined that “since 2017, the Prosecutor’s Office has seen its independence progressively limited by the decisions of the Supreme Court.” The Fact-Finding Mission highlighted that a decision issued on July 12th, 2017 also allowed the judges to order the Prosecutor’s Office to continue the investigations, even if the prosecutors do not consider that there is sufficient basis to do so, “which could interfere with its independence”.

On the other hand, the uncertainty of the ownership of the positions of the Public Ministry prosecutors that have already been highlighted in this report, is considerably more affected when it is observed that their appointment and dismissal are left to the discretionary power of the Attorney General, who the questioned National Constituent Assembly elected following “a procedure that does not respect constitutional provisions.” The stability on the job of prosecutors, according to the conclusions issued by the International Fact-finding Mission, has been further eroded since September 2018, when Mr. Tarek Saab issued a restructuring resolution on Public Ministry, which declared that prosecutors occupy “positions of trust” and can be appointed and dismissed at will, thus eliminating job security for prosecutors.

Concerning the Ombudsman’s Office, an institution in charge of promoting, defending and monitoring human rights, after the appointment of its former head as Attorney General by the ANC, the latter proceeded to appoint Alfredo Ruiz Angulo as Interim Defender in August 2017. Subsequently, the National Constituent Assembly ratified him in his functions as the official head of the Ombudsman’s Office.

Finally, it should be considered that the above is aggravated by the current context of complex humanitarian emergency that Venezuela is going through and the consequences of COVID-19 in guaranteeing the rights of the population.

#### **A POSSIBLE SOLUTION FOR THE CASE OF VENEZUELA**

The judiciary’s lack of independence in Venezuela deepens the denial of justice, when international organizations require exhausting internal channels that are neither suitable nor effective.

For the formula that proposed concerning the waiver of the requirement of exhaustion of domestic remedies in Venezuela, it is decisive that both the structural obstacles that operate to prevent access to justice, as well as the consolidation of the institutional breakdown and the rule of law as of the year 2017 unequivocally report the admissibility analysis in international human rights protection organizations. In this way safeguards can be offered access to the only mechanisms currently available for Venezuelans, that is, the protection of their rights in international jurisdictions.

It must be emphasized that the analysis carried out in this document gives a detailed account of all the elements that make it impossible for the people in Venezuela to have minimum guarantees of access to justice, as well as the filing

of appeals. Therefore, there is an unequivocal break in the principle of separation of powers that in turn consolidates the maximum turning point registered in Venezuela with the lack of independence of the Judiciary.

Everything mentioned before should be sufficient reasons to analyze compliance with the requirement of exhaustion of domestic remedies in Venezuela, from a context in which, it is virtually impossible to access domestic remedies. Likewise, it should be considered the existence of a mere risk that their filing of a local action may cause, to citizens or the justice operators, as long as the conditions analyzed of the unwillingness of the Venezuelan State to provide effective remedies are in place.

Therefore, it is essential that for the analysis of the exhaustion of domestic remedies the international human rights bodies take into account the determinations that they have already made in relation to other contentious cases that address the same problems and/or in the mandate to monitor the human rights situation by the Inter-American Commission and the United Nations bodies. Although this does not necessarily imply making the argumentative load more flexible in each case on the reasons for the non-exhaustion of domestic remedies, it does guarantee an approximation by the international protection bodies, consistent with the operation of their different mandates.

## RECOMMENDATIONS

To international protection organizations

- That both the structural obstacles that operate to prevent access to justice, as well as the consolidation of the institutional breakdown and the rule of law as of 2017, unequivocally inform the admissibility analysis.

To civil society

- That at the time of the presentation of the petition or demand to the international human rights bodies, they request that the formula of the “unwillingness” of the Venezuelan State be applied to guarantee access to judicial protection, through effective remedies.

