The Rule of the Duplication of Procedures in the Regional Systems of Human Rights Protection

Andres Pizarro Sotomayor

Resumen: *Este artículo trata sobre la prohibición de la duplicidad de procedimientos en los tres sistemas regionales de protección de los derechos humanos. A través de un estudio descriptivo y comparativo examina cómo cada sistema ha interpretado y aplicado esta regla de admisibilidad, y concluye estableciendo cuáles son los mejores acercamientos para alcanzar los propósitos subyacentes de este requisito procesal.*

Abstract: *This article addresses the prohibition of the duplication of procedures in three regional systems of human rights protection. It analyses through a descriptive and comparative assessment how each system have interpreted and applied this admissibility rule, and it concludes with what are the best approaches to reach the underlying purposes of this procedural requirement.*

I. Introduction

The international protection of human rights is subsidiary to the protection that States should provide. States are forehand responsible for the fulfillment of the human rights duties, and in the event that they are not willing or able to do so, the international human rights judicial or quasi-judicial mechanisms may be activated.[1] In this regard, Doug Cassel, referring to the Inter-American Human Rights bodies, has remarked, *"in deference to national sovereignty and for practical reasons, those bodies have never been conceived as more that supplements to national system."* [2]

As a consequence of this complementary nature of the international human rights protection, the States have agreed to certain prerequisites that must be met before the cases reach the international human rights jurisdiction. Therefore, these admissibility requirements – one being the rule of the duplication of procedures – are essentially established in favor of the States. The policy behind this basis is in attendance of their sovereignty and practical considerations. This rationale explains why, unlike competence matters, the admissibility requirements can be renounced or waived by the States under certain circumstances.

The I/A Commission on Human Rights has reasoned, regarding to the rationale of the prohibition of the duplication of procedures, that, *"This principle [res iudicata] means that no State can be submitted afresh to scrutiny by the Commission in the case of petitions that have already been examined by it or when they are subject to another international human rights protection body."* [3] In the same context, the African Commission on Human and Peoples' Rights has interpreted that, *"The principle behind the requirement under this provision of the African Charter is to desist from faulting member states twice for the*

1. In this respect, the American Convention on Human Rights establishes in its Preamble: "Recognizing that the essential rights of man […] justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states." And, the European Court has pointed out that, "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the «Belgian Linguistic» case, Series A no. 6, p. 35, paragraph. 10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines." EU Court H.R., Application No. 5493/72, Case of Handyside v. The United Kingdom. Merits. Judgment of December 7, 1976, paragraph 48.

2. Douglass Cassel, The Inter-American System of Human Rights: A functional analysis, in Corte Interamericana de Derechos Humanos, Liber Amicorum Hector Fix-Samudio, (1998) 521.

3. IACHR, Report No. 5/96, Case 10.970, Fernando Mejía and Raquel Marin de Mejía. Peru. March 1, 1996, section V.A.1.

same alleged violations of human rights." [4] In other words, this clause seeks to prevent the use of some international human rights bodies as double instances [5] of other human rights bodies, which could be deemed as a *"forum shopping,"* [6] a practice that eventually entails the risk of having contradictory interpretations or decisions on the same case.[7] It should be noted that the world is experiencing an increasing proliferation of tribunals and judicial institutions without any systematic relation or hierarchy among them and without a coherent system.[8] This augment in the number of adjudicatory and monitoring bodies has also taken place in the human rights realm. Therefore, *"With the increase in the number of human rights organs covering human rights violations the possibility of a clash of jurisdictions may occur."* [9]

The prohibition of the duplication of procedures – along with the requirement of the exhaustion of domestic remedies and the time limit for the lodging of the petition – is a procedural prerequisite common to all the regional systems of human rights protection. It is also a common rule set forth for the individual complain procedure before almost all of the human rights committees of the United Nations.[10] Notwithstanding, as we will see through this article, there are some differences in the wording of these norms (see the Annex) and in the practice of the different human rights bodies. This article has as a goal to provide a comparative assessment of what are the best approaches to achieve the underlying purposes of this rule of procedures.

4. Bakweri Land Claims Committee v. Cameroon, (2004) AHRLR 54 (ACHPR 2004). In this respect Frans Viljoen observes, "[T]he rule *ne bis in idem* applies. This is clearly sound, because a State should not be found in violation twice for one violating action or conduct, and a complaint that has been finalized on the merits should not be reopened. This principle is similar to those of *autrefois acquit* and *autrefois convict*, which entail that an accused in a criminal trial may not be tried again for an offence similar to one for which he or she has already been either acquitted or convicted." Frans Viljoen, Communications under the African Charter: Procedure and Admissibility, in Malcolm Evans & Rachel Murray, The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006 126 (2nd Ed. 2008).

5. Héctor Faúndez Ledesma, El Sistema Interamericano de Protección de los Derechos Humanos, 359 (3rd 2004).

6. Catherine Phuong, The Relationship Between the European Court of Human Rights and the Human Rights Committee: Has the 'same matter' already been 'examined', 7 Hum. Rts. L. Rev. 385 (2007). Sarah Joseph, Jenny Schultz, and Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary, 97 (2nd Ed. 2004).

7. Id. at 392-394. Faúndez Ledesma, supra note 5, at 353.

8. Sir Robert Jennings, The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers 9 ASIL Bulletin 5 (1995).

9. Chittharanjan F. Amerasinghe, The jurisdiction of international tribunals, 763 (2003).

10. The only U.N. Human Rights Treaty Body enabled to receive individual complains, whose constitutive instrument does not require expressly the no duplication of procedures, is the Committee on Elimination of Racial Discrimination (CERD).

II. The African System of Human Rights

The pertinent norm of the African Charter on Human and Peoples' Rights is Article 56.7. This norm states that the communications shall be considered if they: *"Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of the African Unity or the provisions of the present Charter."* For the purposes of our analysis, it should be remarked that, (i) according to its wording, this norm is intended to ban only those cases that have reached a *final decision* in a previous procedure,[11] and (ii) the broad conception of *previous procedures* that could be a possible ground for this admissibility ban is a unique characteristic of the African Charter's norm. In practice, the African Commission has applied it in a handful of cases, and oftentimes through a very brief and not always clear reasoning.

In relation to the former issue, the African Commission in the case of *Bob Ngozi v. Egypt* ruled that the phrase: *"cases which have been settled"* of the Article 56.7, means that the claim brought to the other process should reach a decision on the merits or a concrete settlement.[12] In this case, the African Commission held that a previous decision rendered by the formerly named U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, that does not entertain the matter without making any pronouncement, does not represent a settlement of the claim. Thus, the case was held admissible. Seven years later, this same holding was applied in the case of *Bakweri Land Claims Committee v. Cameroon*. The African Commission again asserted that a decision of the U.N. Sub-Commission on the Promotion and Protection of Human Rights does not entertain a case, thus, it is not a decision on the merits of the matter; therefore, it is not a settlement in the terms of the Article 56.7.[13] Nevertheless, this case was declared inadmissible because of the lack of exhaustion of domestic remedies.

Regarding the question of which are the international bodies envisaged under the Article 56.7, the African Commission has positively recognized in its

11. This was a very controversial issue in the past, since the initial Rules of Procedures (of 1988) established in their Rule 114.3.f. the requirement that: "the same issue *is not already being* considered by another international investigation and settlement body." This contradictory rule that went beyond the restrictions of the Article 56.7 of the Charter, was applied in the case of *Amnesty International v. Tunisia* (Communication 69/92), which was declared inadmissible because at the time of the admissibility appraisal by the African Commission, the same claim was being considered by the UN Human Rights Commission under the ECOSOC Resolution 1503 procedure. The Rule 114.3.f. was subsequently abolished with the adoption of the current Rules of Procedure in October 6, 1995. The new Rule 116 declares simply that "The Commission shall determine questions of admissibility pursuant to article 56 of the Charter".

12. ACHPR, Case of Bob Ngozi v. Egypt (Communication No. 40/90). Merits. November 1997. Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights 1997-1998.

13. Bakweri Land Claims Committee v. Cameroon, supra note 4, at 54-56.

practice the following: (i) the U.N. Human Rights Committee, in the case of *Mpka-Nsusu v. Zaire*;[14] (ii) the U.N. procedure under the ECOSOC Resolution 1503, in the case of *Amnesty International v. Tunisia*,[15] and (iii) the Eritrea-Ethiopia Claims Commission (EECC), in the case of *Interights (on behalf of Pan African Movement and Others) v. Eritrea and Ethiopia.* The EECC is an arbitration tribunal established under a peace agreement to decide, through binding decisions, all claims for loss or damage infringed by the Governments or nationals of both sides in the Eritrea-Ethiopia conflict that occurred between 1998 and 2000.[16] This last recognition is interesting because even though the EECC is neither a human rights international body, nor a political organ of the OAU, the African Commission recognized that it belongs to the kind of bodies envisage in Article 56.7. This decision was made basically on three grounds: (i) the EECC is mandated to apply rules of international law and cannot make decisions *ex aequo et bono*; (ii) it has the capacity, unlike the African Commission, to deal with complex matters such as the citizenship of the individuals and the appraisal of the compensation that should be awarded, and (iii) it is mandated to grant monetary compensation and other types of remedies according to international law, in a greater extent that even the African Commission, and through binding decisions.[17] This is an example of a pragmatic and reasonable decision.

Moreover, in the two aforementioned cases, *Bob Ngozi v. Egypt* and *Bakweri Land Claims Committee v. Cameroon*, the African Commission focused its analysis on the fact that the U.N. Sub-Commission did not seize the complains, without assessing directly whether the procedure before that charter body was envisage in the text of Article 56.7. Notwithstanding, in light of the literature of that norm, which expressly refers to the Charter of the United Nations, and considering the conservative interpretations rendered in this issue by the African Commission, we can understand that all the complains procedures before the United Nations System could be deemed as envisaged in the Article 56.7 of the African Charter. Indeed, the argument set forth by the Commission leaves wide open the possibility that in similar cases, where the examination has already been completed, the Commission may decide differently.

14. ACHPR, Case of Mpaka-Nsusu vs. Zaire (Communication No. 15/88). Admissibility. 1994. Available in: http://humanrights.law.monash.edu.au/africa/comcases/15-88.html. See also Vincent O. Orlu Nmehielle, The African Human Rights System, Its Laws, Practice, and Institutions, 227 (2001).

15. ACHPR, Case of Amnesty International vs. Tunisia (Communication 69/92). Admissibility. 1993. Available in: http://www1.umn.edu/humanrts/africa/comcases/69-92.html. See also, Orlu Nmehielle, supra note 15, at 228-229.

16. The official site of the EECC: http://www.pca-cpa.org/showpage.asp?pag_id=1151

17. Interights (on behalf of Pan African Movement and Others) v. Eritrea and Ethiopia, (2003) AHRLR 82-84 (ACHPR 2003). See also, Malcolm Evans & Rachel Murray, supra note 4, at 128.

III. The Inter-American System of Human Rights

The Inter-American System is the one with the most detailed and comprehensive normative framework for the admissibility matter. Thus, the American Convention on Human Rights lays down in its Article 46.1.c the requirement that: "the subject of the petition or communication is not pending in another international proceeding for settlement." Complementing this norm, the Article 47.d adds that a petition or communication shall be considered inadmissible if it *"is substantially the same as one previously studied by the Commission or by another international organization."*[18] In practice the Inter-American Commission on Human Rights has dealt with this issue in various cases, enough to draw a consistent and coherent case law. On the other hand, the only relevant precedent in the jurisprudence of the Inter-American Court of Human Rights is the case of *Baena Ricardo v. Panamá*, which will also be analyzed.

A. The Inter-American Commission on Human Rights

1. Cases in which the Inter-American Commission previously studied the subject matter

Cases in which the Inter-American Commission previously studied the subject matter are among the less frequent in the possibilities envisaged in the American Convention. Nonetheless, there are two possible ways in which this situation may occur: first, if the I/A Commission previously decided the matter under its contentious mandate; or, if this body addressed the matter through its promotional mandate. The I/A Commission looked at this issue for the first time in the case of *Fernando Mejía and Raquel Marin de Mejía v. Perú*. Here, the I/A Commission declared the petition inadmissible only in the claims related to Mr. Fernando Mejía, because those same claims had been previously decided in the Report on the Merits No. 83/90, and no new information, or new claims, were

18. Furthermore, this conventional norm is developed in the article 33 of the Rules of Procedures of the Inter-American Commission on Human Rights, as follows:
1. The Commission shall not consider a petition if: a. the subject matter is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member; or, b. it essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member.
2. However, the Commission shall not refrain from considering petitions referred to in paragraph 1 when: a. the procedure followed before the other organization is limited to a general examination of the human rights situation in the State in question and there has been no decision on the specific facts that are the subject of the petition before the Commission, or it will not lead to an effective settlement; or, b. the petitioner before the Commission or a family member is the alleged victim of the violation denounced and the petitioner before the other organization is a third party or a nongovernmental entity having no mandate from the former organization.

presented about him in the later communication, even though the petitioners of the first communication did not have authorization from Mr. Fernando Mejía.[19] In this decision, the I/A Commission remarked that the rule established in the Article 47 of the American Convention should be interpreted *restrictively*, only in relation to the same claim and the same individual.[20]

With respect to the second possible scenario, the most illustrative example is the case of *Jose Bernardo Diaz et al v. Colombia*, in which the respondent State argued that the subject matter of the petition –the massive and systematic extra judicial killings of many members of the Union Patriotica Party– were already subject of a pronouncement by the I/A Commission in its Second Report on the Situation of Human Rights in Colombia.[21] In this case the I/A Commission drew a clear distinction between the two procedures, ruling that, *"The discussion of specific facts in a general country report does not constitute a 'decision' on those facts as would a final report on an individual petition which denounced the same or similar facts."* [22] Thus, the analysis of petitions, *"[I]s more structured than the preparation of a general report […] The Commission must engage in a careful analysis of the case so that it may reach conclusions of fact and law, pursuant to Articles 50 and 51 of the Convention."* [23] This reasoning about the characteristics and purposes of the individual complains procedure under the American Convention is relevant because it is the comparative standard that the I/A Commission uses to assess the effectiveness of other procedures of international investigation and settlement.

2. Cases in which another international human rights body previously studied the subject matter

The I/A Commission has been very consistent in deciding the admissibility of claims that have also been subject to other international procedures. In doing so, it has clearly established that the key element to determine the kind of procedures envisaged in Articles 46.1.c and 47.d is their nature and effectiveness. Thus, the I/A Commission has laid down from its early jurisprudence that,

19. In the individual complains process before the I/A System, the petitioners do not need to have authorization from the victims to lodge a communication. The article 44 of the American Convention does not require this. This rule has been held consistently by the I/A Commission since its early jurisprudence, see IACHR, Resolution No. 59/81, Case 1954, Pedro Cribari v. Uruguay. October 16, 1981, *Whereas* 2.

20. IACHR, supra note 3, at section V.A.1.

21. IACHR, Second Report on the Situation of Human Rights in Colombia. October 14, 1993, Chapter VII.

22. IACHR, Report No. 5/97, Case 11.227, Jose Bernardo Diaz et al v. Colombia. March 12, 1997, paragraph. 69.

23. Id. at paragraph. 72.

> *"[T]he Commission should not refrain from considering the case if a proceeding in progress in another organization is confined to a consideration of the general human rights situation in the country, and no decision has been reached in the specific facts concerning which the petition has been submitted to the Commission, or the decision does not lead to a real settlement of the violation charged."* [24]

Twelve years later, the I/A Commission in the case of *Mariela Barreto Riofano v. Perú* took another jurisprudential step when ruling that the concept of *settlement* under the article 46.1.c means that it must be *"a mechanism whereby the violation denounced can be effectively resolved between the petitioner and the authorities of the State or, failing that, the proceeding instituted can lead to a decision that ends the litigation and/or gives other bodies jurisdiction."* [25] In other words, the procedure *"must be equivalent to that set forth for the processing of individual petitions in the Inter-American system."* [26]

In accordance with these criteria, the I/A Commission has established that the previous (or simultaneous) examination of complains under the following mechanisms does not make a petition inadmissible: (i) complains before the former U.N. Human Rights Commission, now renamed and restructured as the U.N. Human Rights Council,[27] since the mandate of this *charter body* only concerns general situations of human rights [28] and has no jurisdictional function;[29] (ii) other mechanisms established by the U.N. Commission like the Working Group on Enforced or Involuntary Disappearances,[30] the U.N. Rapporteur on Torture, and the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions;[31] (iii) complains before the Freedom of Association Committee of the International Labor Organization, in which the I/A Commission has

24. IACHR, Resolution No. 7/88, Case 9504, Eustaquio Yauli Huaman v. Perú. March 24, 1988, paragraph f. IACHR, Report No. 89/05, Case 12.103, Cecilia Rosana Núñez Chipana v. Venezuela, October 24, 2005, paragraph 37.

25. IACHR, Report No. 30/00, Case 12.095, Mariela Barreto Riofano v. Perú, February 23, 2000, paragraph 24.

26. IACHR, Report No. 33/98, Case 10.545, Clemente Ayala Torres and others v. México, May 5, 1998, paragraph 43.

27. See: United Nations' General Assembly Resolution 60/251, available in: http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf

28. IACHR, Report No. 10/95, Case 10.580, Manuel Stalin Bolanos Quiñones v. Ecuador, September 12, 1995, paragraph II.2.

29. IACHR, supra note 26 at paragraph 43.

30. IACHR, Resolution No. 7/88, supra note 24 at paragraph g.

31. IACHR, Report No. 30/99, Case 11.026, Cesar Chaparro Nivia and Vladimir Hincapié Galeano v. Colombia, March 11, 1990, paragraph 23. IACHR, supra note 25 at paragraphs 25-26. IACHR, Report No. 22/05, Case 12.270, Johan Alexis Ortiz Hernández v. Venezuela, February 22, 2005, paragraph 41-44.

held consistently that, "the recommendation made by this body, does not entail any binding effect, either pecuniary or restorative, or indemnitory, on the […] State," while also taking into account that the subject matter jurisdiction of the Freedom of Association Committee is restricted to issues related to the right to unionize.[32] In this latter regard, the I/A Commission did not render any further reasoning or analysis about why this process before the CFA does not amount to an effective settlement. And, (iv) matters examined by the United Nations' *treaty bodies* under their periodic reporting mechanisms.[33]

On the other hand, the I/A Commission has found petitions inadmissible that were previously subject to consideration by the U.N. *treaty bodies* under their contentious mandate,[34] since they are *quasi-judicial* bodies that, *"have similar legal prerogatives and their decisions have the same scope or are similar in scope."* [35] In other words, they are expressly empowered to decide individual complains on the merits and to render recommendations that the States must comply with in good faith. Thus, the I/A Commission has applied this rule in cases previously presented before the U.N. Human Rights Committee[36] and the U.N. Committee against Torture.[37] However, the ban is not absolute: if the petitioner withdraws his petition before the other *quasi-judicial* body reaches a decision on the case and before the I/A Commission reaches an admissibility

32. IACHR, Report No. 14/97, Case 11.381, Milton García Fajardo et al v. Nicaragua, March 12, 1997, paragraph 47. In this case, the I/A Commission actually found that the victims were substantially the same (para. 42), and some of the claims were subject of the jurisdiction of the FAC (43-46); however, the I/A laid down its doctrine that such is not a process able to lead to an effective settlement. See also, IACHR, Report No. 21/06, Workers Belonging to the "Association of Fertilizer Workers" (FERTICA) Union v. Costa Rica, March 2, 2006, paragraph 40. IACHR, Report No. 23/06, Union of Ministry of Education Workers (ATRAMEC) v. El Salvador, March 2, 2006, paragraph 27.

33. IACHR, Report No. 03/01, Case 11.670, Amilcar Menendez, Juan Manuel Caride, and others (Social Security System) v. Argentina, January 19, 2001, paragraph 63.

34. At the time of writing this article the only U.N. *treaty bodies* enabled to receive individual complains are: The Human Rights Committee (HRC), the Committee Against Torture (CAT), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on Elimination of Racial Discrimination, and the Committee on the Rights of Persons with Disabilities (CRPD). The individual complains mechanism of the Committee on Migrants Workers (CMW) and the Committee on Economic, Social and Cultural Rights (CESCR), have not entered into force.

35. IACHR, Report No. 32/00, Case 11.048, Víctor Alfredo Polay Campos v. Peru, March 10, 2000, paragraph 19.

36. IACHR, Report No. 1/92, Case 10.235, Orlando García Villamizar and others v. Colombia, February 6, 1992, *Whereas* 1.d. IACHR, Report No. 96/98, Case 11.827, Peter Blaine v. Jamaica, December 17, 1998, paragraphs 40-49. IACHR, Report No. 32/00, Case 11.048, Víctor Alfredo Polay Campos v. Peru, March 10, 2000, paragraph 18-20.

37. IACHR, Report No. 89/05, Case 12.103, Cecilia Rosana Núñez Chipana v. Venezuela, Octubre 24, 2005, paragraph 37.

decision, then there is no duplication of procedures.[38] In addition, the determination of the existence of the duplication of some claims is not extensive to other possible new claims,[39] or victims[40] not considered in the other procedure.

B. The Inter-American Court of Human Rights

The leading precedent in the jurisprudence of the I/A Court is the case of *Baena-Ricardo et al. v. Panama*, in which some of the claims alleged before the I/A System were previously addressed by the Freedom of Association Committee of the ILO. In this case, the I/A Court developed the phrase "substantially the same", contained in the article 47.d of the American Convention, and it ruled that there must be identity of: *parties* (respondent State, petitioners and victims); *object of the action* (the behavior or the event that is a violation of some human rights), and *legal grounds* (the specific international norms breached).[41] What is really interesting about this decision is that the I/A Court ruled that,

> *"[T]he nature of the recommendations issued by the said Committee […] is an action specific to an organ of the ILO with the legal effect of a recommendation to the States. The latter [a decision of the I/A Court] is a judgment that, in the terms of the Convention, is final and not subject to appeal (Article 67) and must be complied with (Article 68.1)."* [42]

Thus, the I/A Court is not really appraising if the I/A Commission properly addressed the admissibility prohibition of the duplication while the case was in the I/A Commission stage of the process. The I/A Court did not compare the recommendations of the I/A Commission as a quasi-judicial body *vis-à-vis* the recommendation of the CFA. The communication before the CFA was filed in 1991 and this body issued the pertinent recommendations to the Panamanian State "towards the end of 1992,"[43] more than two years before the filing of the petition before the I/A Commission.[44] According to this ruling, it seems that

38. IACHR, Report No. 47/08, Luis Gonzalo "Richard" Velez Restrepo y Familia v. Colombia, July 24, 2008, paragraph 65. At the time of the writing of this article this decision was only available in is Spanish version (cidh.org).

39. IACHR, Report No. 96/98, supra note 36, at paragraphs 42, 43 and 45.

40. IACHR, Report No. 1/92, supra note 36, at paragraphs 6, 9 and *Whereas* 1.d.

41. I/A Court H.R., Case of Baena-Ricardo et al. v. Panama. Preliminary Objections. Judgment of November 18, 1999. Series C No. 61, paragraphs 53-57.

42. Id. ad paragraph 57.

43. Id. ad paragraph 26.

44. Id. ad paragraph 3.

the I/A Court assessed this issue more like a competence matter, rather than an admissibility requirement. Technically, the I/A Court's interpretation of what qualifies as an effective settlement turns Articles 46.1.c and 47.d of the American Convention meaningless.

IV. The European System of Human Rights

The norm that consecrates this admissibility requirement in the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by the Protocol No. 11, is Article 35.2.b which establishes that *"The Court shall not deal with any application submitted under Article 34 that is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."* This is the same wording as the previous Article 27.1.b of the European Convention. With relation to the meaning of this Article, the former European Commission has ruled that *"the term 'another procedure' refers to judicial or quasi-judicial proceedings similar to those set up by the Convention. Moreover, the term 'international investigation or settlement' refers to institutions and procedures set up by States, thus excluding non-governmental bodies."* [45]

The organs of the European System of Human Rights have faced a low rate of situations of this kind, especially when taking into account the great amount of cases that they have decided.[46] Notwithstanding, as well as in the Inter-American System, this case law has been enough to delineate a clear jurisprudential pattern on this issue.

A. Cases in which the European System previously studied the subject matter

The occurrence of this kind of situations, in which a claimant requests the reconsideration of a matter that was subject of a previous decision, is not estrange. Notwithstanding, it is very rare to find decisions in this regard issued by the European Court or Commission, and even more unusual, by the I/A Commission. The reason being that, in practice, the Office of the Registrar, or the Executive Secretariat in the case of the I/A System, addresses those situations in the early stages of the procedures. It is useful to recall that in these cases the assessment is done in the same way as in the cases of complains previously considered or under consideration of other judicial or quasi-judicial bodies. The key

45. ECHR, Application No. 21915/93, Case of Lukanov v. Bulgaria, Decision of January 12, 1995.

46. Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, Theory and Practice of the European Convention on Human Rights 174, 179 (4th ed. 2006).

of the analysis is the allegation of *new facts* in the last application, which *"must be of such nature that they cause a change in the legal and//or factual data on which the Court based its earlier decision."* [47]

Thus, the EU Commission considered new facts regarding the same complainant that occurred clearly after the final decision of the European System.[48] In a broader sense, the EU Commission also ruled that under certain circumstances, the time aspect could constitute in itself new relevant information.[49] This criterion applied to qualify as a *new fact* was the time which has elapsed since the examination of a first application, when a complaint concerns the length of proceedings (Art. 6, para. 1),[50] or in the case of a continuation of remand in custody after the rejection of a previous application.[51] In exceptional circumstances the EU Commission has recognized that an error of fact in its decision in a previous application could justify the examination of that fact through a second application.[52]

On the other hand, the EU Commission held that further legal arguments not submitted in the first application, as well as supplementary information on domestic law incapable of altering the reasons for the previous decision, do not constitute *new facts*.[53] The purpose of such strict interpretation is to prevent opening a possibility of appeal not provided by the European Convention against the admissibility decisions.[54] In the same context, this body established that, *"further submissions or re-formulated complaints which were known to the applicant and could clearly have been presented by him with the original applications"* [55] are not new facts that could amount as grounds to the consideration of a new application. Moreover, the EU Commission ruled that a claim is not admissible based on *"developments subsequent to facts on which was based*

47. Id. at 175.

48. ECHR, Application No. 19255/92, Case of Obershlick v. Austria, Decision of May 16, 1995, paragraph 3.a.

49. ECHR, Application No. 8233/78, Case of X v. the U.K., Decision of October 3, 1979, page 130.

50. Id. at 122, 130. In this case the time elapsed between the first and the second decision taken by the EU Commission was of one year and eight months.

51. ECHR, Application No. 9621/81, Case of Vallon v. Italy, Decision of October 13, 1983, page 217, 239. In this case the time elapsed between the first and the second decision taken by the EU Commission was of three months.

52. ECHR, Application No. 23956/94, Case of McKenny v. the U.K., Decision of November 28, 1994, page 3.

53. ECHR, Application No. 8206/78, Case of X v. the U.K., Decision of July 10, 1981, page 147.

54. Id. at 150.

55. ECHR, Application No. 13365/87, Case of Ajinaja v. the U.K., Decision of March 8, 1988, page 3. This case was used as a precedent by the I/A Commission in the Case of Peter Blaine v. Jamaica, December 17, 1998, paragraphs 43.

a previous application which has been the subject of a judgment of the European Court of Human Rights and a resolution of the Committee of Ministers." [56] This is also a case of lack of competence *ratione materiae*, because under the European Convention this supervision is entrusted to the Committee of Ministers of the Council of Europe.

B. Cases in which another international human rights body previously studied the subject matter

In this regard, the former EU Commission ruled that the individual complains procedure before the U.N. Human Rights Committee *"constitutes a procedure of international settlement within the meaning of the article 27.1.b [today article 35.2.b]."* [57] The EU Court, emphasizing that its task is *"to ascertain to what extent the proceedings before it overlap with those before the United Nations Human Rights Committee"*, has maintained this criterion.[58] Thus, the key point of the assessment is the *"scope of the factual basis"* in which the different complains were grounded.[59] The European System has also declared the inadmissibility of complains previously presented before the Committee of Freedom of Association of the ILO, but mainly in those areas in which the competence *ratione materiae* of both international bodies is overlapped,[60] specifically between Articles 2 and 10 of the ILO Convention No. 87, and the Article 11.1 of the European Convention, regarding the right of freedom of association.[61] Moreover, the complainants should be substantially the same in both procedures,[62] which is very difficult to assert, because the complaints must come from an employers' or workers' organization. Notwithstanding, despite these particularities of the specialized procedure before the Committee of Freedom of Association, as Zwart has remarked, *"[I]n the final analysis, the similarities outweigh the differences. The Committee on Freedom of Association, like the Commission, is an independent and impartial quasi-judicial organ*

56. ECHR, Application No. 10243/83, Case of Times Newspapers LTD. v. the U.K., Decision of March 6, 1985, page 123.

57. ECHR, Application No. 17512/90, Case of Calcerrada Fornieles and Cabeza Mato v. Spain, Decision of July 6, 1992, page 214.

58. EU Court H.R., Applications No. 46133/99 and 48183/99, Case of Smirnova and Smirnova v. Russia. Admissibility. Judgment of October 3, 2002, page 2.

59. Id. ad page 2.

60. ECHR, Application No. 11603/85, Case of the Council of Civil Service Unions and others v. the U.K., Decision of January 20, 1987.

61. ECHR, Application No. 16358/90, Case of Miguel Cereceda Martin and others v. Spain, Decision of October 12, 1992, page 133.

62. Id. at 134. This case is an example of this very exceptional situation in which the European Commission found that the complainants were substantially the same.

which may deal with complaints brought by non-governmental organizations within the context of contentious proceedings." [63] Furthermore, the issue of the previous, or simultaneous, examination of complains under other procedures must be brought to the attention of the EU Court by the parties, because *"it is not necessary for the Court to consider it of its own motion."* [64] And, if the petitioners want to avoid the application of this procedure, then they must withdraw completely, not just suspend, the petition lodged before the other international procedure of investigation or settlement.[65]

In contrast, the European Commission has held that the Human Right Committee of the Inter-Parliamentary Union is not a body that generates duplication of procedures because the I-P Union is a non-governmental organization.[66] Furthermore, according to the Article 17 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the paragraph 92 of its Explanatory Report,[67] a case examined by the European Committee for the Prevention of Torture (CPT) would not be declared inadmissible by the European Court of Human Rights on the grounds of the duplication of procedures.

V. Concluding remarks

Even though there are slight differences in the wording of the various treaties that laid down the admissibility rule – mainly in the interest of the States – of the prohibition of the duplication of procedures and the divergences in its application through the different regional human rights bodies, the purpose of this rule is essentially *"to deal with the overlapping jurisdictions,"* [68] seeking *"to avoid a plurality of international proceedings relating to the same cases."* [69] Given the common nature and aim of this norm, the following can be concluded with respect to the best way to achieve the goals of this procedural norm:

63. Tom Zwart, The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee 183 (1994).

64. EU Court H.R., Application No. 16717, Case of Puger v. Austria. Merits. Judgment of May 28, 1997.

65. ECHR, supra note 57, 224.

66. ECHR, supra note 45.

67. Both sources available in: http://www.cpt.coe.int/en/documents/ecpt-version1989.htm

68. Michael Reisman, Creating, Adapting and Designing Dispute Resolution Mechanisms for the International Protection of Human Rights, 9 ASIL Bulletin 9 (1995).

69. ECHR, supra note 57, at 223.

a) The key element of the rules should be the quality or nature of the other procedure. The manner to decide this element should be drawn up in a restrictive manner in a way that could be interpreted to exclude those procedures that cannot: (i) assess complains about specific individuals or groups; (ii) entail an examination and decision on the merits of the communications, and (iii) issue a pronouncement directed to the government regarding to the decision. In this regard, the I/A System has taken the best approach through Article 33.2 of the I/A Commission Rules of Procedure.[70] In contrast, Article 56.7 of the African Charter is highly problematic because it refers generally to the (institutions/procedures) "Charter of the United Nations" and the "Charter of the Organization of the African Unity". This practice entails the risk of being interpreted as inclusive of non-contentious or just political proceedings; thus, leaving the victims unprotected. As expressed before, this issue remains unsolved by the African Commission.[71]

b) Closely related to the before-mentioned conclusive point, the I/A System should consider the proceeding before the Committee of Freedom of Association of the International Labor Organization, like the European System does, as an international quasi-judicial body able to generate duplication of procedures. In this regard, it is worth recalling that this *special supervisory mechanism* of the ILO's Governing Body as a quasi-judicial body is comparable to the I/A, the African and the former European Commission of Human Rights, and the U.N. Human Rights *treaty bodies*.[72] The best approach here is to not consider those claims that were examined within the subject matter jurisdiction of the CFA, when the victims in both procedures are substantially the same. On the other hand, given the specialized subject matter jurisdiction of this body and its standing requirement, the activity of this ILO Committee will not constitute a significant ban for the admissibility of a claim before the other systems.

c) In order to effectively avoid the overlapping of international proceedings and the possibility of contradictory decisions, the rules should lay down the inadmissibility of claims that are being considered at the same time by another judicial or quasi-judicial body. In this

70. See, supra note 18.

71. Orlu, supra note 14, at 228.

72. The Committee on Freedom of Association "makes conclusions and recommendations based on the information before it, and asks the governments concerned to take steps to implement the recommendations; and brings its conclusions and recommendations before the Governing Body and, where the government concerned has ratified the relevant FOA Convention, may pass aspects of the case to the ILO Committee of Experts on the Application of Conventions and Recommendations for follow-up." David Taigman and Karen Curtis, Freedom of association: A user's guide, 2, 66 (2000).

respect, the Article 56.7 of the African Charter is the only one of the three regional systems that does not ban this kind of claims.

d) In relation to the consideration of what qualifies as a decision of another body, the most appropriate approach could be to regard those formal decisions on admissibility or merits that entail a degree of examination of the facts and the legal issues, and that are issued by the members of the given judicial or quasi-judicial bodies. Excluding those "prima facie" rejections or decisions of not to entertain or seize the application.

e) The rule of the prohibition of the duplication of procedures also aims to prevent the subsequent presentation of the same claim before the same body, seeking to avoid "appeals" against the decisions of inadmissibility. The rule thus maintains the value and stability of these decisions,[73] preserving the States from being under the same scrutiny more than once; and, for practical reasons, avoiding the recurrence of the same issues, which could overload the systems.[74] Therefore, in considering the *new facts* presented in a second application by the same complainant of a previous one, this rule should be applied in a very restricted way, allowing those claims based on really new facts, not presented before for reasons that could not be attributable to the claimant. In this regard, we consider that holdings like those rendered by the EU Commission in the cases of *X v. the U.K (Application 8233/78)* and *Vallon v. Italy*, in the sense of considering the time itself as a "new fact", are absolutely unfeasible. By the contrary, an example of a much better approach or this situation is the case of *Fernando Mejía y Raquel Marin de Mejía v. Perú.*

73. See, Thomas Buergenthal, International Human Rights In a Nutshell, 205 (1995).

74. Faúndez Ledesma, supra note 5, at 353.

Annex

The rule of the duplication of procedures in the regional human rights treaties

Document	*Article(s)*	*Text of the Norm*
African Charter of Human and Peoples' Rights	56.7	Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they: […] Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of the African Unity or the provisions of the present Charter.
American Convention on Human Rights	46.1.c 47.d	Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: […] That the subject of the petition or communication is not pending in another international proceeding for settlement. The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: […] The petition or communication is substantially the same as one previously studied by the Commission or by another international organization.
Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11.	35.2.b	The Court shall not deal with any application submitted under Article 34 that: […] In substantially the same as a matter has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

The rule of the duplication of procedures in the United Nations treaty bodies that are entitled to receive individual complains

Document	*Article(s)*	*Text of the Norm*
Optional Protocol to the International Covenant on Civil and Political Rights (1966)	5.2.a	The Committee shall not consider any communication from and individual unless it has ascertained that: The same matter is not being examined under another procedure of international investigation or settlement.
International Convention on the Elimination of All Forms of Racial Discrimination (1969)	(none)	(none)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)	22.5.a	The Committee shall not consider any communication from and individual unless it has ascertained that: The same matter has not been, and is not being, examined under another procedure of international investigation or settlement.
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (2000)	4.2.a	The Committee shall declare a communication inadmissible where: The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.
Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)	2.c	The Committee shall consider a communication inadmissible when: The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.