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Second report on diplomatic protection

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A. Exhaustion of local remedies

1. The exhaustion of local remedies rule is a rule of customary international law. In the *Interhandel* case the International Court of Justice stated that:

> "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system."[1]

In the *Elettronica Sicula (ELSI)* case the International Court of Justice described it not merely as a rule, but as "as important principle of customary international law."[2]

2. Many reasons have been given for this rule. Borchard advances the following reasons:

> "First, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local State in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home Government of the complaining citizen must give the offending Government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussions; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the State; and fifthly, if it is a deliberate act of the State, that the State is willing to leave the wrong unrighted. It is a logical principle that where there is a judicial remedy, it must be sought. Only if it is sought in vain and a denial of justice established, does diplomatic interposition become proper."[3]

The foundation of the rule, according to Jiménez de Aréchaga, is "the respect for the sovereignty and jurisdiction of the State competent to deal with the question through its judicial organs."[4]

3. An exhaustion of local remedies rule was included in article 22 in the draft articles on State responsibility adopted by the Commission on first reading.[5] The

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[1] 1959 *I.C.J. Reports* 27.

[2] 1989 *I.C.J. Reports* 42, para. 50.

[3] *The Diplomatic Protection of Citizens Abroad* (1915), pp. 817-818. For further reasons, see K. Doehring, "Local Remedies, Exhaustion of", in *Encyclopedia of Public International Law* (1997), vol. 3, p. 238; Bernardo Sepúlveda Amor, "International Law and National Sovereignty: NAFTA and the Claims of Mexican Jurisdiction" (1996), 19 *Houston Journal of International Law* 586.

[4] "International Responsibility", in M. Sørensen (ed.), *Manual of Public International Law* (1968), p. 584.

[5] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* and corrigendum (A/51/10 and Corr.7), chap. III.D.1.

commentary to that article[6] described the requirement of the exhaustion of local remedies as "a principle of general international law". The draft articles on State responsibility provisionally adopted by the Drafting Committee on second reading in 2000[7] provide that "the responsibility of a State may not be invoked if … the claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted",[8] but leave the drafting of a comprehensive rule on this subject to the present study.

4. Roberto Ago, the Special Rapporteur responsible for the drafting of article 22, succeeded in including many of the principles comprising the exhaustion of local remedies in a single article uninterrupted by a single full-stop. It reads:

> "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

No attempt is made to emulate this feat in the present report, first, because the components of the exhaustion of local remedies rule considered in this report go beyond those addressed by Ago,[9] and secondly, because the goal of clarity is better achieved by a number of draft articles. Consequently Roberto Ago's single article is replaced by no less than five articles in the present report.

B. The general principle that local remedies must be exhausted

Article 10

1. A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, before the injured national has, subject to Article 15, exhausted all available local legal remedies in the State alleged to be responsible for the injury.

2. "Local legal remedies" means the remedies which are as of right open to natural or legal persons before judicial or administrative courts or authorities whether ordinary or special.

C. The exhaustion of local remedies rule is a customary rule

5. That the exhaustion of local remedies is a well-established rule of customary international law is not disputed. It has been affirmed by the decisions of

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[6] *Yearbook* ... 1977, vol. II (Part Two), pp. 30-50.

[7] A/CN.4/L.600.

[8] Ibid., article 45.

[9] Ago acknowledged that article 22 did not pretend to cover all aspects of the exhaustion of local remedies rule, particularly those that went beyond the purpose of the draft articles, namely the codification of the general rules governing State responsibility; commentary to article 22, paras. (52) and (61), *supra*, note 6, pp. 48, 50.

international[10] and national courts, bilateral and multilateral treaties, State practice, codification attempts by governmental and non-governmental bodies and the writings of jurists. The fact that treaties, particularly investment treaties, may on occasion exclude the operation of the rule in no way detracts from the generality of the rule or the universality of its acceptance.[11] The commentary to article 22 of the draft articles on State responsibility adopted by the Commission on first reading[12] contains a litany of sources proclaiming its validity. There is no reason to rehearse those sources.

D. Persons required to exhaust local remedies

6. Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies where it engages in *acta jure gestionis*.[13] Diplomats or State enterprises engaged in *acta jure imperii*, on the other hand, are not required to exhaust local remedies, as an injury to them is a direct injury to the State to which the exhaustion of local remedies rule is inapplicable.[14]

E. Primary and secondary rules

7. No attempt is made to define or describe the great range of internationally wrongful acts that give rise to State responsibility when an alien is injured to which the exhaustion of local remedies rule applies. To do so would be to trespass on the field of "primary rules" of international law which the Commission has studiously avoided in its draft articles on State responsibility, and which it has suggested should likewise be avoided in the study on diplomatic protection.[15] This policy has served the Commission well in its approach to State responsibility. However, it should be stressed, first, that there is no clear distinction between primary and secondary rules; secondly, that the distinction rests on unclear jurisprudential grounds; and thirdly, that it is a distinction of dubious value in a study on the exhaustion of local remedies.

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[10] See para. 1, above.

[11] *Supra,* note 6, p. 49, para. 5(55). See also C. F. Amerasinghe, "Whither the Local Remedies Rule?" (1990), 5 *ICSID Review* 292 (hereinafter "Whither the Rule?").

[12] *Supra*, note 6.

[13] *Supra,* note 6, p. 46, para. 45; R. Ago, Sixth Report on State Responsibility, *Yearbook ...* 1977, vol. II (Part One), p. 40, para. 103, document A/CN.4/209; see, also, the report of the Committee on Diplomatic Protection of Persons and Property to the International Law Association London Conference (2000), pp. 12-13; M. Herdegen, "Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen", in G. Ress and T. Stein, *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen* (1996), p. 65; C. H. P. Law, *The Local Remedies Rule in International Law* (1961), pp. 116-121.

[14] See para. 27 below.

[15] At its forty-ninth session a Working Group of the International Law Commission recommended that the study of diplomatic protection "will be limited to codification of secondary rules: while addressing the requirement of an internationally wrongful act of the State as a requisite, it will not address the specific content of the international legal obligation which has been violated, whether under customary or treaty law". *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), chap. VIII.B, para. 181.

8. That a clear distinction between primary and secondary rules is unattainable is evidenced by the many occasions on which members of the Commission have disagreed over the classification of a rule as primary or secondary.[16] Scholars have likewise had difficulty in drawing a clear distinction.[17]

9. The distinction between primary and secondary rules was invoked by Special Rapporteur Roberto Ago as a tool for rescuing the Commission from the difficulties caused by Special Rapporteur García Amador's proposals to codify the international minimum standard in his draft articles on State responsibility.[18] Little attention was paid to the jurisprudential basis of the distinction by Ago when he first introduced the distinction in his second report on State responsibility, in which he stated:

> "Responsibility differs widely, in its aspects, from the other subjects which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed 'primary', as opposed to the other rules — precisely those covering the field of responsibility — which may be termed 'secondary', inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules."[19]

Common-law lawyers familiar with the distinction between primary and secondary rules expounded by H.L.A. Hart in 1961 in *The Concept of Law*, which views secondary rules largely as rules of recognition designed to identify the primary rules of obligation,[20] will immediately realize that Ago had some other jurisprudential explanation in mind. It is more likely that Ago was influenced by the writings of a jurist such as Alf Ross,[21] who sees a legal rule as completed only when the "secondary norms" of effectiveness (or sanctions) are added to the "primary norms" of obligation.[22] Whatever the inspiration for the distinction between primary and

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[16] The controversial article 19 in the draft articles on State Responsibility adopted by the Commission on first reading (*supra*, note 5), dealing with international State crimes, has been frequently classified as a primary rule in a code of secondary rules. See James Crawford's First Report on State Responsibility (1998), A/CN.4/490, para. 18.

[17] See R. B. Lillich, "Duties of States regarding the Civil Rights of Aliens" (1978-III), 161 *Recueil des Cours* 373. See also J. Combacau and D. Allard, "'Primary' and 'Secondary' Rules in the Law of State Responsibility: Categorizing International Obligations" (1985), 16 *Netherlands Yearbook of International Law* 81. This highly sophisticated article hardly produces clarity on the distinction between primary and secondary rules. Rather, it provides evidence of the difficulties inherent in drawing such a distinction.

[18] See Ago's First Report on State Responsibility, *Yearbook ...* 1969, vol. II, pp. 125-141, document A/CN.4/217 and Add.1; and Second Report on State Responsibility, *Yearbook ...* 1970, vol. II, pp. 177-197, document A/CN.4/233.

[19] *Yearbook ...* 1970, vol. II, pp. 178-179, document A/CN.4/233.

[20] K. Wellens, "Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends", in L. A. N. M. Barnhoorn and K. C. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (1995), p. 3, addresses the question of international law from the perspective of H. L. A. Hart's distinction between primary and secondary rules. It does not, however, suggest that it was this distinction that inspired Ago's approach to State responsibility.

[21] *On Law and Justice* (1959), pp. 209-210.

[22] For an examination of this matter, see L. F. E. Goldie, "State Responsibility and the Expropriation of Property" (1978), 12 *International Lawyer* 63.

secondary rules as employed by the Commission may be, it does not rest on a clear jurisprudential foundation.

10. While the distinction between primary and secondary rules has served its purpose in the field of State responsibility, it is a distinction that cannot be too strictly maintained in a study on the exhaustion of local remedies in the context of diplomatic protection, as the concept of denial of justice is intimately connected with the exhaustion of local remedies rule. Writers on the exhaustion of local remedies rule often include an examination of denial of justice as an integral component of the exhaustion of local remedies rule, or at least find it necessary to discuss the connection between denial of justice and the exhaustion of local remedies.[23] Moreover, attempts at codification of the local remedies rule often seek to give some definition to denial of justice.[24] Circumstances of this kind, coupled with the fact that denial of justice may be seen both as a secondary rule excusing recourse to further remedies (associated with the "futility rule", discussed in article 15) or as a primary rule giving rise to international responsibility, suggest that the attempt at maintaining a rigid distinction between primary and secondary rules followed in the study on State responsibility should not be pursued with the same degree of rigidity in the present study. The commentary on article 22 of the draft articles on State responsibility adopted by the Commission on first reading warns that consideration of the topic of exhaustion of local remedies "must at all costs stop short of the content of 'primary' rules of international law."[25] This warning was, however, in the context of the codification of State responsibility and does not preclude the Commission from adopting a different approach in a study on diplomatic protection.

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[23] C. F. Amerasinghe, *Local Remedies in International Law* (1990), chap. 3 (hereinafter *Local Remedies*); Borchard, *supra*, note 3, part I, chap. 8; A. A. Cançado Trindade, "Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law" (1978), 53 *Philippine Law Journal* 404 (hereinafter "Denial of Justice"); C. Eagleton, *The Responsibility of States in International Law* (1928), p. 113; and "Denial of Justice in International Law" (1928), 22 *A.J.I.L.* 542; D. P. O'Connell, *International Law*, 2nd ed. (1970), vol. 2, pp. 945-950; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (1992), vol. 1, pp. 525, 544; I. L. Head, "A Fresh Look at the Local Remedies Rule" (1967), 5 *Canadian Yearbook of International Law* 149; A. O. Adede, "A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies" (1977), 5 *Harvard International Law Journal* 1 (hereinafter "Survey"); and "A Fresh Look at the Meaning of the Doctrine of the Denial of Justice" (1976), 14 *Canadian Yearbook of International Law* 76 ("the doctrine of denial of justice and the local remedies rule are two sides of the same coin") (hereinafter "Fresh Look"; F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (1932), pp. 146-159.

[24] Articles 4 and 9 of *Articles Adopted in First Reading by the Third Committee of the Conference for the Codification of International Law* (The Hague, 1930) (League of Nations publication V. Legal, 1930. V.17) (text in *Yearbook* ... 1956, vol. II, pp. 225-226); American Institute of International Law (1925) Project No. 15, article 4 (text in *Yearbook* ... 1956, vol. II, p. 226); Draft Convention on Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners, Institute of International Law (1927), articles 5 and 6 (text in ibid., p. 228); Draft Convention on Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners (particularly article 9), Harvard Law School 1929 (text in ibid., p. 229); Principles of International Law that Govern the Responsibility of the State in the Opinion of Latin-American Countries (article 8), prepared by the Inter-American Juridical Committee in 1962 (text in *Yearbook* ... 1969, vol. II, p. 153, document A/CN.4/217 and Add.1); F. V. García Amador, Third Report to ILC, *Yearbook* ... 1958, vol. II, pp. 55-60, document A/CN.4/111.

[25] *Supra*, note 6, p. 48, para. 52.

F. Remedies to be exhausted

11. The remedies available to an alien that must be exhausted before an international claim is brought will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. The words "all", "available" and the limitation of local remedies to remedies before "judicial or administrative courts or tribunals ordinary or special" offer some guidance but cannot hope to cover all circumstances. This article must, moreover, be read with article 15, which provides for exceptions to the rule that all available local remedies must be exhausted.

12. There is strong support for the view that all *legal* remedies that offer the injured individual a prospect of success must be exhausted. In *Nielsen v. Denmark*[26] the European Commission of Human Rights stated that the exhaustion of local remedies rule requires "that recourse should be had to all *legal* remedies available under the local law"; while in the *Ambatielos Claim*[27] the arbitral tribunal declared that "it is the whole system of *legal* protection, as provided by municipal law, which must have been put to the test." Writers too formulate the rule as requiring the exhaustion of *legal* remedies.[28] There is, however, some uncertainty as to the meaning of the term "legal" in the context of local remedies.

13. "Legal" remedies clearly include judicial remedies. The foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Courts in this connection include both ordinary and special courts since "the crucial point is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress."[29]

14. Legal remedies also include remedies before administrative bodies — provided the foreign national has a right to obtain redress from the tribunal. Some authorities have formulated the recourse to administrative authorities too broadly. The Draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by Harvard Law School in 1961,[30] states that local remedies shall be considered to be exhausted "if the claimant has employed all administrative, arbitral or judicial remedies which were made available to him by the respondent State."[31] Moreover, the explanatory commentary on the Draft declares that:

> "By administrative remedies are meant all those remedies which are available through the executive branch of the Government, as well as special remedies

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[26] Application No. 343/57, *Report of the Commission, Council of Europe* (1961), p. 37.

[27] (1956) 12 *U.N.R.I.A.A.* 120.

[28] See, for example, *Oppenheim's International Law*, *supra*, note 23, p. 523; Amerasinghe, *Local Remedies, supra*, note 23, p. 157; A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983), p. 58 (hereinafter *Application of the Rule*).

[29] *B. Schouw Nielsen v. Denmark* Case, Application No. 343/57 (1958-9), 2 *Yearbook of the European Convention on Human Rights* 438. See also *Lawless* Case, Application No. 332/57 (1958-9), 2 *Yearbook of the European Convention on Human Rights,* pp. 318-322.

[30] For the text, see *Yearbook* ... 1969, vol. II, p. 142, document A/CN.4/217 and Add.1 (1961) 55 *A.J.I.L.* 577.

[31] Article 19.

which may be provided by legislative action if claims are routinely handled through private bills for relief."[32]

This formula, supported by some writers,[33] suggests that the claimant is required to exhaust not only those remedies which lie as of right, in accordance with the maxim *ubi jus ibi remedium*, but may also be required to approach the executive (or legislature?) for relief in the exercise of its discretionary powers. Clearly, the exhaustion of attempts to obtain such relief does not fall within the scope of the exhaustion of local remedies rule. The local remedies which must be exhausted include remedies of a legal nature "but not extra-legal remedies or remedies as of grace"[34] or those whose "purpose is to obtain a favour and not to vindicate a right."[35] Administrative or other remedies which are not judicial or quasi-judicial in character and are of a discretionary character therefore fall outside the application of the local remedies rule.[36]

15. The *Ambatielos Claim*,[37] in which an arbitration commission, in finding that a foreign national had failed in his endeavour to exhaust local remedies by not calling a crucial witness, held that "'local remedies' include not only reference to the courts and tribunals, but also the use of procedural facilities which municipal law makes available to litigants before such courts and tribunals", has been rightly criticized as imposing too heavy a burden on the foreign national.[38] It seems both impossible and unwise to draft a rule that accurately reflects the complexities of the *Ambatielos* case. It seems better simply to draw this case to the attention of litigants as a reminder that litigants cannot have a "second try" at the international level if,

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[32] L. B. Sohn and R. R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* (1961), p. 164.

[33] Adede, "Survey", *supra,* note 23, pp. 4-7.

[34] J. L. Brierly, *The Law of Nations,* 6th ed. (ed. H. Waldock), p. 281; I. Brownlie, *Principles of Public International Law*, 5th ed. (1998), p. 499 (hereinafter *Principles*); C. F. Amerasinghe, "The Local Remedies Rule in Appropriate Perspective" (1976), 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 747 (hereinafter "The Local Remedies Rule"); A. M. Aronovitz, "Notes on the Current Status of the Rule of Exhaustion of Local Remedies in the European Convention of Human Rights (1995), 25 *Israel Yearbook on Human Rights* 89; *Greece v. United Kingdom*, Application No. 299/57 (1958-9), 2 *Yearbook of ECHR* at 192; *Finnish Vessels Arbitration* (1934), 3 *U.N.R.I.A.A.* 1479.

[35] *De Becker v. Belgium*, Application No. 214/56, (1958-9), 2 *Yearbook of ECHR* 238; E. Jiménez de Aréchaga, "General Course in Public International Law" (1978-I), 159 *Recueil des Cours* 293 (hereinafter "General Course").

[36] Cançado Trindade, *Application of the Rule*, *supra*, note 28, p. 62; Amerasinghe, *Local Remedies, supra*, note 23, p. 161; J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (1965), p. 295 (hereinafter *Application*). In *Velásquez v. Rodríguez*, Inter-American Court of Human Rights, Preliminary Objections, Judgement of 26 June 1987, Series C, No. 1 (1994) the Court defined remedies as those "which are suitable to address a legal right" (ibid., p. 222, para. 64).

[37] *Supra*, note 27, p. 120.

[38] See the dissenting opinion of arbitrator Spiropoulos, ibid. p. 128; Amerasinghe, *Local Remedies*, *supra*, note 23, pp. 215-249; E. Jiménez de Aréchaga, "International Responsibility", in M. Sørensen (ed.), *Manual of Public International Law* (1968), pp. 586-587; (1956) 46 *Annuaire de l'Institut de Droit International* 306-307 (hereinafter "International Responsibility"). *Sed contra* T. Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (1968), pp. 81-92; C.H.P. Law, *The Local Remedies Rule in International Law* (1961), pp. 83-91; *Oppenheim's International Law, supra,* note 23, p. 524.

because of faulty preparation and presentation of the claim at the municipal level, they fail in their action in the course of exhausting local remedies.[39]

16. In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise in the municipal proceedings all the arguments he intends to raise in international proceedings. In the *Finnish Ships Arbitration* the arbitrator stated that:

> "all the contentions of fact and the propositions of law which are brought forward by the claimant Government … must have been investigated and adjudicated upon by the municipal courts."[40]

This principle has been confirmed by the International Court of Justice in the *ELSI* case.[41] Like the "rule" in *Ambatielos*, this principle seems to belong in the commentary as an admonition to prospective litigants rather than as a component of an article on the exhaustion of local remedies.

17. Article 10 makes it clear that the local remedies must be "available". This means that the local remedies must be available both in theory and in practice. There is, however, some disagreement as to how far the foreign national must test or exhaust local remedies that on the face of it are available more in theory than in practice. In the *Rhodope Forest* claim[42] the tribunal held that there was no remedy to exhaust where the sovereign was immune from suit under municipal law, while in the *Panevezys-Saldutiskis Railway* case[43] the Permanent Court of International Justice refused to accept that there was no local remedy in respect of a challenge to the validity of an act of seizure *jure imperii* on the part of the Government. The Court held that:

> "The question whether or not the Lithuanian Courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian Courts alone can pronounce a final decision … Until it has been clearly shown that [they] have no jurisdiction … the Court cannot accept the contention … that the rule as to the exhaustion of local remedies does not apply."

It will be for the Court to decide on the facts of each case whether under the legal system of the State in question there is no available remedy. While counsel's advice on the availability of a remedy should be given serious attention, it cannot be conclusive.[44] Issues related to availability of a remedy are further considered in article 15.

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[39] See O'Connell, *supra*, note 23, p. 1059.

[40] *Supra*, note 34, p. 1502. See also the *Ambatielos Claim, supra*, note 27, p. 123.

[41] *Supra*, note 2, pp. 45-46. See also the commentary to article 22 of the draft articles on State responsibility adopted by the Commission on first reading (*supra*, note 6, p. 46, para. 49), which asserts the demonstration of an intent to win to be decisive.

[42] (1933) 3 *U.N.R.I.A.A.* 1420.

[43] 1939 *P.C.I.J. Reports*, Series A/B, No. 76, p. 19. See also Amerasinghe, "The Local Remedies Rule", *supra*, note 34, pp. 752-754; ILA Report, *supra*, note 13, p. 17; Aronovitz, *supra*, note 34, pp. 78-79.

[44] Amerasinghe, *Local Remedies, supra*, note 23, pp. 191-192.

G. Local remedies must be exhausted where the claim is preponderantly based on injury to a national

Article 11

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national and where the legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]

18. The exhaustion of local remedies rule properly belongs to a study on diplomatic protection, as the rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State,[45] as here the State has a distinct reason of its own for bringing an international claim. Moreover, it could not be expected of a State to exhaust local remedies in such a case, as this would violate the principle of *par in parem non habet imperium non habet jurisdictionem*.[46]

19. In practice it is difficult to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State.[47] Many disputes before international courts have presented the phenomenon of the mixed claim. In *Aerial Incident of 27 July 1955* (*Israel v. Bulgaria*),[48] in which Bulgaria shot down an El Al flight, there was injury to both the State of Israel and to its nationals on the flight; in the *Hostages Case*,[49] there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case,[50] there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Aerial Incident* it was not necessary for the International Court of Justice to make a decision; in the *Hostages* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that

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[45] *Oppenheim's International Law*, *supra*, note 23, p. 523; Amerasinghe, *Local Remedies*, *supra*, note 23, pp. 107 et seq.; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (1938), p. 404; P. Jessup, *A Modern Law of Nations* (1956), pp. 118-120; Cançado Trindade, *Application of the Rule*, *supra*, note 28, p. 172 (with special reference to human rights cases); T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies" (1959), 35 *B.Y.I.L.* 85; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (1984), p. 886; Herdegen, *supra*, note 13, p. 68; Adede, "Survey", *supra*, note 23, p. 1, n.1; *Restatement (Third) of the Foreign Relations Law of the United States* (1989), part II, para. 902, cmt. k, p. 348. Cf. Brownlie, *Principles*, *supra*, note 34, p. 498.

[46] Meron, *supra*, note 45, pp. 83, 85. Cf. Brownlie, *Principles*, *supra*, note 34, p. 498.

[47] G. Fitzmaurice, "Hersch Lauterpacht — The Scholar as Judge" (1961), 37 *B.Y.I.L.* 54.

[48] (Preliminary Objections) 1959 *I.C.J. Reports*, 127.

[49] *United States Diplomatic and Consular Staff in Tehran*, 1980 *I.C.J. Reports*, 3.

[50] *Supra,* note 1.

the claim was preponderantly indirect and that Switzerland had failed to exhaust local remedies.

20. Writers have suggested various tests that may be employed in deciding whether the claim is direct or indirect. However, the same decision is often employed to support different tests and there is, moreover, some overlap in respect of the different tests. The following tests or factors are most commonly advanced to explain the distinction between direct and indirect claims: preponderance, subject of the dispute, nature of the claim, nature of the remedies and the sine qua non test.

21. In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant.[51] Support for this test is to be found in both the *Interhandel* case and the *ELSI* case. In *Interhandel* the Court stated that, although the dispute might contain elements of a direct injury,

> "Such arguments do not deprive the dispute ... of the character of a dispute in which the Swiss Government appears to have adopted the cause of its national."[52]

In *ELSI* a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

> "the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole is the alleged damage to Raytheon and Machlett [United States corporations]."[53]

22. Closely related to the preponderance test is the sine qua non or "but for" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered affirmatively, the claim is an indirect one and local remedies must be exhausted.[54] Reliance for this test is placed on the *ELSI* case but, as shown above, the *ELSI* case may also be invoked in support of the preponderance test.

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[51] According to the *Restatement (Second) of the Foreign Relations Law of the United States* (1965), the exhaustion of local remedies rule is inapplicable if "the State of the alien's nationality, which has espoused his claim, is asserting on its own behalf a separate and preponderant claim for direct injury to it arising out of the same wrongful conduct" (Part IV, para. 208 (c)). The *Third Restatement* (1989) contains the same principle:

> "Under international law, before a State can make a formal claim on behalf of a private person, … that person must ordinarily exhaust domestic remedies available in the responding State … Local remedies need not be exhausted for violations of international law not involving private persons; a State is not required to seek a remedy for violations of its rights in the courts of the responsible State, even where the State suffered injury to its own interests as a result of a violation of international law that also caused injury to its nationals." (Part II, para. 902, cmt. k, p. 348)

See also Meron, *supra,* note 45, p. 86; M. M. Whiteman, *Digest of International Law* (1967), vol. 9, p. 779.

[52] *Supra*, note 1, p. 28.

[53] *Supra*, note 2, p. 43, para. 52.

[54] M. Adler, "The Exhaustion of the Local Remedies Rule after the International Court of Justice's Decision in *ELSI*" (1990), 39 *I.C.L.Q.* 641.

23. There is little to distinguish the preponderance test from the "but for" test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. Conversely, if there is evidence to show that the claim would not have been brought but for the injury to the national, this evidence will usually demonstrate that the claim is preponderantly indirect. Article 11 adopts both tests, as together they emphasize the need for the injury to the national to be the dominant factor in the initiation of the claim if local remedies are required to be exhausted.

24. The other "tests" invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed.

25. The *subject of the dispute* is clearly a factor to be considered in the classification of a claim as direct or indirect. Where the injury is to a diplomatic or consular official (as in the *Hostages* case) or to State property (as in *Aerial Incident* or *Corfu Channel*[55]), the claim will normally be direct.[56] In most circumstances the breach of a treaty will give rise to a direct claim unless the treaty violation is incidental and subordinate to an injury to the national, as in *Interhandel* and *ELSI*.

26. Meron, in considering the *nature of the claim* as a factor to be taken into account suggests that "the true test is to be found in the real interests and objects pursued by the claimant State".[57] This determining factor has been elaborated upon by other authors. Thirlway states:

> "It appears therefore that, in the Court's jurisprudence, what counts for the applicability or otherwise of the local remedies rule is the nature of the principal element of the claim. Obviously if the claim is such that it does not involve injury of a kind which could be remedied by recourse to the local courts, the rule is totally excluded; not however because purely inter-State rights are involved, but because the claim is of such a kind that redress *could* not be obtained in local courts. But if the essence of the matter is injury to nationals, whose claim is being espoused by their State, and redress by the local courts will effectively put an end to the dispute, then the rule will apply to render inadmissible also any subsidiary aspects of the claim which might be regarded as strictly matters of direct inter-State relations."[58]

Amerasinghe, while approving the "nature of the claim" test, argues that:

> "The rule of exhaustion relates to the right violated or the injury committed and not to the claim based on it as such, which reflects a secondary or remedial

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[55] 1949 *I.C.J. Reports*, p. 4.

[56] Meron, *supra*, note 45, p. 87; F. V. García Amador, *The Changing Law of International Claims* (1984), pp. 467-468. See also Draft Convention on the Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners, Harvard Law School, 1929, and Commentary, reproduced in (1929) 23 *A.J.I.L.*, Special Suppl., pp. 156-157.

[57] *Supra*, note 45, p. 87.

[58] "The Law and Procedure of the International Court of Justice, 1960-1989" (1995), 66 *B.Y.I.L.* 89-90

> right. It is also the essence of the substantive right violated, as determined by the objects and interests promoted therein, that is of importance."[59]

Support for this approach is to be found in the *Interhandel* case, in which the Court stated:

> "The Court considers that one interest, and one alone, that of *Interhandel*, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings."[60]

Clearly the "real interests and objects" of the claimant State in bringing the claim (Meron) "the nature of the principal element of the claim" (Thirlway) and "the essence of the substantive right violated" (Amerasinghe) are factors to be considered in the classification of the claim. None, however, is conclusive. Ultimately the question to be answered is whether the claim is preponderantly based on injury to a national and whether the claim would have been brought but for this injury.

27. The *nature of the remedy* sought by the claimant State will also assist in the classification of the claim. Where a State seeks purely declaratory relief the claim will be direct; while where a State seeks monetary relief or restitution for its national, the claim will be indirect. There is certainly support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted. In the *Air Service Agreement*[61] arbitration between the United States and France, the United States objected to decisions of the French Government causing damage to United States carriers that the United States alleged were in breach of a bilateral air services agreement. France contended that Pan American Airlines, the United States carrier most affected by France's conduct, was required to exhaust local remedies before an international claim might be brought; while the United States argued that it was clear from the remedy it sought — an authoritative interpretation of the Air Services Agreement — that its interest in the arbitration extended beyond the problems experienced by Pan American Airlines to other United States-designated carriers. In upholding the United States' argument the arbitration panel held that there was no need for local remedies to be exhausted, as the dispute involved "a right granted by one Government to the other Government".[62]

Further support may be found for this approach in the opinion of the International Court of Justice in the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* in which the Court stated that the alleged dispute arising out of the United States legislation directed to closing the PLO office

> "relates solely to what the United Nations considers to be its rights under the Headquarters Agreement. The purpose of the arbitration procedure envisaged

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[59] *Local Remedies*, *supra*, note 23, p. 129.

[60] *Supra*, note 1, p. 29.

[61] (1978) 19 *U.N.R.I.A.A.* 415; 54 *I.L.R.* 304.

[62] 54 *I.L.R.* 324. See also *Swiss Confederation v. German Federal Republic*, 25 *I.L.R.* 47, noted in (1958) 34 *B.Y.I.L.* 363. Relying on these decisions, Adler has contended that "[a]uthorities prior to *ELSI* suggested that the nature of the remedy sought should determine whether the exhaustion rule applied to mixed claims" (*supra*, note 54, p. 643).

> by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of that Agreement for the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation."[63]

28. Not infrequently States seek "mixed" remedies in international claims. In both *Interhandel* and *ELSI* the claimant State sought a declaratory judgement relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national. In neither case did the claimant State succeed in its bid to avoid the local remedies rule. In *Interhandel* the Court held that the Swiss claim was primarily "designed to secure the restitution of the assets of *Interhandel* in the United States"[64]; while in *ELSI* the Court held that the United States claim for monetary damages on behalf of its nationals "colours and pervades the United States' claim as a whole".[65]

29. *Interhandel* and *ELSI* indicate that local remedies must be exhausted where the request for a declaratory judgement is linked to other relief arising out of injury to a national. It seems, however, that a State may seek a declaratory judgement on the interpretation of a treaty relating to the treatment of nationals without exhausting local remedies provided it does not couple this request with a claim for compensation or restitution on behalf of its national.[66] This is an undesirable situation as it would allow a State "to circumvent the local remedies rule by promoting declaratory judgements which would acquire force of *res judicata* with respect to subsequent international proceedings seeking reparation."[67]

30. It is impossible to draft a rule that subjects the claimant State to compliance with the local remedies rule in the above case without imposing an obligation on States to comply with exhaustion of local remedies in cases involving the interpretation of a treaty where this would be unwarranted.[68] Article 11 does, however, make it clear that a request for a declaratory judgement per se is not exempt from the exhaustion of local remedies rule. Where the request for a declaratory judgement is incidental to or related to a claim involving injury to a national — *whether linked to a claim for compensation or restitution on behalf of the injured national or not* — it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgement is preponderantly brought on the basis of an injury to the national. Such a decision would be fair and reasonable where there is evidence that the claimant State has deliberately requested a declaratory judgement in order to avoid compliance with the local remedies rule.

31. Article 11 includes in parenthesis a number of factors to be taken into consideration in the classification of a claim as direct or indirect. The Commission may, understandably, take the view that such factors are best left to the commentary

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[63] 1988 *I.C.J. Reports* 29, para. 41.
[64] *Supra*, note 1, pp. 28-29.
[65] *Supra*, note 2, p. 43.
[66] Adler, *supra*, note 54, p. 652; Meron, *supra*, note 45, p. 86.
[67] Aréchaga, "General Course", *supra*, note 35, p. 293.
[68] As in the cases described in para. 30, above.

for, as a rule, codification should avoid the inclusion of examples of this kind in a legislative text.

Article 12

The requirement that local remedies must be exhausted is a procedural precondition that must be complied with before a State may bring an international claim based on injury to a national arising out of an internationally wrongful act committed against the national where the act complained of is a breach of both local law and international law.

Article 13

Where a foreign national brings legal proceedings before the domestic courts of a State in order to obtain redress for a violation of the domestic law of that State not amounting to an international wrong, the State in which such proceedings are brought may incur international responsibility if there is a denial of justice to the foreign national. Subject to article 14, the injured foreign national must exhaust any further local remedies that may be available before an international claim is brought on his behalf.

32. In the *Encyclopedia of Public International Law* Karl Doehring states that:

> "As long as the local remedies rule exists, controversy will remain as to the question of its conceptual nature, i.e. the question whether the rule forms a part of procedural law or whether it operates as a part of substantive law." [69]

This controversy, which has not left the International Law Commission untouched, has produced three positions.[70] The first maintains that the internationally wrongful act of the wrongdoing State is not complete until local remedies have been exhausted without success; that the exhaustion of local remedies is a substantive condition on which the very existence of international responsibility depends. According to the second position, the exhaustion of local remedies rule is simply a procedural condition which must be met before an international claim may be brought. The third[71] distinguishes between an injury to an alien under domestic law and under international law. If the injury is caused by a violation of domestic law not constituting a violation of international law, international responsibility arises only from an act or omission constituting a denial of justice committed against the alien by the judicial organs of the respondent State in the course of his attempt to secure redress for the violation of domestic law. Here the exhaustion of local remedies rule is a substantive condition for the existence of international responsibility. In contrast, where the injury to the alien arises from a violation of international law, international responsibility occurs at the moment of injury and the

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[69] K. Doehring, "Local Remedies, Exhaustion of", in *Encyclopedia of Public International Law* (1997), vol. 3, p. 240.

[70] Another position which has not received much support maintains that where the international responsibility of the State is established by the original injury, the exhaustion of local remedies is no longer required. (See J. H. W. Verzijl, quoted in H. W. Briggs, "The Local Remedies Rule: A Drafting Suggestion" (1956), 50 *A.J.I.L.* 923.)

[71] J. E. S. Fawcett, "The Exhaustion of Local Remedies: Substance or Procedure?" (1954) 31 *B.Y.I.L.* 452 (hereinafter "Exhaustion of Local Remedies"); Brownlie, *Principles, supra*, note 34, p. 497.

requirement that local remedies must still be exhausted before an international claim is brought is merely a procedural precondition. There is no need to establish a denial of justice on the part of the judicial organs of the respondent State. Moreover, if the act or omission violates international law and not domestic law, the absence of local remedies obviates the need to exhaust such remedies.

33. Some jurists have suggested that the debate over the question whether the exhaustion of local remedies rule is one of substance or procedure is purely theoretical.[72] This is manifestly incorrect as the critical time at which international responsibility arises will differ according to the approach adopted. If the rule is substantive, international responsibility will arise only after all local remedies have been exhausted, whereas international responsibility is incurred immediately on the commission of an internationally wrongful act if the rule is procedural. This difference has serious consequences for the principle of nationality of claims, which generally requires the injured alien to be a national of the claimant State at the time the international wrong is committed.[73] It may also affect the jurisdiction of a tribunal if a State party to a dispute has attached a time limit to its acceptance of jurisdiction, as occurred in *Phosphates in Morocco*.[74] Furthermore the position adopted on the nature of the rule has decisive implications for the rendering of a declaratory judgement in the absence of the exhaustion of local remedies, and for the waiver of the need for recourse to local remedies by the respondent State as, logically, neither would be possible if the rule is characterized as substantive.[75] Whether the rule is characterized as substantive or procedural may also affect the question whether it is to be treated as a preliminary objection (if it is procedural) or considered as part of the merits (if it is substantive) in proceedings before an international tribunal.[76]

34. The debate over the nature of the exhaustion of local remedies rule has surfaced in codification attempts, judicial decisions, separate judicial opinions and the practice of States. Furthermore no serious academic work on the exhaustion of local remedies rule is complete without an expression of views on the question whether the rule is substantive or procedural.

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[72] According to Schwarzenberger,

> "On the level of unorganized international society, it would be as pointless as in the case of the nationality test to attempt to classify the local remedies rule by reference to irrelevant distinctions between substance and procedure." (*International Law*, 3rd ed. (1957), vol. 1, p. 611)

See also Dunn, *supra*, note 23, p. 156; and the ILC commentary, *supra*, note 6, p. 35, para. 14.

[73] Doehring, *supra*, note 69, p. 240.

[74] 1938 *P.C.I.J. Reports*, Series A/B, No. 74.

[75] C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967), pp. 201-208 (hereinafter *State Responsibility*); C. F. Amerasinghe, "The Formal Character of the Rule of Local Remedies" (1965), 25 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 447-455 (hereinafter "Formal Character"); Amerasinghe, *Local Remedies*, *supra*, note 23, pp. 330-337.

[76] Amerasinghe, *Local Remedies*, *supra*, note 23, pp. 333-335. *Sed contra*, see Ago, *supra*, note 6, p. 42, para. 33.

H. Codification

35. Attempted codifications of the exhaustion of local remedies rule have generally avoided a clear commitment to either the procedural or the substantive approach. There was, however, a discernible trend in favour of the procedural view before the endorsement of the substantive position by the International Law Commission in 1977.

36. In 1927, the Institute of International Law resolved that:

> "No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due to him.
>
> "Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages."[77]

Although hardly a model of clarity, this provision has been interpreted as a reflection of the view that the exhaustion of local remedies rule is concerned with the admissibility of the claim rather than the origin of responsibility. It does, moreover, suggest support for the view that responsibility arises at the time of the injury.[78]

37. Two years later, in 1929, the Preparatory Committee of the 1930 Hague Conference for the Codification of International Law drew up a provision which read:

> "Where a foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions [on State responsibility for denial of justice]."[79]

The text adopted in first reading by the Third Committee of the Conference provided:

> "The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State."[80]

Both these formulations may be seen as examples of deliberate ambiguity.[81] On the one hand they suggest that international responsibility does not arise until local

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[77] Article XII, reproduced in F. V. García Amador, First Report, *Yearbook ...* 1956, vol. II, p. 228, document A/CN.4/96.

[78] E. M. Borchard, "Theoretical Aspects of the International Responsibility of States" (1929), 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 235 (hereinafter "Theoretical Aspects"); C. de Visscher, "Responsibilité internationale des États et la protection diplomatique d'après quelques documents récents" (1927), 8 *Revue de droit international et législation comparée* 245.

[79] Basis of Discussion No. 27, reproduced in García Amador, First Report, *supra*, note 77, p. 227.

[80] Article 4, ibid., p. 225.

[81] See the ILC commentary, *supra,* note 6, pp. 36-37, para. (19).

remedies have been exhausted, while on the other hand they suggest that responsibility is simply suspended pending the exhaustion of local remedies.[82]

38. The provisions of the Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person and Property of Foreigners prepared by Harvard Law School in 1929 lend support to the substantive position. They provide as follows:

> "*Article 6*
>
> "A State is not ordinarily responsible (under duty to make reparation to another State) until the local remedies available to the injured alien have been exhausted.
>
> "*Article 7*
>
> "(a) A State is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.
>
> "(b) A State is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the State has failed to discipline the officer or employee.
>
> "*Article 8*
>
> "(a) A State is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.
>
> "(b) A State is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.
>
> "*Article 9*
>
> "A state is responsible if an injury to an alien results from a denial of justice ..."[83]

The 1933 Montevideo Resolution adopted at the Seventh International Conference of American States, in stating that "diplomatic protection cannot be initiated"[84] unless local remedies have been exhausted, gave further support to the substantive view.

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[82] See A. A. Cançado Trindade, "The Birth of State Responsibility and the Nature of the Local Remedies Rule" (1978) 58 *Revista di Diritto Internazionale* 158 (hereinafter "Birth of State Responsibility").

[83] Text in García Amador, First Report, *supra*, note 77, p. 229.

[84] Ibid., p. 226.

39. In 1956, the Institute of International Law, after rejecting a radical proposal of Verzijl[85] to abandon the local remedies rule, adopted a resolution endorsing the view that the exhaustion of local remedies rule is procedural in nature:

> "When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a judicial body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient, so long as the normal use of these means of redress has not been exhausted."[86]

40. In 1956, the International Law Commission commenced its study of the subject. Special Rapporteur García Amador presented his first report on State responsibility, in which he proposed the following basis of discussion:

> "The following, among others, may be considered as exonerating circumstances [for international responsibility]:
>
> (a) Failure to resort to local remedies, in the sense that, so long as these remedies have not been exhausted, an international claim will not lie and the duty to make reparation will not be enforceable ..."[87]

The commentary explains that:

> "the rule implies a suspensive condition, which may be procedural or substantive, but to which the right to bring international claims is subordinated. Responsibility may or may not exist, as the case may be, but unless and until the said condition is fulfilled, the claiming State has only a potential right. Responsibility as such may be imputable but the duty to make reparation cannot be claimed. Consequently, in pure legal theory, failure to exhaust local remedies may or may not be grounds for exoneration from international responsibility, according to the circumstances, but it will always constitute a complete bar to the bringing of an international claim."[88]

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[85] In his preliminary report to the Institute Verzijl proposed:

> "(I) Where the injury to the person or property of an alien does not in itself involve the international responsibility of the State on whose territory the injury was committed, no diplomatic claim may be brought before international responsibility exists as a result of a denial of justice.
>
> "(II) Where the injury to the person or property of an alien involves in itself the international responsibility of the State on whose territory the injury was committed, there is no valid motive for subordinating a diplomatic claim to the previous exhaustion of local remedies."

(1954) 45 *Annuaire de l'Institut de Droit international* 24, 31. See further on this proposal Briggs, *supra,* note 70.

[86] (1956) 46 *Annuaire de l'Institut de Droit international* 364.

[87] Basis of Discussion No. V(2), in García Amador, First Report, *supra,* note 77, p. 220.

[88] García Amador, First Report, *supra,* note 77, p. 206, para. 173. The author expressed the same view in F. V. García Amador, "State Responsibility: Some New Problems" (1958 II) 94 *Recueil des Cours* 449; and Third Report, *supra*, note 24, p. 56, para. 3.

In his third report he modified this provision to read:

> "An international claim brought for the purpose of obtaining reparation for injuries alleged by an alien, ..., shall not be admissible until all the remedies established by municipal law have been exhausted."[89]

At about the same time, in 1960, the Harvard Law School proposed the following rule, which inclined more clearly in favour of the procedural position:

> "(a) An alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made.
>
> (b) A State is entitled to present a claim under this Convention only on behalf of a person who is its national, and only if the local remedies and any special international remedies provided by the State against which the claim is made have been exhausted."[90]

41. In 1977, at the strong urging of Special Rapporteur Roberto Ago, the International Law Commission adopted article 22 of the draft articles on State responsibility on first reading, which adopts the substantive view:

> "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."[91]

This provision is premised on the distinction between obligations of conduct and result contained in articles 20 and 21 of the draft articles on State responsibility adopted on first reading.

42. The draft articles provisionally adopted by the Drafting Committee of the International Law Commission on second reading[92] make only passing reference to the exhaustion of local remedies rule in article 45 and leave it to the present report on diplomatic protection to deal fully with the rule. Moreover, these draft articles abandon the distinction between obligations of conduct and of result upon which article 22 of the draft articles adopted on first reading is premised.

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[89] Article 15 in García Amador, Third Report, *supra,* note 24, p. 55. The same provision is to be found in each subsequent draft submitted by the Special Rapporteur. For the last formulation, see article 18(1) in F. V. García Amador, Sixth Report, *Yearbook* … 1961, vol. II, p. 48, document A/CN.4/134 and Add.1.

[90] Article 1(2) of the Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law in 1960. Reproduced in L. B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961), 55 *A.J.I.L.* 548.

[91] *Supra*, note 6, p. 30. For the debate on this provision in the Commission, see the summary records of the 1463rd and 1465th to 1469th meetings of the Commission, *Yearbook* ... 1977, vol. I, pp. 250-283.

[92] A/CN.4/L.600.

43. In 2000, the Committee on Diplomatic Protection of Persons and Property of the International Law Association submitted its first report to the plenary meeting of the Association in London. In an interim report, prepared by Juliane Kokott, to the Committee it was recommended that a draft article should be adopted to read:

> "According to the general principles of international law the exhaustion of local remedies is a procedural precondition for the exercise of diplomatic protection."[93]

I. Judicial decisions

44. Judicial decisions do not provide a clear answer to the question under consideration. Courts, like codification bodies, have often preferred to leave their reasoning on the nature of the local remedies rule deliberately vague. This explains why proponents of both the substantive and the procedural positions often rely on the same decision for support.[94]

45. The *Mexican Union Railway* case gives clear support to the substantive position as it held that:

> "the responsibility of a State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question."[95]

On the other hand, implied support for the procedural approach is to be found in the *German Interests in Upper Silesia* case,[96] which held that a declaratory judgement could be given before local remedies had been exhausted, and in cases such as *Chorzów Factory*[97] and *Electricity Co. of Sophia*,[98] in which the local remedies rule was considered as a preliminary objection.

46. The *Phosphates in Morocco* case,[99] in which Roberto Ago appeared as counsel for Italy to argue the substantive position, has given rise to conflicting opinions.

> In its preliminary application of 30 March 1932 to the Permanent Court of International Justice, the Italian Government asked the Court to judge and declare that the decision of the Mines Department in Morocco dated 8 January 1925 and the denial of justice which had followed it were inconsistent with the international obligation incumbent upon France to respect the rights acquired by an Italian company. The French Government had accepted the compulsory jurisdiction of the Court by a declaration dated 25 April 1931, for "any

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93 "The Exhaustion of Local Remedies", interim report in International Law Association, *Report of the Sixty-ninth Conference (2000)*, p. 629.

94 Here it is interesting to compare the reasoning of the principal proponents of the two schools, Amerasinghe and Ago. See Amerasinghe, *State Responsibility, supra*, note 75, pp. 216-235; Amerasinghe, "The Formal Character", *supra*, note 75, pp. 462-476; Amerasinghe, *Local Remedies, supra*, note 23, pp. 337-356, and Ago, Sixth Report on State Responsibility, *Yearbook ... 1977*, vol. II (Part One), pp. 27-32, paras. 27-79, document A/CN.4/302 and Add.1-3. See also ibid. (Part Two), pp. 37-41, paras. 20-31.

95 (*UK v. Mexico*) (1926) 5 *U.N.R.I.A.A.* 122.

96 1925 *P.C.I.J. Reports*, Series A, No. 6.

97 1927 *P.C.I.J. Reports* Series A, No. 9.

98 1939 *P.C.I.J. Reports* Series A/B, No. 77.

99 *Supra,* note 74.

disputes which may arise after the ratification of the present declaration with regard to *situations or facts subsequent to such ratification*". The question thus arose whether the internationally wrongful act of which Italian Government was complaining could or could not be regarded as a "fact subsequent" to the critical date. The Italian Government contended that the breach of an international obligation initiated by the decision of 1925 only became a completed breach following certain acts subsequent to 1931, in particular a note of 28 January 1933 from the French Ministry for Foreign Affairs to the Italian Embassy and a letter of the same date sent by the same Ministry to the Italian individual concerned. The Italian Government saw that note and that letter as an official interpretation of the acquired rights of Italian nationals which was inconsistent with the international obligations of France. It saw in them a confirmation of the denial of justice to the Italian nationals concerned, constituted by the refusal of the French Resident-General to permit them to submit to him a petition for redress. The new denial of justice now consisted in the final refusal of the French Government to make available to the claimants an extraordinary means of recourse, whether administrative or other, in view of the lack of ordinary means. On the basis of these facts, the Italian Government opted for the thesis that an internationally wrongful act, though begun by initial State conduct contrary to the result required by an international obligation, was completed only when the injured individuals had resorted without success to all existing appropriate and effective remedies. It was thus from that moment that, in its view, the responsibility came into existence.

In opposition to the Italian Government, the French Government maintained that, if, as the former affirmed, the decision of 1925 by the Mines Department really merited the criticisms made against it — breach of treaties, breach of international law in general — it was at that date that the breach by France of its international obligations had been committed and completed, and at that date that the alleged internationally wrongful act had taken place. The French representative affirmed:

> "*Here,* therefore, the rule of the exhaustion of local remedies is *no more* than a rule of procedure. The international responsibility is already in being; but it cannot be enforced through the diplomatic channel or by recourse to an international tribunal or appear to the Permanent Court of International Justice unless remedies have first been exhausted."[100]

In its judgment of 14 June 1938, the Court indicated that it did not discern in the action of the French Government subsequent to the decision of 1925 any new factor giving rise to the dispute in question, and that the refusal by the French Government to accede to the request to submit the dispute to extraordinary judges did not constitute an unlawful international act giving rise to a new dispute. The Court went on to say:

> "The Court cannot regard the denial of justice alleged by the Italian Government as a factor giving rise to the present dispute. In its Application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act, because that

[100] This account of the case is taken from paras. (25) to (27) of the commentary to article 22 in the draft articles on State responsibility adopted by the Commission on first reading, *supra,* note 6, pp. 38-39.

> decision was inspired by the will to get rid of the foreign holding and because it therefore constituted a violation of the vested rights placed under the protection of the international conventions. That being so, it is in this decision that we should look for the violation of international law — a definitive act which would, by itself, directly involve international responsibility. *This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States.* In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it."[101]

Ago maintains that although the Permanent Court rejected Italy's application it did not reject Italy's argument that the local remedies rule was substantive in nature.[102] This argument is difficult to accept, particularly in the light of the Court's finding that international responsibility was established "immediately as between the two States" following the decision of the Department of Mines and not after the exhaustion of local remedies.[103] For this reason the assessment of C.F. Amerasinghe on the finding of this case is to be preferred:

> "The PCIJ clearly held that the initial act, which was a violation of international law, gave rise to international … responsibility, and that such responsibility did not arise solely after the later actions, relating to the exhaustion of local redress, alleged by the claimant State to have taken place. The time at which international responsibility arose was critical for this case and therefore the decision in the case is based on the understanding that international responsibility arose before any resort to local remedies might have taken place. This is clearly based on a procedural view of the rule of local remedies."[104]

47. Although of limited value, the *Panevezys-Saldutiskis Railway* case provides some support for the procedural position in referring to the local remedies rule as one which "in principle subordinates the *presentation* of an international claim to such an exhaustion".[105] Moreover, in that case, as in the *Administration of Prince von Pless*[106] and the *Losinger & Co.*[107] cases, although the objection concerning the exhaustion of local remedies was joined to the merits owing to the complexity of the issue, it was treated as a preliminary objection rather than a defence to the merits of the case.

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[101] *Supra,* note 74, p. 28. Emphasis added.
[102] *Supra,* note 6, pp. 39-40, para. (28).
[103] The sentence in italics in the passage in the Court's judgment cited above, which seems to provide the key to the Court's decision, is omitted from the account of the case in the ILC commentary; *supra,* note 6, p. 39, para. (27).
[104] *Local Remedies, supra,* note 23, pp. 349-350.
[105] *Supra,* note 43, p. 18.
[106] 1933 *P.C.I.J. Reports*, Series A/B, No. 54.
[107] 1936 *P.C.I.J. Reports*, Series A/B, No. 67.

48. The *Finnish Ships Arbitration*[108] is another case on which opinions are divided. According to the ILC commentary, Arbitrator Bagge "maintained a sort of neutrality between the two approaches to the requirement of the exhaustion of local remedies"[109] while other writers have seen in the award support for the procedural view.[110] Arbitrator Bagge's reasoning undoubtedly lends some support to Ago's interpretation[111] that the award is inconclusive on the nature of the local remedies rule. In an article published[112] more than 20 years later, Bagge again failed to state his position on the question whether the local remedies rule is procedural or substantive but there is suggested support for the former view.

49. No decision of the International Court of Justice gives support to the view that the local remedies rule is substantive in nature. While clear judicial support for the procedural view is not forthcoming either, there are some signs that this approach is preferred. In several decisions the local remedies rule has been treated as a preliminary objection[113] or joined to the merits as a preliminary objection,[114] which some writers see as signs of support for the procedural view[115] — although this is denied in the ILC commentary.[116] More important perhaps is the obiter dictum of the Court in the *Elettronica Sicula (ELSI)* case that parties might agree in a treaty "that the local remedies rule shall not apply to claims based on alleged breaches of that treaty".[117] If the rule is procedural such a waiver presents no difficulty. If however the rule is substantive the question may legitimately be asked whether parties to a treaty can "decide to agree that action which would ordinarily not be a breach of international law unless and until it has given rise to a subsequent denial of justice, should, as between those parties, be treated ab initio as a breach of the treaty."[118]

50. The division of views on the nature of the local remedies rule is reflected in separate and dissenting judicial opinions. Support for the substantive position is to be found in the opinions of Judges Hudson,[119] Cordova,[120]

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[108] *Supra,* note 34.

[109] *Supra,* note 6, p. 38, para. (34).

[110] Amerasinghe, *Local Remedies, supra,* note 23, pp. 344-347; A. P. Fachiri, "The Local Remedies Rule in the Light of the Finnish Ships Arbitration" (1936), 17 *B.Y.I.L.* 19.

[111] See in particular the award (*supra,* note 34), pp. 1502-1503.

[112] "Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders" (1958), 34 *B.Y.I.L.* 162.

[113] *Ambatielos* case, 1953 *I.C.J. Reports* 18, 22, 23.

[114] *Barcelona Traction* case (Preliminary Objections) 1964 *I.C.J. Reports* 41-44.

[115] Amerasinghe, *Local Remedies, supra,* note 23, pp. 347, 350-352.

[116] *Supra,* note 6, p. 42, para. (33).

[117] *Supra,* note 2, p. 42, para. 50.

[118] Thirlway, *supra,* note 58, p. 84.

[119] In his dissenting opinion in the *Panevezys-Saldutiskis Railway* case, Judge Hudson stated:

> "It is a very important rule of international law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. This is not a rule of procedure. It is not merely a matter of orderly conduct. It is part of the substantive law as to international, i.e. State-to-State, responsibility. If adequate redress for the injury is available to the person who suffered it, if such a person has only to reach out to avail himself of such redress, there is no basis for a claim to be espoused by the State of which such a person is a national. Until the available means of local redress have been exhausted, no international responsibility can arise" (*supra,* note 43, p. 47).

[120] *Interhandel* case, *supra,* note 1, pp. 45-46.

Morelli[121] and Schwebel.[122] On the other hand, Judges Lauterpacht,[123] Armand-Ugon[124] and Tanaka[125] have expressed opinions in favour of the procedural view.

J. State practice

51. State practice in respect of the nature of the local remedies rule is mainly to be found in arguments presented by States in legal proceedings before international tribunals. The value of such practice, if it can properly be so called, is highly questionable as inevitably States (or more accurately their counsel) have chosen to advance the procedural or substantive position for functional reasons and not out of conviction. Thus Italy in the *Phosphates in Morocco* case relied strongly on the substantive approach,[126] while 50 years later in *ELSI*[127] it argued that the local remedies rule was procedural in nature! In these circumstances it is pointless to attempt to extract evidence of *usus* or *opinio juris* for a particular position from counsel's arguments.

52. On rare occasions States have taken positions on the nature of the local remedies rule outside the context of legal proceedings. In response to García Amador's first report on State Responsibility, the United States Department of State prepared a memorandum which expressed strong support for the "third position" described in paragraph 34:

> "Under existing international law where the initial act or wrong of which complaint is made *is not imputable* to the State, the exhaustion of local remedies is required with a resultant denial of justice on the part of the State. In this view, the exhaustion of remedies rule is a substantive rule, i.e., it is required from a substantive standpoint under international law in order to impute responsibility to a State.
>
> "On the other hand, where the initial act or wrong of which complaint is made *is imputable* to the State, substantively it is unnecessary to exhaust local remedies in order to impute responsibility to the State. If the draft ultimately prepared by the International Law Commission requires the exhaustion of local remedies in the latter situation, the rule of exhaustion of local remedies in such circumstance is procedural, i.e., a condition precedent to the presentation of a formal claim.
>
> "Accordingly, the rule of exhaustion of local remedies may be substantive in certain types of cases and procedural in others."[128]

In 1985 the British Government issued a set of rules relating to international claims in which it stated:

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[121] *Barcelona Traction* case (Preliminary Objections), *supra,* note 114, p. 114.
[122] *ELSI* case, *supra,* note 2, p. 116.
[123] *Norwegian Loans* case, 1957 *I.C.J. Reports* 41.
[124] *Interhandel* case, *supra,* note 1, pp. 88-89.
[125] *Barcelona Traction* case (Second Phase), 1970 *I.C.J. Reports* 143.
[126] *Supra*, para. 48.
[127] 1989 *I.C.J. Pleadings, Oral Arguments and Documents*, vol. 2, pp. 156-165; *supra,* note 2, p. 21.
[128] Reproduced in M. M. Whiteman, *Digest of International Law*, vol. 8 (1967), pp. 789-790. Emphasis in original.

"*Rule VII*

"[Her Majesty's Government] will not normally take over and formally espouse a claim of a United Kingdom national against another State until all the legal remedies, if any, available to him in the State concerned have been exhausted.

"*Comment.* Failure to exhaust any local remedies will not constitute a bar to a claim if it is clearly established that in the circumstances of the case an appeal to a higher municipal tribunal would have had no effect. Nor is a claimant against another State required to exhaust justice in that State if there is no justice to exhaust.

"*Rule VIII*

"If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf to secure redress of injustice."[129]

Although not expressed in unequivocal terms, the formulation of rule VII and the implication of rule VIII that a denial of justice is not required in every case suggests that, like the United States, the British Government prefers the third position, which views the local remedies rule as procedural where an international wrong has been committed against an alien, but as substantive where, in the course of exhausting local remedies, a denial of justice has occurred.

K. Opinions of writers

53. Academic opinion is divided on the nature of the local remedies rule, but there is, in the words of the ILC commentary, "no clearly dominant opinion"[130] among authors. Moreover, it is difficult to speak of clear schools of thought "since the arguments advanced for or against a particular thesis vary so greatly from one author to another that writers sometimes arrive at similar conclusions from virtually opposite directions."[131] Subject to this admonition, Ago has produced a bibliography of the three different schools.[132] The present study makes no attempt to provide a comprehensive account of the different opinions of writers. Instead, it will draw attention to the views expressed by the main proponents of the three different schools.

54. The most ardent supporters of the substantive school are Borchard and Ago.

In 1929, Borchard wrote:

"it [is] very questionable whether the prevailing view regards the alien State as automatically injured whenever an officer of the State injures an alien. The alien is not regarded as a living embodiment of his State, by virtue of which the State is to be deemed simultaneously injured whenever the national is injured.

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[129] Rules Applying to International Claims, published in 1985, reproduced in C. Warbrick, "Protection of Nationals Abroad: Current Legal Problems" (1988), 37 *I.C.L.Q.* 1008.

[130] *Supra* note 6, p. 34, para. (15).

[131] Loc. cit.

[132] Loc. cit., footnotes 135-137.

…

However logical [the procedural] view may seem, it is apparently rejected in international practice, doubtless because in the majority of countries the local law has not yet advanced to the stage of regarding the State as immediately responsible for torts of its officers. But even apart from this fact, the view above set forth fails to perceive the vital distinction between *municipal* responsibility to an alien and *international* responsibility to his State. The majority view, to the effect that there is no *international injury* to the claimant State — and it seems proper to regard the international claim or injury as arising simultaneously with the right to diplomatic interposition and not before then — until the alien has exhausted his local remedies if available and effective, is strongly influenced by the fact that the alien must ordinarily accept the same treatment from the law that nationals enjoy, and that if nationals have recourse only against the wrongdoing officer, that is all that aliens can demand, and the State assumes no greater responsibility toward aliens than it does towards nationals. The view seems entirely sound."[133]

Frequent reference has been made above to the views of Roberto Ago expressed in his 1977 report to the International Law Commission. The present study would, however, be incomplete without a more complete expression of Ago's views on the nature of the local remedies rule. The following statement, it is hoped, provides an accurate account of Ago's views:

"It should be recalled that the fact of establishing that a State has committed, for example, a breach of an obligation laid on it by a treaty to accord a certain treatment to a national of another State, and has thus infringed the right of the other State that its national shall be accorded the treatment provided for in the treaty, is tantamount to saying that the first State has incurred, if all conditions for this are satisfied, an international responsibility towards the second State. And generation of an international responsibility is equivalent, in the example we have taken, to the creation of a new right of the injured State: the right to reparation for infringement of the right accorded to it by the treaty. But it would be difficult to conceive that this new right, attributed to the injured State by the international legal order, should depend on the result of proceedings instituted by a private individual at the internal level, which may lead to the restoration of the right of that individual, but not to the restoration of a right which belongs to the State at the international level and has been infringed at that level. If, so long as the condition of exhaustion of local remedies has not been satisfied, the injured State has no faculty to claim reparation for an internationally wrongful act allegedly committed to its detriment in the person or property of its national, it is because for the time being its new right to reparation of an injury suffered by it has not yet been created. In other words, a breach of the obligation imposed by the treaty has not yet occurred or, at least, has not yet definitively occurred. At this moment, therefore, the international responsibility, which in our case is reflected precisely in the right of the State to reparation of the injury suffered by it, has not yet arisen. In other words, the finding that the right of the State to demand reparation exists only after the final rejection of the claims of the private individuals concerned inevitably leads to the conclusion that the breach of the

[133] Borchard, "Theoretical Aspects", *supra,* note 78, pp. 236-237.

> international obligation has not been completed before those remedies are exhausted, that is to say, before the negative effects of the new conduct of the State in regard to those remedies have been added to those of the initial conduct adopted by the State in the case in point, thereby rendering the result required by the international obligation definitively impossible of achievement."[134]
>
> Although his name is clearly associated with the substantive view, it should be pointed out that Ago's arguments concern only what he called "obligations of result", i.e., obligations not concerned with the way the specified result was reached. In cases of violations of an "obligation of conduct", in other words where the mere conduct of the State violates an international obligation irrespective of the legality of the result reached, the international responsibility of the State is not conditional upon the exhaustion of local remedies. Indeed, although not spelled out in the report, it appears that the rule is not applicable at all in these cases in Ago's scheme.[135]

55. Writers in favour of the substantive school include Gaja,[136] who argues that the exhaustion of local remedies rule is a "presupposition" for unlawfulness, and O'Connell,[137] who emphasizes the right of the State to attempt to redress the wrong within its own legal system.

56. The substantive view has drawn heavy criticism from legal scholars, particularly C.F. Amerasinghe who has published profusely in support of the procedural position.[138] In his view there is something intrinsically incorrect about the substantive view's insistence that international responsibility is dependent upon local action and that the violation of international law — and international responsibility — is only completed once local courts have so pronounced.

> "In the case of international law, an international court is the proper organ finally to make the decision that a rule of international law has been broken. Municipal courts may pronounce on the issue, but it is clear that for the international legal system this cannot be final."[139]

Amerasinghe challenges the substantive view's reasoning that an international wrong is not committed until local remedies have been exhausted.

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[134] *Supra* note 6, pp. 35-36, para. 15.

[135] Ibid., pp. 11-18, paras. 1-24.

[136] *L'Esaurimento dei Ricorsi Interni nel Diritto Internazionale* (1967), pp. 12, 33.

[137] *Supra,* note 23, p. 1053:

> "A State is only internationally responsible to foreign nationals when the injuries they have suffered at its hands are irremediable at their own instance through the agency of the State's own law. If an avenue of redress is available under that law, either through appeal to the highest courts or through executive instrumentalities, the injury is not complete until the avenue has been explored in vain."

See, also, Head, *supra,* note 23, p. 150; Nguyen Quoc Dinh, *Droit international public* (P. Daillier and A. Pellet (eds.)), 6th ed. (1999), p. 775, para. 490; J. Combacau and S. Sur, *Droit international public,* 4th ed. (1999), p. 546.

[138] *State Responsibility, supra,* note 75, pp. 169-270; *Local Remedies*, *supra,* note 23; "The Local Remedies Rule", *supra,* note 34, p. 727.

[139] *State Responsibility, supra,* note 75, p. 215.

> "What international law prohibits is the initial injury to the alien. To say that international law merely prohibits the perpetration of the injury after resort to local remedies, and therefore does not take particular note of the initial injury as a violation of international norms, provided the result is brought about that satisfaction is given to the injured alien, seems to twist the truth to suit the theory. In short it seems difficult to accept an interpretation of the situation which requires the State merely to fulfil its secondary obligation, of making reparation through whichever means it chooses, as the result to be achieved by the obligation imposed by international law, and therefore characterizes this secondary obligation as the only one that has not been fulfilled, while not attaching special importance to the primary obligation not to cause injury to the alien in the first place. The local remedies rule really pertains only to secondary obligation, leaving the fact of the violation of the primary obligation substantially unaltered."[140]

57. Doehring maintains that in certain cases it is impossible to argue that the original act is not a violation of international law.[141] Even though his example, the killing of an individual, may be more closely linked with the protection of human rights, it is also highly relevant from the perspective of treatment of aliens and is therefore of broader applicability.[142] Moreover, it is claimed that the exceptions to the local remedies rule — for instance, waiver by the State in an arbitration agreement — are incompatible with the idea that international responsibility arises only after the exhaustion of local remedies.[143] Also, the continuous nationality rule is illogical if the international wrong is committed only after the exhaustion of local remedies.[144]

58. An important argument against perceiving the rule in substantive terms is stated by Verzijl in the following terms:

> "If it be assumed that no international delinquency exists at all until the local remedies have been exhausted, the rule is necessarily much more rigid than in the other construction, since in that case the international claim itself is provisionally devoid of any juridical foundation. If, on the contrary, its merely procedural nature is recognized, much greater freedom is left to mitigate and qualify the rule with a view to obviating the evident abuses which can be, and regrettably often are, made of the rule."[145]

59. Although the American Law Institute's *Restatement of Law (Third)* does note take a position on the nature of the local remedies rule, the *Second Restatement* provides:

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[140] *Local Remedies, supra,* note 23, p. 328.

[141] *Supra,* note 69, p. 240. Support for Doehring's views has been expressed by other German authors: Herdegen, *supra,* note 13, p. 65; Kokott, *supra,* note 93, p. 613; W. K. Geck, "Diplomatic Protection", *Encyclopedia of Public International Law,* vol. 1 (1992), p. 1056.

[142] In the context of human rights protection, the procedural nature of the rule of exhaustion of local remedies is more broadly accepted than with regard to diplomatic protection. See, for example, Amerasinghe, *Local Remedies, supra,* note 23, pp. 354 et seq.

[143] Verdross and Simma, *supra* note 45, p. 883, n. 42. Other German authors have also adopted this view. See, for example, Kokott, *supra,* note 93, p. 613; Herdegen, *supra,* note 13, p. 65; J. Schwarze, "Rechtschutz Privater bei völkerrechtswidrigem Handeln fremder Staaten" (1986), 24 *Archiv des Völkerrechts* 428-429. See further Adede, "Survey", *supra,* note 23, p. 15.

[144] Schwarze, *supra,* note 143, p. 429.

[145] J. H. W. Verzijl, *International Law in Historical Perspective* (1973), part VI, p. 629.

> "*Procedural nature of requirement of exhaustion*. As indicated in §168, there are some types of conduct causing injury to aliens that are in themselves wrongful under international law and others that merely give rise to a duty to make reparation, in which case a violation of international law does not occur until and unless there is a failure to make such a payment. However, once an international wrong has been committed, whether in causing the original injury or in failure to pay compensation, the international responsibility of the State is engaged and the exhaustion of available remedies is primarily a procedural requirement."[146]

60. Reasons of the above kind have led many international lawyers to support the procedural position.[147]

61. The third school, which has its origins in the writings of Hyde and Eagleton, is not incompatible with the procedural position. The main difference is that its proponents consider that:

> "in the examination of claims, it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign, from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct. The former serves to establish national responsibility; the latter to justify interposition."[148]

In other words, this school considers the rule as one representing a procedural condition when it concerns cases where the original act or omission by itself amounts to a violation of international — as well as municipal — law. In contrast, where the injury is caused by an act constituting a violation of municipal law but not of international law, international responsibility commences only after the exhaustion of local remedies resulting in a denial of justice.

62. The leading proponent of this school is J.E.S. Fawcett. In an article published in 1954[149] in which he seeks to distinguish clearly between the cause of action and

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[146] *Supra* note 51, Part IV, para. 206, cmt d, p. 612.

[147] See C. de Visscher, "Le Deni de justice en droit international" (1935-II), 52 *Recueil des Cours* 421; Freeman, *supra,* note 45, pp. 407 et seq.; M. N. Shaw, *International Law,* 4th ed. (1997), pp. 603-604; P. C. Jessup, *A Modern Law of Nations,* reprint (1968), p. 104; Geck, *supra,* note 141, p. 1056; Herdegen, *supra,* note 13, p. 65; Kokott, *supra,* note 93, p. 613; Schwarzenberger, *supra,* note 72, pp. 603-604. Arguably this is also the position taken in *Oppenheim's International Law* (*supra,* note 23, pp. 522-524) in the following statement:

> "[W]here a State has treated an alien in its territory inconsistently with its international obligations but could nevertheless by subsequent action still secure for the alien the treatment (or its equivalent) required by its obligations, an international tribunal will not entertain a claim put forward on behalf of that person unless he has exhausted the legal remedies available to him in the State concerned. So long as there has been no final pronouncement on the part of the highest competent authority within the State, it cannot be said that the valid international claim has arisen."

[148] C. C. Hyde, *International Law chiefly as interpreted and applied by the United States* (1922), vol. 1, p. 493. See also Eagleton, *supra,* note 23, pp. 97-100. Writers of this period who lean towards the third school include Dunn, *supra,* note 23, p. 166 (this is implied in his interpretation and criticism of article 8 (a) of the 1929 Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person and Property of Foreigners prepared by the Harvard Law School); Fachiri, *supra,* note 110, p. 33; J. G. Starke, "Imputability in International Delinquencies" (1934), 14 *B.Y.I.L.* 107-108.

[149] "Exhaustion of Local Remedies", *supra,* note 71.

the right of action, he set out three possible legal situations in which the operation of the local remedies rule must be considered:

> "*Case I:* The action complained of … is a breach of international law but not of the local law.
>
> *Case II:* The action complained of is a breach of the local law but not of international law.
>
> *Case III:* The action complained of is a breach of both the local law and of international law."[150]
>
> "In the first case, where the action complained of is a breach of international law but not of the local law, the local remedies rule does not … come into play at all; for, since there has been nothing done contrary to the local law, there can be no local remedies to exhaust."[151]

Examples that would fall under this case include an injurious act committed by the highest executive authority of the State for which there is no remedy in domestic law; or where a State official commits a crime against humanity (e.g. apartheid) which is condoned or promoted by local law.

> "In the second case, where the action complained of is a breach of the local law but not initially of international law, the international responsibility of the State is not engaged by the action complained of: it can only arise out of a *subsequent* act of the State constituting a denial of justice to the injured party seeking a remedy for the original action of which he complains."[152]

Here the local remedies rule operates as a substantive bar to an international claim as no claim arises until a denial of justice can be shown.

In the third case,

> "Where the act complained of is a breach of the local law and of an international agreement or customary international law, the rule of the exhaustion of local remedies operates as a procedural bar to an international claim."[153]

Fawcett's simple, but clear, analysis, which has won the support of Fitzmaurice[154] and Brownlie,[155] provides the answer to the debate over the nature of the local remedies rule. It is unfortunate that it received so little attention in Ago's study.[156] Amerasinghe has attempted to reconcile Fawcett's position with his own procedural view by arguing that Fawcett's second case, which adopts the substantive approach, has nothing to do with the local remedies rule.

> "What is called the substantive aspect of the rule is really not an aspect of the rule at all. It is a misapplied terminology to an area of State responsibility for injuries to aliens which deals with breaches of international law committed in connection with the administration of justice. That which has been called the

[150] Ibid., p. 454.
[151] Ibid., p. 455.
[152] Ibid., p. 456. Emphasis in original.
[153] Ibid., p. 458.
[154] *Supra,* note 47, p. 53.
[155] *Principles, supra,* note 34, p. 497.
[156] *Supra,* note 6, p. 34, para. 13, n. 137.

substantive aspect of the rule really related to 'denials of justice' and should be dealt with in those terms."[157]

Once this is understood, he continues, Fawcett's view can be reduced "to a basically procedural view of the rule".[158]

L. Conclusion

63. The "third position" is, logically, the most satisfactory. If a State commits an internationally wrongful act — for example, by torturing an alien — it incurs international responsibility from that moment. The act of torture gives rise to a cause of action against the responsible State but the right of action, the right to bring an international claim, is suspended until the State has had the opportunity to remedy the situation, for example by means of reparation, through its own courts. In such a case the local remedies rule is procedural. This view enjoys the support of some codification attempts, several judicial decisions and the majority of writers, as it is a view supported by both those who favour the procedural position and those who belong to the "third school". Supporters of the substantive view are unable to accept this explanation of the local remedies rule largely because of their refusal to distinguish between injurious acts to the alien that violate international law and those that violate only local law.

64. There is an even clearer consensus that where the original injury is caused by an act or omission in violation of local law only, a denial of justice arising in the course of the domestic proceedings is required before an international claim can be brought. Substantivists accept this and so do proceduralists, but the latter school denies that this phenomenon falls within the purview of the local remedies rule. The refusal of the procedural school to consider this type of case as belonging to the subject of exhaustion of local remedies is of no practical relevance and does not warrant further consideration.

65. There remains one last issue to be considered: whether a denial of justice further necessitates the exhaustion of remaining local remedies, not only in the context of the situation described in paragraph 64 but also where denial of justice follows a violation of international law. Authors who have expressed an opinion on this issue in the works reviewed[159] support the view that local remedies need to be exhausted in such cases. This is logical if one perceives a denial of justice as a violation of international law. This view is not contradicted by codification attempts, international decisions or State practice.

66. The above draft articles seek to give effect to the conclusions reached in the present report. The decision to depart from the substantive position advanced by Roberto Ago in draft article 22 of the draft articles on State Responsibility adopted on first reading has not been taken lightly. That position was, however, premised on the distinction between obligations of conduct and result, which has not been retained in the draft articles on State Responsibility provisionally adopted by the

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[157] Amerasinghe, *State Responsibility*, *supra,* note 75, pp. 212-214. A similar view is expressed by Law, *supra,* note 13, p. 34.

[158] *Local Remedies*, *supra,* note 23, p. 326.

[159] Law, *supra,* note 13, p. 34; Fitzmaurice, *supra,* note 47, p. 59; Amerasinghe, "The Local Remedies Rule", *supra,* note 34, p. 732.

Drafting Committee in 2000. The substantive view does not have substantial support from codification attempts, judicial decisions and writers. Moreover, the trend among writers since 1977 has been in favour of the procedural view or the third school. In these circumstances it is suggested that the Commission should approve the philosophy contained in draft articles 12 and 13.

M. Future work

67. The commentary to draft article 14 is still in the course of preparation. It is likely that the article will take the following form:

Local remedies need not be exhausted where:

(a) There are no effective remedies;

(b) The exhaustion of local remedies would be futile;

(c) The respondent State has waived the requirement that local remedies be exhausted;

(d) There is no voluntary link between the injured individual and the respondent State;

(e) The internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State.

Further articles on the exhaustion of local remedies will deal with the burden of proof and advance waiver of an international claim by the foreign national ("Calvo clause"). It will also be desirable to draft a provision on the meaning of "denial of justice" in the light of the reference to this term in draft article 13, despite the fact that this will possibly involve the formulation of a primary rule. However, as pointed out in the commentary to draft article 10, the distinction between primary and secondary rules is of uncertain value in the present codification exercise.