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Title	Checklist: planning ahead for potential international litigation
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Publication date	2018-05-01
Original Citation	O'Mahony, C., O'Callaghan, E. and Burns, Kenneth (2018) Checklist: Planning Ahead for Potential International Litigation, IDEA Project, University College Cork, Available online: https://ideachildrights.ucc.ie/resources/tools/IDEA-Checklist-international.pdf
Type of publication	Report
Link to publisher's version	https://ideachildrights.ucc.ie/resources/tools/IDEA-Checklist-international.pdf, http://ideachildrights.ucc.ie/resources/
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Download date	2026-09-08 02:53:51
Item downloaded from	https://hdl.handle.net/10468/6405

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CHECKLIST

PLANNING AHEAD FOR POTENTIAL INTERNATIONAL LITIGATION

IDEA Improving Decisions through Empowerment and Advocacy

If you are litigating a children's rights issue in the Irish courts, and your case is unsuccessful, you may wish to pursue a remedy under the European Convention on Human Rights or the United Nations Convention on the Rights of the Child individual complaints procedure (Optional Protocol 3). However, most claims are declared inadmissible as a result of decisions made during the domestic phase of litigation.[1] This checklist is designed to help you avoid that eventuality. We suggest you attach it as a cover sheet to a file to remind you of the steps needed to avoid an application under the ECHR or the CRC Optional Protocol 3 being declared inadmissible.

ADMISSIBILITY CRITERIA – SNAPSHOT

ECHR

1. Application must air the same essential grievance as the domestic proceedings.
2. Domestic remedies must first be exhausted (unless no reasonable prospect of success).[2]
3. Not strictly necessary to exhaust all possible avenues once the essential grievance has been aired[3] – but failure to do so leaves applicant open to arguments of non-exhaustion.
4. Application must be lodged within 6 months of exhaustion (or of futility of domestic proceedings becoming clear).[4]

CRC OPTIONAL PROTOCOL 3

1. Domestic remedies must first be exhausted (unless ineffective, or would be unreasonably prolonged).
2. Application must be lodged within 12 months of exhaustion.[5]

CHECKLIST

1. **State liability**: has State liability for a breach of rights been raised in the domestic proceedings?[6] YES NO
2. **Nature of violation**: can you clearly identify positive or negative obligations that the State has failed to discharge, and the associated Convention Articles and cases? YES NO
3. **Evidentiary record**: has all evidence that might help to demonstrate a breach of obligations by the State been placed on the record in the domestic proceedings? YES NO
4. **Exhaustion**: has a claim been pursued all the way to the Supreme Court?[7] YES NO
5. **Futility**: if domestic remedies have not been exhausted, can it be demonstrated that litigation in the domestic courts would have had no reasonable prospect of success?[8] YES NO
6. **Remedial avenues**: have all possible remedial avenues (e.g. redress schemes or other non-court remedies)[9] been exhausted or all possible forms of the legal argument ventilated? Did domestic proceedings raise arguments based on the ECHR Act 2003?[10] YES NO

RESOURCES

This checklist is indicative only and should not be relied on as a comprehensive or exclusive guide to admissibility. Further information is available from the following resources:

Website of the European Court of Human Rights: http://echr.coe.int/Pages/home.aspx?p=applicants&c

Website of the Department of Foreign Affairs and Trade:https://www.dfa.ie/our-role-policies/international-priorities/international-law/courts-tribunals-dispute-mechanisms/european-court-of-human-rights/

Website of the Council of Europe: https://www.coe.int/en/web/children/participation

Handbook on European Law Relating to the Rights of the Child: http://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF

United Nations Convention on the Rights of the Child: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

Optional Protocol to the Convention on the Rights of the Child on a communications procedure: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx

European Court of Human Rights Practical Guide on Admissibility Criteria: https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

ENDNOTES

1. In 2016, some 82% of all applications (a total of 38,505) decided by the Court were declared inadmissible: http://app.echr.coe.int/CheckList/?cookieCheck=true.

2. Domestic proceedings which have no reasonable prospect of success need not be pursued prior to applying to the Court. See, e.g., Selmouni v France, 25803/94, July 28, 1999 at [74] to [77] and A, B and C v Ireland, 25579/05, December 16, 2010 at [145] to [149].

3. See, e.g., O'Reilly v Ireland, 24196/94, January 22, 1996; TW v Malta, 25644/94, April 29, 1999 at [34]; Jeličić v Bosnia and Herzegovina, 41183/02, November 15, 2005; Shkalla v Albania, 26866/05, May 10, 2011 at [61], and Leja v Latvia, 71072/01, June 14, 2011 at [46].

4. The time limit will be reduced to four months when all Member States have ratified Protocol 15. See Article 4 of this Protocol, available at: http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.

5. Unless it can be shown that this was not possible – see Article 7(8).

6. Remember: the State will be the defendant in any international proceedings, and your international claim must air the same essential grievance as the domestic proceedings. The one exception is where the violation has been at the hands of a private actor, and the international claim relates to a failure by the State to provide protective deterrents in the form of potential criminal and civil actions against that private actor: see, e.g., Söderman v Sweden, 5786/08, November 12, 2013.

7. Note: denial of leave to appeal to the Supreme Court against a decision of the Court of Appeal will suffice.

8. A precedent dismissing a similar case is the best evidence here. Strictly speaking, the onus is on the State to demonstrate non-exhaustion, but it is better to be prepared to counter its arguments.

9. In Cardot v France, 11069/84, March 19, 1991, the Court held at [34] that "any procedural means which might prevent a breach of the Convention should … [be] used". It is better to exhaust such avenues before exhausting litigation, since waiting until after litigation has run its course opens the possibility of delaying the application to the Court for more than 6 months after losing in the Supreme Court (in which case the State will argue that the time limit has not been adhered to).

10. Again, strictly speaking, there is no firm obligation to exhaust all possible arguments once the essential grievance has been aired – but it is better to do so, even if only briefly, as failure to do so will be characterised as non-exhaustion by the State in its defence.

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