Sixth report on State responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (continued)

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Sixth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

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The internationally wrongful act of the State, source of international responsibility (continued) *

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ABBREVIATIONS

GATT General Agreement on Tariffs and Trade
I.C.J. International Court of Justice
I.C.J. Pleadings I.C.J., Pleadings, Oral Arguments, Documents
I.C.J. Reports I.C.J., Reports of Judgments, Advisory Opinions and Orders
ILO International Labour Organisation
P.C.I.J. Permanent Court of International Justice
P.C.I.J., Series A P.C.I.J., Collection of Judgments
P.C.I.J., Series A/B P.C.I.J., Judgments, Orders and Advisory Opinions
P.C.I.J., Series C P.C.I.J., Pleadings, Oral Statements and Documents

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

CHAPTER III

5. BREACH OF AN INTERNATIONAL OBLIGATION CALLING FOR THE STATE TO ADOPT A SPECIFIC COURSE OF CONDUCT

1. The preceding section of this chapter was devoted to a study of the impact of the content of an international obligation on the definition of a State action committed in violation of that obligation. Specifically, consideration was given to the manner in which the degree of importance of the content of the breached international obligation for the safeguarding of the fundamental interests of the international community as a whole was reflected in the characterization of the act. On that basis, a distinction was made between two types of internationally wrongful acts, defined respectively as international "crimes" and international "delicts", to which different régimes de responsibility applied. Quite logically, the definition of these régimes was postponed until later; it was nevertheless noted that the difference between them related both to the type of consequences deriving from the internationally wrongful act attributable to the State that had committed the breach and to the subjects of law authorized to "enforce" those consequences.

2. However, the substantive aspects of an international obligation may also be viewed from another angle: not so much from the point of view of content but rather from that of the type of obligation, of the manner in which it imposes its requirements upon a State. The obligations imposed on a State under international law not only reflect duties relating to various sectors of international relations, but matters of varying importance for the international community: they may also be structured differently with respect to the ways and means by which the State is expected to ensure their fulfilment. It follows that the breach by a State of an international obligation incumbent upon it does not necessarily assume the same form in each case.

3. For a better understanding of the nature of this distinction, it should be remembered that, although all obligations placed upon a State under the rules of international law are of course directed towards a particular goal, there is a vast difference between a case where the means of achieving that goal are determined at the international level and a case where they are determined at the national level. In the former case, the obligations are laid upon the State, requiring it to take or to refrain from taking some specific action: for example, to adopt or to refrain from adopting a specific legislative, administrative or judicial act. In the latter case, international law, concerned with respect for the internal freedom of the State, merely requires the State to ensure a particular situation or result and leaves it free to do so by whatever means it chooses. To quote Dionisio Anzilotti:

"... as a rule, international law does not establish the means whereby the State has to ensure that its duties are carried out."

4. On that basis, therefore, the existence of two kinds of international obligations may be noted. In carrying out some of them, the State may employ only certain specific means; in carrying out others, it can choose from among a variety of means. It will be seen in the next section that, in the latter case, there are, in turn, a number of possibilities. It may make no difference with regard to international law which of the possible alternatives a State chooses, or—and this amounts to almost the same thing—the obligation in question, while implying a preference for one means, may nevertheless permit, or at any rate not rule out, the State's choice of another means. Above all, the result aimed at by the international obligation may be so defined that, once a situation inconsistent with that result has been created by the means chosen by the State, it will have to be concluded that the State has definitely failed to carry out the task incumbent upon it, whereas in a different case it may not be necessary to arrive at such a conclusion. The internationally desired result may be defined in such a way as to permit its being also regarded as achieved when, by extraordinary means, the State ex post facto remedies the situation created by the means originally employed and restores a situation that is fully consistent with the desired result. However, rather than anticipate, it is preferable at this stage simply to consider the basic distinction between obligations that call categorically for the use of specific means and those that leave the State free to choose among various means. As has just been said, this basic distinction


2 "La responsabilité internationale des États à raison des dommages soufferts par des étrangers", Revue générale de droit international public, vol. XIII, No. 1, (Paris, 1906), p. 26. Anzilotti adds: "That is why the State in most instances performs not so much acts prescribed by international law as acts that it has itself freely chosen as the most appropriate means of ensuring that its duty vis-à-vis other States is fulfilled." See also the same author's Teoria generale della responsabilitá dello Stato nel diritto internazionale, reprinted in Scritti di diritto internazionale pubblico (Padua, CEDAM, 1956), vol. I, p. 117.

3 A distinction between the two types of obligations had already been made by H. Triepel, who emphasized the difference between directly ordered internal law ("unmittelbar gebotenes Landesrecht") and internationally necessary internal law ("internationales entbehrlches Landesrecht") (H. Triepel, Völkerrecht und Landesrecht (Leipzig, Hirschfeld, 1899), p. 299) (French edition: Droit international et droit interne, translated by R. Brunet (Paris, Pédron, 1920), p. 297). The same distinction is necessarily implied in the passages from Anzilotti quoted in the preceding foot-note. However, it was D. Donati who stated it explicitly for the first time and made it a general principle (D. Donati, I trattati internationali nel diritto costituzionale (Turin, Unione tipografico-editrice tornese, 1906), vol. I, pp. 343 et seq.).
between two types of international obligations necessarily has an impact on the manner in which the obligation is breached. This section is devoted to analysing the first of the two possibilities indicated above; its purpose will therefore be to determine under what conditions a breach of an international obligation exists in cases where the obligation calls for the State to adopt a specific course of conduct.

5. In the situation that has just been mentioned, the specific conduct required of the State by the international obligation may be a course of action. It may involve action by legislative or, in a broader sense, regulatory bodies in the form of adoption or repeal of a law in the strict sense of the term, or at all events of a given regulation, of whatever kind. The example may be cited of the obligation imposed by one of the so-called "uniform law" international conventions. Under article I, paragraph 1, of the Convention relating to a uniform law on the international sale of goods: (The Hague, 1 July 1964)⁴

Each Contracting State undertakes to incorporate into its own legislation, in accordance with its constitutional procedure, not later than the date of entry into force of the present Convention in respect of that State, the Uniform Law on the International Sale of Goods ... forming the Annex to the present Convention.

The Hague conventions on private international law, some of the international labour conventions,⁵ some agreements relating to international law in matters of health, the provisions drawn up by some international organizations and agencies,⁶ etc. contain similar formulæ. Article 10, paragraph 1, of the State Treaty for the Re-establishment of an Independent and Democratic Austria (Vienna, 15 May 1955)⁷ requires Austria, inter alia, to codify the principles set out in articles 6, 8 and 9 of the Treaty and to give effect to them. On the other hand, under article 2, paragraph 1 (c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,⁸

Each State Party shall take effective measures to ... amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

Similarly, under article 3 (a) of the 1960 Convention against discrimination in education,⁹ States undertook to "abrogate any statutory provisions and any administrative instructions ... which involve discrimination in education". Article 10, paragraph 1, of the Austrian State Treaty required Austria to repeal or amend all legislative and administrative measures adopted between 5 March 1933 and 30 April 1945 that conflicted with the principles set forth in articles 6, 8 and 9 of the Treaty. Action by executive organs might also be involved: for example, in connexion with specific obligations to deliver arms and other objects, to deliver or scuttle ships, or to dismantle fortifications, which appear so frequently in peace treaties.¹⁰ Lastly, action by judicial organs might be involved. Examples are to be found in some international conventions on judicial competence, on recognition of foreign decisions or on legal assistance.¹¹ Even more specific examples are provided by peace treaties requiring the competent authorities to revise certain rulings and orders of prize courts.¹²

6. The specific conduct required of a State under an international obligation may also be an act of omission. Moreover, the conduct in question may relate to different areas of activity. It may be the obligation of the State not to enact certain laws or, more generally, certain regulations. An example of an international obligation requiring the State not to rescind specific laws is found, once again, in article 10 of the 1955 Treaty, under which Austria undertakes to keep in force the laws already adopted for the liquidation of the remnants of the Nazi régime; a similar case is the law of 3 April 1919 concerning the House of Hapsburg-Lorraine. Again, certain Danube Commission should draw up navigation and police regulations and that "Each State shall bring these regulations into force in its own territory by a legislative or administrative act ...".

⁵ See, for example, ILO Convention No. 121 concerning Benefits in the Case of Employment Injury (Conventions and Recommendations, 1919-1966 (Geneva, International Labour Office, 1966), p. 1080), which specifies the categories of persons to whom national legislation is to accord such benefits. It should be noted that some conventions do not expressly lay down, or mention only in part, the requirement for legislative action; this requirement may nevertheless be deduced from the context of the convention, as is the case with regard to articles 1 and 2 of Convention No. 55 concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen (ibid., p. 333), or article 2 of Convention No. 112 concerning the Minimum Age for Admission to Employment as Fishermen (ibid., p. 977), or article 4 of Convention No. 123 concerning the Minimum Age for Admission to Employment Under-ground in Mines (ibid., p. 1117), and others. The forms addressed to States concerning observance of the provisions of these conventions confirm this conclusion. For example, that relating to Convention No. 55 contains the following injunction: "Please give a list of the legislation and administrative regulations, etc., which apply to States concerning observance of the provisions of these conventions.

⁶ See, for example, annex XVII (A) of the Peace Treaty between Austria and Italy (Vienna, 15 May 1955) for reference, see foot-note 12 below) and the similar provisions in the other peace treaties following the Second World War.

⁷ See, for example, article 115 of the Treaty of Versailles, which provides for the destruction of the fortifications, military establishments and harbours of the Islands of Heligoland "by German labour and at the expense of Germany" (British and Foreign State Papers, 1919 (London, H. M. Stationery Office, 1922), pp. 71 and 72). See also articles 145 and 195 and other articles of part V of the same Treaty. See further, articles 40, 41 and 42 of the Treaty of Peace with Italy (for reference, see foot-note 12 below) and the similar provisions in the other peace treaties following the Second World War.

international obligations require that the administrative authorities, particularly the police, refrain from entering certain premises which enjoy special protection, such as the premises of a diplomatic or consular mission or an international organization, or that the authorities in question refrain from subjecting certain individuals to arrest or detention. Under general international law, the police forces—and, a fortiori, the armed forces—of any country are under an obligation not to enter the territory of another country without the latter’s consent, not to make arrests there, etc. Some peace treaties even lay down the specific obligation not to maintain or assemble armed forces in a specified portion of the territory of the State in question. In other cases, it is the judicial authorities which are required not to exercise their jurisdiction in respect of foreign States, certain of their organs or certain categories of disputes, etc.

7. In the cases just envisaged, which, despite their diversity, are all characterized by the fact that the international obligation in question requires from the State a specific course of conduct in the form of an action or omission, the implications of the nature of the obligation for determining the existence of a possible breach are logically clear. Difficulties may always arise in a particular case in determining what in fact was the conduct of the State organs, and questions may always arise regarding the verification of the exact content of the obligation incumbent upon the State. There can be no doubt, on the other hand, regarding the conclusion that, when the action or omission noted is, in fact, not in conformity with the conduct specifically required of the organ responsible for the action or omission, there is an immediate breach of the obligation in question, without any other condition being required for such a finding. The finding should not be influenced by whether or not the non-conformity of the conduct adopted with the conduct which should have been adopted had harmful consequences. If, for example, as in the case of article 10, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights, an international convention imposes on a State an obligation to the effect that the employment of children and young persons “in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law”, this obligation is breached simply by the fact that the law providing for punishment of such practices has not been enacted, even if no specific instance of employment of children in such work has been found in the country concerned. Similarly, if, as in the case of article 2, paragraph 1 (c), of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, a convention obliges a State to rescind legislative provisions which have the effect of creating such discrimination, this obligation is breached simply by the fact that the provisions in question have not officially been rescinded, even if they actually never would have been or no longer could be applied.

8. A study of both State practice and international legal precedents confirms the validity of the distinction drawn here between the nature of the international obligation which requires from the State a specific activity and the nature of the obligation which requires only that the State achieve a certain result, leaving it free to choose the means of attaining that result. In particular, this study confirms the conclusion that, when the obligation is in the first of these two categories, the activity of a State organ which proves to be not in conformity with that required of it is sufficient to constitute a breach of the obligation. The most accurate theoretical formulation of these conclusions was given by the Swiss Government in its reply to point III, No. 1, of the request for information addressed to States by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930). The “point” was worded as follows:

Does the State become responsible in the following circumstances:

Enactment of legislation incompatible with the treaty rights of other States or with its other international obligations? Failure to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations? In response to the second question, the Swiss Government noted:

We should ... be adopting too absolute an attitude if we merely replied in the affirmative to the second question raised under (I). Failure to enact legislation may of itself involve the international responsibility of the State if some agreement to which the State is a party expressly obliges the contracting parties to enact certain legislation. On the other hand, in the absence of a contractual provision of this kind, it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations ... The distinction between the two ways in which an international obligation may be breached, depending on the varying nature of the obligation, is clearly brought out

13 Under article 22, para. 1, of the 1961 Vienna Convention on Diplomatic Relations (ibid., vol. 500, p. 95), for example, “The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

14 Article 29 of the same Convention provides that “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention ...”.

15 Article 43 of the Treaty of Versailles (for reference, see footnote 10 above) forbade Germany to maintain or assemble armed forces and execute military manoeuvres on the left bank of the Rhine and on the right bank to the west of a line situated 50 kilometers from the river.

16 Thus, for example, article 43, para. 1, of the 1963 Vienna Convention on Consular Relations (United Nations, Treaty Series, vol. 596, p. 261) forbids the judicial authorities of the receiving State to exercise their jurisdiction over consular officers in respect of acts performed in the exercise of consular functions. Article II, para. 3, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (ibid., vol. 330, p. 3) requires the court of a contracting State, seized of an action in a matter in respect of which the parties have made an arbitration agreement to refrain from any exercise of jurisdiction and to refer the parties to arbitration if one of them so requests. Other conventions provide for the obligation to suspend certain sentences during the term of a parallel sentence in another State.

17 General Assembly resolution 2200 A (XXI), annex.


19 Ibid., p. 29.
in this explicit statement. In particular, with regard to the case referred to in this section, the Swiss Government clearly favours the view that, when the international obligation specifically requires the State to adopt a certain measure (in this case a law), the mere negative fact of not adopting that measure constitutes in itself a breach of the international obligation in question and, if all other circumstances are equal, involves the responsibility of the State.

9. There is no doubt either about the applicability of the principle thus stated to practical cases. In this connexion, it is particularly interesting to consider cases involving the violation of certain international labour conventions, for example, when one of the States which ratified a convention has not enacted the legislative provisions required by the convention or, above all, has not rescinded the laws which the convention expressly obliged it to rescind. Let us take, for example, the report of the commission appointed under article 26 of the Constitution of the ILO to examine the complaint filed by the Government of Ghana concerning the observance by the Government of Portugal of Convention No. 105 concerning the Abolition of Forced Labour, 1957. It will be noted that the Commission (composed of Mr. P. Ruegger, Mr. E. Armand-Ugon and Mr. I. Forster) stressed in particular that the international obligations placed on the State by certain conventions require the formal rescission of a particular legislative provision and that a "situation in which a legal provision inconsistent with the requirements of the Convention subsists but is regarded as obsolete" or as being superseded de facto cannot be considered satisfactory for the purposes of the application of the Convention. The Commission emphasized that "Full conformity of the law with the requirements of the Convention is therefore essential," even if taken alone that is not enough, since it is also necessary "that the law should be fully and strictly applied in practice." 101 Subsequently, the report of the commission appointed under article 26 of the Constitution of the ILO to examine the complaint filed by the Government of Portugal concerning the observance by the Government of Liberia of the Forced Labour Convention, 1930 (No. 29) showed that the Commission (composed of Mr. E. Armand-Ugon, Mr. T. P. P. Goonetilleke and Mr. E. Castrén) endorsed the opinion expressed by the Ghana-Portugal omission. It was in application of and with specific reference to article 23 of the Convention, which requires the competent authorities of the State to "issue complete and precise regulations governing the use of forced or compulsory labour", that the Commission concluded that:

... the legislation of Liberia until 31 August 1961, the date of filing of the complaint, was inconsistent with the obligation of Liberia under the Constitution of the Organisation to give effect to the provisions of the Convention in law and in fact and with the specific requirements of Articles 23 to 25 of the Convention".

10. In other cases it has not been a breach of the specific obligation to enact or abrogate a legislative provision which has been the subject of a dispute between States but rather failure to observe the equally specific obligation to perform a certain act of an administrative nature or, particularly, to refrain from performing such act, as the obligation not to enter the premises of a diplomatic mission or the private residence of a foreign diplomatic agent, or the premises of a foreign consulate. In still other situations, the dispute has been caused by a breach of the obligation to respect the immunity from jurisdiction of diplomatic agents etc. In all these cases, the basic principle applied has been the same, namely, that the adoption by any administrative or judicial authority of conduct different from that specifically required by the international obligation has been considered as immediately constituting a breach of that obligation.

11. The positions taken by the authors of scientific works dealing with the question examined here coincide with those deriving from the logic of the relevant principles and confirmed by State practice and by international judicial decisions. Heinrich Triepel expressly deduced from the distinction he had made concerning the possible influence of international law on internal law that, when a rule of international law or a treaty imposes on the State the duty to have a particular law, the non-adoption or the abrogation of such law constitutes a breach of international law or of the treaty; this obtains even if, despite the non-adoption or the abrogation of the internationally required internal law, the State is in a position "effectively to carry out everything which can or should be carried out under the law" and intends to do so. More recently, several authors have studied the question in greater detail and have shown the effect which the form taken by an international obligation necessarily has on determining the existence of a breach of such obligation. With reference to the matter which is of concern to us in this section, the authors have stressed that, where the obligation requires of a State conduct—whether involving an action or an omission—"which must necessarily be carried out in certain ways and by specific bodies", any conduct adopted by the State which is not in conformity with that specifically required constitutes as such "a direct breach of the existing international legal obligation", so that, if all the other requisite conditions exist, we are confronted with an internationally wrongful act.

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11 *Ibid.*, vol. XLVI, No. 2, Supplement II, April 1963, para. 416, p. 182. Article 25 supplements article 23 by requiring that the illegal exaction of forced or compulsory labour should be punishable as a penal offence.
16 See R. Ago, "La regola del previo esaurimento dei ricorsi interni in tema di responsabilità internazionale", *Archivio di diritto* (Continued on next page)
12. One might be tempted to characterize as “international obligations of conduct” those obligations which require a State to adopt a specific course of conduct, whether an action or an omission, as opposed to those obligations which impose on the State the generic requirement that it should bring about a certain result but leave to it the choice of the ways and means by which the results are to be achieved, and which could be characterized as “obligations of result”. That would simply be following the model furnished by the systems of internal private law originating in Roman law. Thus it would be possible to define as an “internationally wrongful act of conduct” and an “internationally wrongful act of result” respectively the breach by a State of an international obligation falling within the first or the second of those two categories. In our opinion, the use of this terminology might be helpful because of its concision. It might, however, be wiser to speak more precisely, with regard to the first category, of “obligations of specific conduct” and, consequently, of “internationally wrongful acts of specific conduct”, for even in the case of “obligations of result” it is still the “conduct” of the State which is required in order to ensure the desired result. We feel it would be appropriate to emphasize that the meaning attributed to the distinction and the characterizations in question would be that which is made clear in this section, a meaning which seems to us to correspond to typical aspects of the international community and its law. On the other hand, there would be some risk of conclusion in seeking to liken the distinction and the characterizations in question too closely to those which are familiar to jurists concerned with systems of private law and which are logically influenced by the aspects proper to these other socio-juridical systems.  

(Foot-note 26 continued.)

13. Whatever the terminology which the Commission may choose, the Special Rapporteur thinks that, for the purposes of the present draft, the definition of the principle with which this section is concerned should not present any particular difficulties. In view of all the foregoing considerations, he therefore proposes the adoption of the following text:

Article 20. Breach of an international obligation calling for the State to adopt a specific course of conduct

A breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically required.

6. BREACH OF AN INTERNATIONAL OBLIGATION REQUIRING THE STATE TO ACHIEVE A PARTICULAR RESULT

14. The previous section was devoted to cases of breach by a State of international obligations requiring it to engage in or refrain from a specific activity. In such cases—which, as stated, are relatively rare—international law, in a sense, invades the sphere of the State by requiring one or other specified component of the State machinery to adopt a particular course of conduct. It requires that the legislative organ, or at any rate some organ having a normative function, issue or revoke certain rules, or that the executive organs perform or refrain from certain acts, or that the judicial organs rule or refrain from ruling on certain situations or as regards certain persons, and so on. We showed in this way that, in all such cases, the form, as thus described, of the international obligation had obvious consequences for determining whether the obligation had been fulfilled or breached. If the course of conduct specifically required has been adopted, the obligation will have been fulfilled; if it has not, the obligation will have been breached.

15. The situation is entirely different in the cases—particularly numerous in international law—where international law stops short at the outer boundaries of the State machinery and, as we stated above, being “concerned with respect for the internal freedom of the State, merely requires the State to ensure a particular situation or result and leaves it free to do so by whatever means it chooses”.  

The purpose of the present section is precisely to establish how to determine that there has been a breach of an international obligation characterized by this other form, so different from the previous one.

16. It was pointed out earlier that the cases we now propose to consider covered a vast and varied range, and the various possibilities within that range were briefly reviewed. We looked first of all at cases in which the State has some initial freedom of choice as to the means of achieving the result required by an international obligation. Among those cases, we noted that there was a distinction to be made. On the one hand were the cases where it was left entirely to the State to choose between the means available to it to achieve the result required by
the international obligation, and no opinion was expressed at the international level. On the other hand were the cases where the international obligation did at least indicate a preference and suggest that a particular means appeared as at any rate the most likely to produce the required result though without making recourse to that means compulsory.

17. There are many examples of cases in the first group. Sometimes the text of the treaty itself, in imposing certain obligations, expressly states that it is left to the State to choose the means of achieving the purpose of the obligation. Article 14 of the Treaty instituting the European Coal and Steel Community provides that:

Recommendaions shall be binding with respect to the objectives which they specify but shall leave to those to whom they are directed the choice of appropriate means for attaining these objectives. 80

The Treaty establishing the European Economic Community provides in article 189, third paragraph, that:

Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means. 81

Again, the State’s complete freedom of choice is sometimes implicit in the fact that the international obligation generally calls upon the States bound by it to take “all appropriate measures” to achieve a given result, without giving any indication as to what those appropriate measures may be. For example, the International Convention on the Elimination of All Forms of Racial Discrimination provides in article 2, paragraph 1, that:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. 82

Similarly, with regard to the protection of the representatives of other States, the Vienna Convention on Diplomatic Relations provides in article 22, paragraph 2, that:

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. 83

and in article 29 that “The receiving State . . . shall take all appropriate steps to prevent any attack on [a diplomatic agent’s] person, freedom or dignity”. The Vienna Convention on Consular Relations, in article 31, paragraph 3, and article 40, 84 and the 1969 Convention on Special Missions, in article 25, paragraph 2, and article 29, 85 use virtually identical language. In perhaps an even larger number of cases, the freedom of choice accorded to the State is left to be inferred from the fact that the international obligation merely specifies the result to be achieved, and the text imposing the obligation makes no mention of the means of achieving it. Examples are to be found in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms 86 and certain international labour conventions; many other texts contain provisions of the same kind. 87

We may add that the situation described here is normal as regards international obligations, whether of customary or of treaty origin, concerning the protection of aliens and certain specific categories. 88

18. With regard to the second group of cases, we need only mention, among other examples, article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, which provides that:

Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures, 89 or article 2, paragraph 2, of the International Covenant on Civil and Political Rights, which provides that:

Where not already provided for by existing legislative or other means, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures 90 as may be necessary to give effect to the rights recognized in the present Covenant. 91

There can be no doubt that, in these cases, the legislative means is expressly indicated at the international level as the most normal and most appropriate means of achieving the purposes of the Covenant in question. But recourse to such means is not specifically required; it is not made an exclusive condition. The State is left free to employ some other means if it sees fit, provided that such means equally enables it to achieve in concreto the full realization of the human rights prescribed by the Covenants.

81 Ibid., vol. 298, p. 11.
82 For reference, see foot-note 8 above.
83 Idem, foot-note 13.
84 Idem, foot-note 16.
85 General Assembly resolution 2530 (XXIV), annex.
86 General Assembly resolution 2200 A (XXI), annex.
87 Ibid.
88 General Assembly resolution 2200 A (XXI), annex.
The reply given to the Irish Government by the ILO on 18 October 1929 is particularly instructive on this point. The Government had asked whether legislation was specifically required in order to give effect to the provisions of articles 2, 3 and 4 of Convention No. 14 of 1921 (Convention concerning the application of the weekly rest in industrial undertakings), seeing that it was already Irish practice to grant industrial workers a rest period of 24 hours. The ILO observed that “The course most usually adopted is that of passing legislation to make the application of the weekly rest compulsory in industrial undertakings”, but that the Convention left considerable latitude to Governments in fulfilling the obligation. It went on to say:

A Government is therefore free to apply under the Convention any system which meets with its approval; ... it is for the Government which undertakes international responsibility as a party to a Convention to judge what is the action which in its view will secure the Convention's effective application. ... it would be for your Government to decide what guarantees, if any, would be necessary after ratification to guard against changes in, or non-observance of, the existing practice.

The ILO made no secret of its view that the adoption of legislation giving the force of law to the existing practice was the most appropriate method to follow in the case in point; but it repeated that the Government was free to adopt any other method, provided it would “secure the effective fulfilment of the Convention”. 41

19. We also noted that the existence of a certain latitude with regard to the course to be followed to achieve the result required by international law might be demonstrated in some other way than by the existence of an initial freedom of choice. 42 It is fairly common for a State which has initially adopted a course of conduct, by act or omission, calculated to frustrate the achievement of the result required of it by an international obligation to find itself granted another opportunity to comply with that obligation. In certain circumstances, and provided that the initial course of conduct has not made the required result impossible of attainment, international law allows the State to redress the unfortunate situation which has temporarily arisen and produce that result, albeit after some delay, by adopting, as an exceptional measure, another course of conduct capable of erasing entirely the consequences of its first course of conduct. Obviously—and this should be quite clear—the situation in this case is not the same as in the cases considered above. As we have already noted, this is not a question of freedom of choice for the State between different means on the same plane; recourse to a subsequent course of conduct designed to remedy the internationally unacceptable effects of the initial course of conduct partakes of the “pathology” rather than the “physiology” of the fulfilment of international obligations. It is nevertheless a fact that the existence of this possibility of making good the defects of the means which ought normally to have been applied at the outset to achieving the result required by the international obligation is sufficient in itself to warrant the conclusion that the State has at its disposal more than one means of fulfilling its obliga-

41 The International Labour Code, 1951 (op. cit.), pp. 277-278.
42 See para. 4 above.

For reference, see foot-note 40 above.
before the law will not be denied; that his or her freedom of association will not be obstructed, and so on. But the spirit of the Covenant, its aim, object and context, also point to another conclusion. If we assume, for example, that the State has chosen to fulfil its obligations through the administrative channel, an adverse decision concerning the right of an individual taken by the first authority called upon to decide his case does not normally make it impossible for the State to achieve the internationally required result. That result may be considered to have been achieved even if a higher authority has had to intervene and set aside the first authority’s decision, and only this subsequent action has secured for the individual concerned respect for the right he sought to exercise. If any doubt should persist as to the soundness of this conclusion, the existence in the Covenant of a clause concerning the exhaustion of domestic remedies should suffice to remove it. And it stands to reason that a similar conclusion applies for all obligations imposed by conventions which contain a clause of this kind. For this clause, as we shall show in the next section, should be regarded essentially as a substantive clause, the effect of which is, precisely, to prevent the establishment of definitive failure to achieve the result required of the State by the obligation the clause accompanies, so long as it is still possible to achieve that result by one of the other means at the State’s disposal.

21. It would, however, be wrong to believe that the conclusion which must clearly be drawn from the example we have just been considering is only justified in cases where the agreement from which certain obligations derive contains a clause expressly providing that the State cannot be charged, at the international level, with not having fulfilled its obligations, so long as the available local remedies have not been exhausted. Even in the absence of such a clause, the conclusion reached in the example in question might also follow from the context of the agreement, its spirit, its object and purpose, or, lastly, from the customary rules in the context of which the agreement is to be interpreted. Let us take as another example article 3, paragraph 1, of the General Agreement on Tariffs and Trade (GATT) which reads:

The contracting parties recognize that internal taxes and other internal charges ... should not be applied to imported or domestic products so as to afford protection to domestic production, and paragraph 2 of the same article, which provides that

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

These provisions are not accompanied by any explicit clause relating to local remedies. But their purpose, their only raison d’être, is to prevent domestic products from ultimately enjoying protection in practice, at the expense of like foreign products. What is required of the State party to the Agreement is that it ensure in the final result that foreign products are not placed at a disadvantage on the domestic market because their price is burdened by heavier taxation than domestic products. Hence these provisions cannot be interpreted as requiring absolute prevention of any act, even temporary, by which a foreign product is wrongly taxed. If at a given moment one of these products becomes subject to a tariff different from that applicable to a like national product, and if the duty is improperly collected, the result referred to by the obligations stated in the articles cited will also be achieved if the State takes steps to cancel or duly reduce the discriminatory taxation and refund the amounts wrongly collected. The desired purpose of equality of treatment of foreign and domestic products will thus be achieved.

22. The examples given so far all relate to obligations laid down in agreements. But it goes without saying that no less valid examples can be found among obligations of customary origin. Let us take the obligation which requires a State to guarantee to aliens, in certain spheres at least, equal treatment with nationals; or the obligation which, under certain conditions, requires the State to indemnify aliens whose property has been expropriated; or again, the obligation which requires the State to punish the authors of crimes against the person of aliens, especially aliens having the status of organs of their State, etc. It would obviously be going too far to say that these different obligations will not be considered as fulfilled unless the State so acts that at no time does a State organ take a discriminatory measure against an alien or carry out an act of expropriation without compensation, or pronounce a sentence acquitting the author of a crime against an alien or against an organ of a foreign State. The result required by these international obligations is that, in the last resort, the foreigner should receive the same

44 Article 41, paragraph 1 (c), provides that the Committee established by the Covenant to consider “communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant ... shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law”.

46 See, for example, article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms (for reference, see foot-note 36 above); and articles 11, para. 3, and 14, para. 7 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination (for reference, see foot-note 8 above). See also the agreements on economic co-operation concluded by the United States and cited by G. Gaja in L’esaurimento dei ricorsi interno nel diritto internazionale (Milan, Giuffré, 1967), p. 140, note 17.

47 The international obligation referred to here should be compared, from this point of view, with, for example, the obligations stated in article 34 of the Vienna Convention on Diplomatic Relations, which provides that “A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, ...” (for reference, see foot-note 13 above). Here, the ratio of the obligation is quite different. What the Convention requires is that, in the fundamental interests of the unhindered exercise of the functions entrusted to him, the diplomatic agent should not be hampered in his activity by the application of fiscal measures, just as he should not be hampered by the application of police measures, judicial measures, etc. No improper act of tax collection should be applied to him. Unlike the obligation considered in the text, this is one of the obligations which require the State to adopt a specific conduct of forbearance. It is one of the obligations dealt with in section 5: the State cannot consider that it has correctly performed its international duty because it has subsequently refunded to the diplomatic agent the sums unduly demanded of him, or because it has released a diplomatic agent who was improperly arrested, etc.
result, achieved instead of the primary required result of preventing the arrest or arbitrary detention from having taken place.

The obligation requiring, not the adoption of specific conduct, but the achievement of a certain general result, may take an even more permissive form than that which allows the State an initial freedom of choice of the means by which the result is to be achieved or which permits the State to achieve the result by completely obliterating, through different conduct, the consequences of any initial conduct calculated to frustrate the achievement of the result. There are cases in which, when the initial conduct adopted has made the main result required impossible to achieve, the form of the international obligation allows the State to consider that it has fulfilled its international obligation by achieving an alternative result. Let us take, for example, the obligation of customary international law which requires the State to exercise a certain vigilance to prevent unlawful attacks against the person or property of aliens. If, in a concrete case, the State has been unable to prevent an attack of this kind, it can still discharge its obligation by offering reparation for the damage suffered by the alien who was attacked. A similar conclusion is reached in regard to article 9, paragraph 1, of the International Covenant on Civil and Political Rights which provides that “No one shall be subjected to arbitrary arrest or detention”. The obligation here set out should be read together with paragraphs 4 and 5 of the same article, which provide, respectively, that

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful and that

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. This juxtaposition of provisions shows that the State can consider that it has acted in conformity with its international duties even when, having failed to achieve the main result required by the obligation stated in article 9, it has nevertheless achieved the alternative result of making reparation for the injury unlawfully caused to the person who suffered an arrest or detention which should not have taken place.

24. To sum up, the international obligations which do not go so far as to require a specific course of conduct of the State (or, one might say, conduct by specifically designated organs), but are confined to requiring the achievement of a given result, are characterized, as compared with the former, by a degree of permissiveness, which is, moreover, variable. As already seen, this permissiveness may include initial freedom to choose between the various means of achieving the desired result. In addition to this freedom of choice, or even without it, it may sometimes include the possibility of applying a remedy a posteriori to the effects of an initial conduct which resulted in a situation contrary to the desired result. And this faculty of applying a remedy may extend only to the belated achievement of the same result, by the obliterating of all the consequences of the initial conduct; or it may go so far as to include the achievement of an alternative result, considered, to some extent, as equivalent to that which the initial conduct has rendered impossible to achieve.

25. In the light of these findings, it must now be established how the breach of an international obligation of the kind considered in this section is to be determined. This task is much less simple than in the cases considered in the preceding section, where the existence of the breach was shown simply by comparing the conduct in fact adopted by the State with the conduct it was specifically required to adopt in the case in point. In the cases considered in the present section, it will, rather, be necessary to compare the result required by the international obligation with the result finally attained in practice by the course or courses of conduct adopted by the State. Only where the two results do not coincide must it obviously be concluded that the conduct of the State was not in conformity with what the international obligation required of it, and that there has therefore been a breach. In other words, it is the circumstance that the result required by the international obligation has not been achieved which alone characterizes the nature of the breach. It is now necessary to examine in greater detail how this circumstance applies in the different cases discussed in the foregoing paragraphs and the consequences which follow from it in each case.

26. It is natural to begin by considering the case in which the permissiveness which characterizes the international obligation as to the means of ensuring its fulfilment takes the form, as we have seen, of a simple initial freedom to choose between the different means of the Vienna Convention on Diplomatic Relations, which lays down that “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.” It is obvious that both the letter and the spirit of this provision make it impossible to accept that the State can consider it has fulfilled its obligation if it offers to pay compensation for the arrest or detention of a diplomatic agent. As we have emphasized several times, the obligation which remains in regard to the foreign diplomatic agent amounts to requiring the State to adopt a specific course of conduct of forbearance, not merely to achieve a certain result and still less to achieve a possible alternative result, such as reparation for the injury caused to the diplomatic agent by arrest or detention.

48 For reference, see foot-note 40 above.

49 In addition, as noted above in foot-note 44, the Covenant contains in article 41, para 1 (c), a general provision making the exhaustion of domestic remedies a condition for the Committee on Human Rights to “receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant”. Now any domestic remedy may put an end to arbitrary arrest or detention or provide reparation for injury suffered, but it certainly cannot prevent the arrest or arbitrary detention from having taken place. Reparation for the injury caused is clearly only an alternative result, achieved instead of the primary required result of preventing arbitrary arrest or detention.

Once again, attention must be drawn to the difference between an obligation such as that to which we are referring and another, apparently similar, obligation such as that contained in article 29.
available for achieving the result internationally required. This freedom of choice, as we have also seen, obtains both where the international obligation is completely neutral as to the choice, and where the instrument in which the obligation is embodied expresses a simple preference for one means rather than another, without that preference being binding on the State. In both cases, the State is only required to achieve the result called for by the obligation.

27. Let us take the case of an international obligation which allows the State to achieve the required result by whatever means it prefers, that is to say, either by promulgating a law, or by passing an act or issuing administrative regulations, or by following established practice or adopting a new practice, or by some other means. It seems obvious that, when an international obligation is of this nature, the State’s choice of the means to be employed can in no case constitute the breach of the obligation. The breach can consist only in the fact that the State has not in practice succeeded in achieving the result internationally required by one or other of the means available to it for doing so. This logically evident conclusion comprises the following four elements:

(a) Where the State has in fact succeeded, by the means of its choice, in achieving the internationally desired result, no one can claim that it has committed a breach of the obligation on the ground that its conduct was contrary to that which allowed the State to achieve the required result by the international obligation.

(b) So long as it cannot be established in concreto that the State has failed in its task as regards the result required of it by an international obligation, the fact that it has not taken the measure which, in abstracto, would have appeared the most appropriate for achieving that result is not in itself sufficient grounds for charging the State with a breach of the obligation;

(c) So long as there has been no concrete failure to achieve the result required, the conclusion is the same where the State has taken a measure susceptible in principle of frustrating the achievement of that result, but has not itself created a concrete situation contrary to that result;

(d) On the other hand, where it is established that the situation actually created by the State, by one or other of the means between which it could choose, is contrary to the result required of it by an international obligation, the State obviously cannot claim that it has fulfilled its obligation by invoking, for example, the fact that it had nevertheless adopted measures by which it could hope to achieve the required result.

28. The conclusion just stated and its different elements are inescapable from the point of view of logic and common sense; they are the obvious consequence of the fact that, in the cases considered, it is only the result actually achieved which counts, and a comparison of that result with the result which the State should have achieved is the only criterion for establishing whether the obligation has been breached or not. However, it should be emphasized that this same conclusion and its elements are fully confirmed by an examination of State practice, international jurisprudence and the opinions of learned writers.

29. In section 5, it was noted that the difference in the form taken by the breach of an international obligation, according to whether it required the State to adopt a specific course of conduct or only required it to achieve a specific result by conduct of its own choice, had been clearly brought out in the practice of States, when examining the possibility of establishing that a breach of an international obligation has been committed by taking or failing to take legislative action. Certain States which, like Switzerland and Poland, stated their opinion on the matter in their replies to point III, No. 1 of the request for information addressed to them by the Preparatory Committee for the 1930 Codification Conference, pointed out that, in the second case, which in their opinion was much more common than the first, the adoption or non-adoptions of a law having a specific content could only be considered as one means, among others, of achieving a result, which alone was decisive.

A similar statement of position may be noted in a letter sent on 18 October 1929 by Mr. Albert Thomas, the Director General of the International Labour Office, to the Government of the Irish Free State, in reply to an inquiry from that Government as to whether the provisions of the Weekly Rest Convention were fulfilled by existing practice in that country. While pointing out that the course most usually adopted to secure the Convention’s effective application was that of passing legislation, the letter from the Director General of the International Labour Office emphasized that the State was free to follow whatever method seemed most appropriate in its particular case, provided only that method would in fact ensure effective application of the provisions of the Convention.

As we recalled in paragraph 8 above, the Swiss Government emphasized the need to qualify its reply to the question whether international responsibility was engaged by the failure of a State “to enact legislation necessary for the purpose of implementing” its obligations. It replied in the affirmative only as regards the case in which an international agreement expressly required the parties to take specific legislative measures. It observed that, in the other cases, “it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations”.

The Polish Government in its reply distinguished between the “entirely exceptional and very rare case of a State which has assumed an international undertaking to enact provisions before the expiry of a certain period” and “all other cases”. It indicated that only in the first case did the fact that the provisions had not been enacted within that period constitute an offence, whereas in the other cases “the mere fact of not enacting legislation does not involve international responsibility”. See League of Nations, Basis of Discussion ... (op. cit.), pp. 28-29.

Mr. A. Thomas’s letter stated: “The Convention leaves considerable latitude to the Governments which ratify it ... A Government is therefore free to apply under the Convention any system which meets with its approval; and the existing practice in the Irish Free State would undoubtedly fulfil the requirements of the Convention ... it is for the Government which undertakes international responsibility as a party to a Convention to judge what is the action which in its view will secure the Convention’s effective application ... The course most usually adopted is that of passing legislation to make the application of the weekly rest compulsory.”

(Continued on next page.)
Thus, these different statements of opinion expressly confirm the correctness of the conclusion stated above and of its first element, according to which, if the internationally required result is achieved by the State in a particular case, it matters little whether it is achieved by legislation or by any other means.

30. The replies quoted above to the request for information by the Preparatory Committee for the 1930 Codification Conference also provide confirmation of the second element of the conclusion already mentioned, which is closely connected with the first. According to this element, so long as the State has not failed to achieve in concreto the result required of it by the international obligation, the fact that it has not taken a specific measure to that end (and in particular has not enacted a law) cannot be held against it as a breach of the obligation.

In the continuation of the Swiss Government's reply to the request for information by the Preparatory Committee, it is stated:

... even in the absence of a law by which the State could immediately fulfill its obligations, we will not be confronted with a fact or act contrary to international law unless some circumstance arises by which the rights of other States are prejudiced.

In the continuation of the Polish Government's reply, it is stated that responsibility:

... ensues only if the State authorities or tribunals refuse, in the absence of relevant municipal provisions, to give effect to rights arising out of international undertakings. Until this has occurred, there is nothing to show that such provisions are required, that the authorities and tribunals, for example, will give decisions incompatible with the international undertakings of the State; it should be left to the State to decide whether the promulgation of a special law, decree or circular is necessary.

31. With regard to the ideas put forward in the works of learned writers, these also accord with the basic conclusion set out in paragraph 27, particularly with its first two elements, supported, as we have seen, by official expressions of the opinion of States. The authors of these works also naturally concentrate their attention on the problem as it arises in relation to the taking of, or failure to take, legislative measures. They state very emphatically that, in their view, no State which has specifically ensured the result required of it by an international obligation can be accused of breaching that obligation on the ground that it achieved the result without enacting a law for the purpose, and, more generally, that failure to take legislative measures does not in itself warrant the conclusion that the obligation has been breached unless it can be affirmed that the State specifically failed to ensure the result in question. These principles had already emerged clearly from the reasoning of Heinrich Triepel; they have been explicitly formulated in the writings of Charles de Visscher and Eduardo Jiménez de Aréchaga. Some authors have explicitly stipulated that these principles are merely the necessary consequence of

\[\text{Foot-note 53 continued.}\]

in industrial undertakings ... It would, however, suffice that legislation should be adopted which would be confined to giving the force of law to the existing practice ... It is for the Government of the Irish Free State to appreciate which of these methods is the best adapted to its requirements. Any of them would ... secure the effective fulfilment of the Convention." (ILO Official Bulletin, vol. XIV, No. 3, 31 December 1929, pp. 125-126.) See also The International Labour Code, 1951 (op. cit.), p. 277, note 464.

Para. 27.

Para. 27 (b).

In other words, so long as the State has not actually reached a result in conflict with that internationally required of it (League of Nations, Basis of Discussion ... (op. cit.), p. 29).

Ibid. The reply of the British Government gave examples of obligations for the fulfilment of which the adoption of legislative measures constituted the appropriate and, probably, essential means. But it clearly brought out that, in view of the form of the obligations, which required only the achievement of a certain result, the failure to adopt such legislative measures should not be considered as in itself a breach of the obligations. The breach would be established only if, probably through lack of appropriate provisions, the State showed itself unable in practice to achieve the result required by its obligation.

\[\text{Foot-note 53 continued.}\]

\[\text{Foot-note 53 continued.}\]
a distinction between obligations requiring the State to adopt a specific course of conduct and those which merely require it to achieve a particular result. 61

32. At first sight, acceptance of the third element of the conclusion set out on the basis of the characteristic nature of obligations which leave the State free to choose the means of achieving the result required, may raise problems. 62 It may be asked whether it is quite clear that the adoption of a measure or, particularly, of a law which would appear to obstruct the attainment of the result internationally required is not in itself sufficient to establish that there has been a breach of the international obligation. But there is no justification for doubt: logically, whatever the measure taken, we can say that there has been a breach of an obligation requiring a particular result to be actually attained only if it is in fact established that this result has not been attained, not if it has merely been found that there is an obstacle to its attainment. The difficulties experienced by certain writers seem to us to be really due to the fact that they have not borne in mind the distinction to be made between the different types of obligation, and that they have taken an undifferentiated position on the whole question whether the promulgation of a law “contrary to international law” is in itself a breach of its obligation by the State, or whether the breach only occurs later, when the law is applied in practice. It is therefore logical that those among these writers who had mainly in mind obligations specifically requiring the State to enact or not to enact a certain law should naturally have reached the conclusion that the breach occurs when the law is promulgated 63 and that, conversely, those who were thinking mainly of obligations which require only the attainment of a concrete result should have reached the conclusion that the breach occurs only when the law is applied to a specific case. 64 But most writers have found it necessary to make a distinction between different situations and have maintained that either conclusion could be justified, depending on the content of the obligation 65 and the circumstances of the particular case. 66 However, the criteria put forward on both sides for establishing in which specific cases the mere fact of having passed a law with a particular content constitutes a breach of an international obligation, and in which cases the opposite conclusion is warranted, vary and do not always seem pertinent. 67 The writers who have based their solution of the problem on the distinction between the breach of obligations “of conduct” and the breach of obligations “of result” are undoubtedly those who have provided the valid criterion for deciding the question we are considering. 68

33. In the opinion of the Special Rapporteur, the criterion of differentiation advocated by these writers is not only the most logical: it also permits the most plausible interpretation of State practice and international jurisprudence. State practice, it must be admitted, does not abound in explicit statements of position on the question under consideration. The replies from Governments to point III, No. 1 of the request for information by the Preparatory Committee of the 1930 Conference were bound to be influenced on this point by the rather superficial manner in which the question was drafted. Many countries accordingly confined themselves to answering in the affirmative, without giving any information as to the extent of the agreement they were expressing. However, we think it would be quite wrong to believe that, by such answers, the Governments concerned meant to express their conviction that, in the event of legislative action by the State, its international responsibility would immediately and in all cases be engaged by the promulgation of the law. On the contrary, the reply of the South African Government, for example, 69 shows that it regarded the request submitted to it as referring to the application, not the promulgation of the law. Two other Governments, those of Great Britain and Switzerland, explicitly stated that, in their view, the mere fact of the adoption of a measure, such as the promulgation of a law, which constituted an obstacle to the fulfilment of the obligation, would not in itself warrant the conclusion that there was a breach of an international obligation. The British Government stated that “It is not the enactment but the enforcement of the legislation so enacted which engages

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61 See, in particular, Bilge, op. cit., pp. 103-104; and Vittar, op. cit., p. 95 et seq.
62 See para. 27 (c) above.
63 This applies, for example, to U. Scheuner, who nevertheless qualifies his assertion by the words “as a general rule” (“L’influence du droit interne sur la formation du droit international”, Recueil des cours …, 1939-II (Paris, Sirey, 1947), vol. 68, p. 121 et seq.).
65 B. Cheng, for example, observes that the answer to the question raised here “depends upon what is in fact prohibited by the particular rule of international law and upon whether the municipal law actually contravene it or merely enables some other organ of the State to do so” (General Principles of Law as applied by International Courts and Tribunals (London, Stevens, 1953), pp. 174-175).
67 Some writers make a distinction according to whether the law can be applied direct or whether it requires the enactment of regulations for its application (for example, P. Guggenheim, Traité de droit international public (Geneva, Georg, 1954), vol. II, pp. 7-8). Others base the distinction on the fact that the law “directly violates existing rights or rules”, as in the case of an illegal revocation of a concession granted to a foreign company, or that it produces wrongful effects only when there is “implementation in concreto”, as in the case of a law laying down directives for future nationalizations (see J. H. W. Verzijl, International Law in Historical Perspective (London, Sijthoff, 1973), vol. VI, pp. 621-622, 641-642). Others, again, emphasize that, in the case of injury to a State, the promulgation of the law may be sufficient in itself, whereas when the injury is suffered by foreign individuals, responsibility generally arises at the time of its application (E. Jimenez de Arechaga, loc. cit., pp. 547-548; L. Brownlie, Principles of Public International Law, 2nd ed. (London, Oxford University Press, 1973), pp. 435-436).
68 These are, in particular, the writers who have published monographs on the question of State responsibility for the acts of legislative organs. See Bilge, op. cit., pp. 101 et seq.; and Vittar, op. cit., pp. 89 et seq. See also Sereni, op. cit., pp. 1538-1539; A. A. Fabre, Principes du droit des gens (Paris, Librairie de droit et de jurisprudence, 1974), pp. 650-651.
69 See League of Nations, Bases of Discussion … (op. cit.), p. 25. The South African Government stated that the “enforcement of legislation incompatible with the provisions of a treaty concluded with another State or with its other international obligations” engaged the responsibility of a State.
the responsibility of the State”. *70 while the Swiss Government held that “Generally speaking . . . we should not consult the various laws as such in order to ascertain and establish international responsibility, but rather the facts deriving from these laws, which affect the rights of other States”. *71 We may add that the view expressed by the British and Swiss Governments, like the request to which they were replying, related only to responsibility for the breach of obligations concerning the treatment of foreigners, which are in fact obligations requiring only the achievement of a particular result. If their replies had related to the breach of obligations in any sphere in general, they would no doubt have been more detailed. The two Governments would probably have found it necessary to distinguish between cases in which the enactment of a law constitutes the “specific conduct” which itself constitutes the fulfilment or breach of an international obligation, and the more frequent cases in which the enactment of a law is only one of the ways in which the State can arrive at the concrete result which is the real object of the international obligation. 72 It seems probable that, had other Governments given their views in more detail, they would have endorsed the views of the British and Swiss Governments. It can therefore be accepted that the codification work done by the League of Nations in 1929 and 1930 does not provide sufficient evidence to establish with certainty what States considered, at that time, to be the correct solution to our problem. It must, nevertheless, be recognized that the results of this work are certainly not incompatible with the conclusion that, where an international obligation only requires the achievement of a specific result by the State, it cannot be concluded that this obligation has been breached merely because the State has enacted a law which may be an obstacle to the attainment of the result required.

34. When the positions taken by Governments in specific cases are examined, it is interesting to note those of the United States and Great Britain in the controversy which arose between the two countries in 1912-1913 concerning the Tolls on the Panama Canal. In 1912, the United States Congress passed an Act regulating tolls on the Canal on the basis of criteria which Great Britain considered incompatible with the provisions of article III, paragraph 1, of the Hay-Pauncefote Treaty of 18 November 1901, which provided for equality of treatment for the flags of all nations parties to the treaty, without discrimination.73 Invoking article I of the Arbitration Treaty of 1908, the Government in London therefore proposed that the question be submitted to arbitration. The United States Government did not go into the substance of the matter, but opposed that British proposal, saying:

When, and if, complaint is made by Great Britain that the effect of the act and the proclamation together will be to subject British vessels as a matter of fact to inequality of treatment, or to unjust and inequitable tolls in conflict with the terms of the Hay-Pauncefote Treaty, the question will then be raised as to whether the United States is bound by the treaty both to take into account and protect rights from American vessels, and also whether under the obligations of that treaty British vessels are entitled to equality of treatment in all respects with the vessels of the United States. Until these objections rest upon something more substantial than mere possibility, it is not believed that they should be submitted to arbitration.74

The British Government expressed a different view, in the following terms:

... international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that a nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a conclusive instance has been taken, which in the present instance would, according to your argument, seem to mean until tolls have been actually levied upon British vessels from which vessels owned by citizens of the United States have been exempted...

... the Act of Congress, when it declared that no tolls should be levied on ships engaged in the coasting trade of the United States, and when, in further directing the President to fix those tolls within certain limits, it distinguished between the vessels of citizens of the United States and other vessels, was in itself, and apart from any action which may be taken under it, inconsistent with the provisions of the Hay-Pauncefote Treaty for the equal treatment of the vessels of all nations.75

In the end, there was no arbitration in this case, as the United States agreed to amend the law which had given rise to the exchange of notes. But it is nevertheless interesting to consider the positions taken by the two Governments. The United States view was fully consistent, at least from the formal standpoint, with the general principle which seems to us to compel recognition in this matter: the principle that it cannot be concluded that there has been a breach of an obligation requiring a State to achieve a particular result in concreto, on the ground that the State has taken a legislative or other measure which falls short of creating a specific situation not in conformity with the desired result, even if such a measure introduces an obstacle to the attainment of that result. The British view, on the other hand, seems to equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.” (British and Foreign State Papers, 1900-1901, vol. XCIV (London, H.M. Stationery Office, 1904). p. 47.)


contradict that criterion. It may, however, be noted that the measure taken by the United States Government in this case did not impose higher tolls on British vessels than those levied on United States vessels, but exempted United States vessels from the tolls which continued to be levied on the vessels of other nations. It could therefore be maintained with some justification that the situation which resulted for British vessels was already a discriminatory situation in concreto, which was unlawful under the Treaty, which explains President Wilson's prompt action to change the situation by the 1914 Act. Moreover, as Lord McNair's comment on the British Note states:

... the British Note did not go so far as to allege that a violation of the Treaty had already occurred, and ... the following paragraphs are rather in the nature of the assertion of a right, quia timet, to protest and demand arbitration. 76

Indeed, the purpose of the British protest and its proposal for arbitration seem to have been to prevent an internationally wrongful act from occurring, rather than to invoke the consequences of a wrongful act already committed. 77 And, as already noted, in 1929 the British Government was to adhere firmly to the principle that is not the law as such which gives rise to State responsibility but the facts deriving from that law. 78

35. As regards international jurisprudence, it may be recalled that the United States-Panama General Claims Commission, established by the Convention of 28 July 1926, took the problem before us directly into consideration in its decision of 27 June 1933 in the Mariposa Development Company case. It stated that:

The Commission does not assert that legislation might not be passed of such a character that its mere enactment would destroy marketability of private property, render it valueless and give rise forthwith to an international claim, but it is the opinion of the Commission that ordinarily, and in this case, a claim for expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible.

Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. There should be a locus penitentiae for diplomatic representation and executive forbearance, and claims should arise only when such confiscation follows. 79

The criterion adopted by the United States-Panama Claims Commission is thus in full conformity with that set out in subparagraph (c) of the conclusion reached in paragraph 27 above. In the case submitted to the Commission, the result intended was clearly respect for the property of foreigners. And, in the Commission's view, it could not already be maintained that this result had not been achieved merely because a law had been enacted which would permit future confiscations of property belonging to foreigners ("legislation is passed which makes the later deprivation of possession possible"). It could not be held that there had been failure to achieve a result, and subject to the existence of subsequent possibilities of obtaining that result—a point which will be dealt with specifically later—it could not be held that an obligation had been breached, unless there had been actual interference with the property of a foreigner ("the possession of the owner is interfered with"). As the Commission pointed out, the only case in which, from another standpoint, the acquired result could be regarded as wanting, as soon as the law authorizing expropriation was enacted, would be that in which the enactment of the law seriously reduced the commercial value of the foreigner's property. 80 Otherwise, in the Commission's view, a breach would occur when the foreigner was deprived of his property in concreto, not when all that had been done was to adopt a measure making such deprivation possible in abstracio.

36. In other international judicial decisions, acceptance of the principle to which we are referring is, if not expressis verbis, at least implicit. This is so, for example, where the Permanent International Court of Justice, asked to rule on whether a particular law constituted a breach of an international obligation or not—an obligation requiring the achievement of a particular result by the State, not the adoption of a specific course of conduct—referred to the application of this law, not to its enactment. In its very well-known judgment of 25 May 1926, in the case concerning Certain German Interests in Polish Upper Silesia (the merits), the Court stated that:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case ... The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, * Poland is acting in conformity with its obligations towards Germany under the Geneva Convention. 81

The European Court of Human Rights appears to endorse the same criterion when stating, in its judgment of 27 March 1962 on the De Becker case:

... the Court is not called upon, under articles 19 and 25 of the Convention, to give a decision on an abstract problem relating to the compatibility of that Act with the provisions of the Convention, but on the specific case of the application * of such an Act to the Applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention ... 82

76 Ibid., p. 548.
77 A note of protest and a proposal that the existence of a right should be established by an objective authority may very well be justified as a means of preventing an internationally wrongful act. See Schwarzenberger, op. cit., p. 614; Vitta, op. cit., p. 95; Favre, op. cit., p. 651.
78 See para. 33 above.
80 On this point, see Reuter, loc. cit., pp. 95-96.
81 P.C.I.J., series A, No. 7, p. 19. In the advisory opinion of 4 February 1932, concerning the Treatment of Polish nationals in Danzig (ibid., series A/B, No. 44, p. 24) the Court also considered that: "The application * of the Danzig Constitution may, however, result in the violation of an international obligation incumbent on Danzig".
Lastly, very similar positions may be noted in a series of decisions of the European Commission on Human Rights. 83

37. We may therefore sum up the result of our investigation by noting that the writers of learned works, State practice and international jurisprudence all confirm what we first logically deduced from the characteristic nature of obligations requiring the State to achieve a specific result. The fact that a State under an obligation of this kind has adopted a measure or, in particular, that it has enacted a law constituting in abstracto an obstacle to the attainment of the result required is not in itself a breach or even the beginning of a breach of the obligation in question. 84 A breach will exist only if the State is found to have failed in concreto to ensure the said result.

38. Lastly, we may refer to the fourth element of the conclusion reached regarding determination of the existence of a breach of an obligation requiring the State not to adopt a specific course of conduct but to achieve in concreto a certain result. 85 This is the element according to which a State having failed to achieve the required result cannot escape the charge of not having fulfilled its international obligation by claiming that it did, nevertheless, adopt measures by which it hoped to achieve the result required of it. As has been said repeatedly, what is important is that the concrete result should be achieved: if it is not, a breach has been committed, regardless of the measures taken by the State. 86 We have seen, for example, that article 2, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination provides that States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms... 87

Now it is obvious that, if the executive authorities of a State Party to the Convention in fact commit acts of racial discrimination, the State will not escape the consequence of being charged with a breach of the Convention by taking refuge behind some law prohibiting such acts which it may have adopted. 88 It is, moreover, unnecessary to dwell further on this point, since the truth stated in the last element of the conclusion set out above 89 (an element which deals with the opposite situation from that previously considered and settles the case according to the same principles) is self-evident.

39. At the beginning of our examination, 90 we said that it would begin with consideration of the case in which, to achieve the result required by a specific international obligation, the State has initial freedom of choice as to the means to be used for this purpose, but is allowed no other latitude than this initial freedom. It is obvious in a case of this kind that, if, through the active or omission of conduct it adopts in taking one of the courses it is free to choose, the State creates a situation incompatible with the result required of it by its international obligation, it thus loses the opportunity of fulfilling that obligation. It is not allowed to remedy the effects of its conduct ex post facto or to change the situation it has created by recourse to another means.

40. It is not impossible that this limitation of the discretion given to the State—for the fulfilment of its obligation—to an initial choice of the different means which could be used to achieve the internationally required result, should be expressly stated in the text of the instrument which establishes the obligation in question. But such a limitation is more likely to be implicit in the context of the instrument or its object and purpose. Most frequently, no doubt, it follows automatically from the specific nature of the result required by the international obligation in question, because, owing to the nature of that result, the creation of a situation which is contrary to it will make it definitively impossible to achieve. As an illustration of this case, let us take one of the examples referred to above, 91 namely, the requirement of article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, which provides that “The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity”. As regards customary international obligations relating to the status of foreigners in general, we can also take the case of the obligation by which the State is required to take minimum preventive measures to protect foreigners against attacks due, for example, to an outbreak of xenophobia. There is no doubt that both of those obligations merely give the State an indication of the result to

83 The decisions on applications Nos. 290/57 against Ireland and No. 867/60 against Norway all contain the following statement: “... the Commission may examine the compatibility of domestic legislation with the Convention only with respect to its application to a person, non-governmental organization or group of individuals and only insofar as its application is alleged to constitute a violation of the Convention... in regard to the applicant person, organization or group in question;...”.


84 Except, of course, in instances such as that referred to by the Claims Commission in the Mariposa Development Company case (supra, para. 39), where the law in question would itself create a specific situation incompatible with the internationally required result.

85 See para. 27 (d) above.

86 The result to be achieved must obviously be that which the international obligation requires of the State and nothing else. This point should be stressed, particularly in connexion with the possible breach of an obligation requiring the State, for example, to provide adequate protection against certain external events by the means it considers most appropriate. It is obvious that the result required in such a case is that the system of protection should be established and made operative, not that the event feared should be avoided in all circumstances. In a later section, we shall consider more particularly internationally wrongful acts constituted by events, and their distinguishing characteristics.

87 For reference, see footnote 8 above.

88 See para. 27 (d) above.

89 It should also be noted that, even where an obligation specifically requires the State to enact a law with a certain content, that obligation is usually accompanied by an obligation to apply the law. The fact of having enacted the prescribed law then constitutes fulfilment of the first obligation, but possible failure to apply the law in practice constitutes a breach of the second obligation. See, in this connexion, the position stated at the end of the part of the report of the Ghana-Portugal Inquiry Commission, cited in paragraph 9 concerning violation of ILC No. 105 on the Abolition of Forced Labour.

90 See para. 27 (d) above.

91 See para. 17 above.
be achieved and that the State does certainly have initial freedom to choose the means by which to establish the required system of protection. However, when, whatever the means used to provide such protection, its manifest inadequacy permits the occurrence of an invasion of the premises of an embassy, the lynching of a foreigner or a massacre of nationals of a particular country by a rioting crowd, it can only be concluded that the State has failed irremediably in its task and that there is no further possibility of using other means to restore a situation *ab initio* in conformity with the result required by the international obligation. It must then be recognized that the result to be achieved by the State has not, and will not, be achieved and that it has thus committed a breach of the obligation.

41. The cases considered in the two preceding paragraphs are, however, the exception rather than the rule. As we have seen, where international law defines the obligation it lays on the State by a simple indication of the result to be achieved, the discretion it gives the State as to the means of achieving this result usually goes beyond mere initial freedom of choice. So long as the required result has not become finally unattainable by reason only of the fact that the initial conduct of the State failed to achieve it, international law does not usually preclude a State, one of whose organs has created a situation incompatible with the result required by an international obligation, from still achieving this result through a new course of conduct by State organs, which eliminates the existing situation and replaces it by another that will *ab initio* be in conformity with the required result. In this case, the possibility of subsequent action open to the State is added to, and supplements, its initial freedom of choice. The latitude left to the State in regard to the fulfilment of its obligation is thus defined in its entirety.

42. One reservation must, however, be made before conclusions are reached on the conditions for recognizing the existence of a breach of an international obligation in the case considered. It may well be that, internationally, there is nothing to prevent the State from still fulfilling its obligation by remedying, *ex post facto*, by the adoption of different conduct, a situation incompatible with the internationally required result which was created by its initial conduct. But it is also possible that the State may encounter an obstacle to this solution in its own system of internal law. This is the case especially when the situation which is incompatible with the internationally required result has been created by means whose effects cannot be obliterated. For example, if the situation was created by the enactment and effective application of a law, there is, in most cases, no hope of finding, in the internal legal system, any means of changing this situation retroactively and thus still achieving the result to which the law ran counter. It would be otherwise only if there existed, in the machinery of the State, a judicial authority empowered to declare legislative acts null and void and to obliterate their effects retroactively. The obligation to respect the property of foreigners, which is imposed by some treaties, is the typical example of an obligation which requires the State to achieve a certain result, but leaves it complete latitude as to the means of doing so. But if the State passes a law providing for the expropriation, without compensation, of certain classes of foreigner, or of certain kinds of property belonging to them, and applies that law to the property of persons covered by such a treaty, it cannot reasonably be expected that the obligation imposed by the treaty can still be fulfilled since it is hard to see what organs or authorities would have the power to fulfil it. The same conclusion is valid for cases in which the action that created a situation incompatible with the required result takes the form of a measure by the executive power which can be neither repealed nor amended by another State organ, of a judicial decision against which there is no appeal, or of an administrative or judicial measure which has merely correctly applied a mandatory provision of the law. For it should be stressed—and not in these cases only—that the impossibility of rectifying the consequences of initial conduct by new conduct which obliterates them may result, not from any real lack of means that can be used for this purpose in the internal legal system, but from the fact that the availability of such means is purely formal, since, in the case in point at least, they offer no real prospect of achieving the required result. In all these cases, the obstacle which makes it impossible to remedy the situation created by the initial action or omission of the organ concerned thus has the same paralysing effect as the obstacle which, as we saw in the preceding paragraph, is encountered when the initial action or omission of the State has made it impossible, in fact, to achieve the result required by the international obligation. In both cases, the State does not really have any means of wiping out the consequences of its initial conduct. Hence, it can only be concluded that the result which the State was required to achieve has not been and will not be achieved: the existence of a breach of the obligation will thus inevitably be established.

43. Thus, when the initial conduct of an organ of the State has created a situation incompatible with the result required by an international obligation, for that situation itself not to be a complete and definitive breach of the obligation, three conditions must be met: (a) the obligation itself must, in principle, give the State discretion to pursue the achievement of the required result, even after a situation incompatible with that result has been created by an action or omission of one of its organs; (b) the required result must not in fact have become unattainable in consequence of that action or omission; and (c) the internal legal system must not place any formal or real obstacles in the way of subsequent efforts nevertheless to fulfil the obligation. If all these conditions are satisfied, it clearly cannot yet be concluded that the State has finally failed to achieve the result properly expected of it. The fact that the organ which first intervened in the case created, by its action or omission, a situation incompatible with the required result is only a beginning or adumbration of a breach of the international obligation, since the State has not yet

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92 This is not necessarily always so, however, for as pointed out in paragraph 6 above, the State may still remedy, *a posteriori*, the consequence of initial conduct opposed to the achievement of the internationally required result, even in cases where, originally, the particular nature of the result to be achieved did not permit of a real choice between different means of action, since the result could, in fact, initially be achieved in only one way.
exhausted all its available means of achieving that result. This adumbration will, moreover, come to nothing if the State can seize the opportunity still open to it and fully achieve the required result by new conduct which eliminates, entirely and ab initio, the incompatible situation created by its previous conduct. In this connexion, we need only refer to the international obligations cited as examples. Let us suppose that, contrary to the requirements of international conventions on human rights, the police authorities of a State deny certain persons freedom to reside in the place of their choice, freedom of association or freedom to profess their religion etc., or that, contrary to the provisions of an establishment treaty, the competent administrative authority refuses, or withdraws from, a foreign national a permit to exercise a certain profession or activity. In both these cases, the State can still, if it wishes, create a situation which conforms to the internationally required result, provided that the country has a higher administrative authority, or an administrative or civil court which is competent, and in fact able, to revoke the prohibition of residence or association, to remove the obstacles to the practice of the chosen religion, or to revoke the decision refusing or withdrawing a permit. Let us also suppose, again, that, contrary to an obligation laid down in an international convention, which requires the national law of a particular country to be applied to certain relations involving nationals of that country, a court of first instance applies a different law in a given case, or that, contrary to obligations imposed by international custom, a court obstructs the normal course of an action brought by a foreigner or acquits persons known to have committed a crime against the representative of a foreign Government or for that matter against any foreigner. The State will still be able to fulfill its obligations provided that there is a higher authority able to reverse the wrongful decision and thus create a situation which in every respect conforms to the internationally required result.

44. Thus, in all these different cases, the initial conduct of a State organ which has created a situation incompatible with the internationally required result becomes a complete breach of the international obligation only if the State refrains, despite the possibility open to it, from eliminating this situation or confirms it by further action. It will be as a result of this later action or omission that the existence of the breach will be definitely established and that the responsibility of the State will be directly engaged. However, since the beginning of the breach represented by its initial conduct will not have been effaced but rather completed by the State’s subsequent conduct, the breach will finally be brought about by a complex act, combining all the successive actions and omissions of the State in the case in question.

45. It only remains to refer briefly to the last of the three possible cases successively considered in the first part of this section, namely, the case involving the category of obligations whose characteristics have been described and examples of which have been given above. As stated, these obligations, as compared with those mentioned previously, are characterized by an even greater degree of permissiveness as regards the latitude left to the State for their fulfilment. By reason of their nature and purpose and their field of application, when the initial conduct of a State bound by such an obligation, besides creating a situation incompatible with the internationally required result, has made the attainment of that result materially impossible, the State still has a last opportunity of discharging its international duties. It is allowed, as an exception, to produce an alternative result, instead of that originally required—a result different from that required under the obligation, but in a way equivalent to it. The conclusion as to the recognition of a breach of one of these obligations is self-evident. As has already been said, a State cannot be charged with a complete breach of the obligation to exercise vigilance to prevent unlawful attacks against the person or property of foreigners, or of the obligation to protect every person against arbitrary arrest and detention, merely because it has not been able to prevent such wrongs from occurring. In order to be able to conclude that such a breach has been committed, it must be established that the State, not having achieved the priority result, has also failed to achieve the alternative result, namely, full and complete compensation of the victims for the injury sustained. It is this second failure which, added to the beginning of a breach constituted by the first, makes it into a complete and definitive breach. And, as in the case previously considered, the breach is constituted by a “complex” act of the State.

46. In view of the information provided and the arguments set out in this section, to define its difficult subject-matter the Special Rapporteur proposes the adoption of the following text:

**Article 21. Breach of an international obligation requiring the State to achieve a particular result**

1. A breach of an international obligation requiring the State to achieve a particular result in concreto, but leaving it free to choose at the outset the means of achieving that result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result.

2. In cases where the international obligation permits the State whose initial conduct has led to a situation incompatible with the required result to rectify that situation, either by achieving the originally required result through new conduct or by achieving an equivalent result in place of it, a breach of the obligation exists if, in addition, the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct.

7. **Exhaustion of local remedies**

47. The preceding section of this chapter was devoted to a consideration of how, in general, a breach of an...
international obligation occurs when the latter does not require the State to adopt a specific course of conduct, but merely to take positive steps to ensure a particular result. We pointed out that, in this case, it is logical that both the fulfilment and the breach of the obligation should be assessed by that result. We therefore began by emphasizing the fundamental criterion that a breach exists when there is no tangible evidence of the required result having been achieved. In the light of this criterion, we asked ourselves in what respect the more or less generous latitude allowed the State in achieving this result is decisive for concluding that there has been a breach of an international obligation. Our analysis enabled us to define the basic principles indicating the conditions in which it may be considered that such a breach has been committed, whether in cases where the State only has freedom of choice at the outset, or in the more frequent cases where the State, having created by its initial conduct a situation incompatible with the result required by the obligation, has the faculty to remedy that situation and still fulfil its obligation by subsequent conduct.

48. Having thus established the basic rules, we now have to study, in particular, in connexion with the last-mentioned cases, the specific conditions of a breach of obligations falling within a given category. We propose to discuss those obligations which are designed to protect individuals, natural or legal persons, and which, at the international level, formulate certain requirements and establish certain guarantees as regards the treatment to be accorded by States, at the internal level, to the persons in question and to their property. A further condition is then added, for the purpose of determining whether a breach of an obligation in this category has been committed, to those required in connexion with a breach of the other obligations which, moreover, are termed obligations “of result”. And in our view, the special aspect of these obligations, due precisely to the beneficiaries of their provisions, is also the cause of the special character of the conditions of their breach.

49. For where the result which the State is required to achieve is fixed essentially in the interest of individuals and affects their situation in the internal legal order of the State in question, it is natural that the co-operation of the persons concerned should be sought to get the State to comply with the stipulation laid down for their benefit by the international obligation. It is natural that, in case of difficulty, it is they who should be responsible for taking the initiative to promote action by the State to remedy the effects possibly engendered by an initial action or omission by a member of the State machinery, such action or omission being attributable to the State and running counter to the achievement of the internationally required result. Hence there will be a breach of the international obligation if the individuals who consider themselves injured through having been placed in a situation incompatible with the internationally required result, do not succeed, even after exhausting all remedies open to them at the internal level, in getting that situation duly rectified. In this case, the result sought by the international obligation becomes definitely unattainable by reason of the act of the State. However if, for various reasons, individuals who should and could set the necessary wheels in motion neglect to do so, the State can hardly be blamed for having failed to take the initiative to obliterate the specific situation which conflicts with the internationally required result, and which was created by its initial conduct. It follows, therefore, that, if the necessary action by the individuals concerned was not taken, the situation engendered by conduct of the State running counter to the internationally desired result could not be rectified by a subsequent action of the State capable of replacing it by a situation compatible with the said result. But the fact that there has been no such corrective action, simply because those on whom it was incumbent to take the necessary initiative have failed to do so, cannot be blamed on the State. The case here is quite different from that where, despite the necessary initiative having been taken to obtain redress, the situation created by the initial course of conduct is confirmed by a new conduct of the State, likewise incompatible with the internationally required result. In the case we are now envisaging, it cannot be concluded that there has been a breach of its obligation by the State, precisely because in fact one of the conditions for the completion of the breach has not been fulfilled. The absence of this condition has the effect of excluding the wrongfulness of the failure to achieve the internationally required result. In this case, therefore, no international responsibility can arise for the State. That, in our opinion, is what is meant by the condition known as “exhaustion of local remedies”.

50. The principle setting forth this condition has been the subject of special and sometimes very penetrating studies. Moreover, it is one of the principles which have attracted most attention from authors of general works on the responsibility of States for breach of their obligations concerning the treatment of aliens or their protection from injury to their person or their property. International courts have often stated this principle. It occurs frequently in international conventions designed to ensure that the contracting States accord a certain situation to private persons, whether aliens or even nationals. In view of the keen interest aroused and this abundance of formulations and analyses, it is only to be expected that different approaches should have emerged in the consideration and explanation of the principle, and that different ideas should have been put forward on the subject. Conflicting views have appeared, particularly as to the conventional or customary origin of the principle, as to whether it should be regarded as a substantive rule or a rule of procedure, and so on.

51. In our opinion, many of these differences are more apparent than real. They are often due to the fact that

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99 Where, on the other hand, the result to be achieved is required in the direct interest of other subjects of international law, the obligation to institute for this purpose action to enable the State still to fulfil its obligation, can only rest with the State, provided it has the possibility of remedying the effects of an initial course of conduct incompatible with that result. Indeed, it would hardly be natural that promotion of such action at the level of the internal legal order of the State should be left to another State and subject of international law.

99 Provided, of course, that the State itself is not to blame for this inaction by individuals.
the question has been badly put or, especially, to the fact that the specific framework within which the problem has been considered has suggested conclusions which would probably not have been reached if the analysis had been carried out in a wider framework. For no one disputes that the principle of the exhaustion of local remedies by private persons who consider themselves injured by measures or decisions incompatible with the treatment to which they are entitled under international law, makes such recourse, in the last resort, a condition for the “implementation” of international responsibility, whether the form taken by such implementation is the submission of a claim through the diplomatic channel, or the lodging of an appeal to an international judicial or arbitral tribunal. Thus no one can dispute that the principle has an obvious impact on the possibility of utilizing the procedures for implementing responsibility. But this does not warrant the conclusion that the principle itself is merely a “practical rule” or a “rule of procedure”, as some contend, even to the point of disagreeing on the question whether this “rule” should concern diplomatic protection in general or only the procedure for instituting proceedings before an international tribunal. The undeniable impact of the principle on these different procedures is a corollary, and a logical one, of the principle in question, but the main proposition it states cannot, in our view, be reduced to this corollary.

52. It is our contention that the principle of the exhaustion of local remedies applies necessarily, and primarily, to the determination of the existence of an internationally wrongful act arising through the breach of an international obligation, and thus to the genesis of international responsibility. To establish, for example, that a State has committed a breach of an obligation laid on it by a treaty, to guarantee a certain situation to a national of another State is tantamount—as we have already noted from the beginning of our work—to establishing that an international subjective right of that other State has been infringed: the right that its own national shall be accorded the situation provided for in the treaty. Hence, if a State has completely breached its obligation towards another State, and if the right of the latter has, in consequence, been definitively infringed, international responsibility is inevitably generated, imputable to the author of the mischief in question. Now, generation of responsibility means generation of those new subjective legal situations by which it is reflected. In our case, it is the generation of a new international subjective right of the injured State to reparation for the infringement of the right accorded to it by the treaty. But, it would be inconceivable that this new international subjective right of the State, generated by the infringement, should remain, as it were, suspended in mid-air pending the result of proceedings instituted by a private person at the internal level, proceedings which may lead to the restoration of the right of that individual but not to the restoration of a right belonging to the State at the international level and which has been infringed at that level. A right, in the subjective meaning of the term, is essentially a faculty to require from someone else a particular conduct or service. If the State is not authorized to require reparation for an internationally wrongful act committed to its detriment so long as local remedies have not been invoked and exhausted by the individual concerned, it is because for the time being it is not entitled to such reparation; in other words, it is because the wrongful act does not yet exist or, at least, has not yet been completed, and the international responsibility has not yet been generated. As we have stated, it is only the final rejection of all appeals which engenders such responsibility, by completing through its effects those of the initial conduct adopted by the State in the case in point and thereby rendering the result required by the international obligation definitely impossible of achievement. For we repeat, it is by rendering definitely impossible the achievement of the required result that the State completes its wrongful act. To think otherwise would be to fail to take into account the essential characteristic of an obligation designed to secure, not the adoption of a specific course of conduct, but the final achievement of a particular result. It would be to overlook the concept of a complex act of the State and of the point of time at which an act of this kind is completed and entails international legal consequences. In conclusion, it seems logically undeniable that the application of the principle with which we are concerned precedes the completion of the breach of an international obligation and the genesis of international responsibility, and does not follow them.

53. To the foregoing considerations should be added the undeniable fact, which we have emphasized, that the requirement of the exhaustion of local remedies is explicitly stipulated in a growing number of international conventions. Mention should first be made of establishment and other treaties which provide for the treatment to be accorded to natural or legal persons of one of the contracting States in the territory of the other, international treaties having as their general or particular object to ensure to all individuals, without distinction as to nationality, respect for certain basic prerogatives of the human person, treaties regulating recourse by States to international arbitral or judicial tribunals following offences committed in one of the above-mentioned fields, and so forth. However, the confirmation and development of this principle in treaty law should not be allowed to obscure the fact that the so-called “exhaustion of local remedies” requirement has its roots in international custom, where its affirmation is of longer standing than is its formulation in written instruments of voluntary origin. The reason is, once again, that the principle concerned lays down a requirement for the generation of international responsibility for breach of an obligation relating to specific subjects much more than a requirement for the practical enforcement of that responsibility.

54. We have so far endeavoured to explain, in terms of the logic of principles, how the expression of the requirement of exhaustion of local remedies should in our opinion be understood, justified and interpreted as
regards both its direct scope and that of its corollaries, a requirement which is affirmed by international law in specific relation to the breach of international obligations relating to the treatment accorded to individuals by the State. Having done so, we now propose to consider, as was done in the preceding section, whether it may not be that international case-law and State practice formally contradict the ideas which we have expressed and, hence, oblige us to modify our conclusions. We mention case-law and practice because, as already stated, the authors of specific works dealing with the subject adopt different approaches and often reach conflicting conclusions. Under these circumstances, taken as a whole, the explanations of the principle given by those writers are not such as to tip the scale towards one solution rather than another. It will be recalled that the Institute of International Law arrived at somewhat inconclusive findings on the matter in 1927, in 1954 and in 1956. Suffice it to say only that the writers who have explained the principle of the exhaustion of local remedies mainly in terms of international responsibility include Borchard, Strisower, Ago, Pau, Durante, Donner, Simone and Fox, Sereni, Morelli, Giuliano, Gaja, and Thierry, Combacan, Sur and Vallée. The procedural aspects of this principle have been brought out by de Visscher, Panayotakos, Urbanek, Law, Amerasinghe, Haeusler, Chappez and Strozzi. Nor should it be overlooked that there is a third current of opinion, according to which the rule concerns the origin of responsibility in cases where the breach of the international obligation derives exclusively from the acts of judicial organs which have failed in their duty to ensure to an individual the internationally required legal protection against injuries sustained in breach of internal law. In other cases, according to this opinion, the same principle would relate only to the procedures for enforcing the responsibility. This view is expressed by Eagleton, Eustathiades, Freeman, Fawcett and Verzijl. These divergences of opinion—or, as in many cases, of emphasis and presentation—find their natural reflection in the draft provisions for the codification of the international responsibility of States drawn up by jurists or by authoritative organizations. To speak of schools of thought

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107 B. Donner, “Kotázce nutnosti vyčerpávání vnitrostátních právních postředků před diplomatickým zákrokom” (Concerning the exhaustion of local remedies prior to diplomatic representations), Studie Z mezinárodního práva (Prague), vol. IV (1958), pp. 5 et seq.


109 A. P. Sereni, op. cit., p. 1534.


112 G. Gaja, op. cit., pp. 5 et seq.

113 H. Thierry et al., Droit international public (Paris, Montchrestien, 1975), pp. 660 et seq.
is also inappropriate, since the arguments advanced by writers for or against a particular thesis vary so greatly that they sometimes arrive at similar conclusions from virtually opposite directions. In addition, the particular concerns of individual writers have often led them to extend the scope of their analysis far beyond the limits of the matter which now concerns us. There is therefore no need to emphasize the impossibility of undertaking in this report a critical review of all the arguments expounded in the various works in support of the theses which they uphold. We shall confine ourselves to taking into consideration, at the appropriate time, those arguments which might, in one way or another, have a direct effect on the concepts which in our view compel recognition in this area.

55. With regard to the positions taken by States, it seems desirable first to consider the general opinions they have expressed in the abstract, without relation, therefore, to the specific disputes in which these States have been involved. The question whether the exhaustion of local remedies is, in certain conditions, a sine qua non for the generation of international responsibility or only for the enforcement of responsibility through the diplomatic channel or by legal proceedings, was considered at the Conference for the Codification of International Law (The Hague, 1930). Point XII of the request for information addressed to Governments by the Preparatory Committee of the Conference reads as follows:

"Is it the case that the enforcement of the responsibility of the State under international law is subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?"

The terms of this request were not very clear. They seem to reflect a certain hesitancy over the ideas to be expressed and a concern not to prejudice the question. It is not surprising therefore that the replies from Governments are not always formulated in such a way as to give a clear idea of the opinion on the question, but it is apparent, however, that Austria, Belgium, Bulgaria, Germany, Czechoslovakia and Poland considered that international responsibility did not come into being until after the fruitless exhaustion of local remedies. On the other hand, Great Britain seems to have expressed the opinion that only the enforcement of an already established responsibility was subject to the exhaustion of local remedies. In the light of the replies, the Preparatory Committee formulated the following Basis for Discussion:

The responsibility of the State arises from the disregard of an international obligation. It is therefore proportionate or subordinate to the measure of the non-fulfilment of that obligation.

So long, however, as some organ of the State is in a position to fulfil the obligation, its non-fulfilment is not proved. Accordingly, the condition for the coming into being of such responsibility —namely, the evidence of non-fulfilment—does not exist.

Consequently, it is quite correct to say that responsibility itself comes into being only after it has become patent that there has been no fulfilment i.e. that the international requirement or obligation has not been met.

So long as there is a possibility of its fulfilment by some internal means of redress, it cannot be said that the international obligation has not been fulfilled.

(footnote continued.)


Other draft provisions, by contrast, deal with the exhaustion of local remedies from the point of view of its effects on the exercise of diplomatic protection: the resolution of the Institute of International Law of 1927 (article XII) (Yearbook... 1956, vol. II, p. 228, document A/CN.4/96, annex 8); the draft of the Deutsche Gesellschaft für Völkerrecht of 1930 (article 13) (Yearbook... 1969, vol. II, pp. 150-151, document A/CN.4/217 and Add.1, annex VIII); the draft prepared by A. Roth in 1932 (article 9) (ibid., p. 152, annex X); the resolution of the Institute of International Law of 1956, specifically concerned with the rule of the exhaustion of local remedies (ibid., p. 142, annex IV, annex X); the draft prepared for the International Law Commission in 1958 by F. V. Garcia Amador (article 15) (Yearbook... 1959, vol. II, p. 72, document A/CN.4/III, annex X); and the revised draft which he prepared in 1961 (article 18) (Yearbook... 1961, vol. II, p. 50, document A/CN.4/134 and Add.1, addendum); the draft prepared by Sohn and Baxter for the Harvard Law School in 1961 (article 1) (Yearbook... 1969, vol. II, p. 142, document A/CN.4/217 and Add.1, annex X); the Restatement drawn up in 1965 by the American Law Institute (para. 206) (Yearbook... 1971, vol. II (Part One), pp. 197-198, document A/CN.4/217/Add.2). In the case of the latter draft, the character accorded to the principle does not really emerge very clearly from the text of the paragraph, but was specified in the commentary (American Law Institute, Restatement of the Law, Second: Foreign Relations Law of the United States (St. Paul, Minn., American Law Institute, 1965, p. 512).

Other representatives, like those of Italy and Germany, although fewer in number, expressed a contrary opinion without, however, taking up such a clear and substantiated position. A third group (e.g. the representatives of the United States and Norway) was of the opinion that exhaustion of local remedies was sometimes a prerequisite for responsibility and sometimes for enforcement.

56. At the end of the discussion, the delegations agreed on the adoption of a formula that did not take any position on the question whether international responsibility came into being before or after the exhaustion of local remedies. The proposal of the sub-committee dealing with the question, and adopted by the committee on first reading, was embodied in article 4, paragraph 1, and read as follows:

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.

There can be no doubt that the formula thus adopted ended by being deliberately ambiguous and, indeed, proponents of each of the schools of thought represented in the discussion subsequently invoked it in support of their own point of view. Consequently, we cannot draw any clear and final conclusions from the work of the 1930 Codification Conference on the point which concerns us. That does not prevent us, however, from noting that the majority of Government representatives who expressed their views on the subject considered that the exhaustion of local remedies, in cases where that is provided for, amounts to fulfilling a condition for the breach of an international obligation to arise (and thus for international responsibility to come into being), and does not simply give the green light to the Faculty to initiate the procedure for the implementation of an already existing responsibility.

55. A further reflection is called for on the subject of the opinion put forward by some Governments, such as those of the United States and Norway, that the principle of the exhaustion of local remedies is not a condition for the existence of international responsibility except in the case where a judicial appeal has been instituted following an ordinary violation of internal law. Leaving aside the curious notion that a principle can change its character according to the case to which it is applied, what is still more interesting is that, even in the case considered, the application of the principle of the exhaustion of local remedies is also and inevitably extended to the case of an appeal to the court to reverse a decision that conflicts with an international obligation. Let us suppose, in order to make this clearer, that the individual who originally complained of the violation of an internal law to his detriment appeals to a court of first instance, and his appeal is dismissed in circumstances that conflict with the requirements of international law regarding the administration of justice to foreigners. According to the opinion to which we referred at the beginning of this paragraph, an act of this kind certainly does not give rise to international responsibility: an internationally wrongful act as understood in the term "denial of justice" is not considered as complete until the higher courts have successively given their judgment and confirmed the decision of the court of first instance. This means recognizing, in the case in point, that, even if conduct has taken place which is contrary to what was required by an international obligation, that obligation will not be completely breached and responsibility will not arise until all available local remedies against such conduct have been employed and exhausted by the individual concerned. Such conduct, let us repeat, may amount to an embryonic breach of an international obligation, but it does not constitute a completed breach, which alone gives rise to the international responsibility of States.

57. This seems an appropriate point at which to analyse some of the more significant positions taken up on other occasions by State organs or international tribunals, particularly in disputes over concrete cases. However, we feel that some reflections are called for to begin with, in order to avoid errors of interpretation that might lead us to draw arbitrary conclusions.

58. In international diplomatic and judicial practice, we sometimes come across the unequivocal statement that the exhaustion of local remedies is a condition for the genesis of the international responsibility of the State. We shall see some striking examples of this. Now it is obvious that the authority of these statements of position varies considerably depending upon whether they are to be found in the written decision of a court, or in the argument put forward by the representative of a State party to a dispute, and, in the latter case, whether the statement of position is accepted or rejected by the opposing party. But, in any case, there can be no doubt that the mere fact that an affirmation of this belief is made at all is strong support for the argument that,

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144 Ibid., pp. 74-75.
145 Ibid., pp. 79-80. It should be noted that, in its reply to the request for information, Germany supported the view that responsibility does not come into being until after all local remedies have been exhausted.
146 Ibid., pp. 73-74.
147 Ibid., p. 76.
148 Several delegations acquiesced in that solution in the belief that the problem was of no major practical consequence. See the statements by the representatives of Greece (Ibid., pp. 66-67), Belgium (p. 69), Great Britain (pp. 69-71), United States (pp. 73-74), Mexico (pp. 72-73), Colombia (p. 78) and Germany (pp. 79-80). The participants in the Conference had obviously failed to weigh the consequences which the adoption of one point of view rather than another might have on such matters as the determination of the moment at which an internationally wrongful act was committed and the duration of the commission of the act. The practical implications of the reply to these questions may be decisive as regards such important points as knowing whether the dispute arising out of a particular act is or is not one which an international tribunal is competent to judge, or of knowing from what moment any damage caused should be taken into consideration for the purposes of assessing the amount of reparation.
149 Ibid., p. 162.
150 Ibid., p. 236.
the cases we are considering in this section, the international responsibility of the State is not engaged until the condition is fulfilled that all local remedies have been exhausted by the individual concerned. In other words, any affirmation of this kind is gist to the mill of those who see in this initiative by the individual an indispensable element in enabling the breach of an international obligation to be completed and produce its consequences.

60. Only an assertion flatly denying that the principle of exhaustion of local remedies may affect the formation of international responsibility would lend support to the contrary opinion. On the other hand, there are no grounds for regarding as evidence of the validity of this other opinion the fact that, in various cases, international courts in their decisions, and Governments in the position they have adopted, have relied on the exhaustion of local remedies as a condition for the exercise of diplomatic protection of certain persons or of the faculty to submit claims on their behalf to an international tribunal. It would be wrong to interpret this as concrete evidence of an implicit conviction that the condition of the exhaustion of local remedies does not affect in any way whatever the genesis of responsibility and is merely of a purely practical and procedural character. It must be remembered that the aim of the State in invoking failure to employ local remedies against a claim asserted against it before an international court is mainly to block consideration of the substance of the claim by entering a plea of inadmissibility. And in turn, the aim of the State submitting the claim, when it contests the existence of such failure or its effect in the case in point, is precisely to remove the preliminary obstacle thus placed in the way of consideration of the substance of its claim. Thus, both States have to take into consideration the principle of exhaustion of local remedies, not from the point of view of its effect on the formation of responsibility but from that of its impact on the admissibility of the claim. The distinction now generally made between the procedure relating to preliminary objections and that relating to substance also means that the international court called on to pronounce on the question within the framework of the former procedure cannot but approach it from the same point of view. Discussion on this point usually centres on interpretation of the agreement establishing the jurisdiction of the international tribunal involved and its scope; therefore, if the agreement mentions the principle of exhaustion of local remedies when defining the conditions in which a claim may be held as admissible by the tribunal in question, the latter will necessarily have to settle the question whether or not local remedies have been exhausted from the point of view of the existence of a condition of admissibility of the claim rather than that of existence of a condition of the international responsibility of the respondent State. It is obvious, however, that any assertion of the effect of failure to exhaust local remedies on the admissibility of an international claim in no way implies an intention to deny the effect of such failure on the substantive question of the generation of international responsibility. On the contrary, recognition of the invalidating effect of such failure on the question of admissibility represents, as was stressed above, the application of a simple corollary to the main thesis of the principle of exhaustion of local remedies, which, far from denying, confirms the effect of this main thesis on the commission of a breach of an international obligation and, thus, on the generation of responsibility.

61. It is moreover a fact that, in many cases, the condition of prior exhaustion of local remedies is simultaneously invoked at two levels: directly, as a condition for the determination of international responsibility and only indirectly as a condition for the legitimate assertion of an international claim. This is the case every time that the internationally wrongful act invoked by the claim is a denial of justice to an individual who has previously suffered injustice only in breach of internal law.

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148 See, for example, the statement in the United Kingdom Government's Memorandum of 28 August 1931 submitted to the League of Nations concerning the Finnish Vessels case (League of Nations, Official Journal, 12th year, No. 11 (November 1931), p. 2217) "that a State is not entitled to make any diplomatic claim on behalf of its nationals against another State in respect of any matter where, if the claim is valid, the municipal law affords a remedy, unless such municipal remedies have been exhausted", or the reference in the note from United States Secretary of State Hull to Senator Ellender, of 25 April 1942 (reproduced in M. Whitman, Digest of International Law (Washington, D.C., U.S. Government Printing Office, 1967), vol. VIII, p. 772) to "The generally accepted principle of international law which requires, as a precedent to the establishment of a valid international claim, the exhaustion of such legal remedies as may be available in the courts of the country against which a claim is asserted". See also the passages of the judgment of the International Court of Justice in the Interhandel case (I.C.J. Reports 1959, p. 27) reading: "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 remedy it by its own means, within the framework of its own domestic legal system" and "local remedies must be exhausted before international proceedings may be instituted", or the comment in the message of the Swiss Federal Council of 15 December 1967 (Swiss Yearbook of International Law, 1968 (Zürich, 1970), vol. XXV, p. 271), that "a claim may not be taken before an international authority until local remedies have been exhausted".

149 The same is true in cases where the respondent State or the international tribunal has maintained that the claimant State was not authorized to submit a claim because, in the case in question, the international obligation had been breached. In making such an assertion, they were not of course maintaining that the existence of a breach of an international obligation was only the condition of the admissibility of an international claim and not, first and foremost, the condition of the existence of international responsibility. They merely wished to make clear the effect on the use of the claim procedures of an act which relates primarily to the generation of responsibility.

151 See para. 51 above.

153 Assertions of the following type are, for example, quite frequently noted: "... claims arising out of contractual relationships between a national of this Government and a foreign government do not, generally speaking, provide a proper subject for diplomatic intervention on the part of this Government in the absence of a clear showing that the American national has exhausted such legal remedies as may be open to him and has sustained a denial of justice as that term is understood in international law" (Letter from United States Attorney Adviser Maitre to Hershel Davis, 14 May 1956, M. Whitman, op. cit., p. 907), or: "... A legal basis for an international claim against the Cuban Government or for representations by this Government to the Cuban Government would not arise unless an American national attempted to collect a debt by exhausting the legal remedies provided by Cuban law and sustained a denial of justice ..." (Department of State, Memoranda of information concerning debts owed to American nationals (by private parties and concerns) in Cuba (ibid.).
Breath by the State of an international obligation occurs, therefore, only when and if the individual appeals to the courts of the country against a failure, to his detriment, to observe internal law. The use of local remedies is thus presented both as the condition for the existence of a denial of justice, a clear example of an internationally wrongful act, and as the condition for the submission of a claim to enforce the international responsibility generated by this wrongful act. Obviously, the second aspect presupposes the first from which it logically derives. In conclusion, the fact that international arbitrators and tribunals, like State organs, have often invoked exhaustion of local remedies as a condition for the implementation rather than the generation of responsibility cannot as such be adduced as evidence of an opinion that international responsibility is in any case generated before local remedies have been initiated and pursued, and irrespective of their exhaustion. There is nothing in this to permit the conclusion that, in the opinion of these tribunals and organs, the only thing that depends on the exhaustion of local remedies is the possibility of enforcing, at the diplomatic or judicial level, a responsibility generated before such exhaustion.

62. All that can be taken into account, therefore, in support of the argument that the exhaustion of local remedies is only a condition for the exercise of diplomatic and legal protection, are statements of position clearly favouring this view. Probative value can be attributed only to unequivocal statements of rejection of the idea that, before being a formal condition of the possibility of enforcing international responsibility through the presentation of an international claim, exhaustion of local remedies is a substantive condition of the generation of such responsibility. Now, it must be said that such statements are very hard to find, and in view of the circumstances in which they are encountered, less conclusive than those supporting the opposite thesis.

63. Let us, to convince ourselves of this, examine the statements of Governments or international tribunals on the rare occasions when they were specifically faced with the question of the possible effect of the exhaustion of local remedies on the generation of the international responsibility of the State. Decision No. 21 of February 1930 of the Great Britain-Mexico Claims Commission, set up by the Convention of 19 November 1926, in the Mexican Union Railway case, contains the statement that:

... the responsibility of the 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. 162

Unquestionably, what was being clearly stated there was that exhaustion of local remedies was a condition for the generation of international responsibility.

64. On the occasion of the proceedings instituted by Germany before the International Court of Justice in connexion with the case concerning the Administration of the Prince von Fless, the Polish Government raised a preliminary objection in which, after opposing the action

... until the legal means made available by internal legislation to individuals to defend their interests have been exhausted, there can be no question of the International responsibility * of the State. 163

Thus, the Polish Government clearly adopted the position that the principle laying down the condition of exhaustion of local remedies directly concerns the existence of international responsibility, even through at the same time it emphasized the corollary of that principle relating to the formal possibility of taking a claim to an international court. It should also be noted that the German Government maintained that, by reason of a conventional derogation therefrom, the principle of exhaustion of local remedies was inapplicable in that particular case, but in no way contested the Polish Government's definition of the principle.

65. Interpretation of the arbitral award in the Finnish Vessels case is less easy. We saw above 164 that the British Government, in its Memorandum to the Council of the League of Nations, had invoked the principle of the exhaustion of local remedies for the purpose of blocking the submission by the Finnish Government of the diplomatic protest addressed to it by that Government. We then showed that invocation of the principle for that purpose in no way excluded the possibility of invoking it for other purposes also, particularly that of challenging the existence, in a specific case, of a completed breach of an international obligation and, thus, of an international responsibility already established against the respondent State. The Finnish Government, in turn, had questioned the very existence of the principle which the United Kingdom regarded as unchallenged. As a result of the discussion before the Council, the parties submitted the following concrete question to arbitration: “Have the Finnish shipowners or have they not exhausted the means of recourse placed at their disposal by British law?” 165

This was the question that the Arbitrator, A. Bagge, had to decide, and he began by noting that the Finnish Government did not claim that the breach of international law alleged by it was represented by the rejection by the British courts of the claim by the Finnish shipowners, but by the “initial breach of international law” 166 constituted, in its view, by the seizure and use without payment of the vessels belonging to them. Having said this, the Arbitrator concentrated on determining what points of law and fact should be submitted by the claimants to the municipal courts in a case of the kind. He commented that, where “an initial breach of international law” was alleged, the sole raison d'être of the principle of exhaustion of local remedies was to enable the municipal courts, up to the highest court of appeal, to inquire into


163 Foot-note 148.

164 Foot-note 148.


and decide all questions of law and of fact alleged by the claimant State in international proceedings to prove that a breach had occurred. The purpose of this was to allow the respondent State the opportunity of doing justice "in their own ordinary way". Without entering here into the substance of the question, which is outside our subject, we note first that, by the very fact of taking into consideration the possibility that the principle requiring the exhaustion of local remedies was applicable to cases where the claimant alleges "an initial breach" of international law, the Arbitrator seemed to be leaning towards the idea that the principle in question did not state a condition for the generation of responsibility, but only a condition for recourse to a claims procedure. Nevertheless, immediately afterwards the Arbitrator declared that he was not unaware of the fact that, in the works of learned writers, at sessions of the Institute of International Law and, in particular, at the 1930 Codification Conference, the theory had been maintained: that no responsibility of the State can come into existence until the private claim has been rejected by the local courts, whether the basis brought forward for the international claim may be a failure of the local courts of law to fulfil the requirements of international law, or the basis is an initial breach of international law, and he finally concluded that:

If this proposition means that the responsibility of the State does not come into existence until the grounds upon which the claimant Government in the international procedure base their contention of an initial breach of international law have been rejected by the municipal courts, this proposition does not seem to result in any difference as to the question which contentions of fact or propositions of law should be considered under the local remedies rule. The expression "initial breach of international law", in the language used by the Arbitrator, Mr. Bagge, probably meant a breach of international law committed at the beginning of the case. The expression is ambiguous, however, since it might also mean the "beginning, inception or first stage of a breach of international law"; it would then express a different idea, namely, precisely the one that seems to us appropriate for describing a concrete situation such as that to which the Arbitrator was referring.

Arbitrator Bagge thus maintained a sort of neutrality between the two approaches to the requirement of the exhaustion of local remedies, since both led to the same conclusion as regards the point he had to decide. It would thus be quite arbitrary to regard his considerations as a clear, reasoned stand in favour of rejection of the theory that, in cases where the principle of the exhaustion of local remedies comes into play, such exhaustion is a condition for the coming into being of international responsibility.

20. The two theories as to the function attributed to the exhaustion of local remedies by the principle which states that condition came face to face in the Phosphates in Morocco case between Italy and France. 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 by the Mines Department 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 acquired rights of the Italian company Miniere e Fosfati. The French Government had accepted the compulsory jurisdiction of the Court by a declaration dated 25 April 1931, for "any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to this ratification." The question thus arose whether the internationally wrongful act of which the 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 in 1925 only became a completed breach following certain acts subsequent to 1931, particularly a note of 28 January 1933 from the French Minister for Foreign Affairs to the Italian Ambassador and a letter of the same date addressed by the same Minister 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 in accordance with the terms of article 8 of the dahir of 12 August 1913. 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 clearly opted for the theory that an internationally wrongful act, though initiated by a first State conduct contrary to the result required by an international obligation, is completed only when the injured individuals have tried unsuccessfully to make use of all existing appropriate and effective remedies. It was thus from that moment that, in its view, the responsibility came into existence.

164 This decision had rejected the claim of an Italian citizen, Mr. Tassara, to be recognized as the discoverer of the phosphate deposits in Morocco.

161 P.C.I.J., Series A/B, No. 74, p. 15.

162 Ibid., p. 22.

163 Ibid., pp. 27-28.

164 The Italian Government's argument was developed mainly in its oral statement of 12 May 1938 (P.C.I.J., Series C, No. 85, pp. 1231-1232), but taken up again in its statement of 16 May (ibid., pp. 1332-1333).
67. 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 levelled against it—violation of treaties, violation 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 come into being. The French representative affirmed that:

Here, the rule of the exhaustion of local remedies is nothing more than a rule of procedure. The international responsibility is already in being, even if it cannot be enforced through the diplomatic channel or by resort to an international tribunal and appeal to the Permanent Court of International Justice until local remedies have first been exhausted.\textsuperscript{166} 

68. 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 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.\ldots 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.\textsuperscript{166} 

69. Despite certain indications to the contrary, the Court, in rejecting the Italian claim that the “unlawful international act” invoked by the Italian Government was an act subsequent to the crucial date and in considering, as a consequence, that it had no jurisdiction to adjudicate on the case, was not in any way taking a stand against the argument of principle put forward by the Italian Government. According to the Court, the decision taken in 1925 by the Department of Mines, against which there was in fact no legal or other redress,\textsuperscript{167} was, by that very fact, a definitive violation of the international obligation to grant Italian nationals full equality of treatment in respect of mining concessions. Consequently, the Court did not accept that the “unlawful international act” attributed to France by the Italian Government had culminated in an alleged “denial of justice” in the form of the French Government’s note of 28 January 1933, which merely confirmed, at the diplomatic level, that there was no redress against the decision of 1925. Neither did it accept that the request by the individuals to the French Government to make available to them extraordinary legal means not provided for by law could be regarded as a “local remedy” within the meaning of the principle. Finally, the Court did not concede that the “unlawful international act”, alleged by the Italian Government to have commenced in 1925, had been dependent upon the note of 1933 for its completion. This point of view can certainly be defended but, although it necessarily culminates in the rejection of the Italian application, it does not constitute a rejection of the opinion put forward by the Italian Government as a general principle, concerning the effect of local remedies where they are available—on the establishment of the definitive nature of a breach of an international obligation and, as a consequence, on the genesis of international responsibility.

70. After the Phosphates in Morocco case, neither the Permanent Court of International Justice nor, subsequently, the International Court of Justice had any further occasion to pronounce on the question of which we are concerned. The Court cannot be regarded as having taken a position on the question in the passage of its judgment of 21 March 1959 in the Interhandel case where, after stating that the exhaustion of local remedies was provided for by “a well-established rule of customary international law\ldots 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”, it goes on to say:

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 legal system.\textsuperscript{168} It is perfectly clear that the expression “violation” used by the Court was intended, as in the previous phrase, to refer to the violation of the individual’s rights under internal law and not to a violation of the State’s rights under international law. The principle so succinctly stated by the Court is therefore perfectly compatible with the idea that a violation by a State of its international obligation, justifying an appeal to an international tribunal, is only completed upon the State’s refusal of redress, within the framework of its domestic legal system, for the injury caused by its initial conduct to the rights of an individual.

\textsuperscript{166} The French Government’s argument was set out in its oral pleading of 5 May 1938 (ibid., Series C, No. 85, p. 1046). Assuming that the French Government was correct in stating, in its note of 28 January 1933, that the decision of the Mines Department was not subject to appeal, the French position was probably well-founded when it contended that the internationally wrongful act in question must have been completed in 1925 and that, consequently, the Permanent Court had no jurisdiction. Where it would seem that the French Government’s argument appears contradictory is when it maintained that the principle requiring the exhaustion of local remedies could still apply in the case in point but purely as a rule of procedure. If no appeal is possible, then the principle of exhaustion of local remedies is clearly not susceptible of any practical application whatsoever.

\textsuperscript{167} Clearly, the Court did not consider that the “petition for redress” to the French Resident-General in Morocco could be regarded as a real remedy.

\textsuperscript{168} I.C.J. Reports 1959, p. 27.
71. On the other hand, the European Commission of Human Rights has several times had occasion to pronounce on the principle of exhaustion of local remedies. In the case-law of the Commission, we find from time to time affirmations of the need to allow the State “an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done...”. Here, the Commission is obviously referring to the wrong done to the individual and is not claiming that such a wrong in itself constitutes a definitive breach of an international obligation. Such affirmations therefore form part of the series already considered; and while they illustrate the effect of failure to resort to local remedies on the admissibility of an international claim, they are certainly not intended to deny the effect of such failure on the creation of international responsibility. Indeed, the justice of this observation is, if need be, further borne out by the Commission itself, which is responsible for the most recent and, at the same time, very clear and direct confirmation of the principle upheld in this section. In its decision of 1958 on Application No. 235/56, the Commission stated that:

... the responsibility of a State under the Human Rights Convention does not exist until, in conformity with article 26, all domestic remedies have been exhausted...  

Although the above statement was made in relation to a particularly clear case of the application of the principle in question, it is couched in terms which obviously cover all possible cases of application of article 26 of the Convention, in which the rule requiring the exhaustion of local remedies is set out in the most general terms. There cannot, therefore, be the slightest doubt that this decision may be regarded as a general interpretation of the principle requiring the exhaustion of local remedies as essentially laying down a condition for the coming into being of the international responsibility of the State.

72. Before concluding an analysis of the positions adopted by official representatives of States, by tribunals and other international courts on the point in question, it may be useful to note the views expressed, in separate or dissenting opinions, by judges of the International Court of Justice and its predecessor, the Permanent Court of International Justice. These opinions are all the more interesting as the Court itself has not taken a direct and clear stand on the matter with which we are concerned in the cases to which they are related.

73. Some of these opinions are not particularly clear. The dissenting opinion of Judge Armand-Ugon in the Interhandel case, for instance, is open to various interpretations. It states that:

74. The separate opinion of Judge Tanaka in the case of the Barcelona Traction, Light and Power Company, Limited (second stage) stresses the idea that the exhaustion of local remedies rule possesses a procedural character in that it sets forth a condition for enabling the State to espouse before an international tribunal the claim of the person it seeks to protect. However, the fact that Judge Tanaka also mentioned the procedural aspect that the principle in question assumes in relation to the exercise of diplomatic and judicial protection does not seem to indicate that he intended to exclude the existence of the substantive aspect which the principle assumes in relation to the question of the generation of international responsibility.

75. Opinions which were absolutely clear, and which were all along the same lines as the ideas upheld here, have been expressed by three other judges. In his dissenting opinion in the Panevezys-Saldutiskis Railway case, Judge Hudson wrote:

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.

Furthermore, Judge Cordoba, in his separate opinion in the Interhandel case, expressed himself as follows:

The right of the State... to protect its national... for an alleged wrongful act of a foreign government... does not legally arise...
until the judicial authorities of the latter decide irrevocably upon such wrongful act through a decision of its judicial authorities. Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated. This principle informs all systems of law—civil as well as criminal, local as well as international.

Finally, Judge Morelli, in his dissenting opinion in the case of the Barcelona Traction, Light and Power Company, Limited (preliminary objections), gave a definition of the exhaustion of local remedies rule which, in our view, is the most thorough and the most precise yet written by an international judge:

The local remedies rule, as a rule of general international law, is in my view substantive and not procedural. It is indeed a rule which is supplementary to other rules, which also themselves possess the character of substantive rules, namely the rules concerning the treatment of foreigners.

Those rules require from the State to which they are directed a particular final result in respect of the treatment of foreign nationals, leaving the State which is under the obligation free as regards the means to be used. Consequently, if an organ of the State which is under the obligation performs an act contrary to the desired result, the existence of an internationally unlawful act and of the international responsibility of the State cannot be asserted so long as the foreign national has the possibility of securing, through the means provided by the municipal legal system, the result required by the international rule.

76. We are gratified to have been able to conclude our examination of the statements of position of government representatives and international judges by quoting an opinion which is so clear, explicit and imbued with the true spirit of the principle which we are studying. We undertook earlier, as a precaution, to make a careful and thorough analysis of international case-law and State practice in order, as we said, to ascertain whether, by chance, they conflicted with the conclusions we had first reached, by a process of deduction, from the nature, purpose and beneficiaries of a given category of international obligations and, consequently, the conditions in which a breach might occur. There is no longer any reason for this precaution, since the very least that can be said is that our analysis has produced no refutation of the ideas advocated by us. On the contrary, looking at them as a whole after having sought the exact meaning of assertions which had initially misled certain observers, the practice and the case-law seem, despite some uncertainties, to lend solid support to the views dictated by the logic of the principles.

77. Some additional considerations will enable us to dismiss certain objections to the conclusions which may have been suggested by various premises. For instance, mention has been made of the fact that, when a State complains of a breach by another State of an international obligation concerning the treatment to be granted to individuals, the injury for which it requests reparation is that caused by the original conduct of the State and not that caused by the refusal of local remedies sought by the injured individuals. This is put forward as evidence that international responsibility irrevocably arises from the first conduct of the State and, accordingly, before the exhaustion of local remedies by the individuals concerned.

In point of fact, this reasoning does not stand up. First of all, on more than one occasion in earlier reports of the Special Rapporteur and of the Commission, attention has been drawn to the danger of trying to draw, from the "damage" element and the criteria for determining its existence and its amount, conclusions regarding the determination of the existence of an internationally wrongful act, its constituent elements, and its effects. The obligation to provide reparation which devolves upon a State pursuant to an internationally wrongful act concerns—let us stress this again—reparation for the failure of the State to fulfill its own obligations towards another State. The reparation which may be requested and obtained by the State injured in its right to have international obligations concerning the treatment to be accorded to individuals respected is one thing; the reparation which one of those individuals, whose enjoyment of his rights has been impaired by the conduct of State organs which have acted in a manner contrary to the result required by an international obligation, may request and obtain from a national tribunal of the same State, is another. These reparations have different bases and are at different levels. Even if the amount of the reparation requested by the State at the international level conformed materially to that of the reparation requested by the individual at the national level, even if the first was actually assessed on the basis of the second, the difference in nature between the two reparations would still remain.

Aside from these considerations of principle, the objection examined here obviously does not take into account the complex situation brought about for the State by the breach of an international obligation in cases where the requirement that local remedies be exhausted enters into play. When the individual injured by conduct of a State incompatible with the result required by an international obligation seeks a remedy by using and exhausting unsuccessfully the means of redress available to him under internal law, the breach of the international obligation is not constituted solely by the final stage in the process of its perpetration, any more than it is constituted solely by the first stage.


177 See para. 54 above.
It results from the whole series of successive acts of State conduct, from the first which sets it in motion to the last which completes it and renders it final, so that the injury suffered by the individual—which may eventually be used as an element of appreciation to determine the amount of reparation which the State in its capacity as diplomatic or judicial protector may demand—is the injury caused to the individual by the aggregate of State conduct conflicting with the internationally required result. Even if the only basis is the injury caused by the original conduct, it is because successive acts of conduct have added nothing to that injury and not because the process of performance of the internationally wrongful act has been completed with the first stage.  

78. Other objections seem to us even less well-founded—for example, the objection that the moment when the breach of an international obligation is completed and when, as a result, international liability is established, necessarily coincides with the moment when the dispute between the States involved originates. Whatever concept of "international dispute" one may adopt, international practice clearly shows that disputes—and we are speaking of legal disputes only—may well arise before the definitive perpetration of an internationally wrongful act, or even without any such act happening at all. To link the genesis of the dispute with that of the existence of international responsibility already fully established, and then to draw from the fact that disputes arise before exhaustion of local remedies the conclusion that such exhaustion has nothing to do with the genesis of responsibility is, in our view, a purely arbitrary procedure.

79. Again, we can attach no value to the view that the argument that the exhaustion of local remedies is a substantive condition for the generation of international responsibility is invalidated by the fact that international tribunals normally deal with that point when considering preliminary objections. The Special Rapporteur is fully convinced that questions of substance also can be raised as preliminary objections, and that is undoubtedly the prevailing opinion in the International Court of Justice itself. But even for those who, like Judges Hudson and Morelli, have expressed a different view, the inevitable conclusion is that it is impossible for the parties to invoke, and for the Court to consider, failure to exhaust local remedies as a preliminary objection. In their view, such failure should be treated as a substantive objection, when considering the substance. The two judges in question are in fact among the firmest upholders of the idea that the exhaustion of local remedies constitutes a substantive condition of responsibility, and not just a procedural condition.

80. Finally, we do not feel obliged to take into consideration the objection that a purely declaratory judgment may be pronounced even before local remedies have been exhausted. Indeed, this is more a theoretical than a practical possibility since it has never actually happened. Apart from this, we are aware that there is a school of thought which holds the much debated view that the requirement of exhaustion of local remedies applies only where a claim is made for restitution of property or indemnification and not, therefore, where all that is asked for is a purely declaratory judgment. But it is hard to see on what grounds certain writers maintain that, for those who hold such an opinion, the exhaustion of local remedies is excluded a priori as a condition for the completion of a breach of an international obligation, particularly if the case is so well founded as to be independent of the actual possibility since it has never actually happened.

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180. Conversely, even if, and equally wrongly in our view, the last act only is considered as constituting the breach of the international obligation and, consequently, as being the source of responsibility, there is no reason why the repairation which the State may request for this breach should be established on the basis of the injury caused to the individual by this last act. The criteria of justice and equity which normally govern the determination of the amount of reparation for internationally unlawful acts may very well lead to the basis adopted for this purpose being the injury caused by the first act. And this does not exclude those cases where it is only subsequent acts that are incompatible with the requirements of an international obligation, as when the internationally wrongful act attributed to the State is exclusively a denial of justice. In that case, an estimate has to be made of the extent to which the determination of the repairation due for the breach of an international obligation is independent of the determination of the "damage" and particularly of the economic damage directly caused by the breach itself.


183. See their joint dissenting opinions in, respectively, the judgment in the Panevezys-Saldutiskis Railway case (P.C.I.J., Series A/B, No. 76, p. 47) and in the case of the Barcelona Traction, Light and Power Company Limited (preliminary objections) (I.C.J. Reports 1964, pp. 114-115), where they criticize the majority decision to treat local remedies as a preliminary objection.

184. In the Interhandel case, the Court gave no decision on the subsidiary request of the Swiss Government that the Court should confine itself to declaring that there had been a breach of an international obligation, in the event of its not recognizing that, in that particular case, local remedies had been exhausted (I.C.J. Pleadings, Interhandel case, p. 405). The United States had reconsidered in the oral proceedings (ibid., pp. 501-502) what it had allowed on that point in the written proceedings (ibid., p. 317). In the award of the Arbitral Tribunal (and the Mixed Commission) between Switzerland and the Federal Republic of Germany, rendered on 3 July 1958, for the agreement on German External debt, the Tribunal observed, but only as a principle, that "appeal to the principle of exhaustion of local remedies as a recognized rule of international law is admitted in law only when a claim is made against a State, particularly a claim for restitution of property or indemnification" (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Stuttgart), vol. 19 (1958), p. 770. See also International Law Reports, 1958-1 (London), vol. 25 (1963).

185. Writers are divided in their views as to the possibility of a declaratory judgment before the exhaustion of local remedies. At the Institute of International Law, P. Guggenheim (Annuaire de l'Institut de droit international, 1956 (Basel), vol. 46, pp. 299-300) and J. H. W. Verzijl (ibid., p. 301) spoke in favour of such a possibility, E. Giraud and C. de Visscher against it (ibid., pp. 300-301). The majority of members shared the view expressed in the text (ibid., p. 302). Those in favour included Fawcett (op. cit., p. 437), and against C. H. P. Law (op. cit., p. 110) and, with reservations, Amerasinghe (op. cit., pp. 450-451). All of these, however, based their views, whether for or against, on the desirability or otherwise of the consequences of such a judgment rather than on international practice. Chapez thinks it can be affirmed that the practice of States recognizes the possibility of such a judgment, (op. cit., p. 94 et seq.). Haesler, on the other hand, maintains that there are no significant precedents (op. cit., p. 125). According to Gaja, if the possibility of a declaratory judgment is admitted, then the possibility of a judgment on some of the conditions of the wrongful act or of responsibility or of diplomatic protection must also be admitted (op. cit., p. 25, footnote 15).
which thereby becomes a source of responsibility. It is entirely possible to envisage a purely declaratory judgment for the purpose of establishing, before any consideration at all of a possible infringement and the resulting responsibility, the existence of an international obligation on the State and the scope and content of that obligation. It is also possible to envisage a judgment of that kind being pronounced for the purpose of recognizing that an initial course of conduct by the State towards an individual is in contradiction with the result required by the obligation.

81. Our brief but adequate survey of the assertions regarding an alleged incompatibility of our views with the alleged conclusions which some would like to draw from certain premises has not induced us to modify our views in the slightest, any more than has our detailed analysis of the positions adopted by Governments and judges of international tribunals. We can therefore confirm our initial reasoning as our conclusion on the question examined so far. Among the multifarious international obligations which require a State not to adopt a specific course of conduct but to achieve a particular result, there is one special category that has to be distinguished: those designed specifically to ensure that, within the jurisdiction of the State, a given treatment is accorded to natural or legal persons and their property. The very fact of this qualification means that, as indicated above, a supplementary condition must logically be added to the others normally required in order to be able to establish the breach of an obligation requiring the State to achieve a particular result. The point to be borne in mind here is the fact that the aim and purpose of international obligations of this particular category are to ensure that the State guarantees a specific situation to individuals, subjects of its internal law. There cannot therefore be a complete and final breach of an international obligation of this category so long as the persons intended as the beneficiaries of the required result have not done everything in their power to bring about that result. In particular, there cannot be a breach of the obligation so long as those persons have not employed, for that purpose, the remedies available to them under internal law to rectify a situation incompatible with the required result and obtain redress, and so long as they have not exhausted those remedies without achieving their aim. Only then can it be said that the State has finally failed to achieve the internationally required results, that it has committed a complete breach of its international obligation, and that it thus incurs international responsibility.

82. In the light of these conclusions, it seems almost superfluous to consider whether or not the requirement of the exhaustion of local remedies is primarily a general principle of unwritten law, even though it is expressly provided for in innumerable conventions. As we have already emphasized, this is in fact one of those principles which command recognition as the logical consequence of the nature and specific object and purpose of the obligations concerned. While it is true that many conventions enunciate, refer to and confirm the principle, stipulate its scope and effect, extend or restrict its limits and, in some cases, wholly preclude its application to the obligations laid down in those instruments, they do so precisely on the basis that the requirement of the exhaustion of local remedies is a pre-existing principle of general application, albeit open to derogation, a principle which, to repeat, has its roots in custom or, still more, in the very logic of the mode of performance of a particular type of international obligation and which is, therefore, certainly not of purely conventional origin.

83. Some recent writers have demonstrated the validity of this assertion in highly conscientious and exhaustive studies. It will suffice to recall briefly the main elements of their demonstration.

84. There would appear to be no doubt that, in general international law, the establishment of the principle of the exhaustion of local remedies is closely related to the development of international obligations regarding the treatment accorded by a State to foreign natural or legal persons and the prevention of injury to such persons and their property. A perusal of the decisions handed down by the Permanent Court of International Justice shows that, in its judgment in the Mavrommatis Palestine Concessions case (1924), the Court defined the requirement that aliens injured by acts of the State which are contrary to international law should seek to "obtain satisfaction through the ordinary channels" as "an elementary principle of international law", while, in its judgment in the Panevezys-Saldutiskis Railway case (1939), it noted that the two parties recognized the existence of "the rule of international law requiring the exhaustion of the remedies afforded by municipal law". In its judgment in the Interhandel case (1959), the International Court of Justice took a very explicit position on the matter when it affirmed that:

... The rule that local remedies must be exhausted is a well-established rule of customary international law.

International arbitration case-law clearly follows this approach. In his award in the British Property in Spanish Morocco case, rendered in 1925, the Arbitrator, Max Huber, held the requirement of the exhaustion of local remedies to be "a recognized principle of international law". In its decision of 1930 in the Mexican Union Railway case—already cited for its definition of the principle as indicating that "the responsibility of the State under international law can only commence" after recourse to local remedies—the Great Britain/Mexico Claims Commission stated that the principle in question was "one of the recognized rules of international..."

188 See, in particular, Gaja, op. cit., p. 37 et seq.
191 I.C.J. Reports 1959, p. 27.
In its award of 1956 in the Ambatielos case, the Greece/United Kingdom Commission of Arbitration described the requirement of the full utilization of local remedies as a rule “well established in international law.” In its decision of 1958, the Tribunal set up by Switzerland and the Federal Republic of Germany for the Agreement on German External Debts affirmed that:

There can be no doubt that the rule of exhaustion of local remedies... is also a generally accepted rule of international law.

International case law thus reveals a unanimous recognition of the existence of the principle of the exhaustion of local remedies in general international law, independently of any special provisions embodied in treaty instruments. At the same time, it is a fact that all the specific cases considered by international courts which have given rise to expressions of recognition of the principle are cases involving the breach or alleged breach of international obligations concerning the treatment accorded by a State in its territory to aliens or their property.

85. There are just as many statements of position in the matter to be found in State practice, all of these virtually unanimous in recognizing the general character of the principle of the exhaustion of local remedies. It is clear from an examination of the opinions expressed by representatives of Governments in the course of codification work concerning the responsibility of States for damage caused in their territory to the person or property of foreigners. It also emerges from the attitude taken by Governments in disputes involving the breach of an international obligation relating to the treatment of nationals of another State.

86. During the 1930 attempt at codification no Government expressed the slightest doubt that the rule which it was sought to codify was first and foremost a rule of general international law. The scope of the rule had been determined in advance by the limits of the subject-matter of the Codification Conference. The replies of Governments to the request for information addressed to them by the Preparatory Committee, the statements by delegations in the Third Committee of the Conference and the proposals made during its deliberations, and the text of article 4 adopted on first reading at the close of the discussions, were all based on a fundamental conviction of the existence of the principle of the exhaustion of local remedies as a rule of general international law. The limitations placed on the principle in the text adopted, as well as those proposed by certain representatives, were grounded in the same conviction.

87. With regard to the positions taken by Governments in the many cases in which the problem of the non-exhaustion of local remedies arose in a particular dispute, the most interesting feature is the convergence of views, not only of respondent Governments but also of claimant Governments, concerning recognition of the principle in question as a general rule of international law. The inevitable divergences related only to the problem of the applicability of the principle in the particular circumstances of the specific case. In any event, it was never maintained that the requirement of the prior exhaustion of local remedies could be invoked only if specifically provided for in a convention. To mention only the most explicit statements before the Permanent Court of International Justice or the International Court of Justice, in the case concerning the Administration of Prince von Pless, the Polish Government expressed the view, which was never challenged by the German Government, that the requirement of the exhaustion of local remedies was “a generally accepted principle of international relations” in the Losinger case, the Yugoslav Government referred to a “universally admitted rule” and the Swiss Government stated that it was not unaware of that “rule of international law.” In the Phosphates in Morocco case, the French Government affirmed that it was “a well-established rule of international law” and the Italian Government stated that it “did not intend to challenge the existence of that rule.” In the Panevezys-Saldutas case, the Lithuanian Government maintained, without opposition from the Estonian Government, that “the rule of the exhaustion of local remedies is firmly established in the positive international law of our time.” In the Anglo-Iranian Oil Company case, the Iranian Government referred to the “prior exhaustion of local remedies” as a condition to be met “in accordance with general international law” and the British Government recognized that it was “in general a condition” in the Interhandel case, the United States invoked the “well-established principle of international law requiring the exhaustion of local remedies” and the Swiss Government replied that it in no way contested that assertion; finally, in the Aerial Incident of 27 July 1955 case, the Bulgarian Government emphasized the “incontestable” nature of the “rule of the prior exhaustion of local remedies”, without being challenged on that point by the Governments of the United States and Israel.

Similar positions were implicit in many other cases.

195 Ibid., vol. XII, pp. 118-119.
197 For the text of point XII of the request for information, see paragraph 55 above. For the replies of Governments, see League of Nations, Bases for Discussion..., (op. cit.), pp. 136 et seq., and Supplement to volume III (C.75(a).M.69(a).1929.Y), pp. 4 and 23. Basis for Discussion No. 27, drafted by the Committee on the basis of those replies, is also reproduced above (para. 55).
198 For the statements made during the debates, see League of Nations, Acts of the Conference..., (op. cit.), pp. 63 et seq., 162 et seq.; for proposals and amendments, see ibid., pp. 209 et seq., 217, 220, 227 et seq., and 251.
199 See para. 56 above.
200 The limitations on the application of the principle provided for in article 4, paragraph 2, concerned self-evident cases in which the judicial authorities had definitely refused to administer justice or had rendered final judgments.
201 P.C.I.J., Series C, No. 70, pp. 134 and 182.
202 Ibid., No. 78, pp. 129 and 156.
203 Ibid., No. 84, pp. 209 and 440.
204 Ibid., No. 86, p. 143.
206 Ibid., Interhandel, pp. 315 and 402.
207 Ibid., Aerial Incident of 27 July 1955, pp. 276-277, 326, 454.
208 In only one case did a Government express any doubts concerning the existence of the principle as a general rule—Belgium
88. The positions taken by Governments parties to disputes referred to other international tribunals are equally conclusive. For example, it is clear from the arbitral award in the *Central Rhodope Forests* case, that the Bulgarian Government based its argument on "the well-known principle of international law of exhaustion of local remedies" and that the Greek Government challenged only the applicability of that principle to the case in point; 209 the decision in the *Anglo-Iranian Oil Co.* case, between Iran and Great Britain, shows that the British Government recognized that the requirement that all local remedies be exhausted, which the Iranian Government had invoked, was, indeed, "an established principle." 210 There was one occasion when the existence of the rule as part of general international law was challenged, and that was the initial challenge by the Finnish Government in the *Finnish Ships* case, which, as stated above, 211 was referred to the Council of the League of Nations in 1931. When the British Government reiterated that the rule was an undisputed principle of international law, however, the Finnish Government accepted that view and agreed to refer to arbitration the question whether, in the case in point, local remedies had been exhausted.

89. We would also point out, *ad abundantiam*, that significant positions have been taken by Governments on other occasions. Particularly interesting is the position taken by the Swiss Government during the 1957 debate in the Federal Assembly on approval of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States. Commenting on article 26 of the Convention, the Federal Council referred to exhaustion of local remedies as "a general principle of international law." 212 Moreover, the practice of certain Governments, particularly the United States and Canadian Governments, of considering themselves as precluded from endorsing claims by their nationals until the latter have exhausted local remedies, attests to their firm belief in the existence of the principle as one of general application. 213

Lastly, even some bilateral treaties refer to the exhaustion of local remedies as a general principle of international law. Article 26 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms 214 for example, refers to the exhaustion of all local remedies, "according to the generally recognized principles of international law". 215

90. In view of the unanimity of opinion reflected in international case-law and State practice, it hardly seems necessary to add that the character of the principle with which we are concerned as a principle of general international law is also recognized by virtually all the learned writers who have considered the question. We see no need to quote further from the numerous writers who have studied this subject since all, with very rare exceptions, recognize that, under general international law, exhaustion of local remedies is a condition for the generation of international responsibility or at least for its implementation. 216

91. Lastly, it is as a principle applicable under general international law that this condition was taken into consideration in the resolution adopted in 1956 by the Institute of International Law. 217 And it was on the same understanding that the principle stating this condition was included in the codification drafts on the international responsibility of States for injury caused on their territory to the person or property of aliens, adopted in the Borchgrave case (*P.C.I.J.*, Series C, No. 83, p. 65). However, the Belgian Government later adopted a clearly positive attitude in the case concerning the Electricity Company of Sofia and Bulgaria (*ibid.*, No. 88, p. 37) and in the case concerning the *Barcelona Tractio, Light and Power Company Limited* (*I.C.J. Pleadings, Barcelona Tractio, Light and Power Company Limited* (*New Application: 1962*), vol. 1, pp. 215 et seq.


211 See para. 65 above.


213 For an example of United States practice, see M. Whiteman, (*op. cit.*), pp. 769 et seq., 906 et seq., and, for an example of Canadian practice, see Canadian *Yearbook of International Law*, 1968 (Vancouver), vol. VI, pp. 263 et seq.

214 For reference, see footnote 36 above.

215 Article 5 of the General Claims Convention between the United States and Mexico of 8 September 1923 speaks of the "general principle of international law that legal remedies must be exhausted". (*British and Foreign State Papers* (*London, H.M. Stationery Office, 1926*), vol. CXVIII, p. 1105.)

216 C. G. Ténekdès did express doubts in an article published in 1933 ("Exhaustion of local remedies as a precondition for international proceedings", *Revue de droit international et de législation comparée* (*Brussels*), 3rd series, vol. XIV, No. 3 (1933), pp. 514 et seq.) but later changed his opinion ("Patently unjust national judgments as sources of international responsibility of States", *Revue générale de droit international public* (*Paris*), 3rd series, vol. XXI, No. 4 (July-August 1939), pp. 376. W. Friedman, in his article "Exhaustion of local remedies" (*Revue de droit international* (*op. cit.*), pp. 318 et seq.), denied the existence of the principle of exhaustion of local remedies in general international law but this article appears to be out of date now. J. H. W. Verzijl, in his report to the Institute of International Law ("The rule of the exhaustion of local remedies ..." (*loc. cit.*), pp. 5 et seq. and, in particular, 22 and 23) accepted that the rule was a principle of general international law but considerably restricted its scope. In his opinion, it would be justified only in the event of a denial of justice in the true sense. In other cases, the possibility open to the State of avoiding international responsibility by referring a foreigner who has suffered injury to its national courts can be explained only "on the grounds of expediency". A young Italian international jurist, G. Strozzi, has very recently published an extensive study, already referred to in footnote 121 above, on this question: he considers that, except in a very few cases, the principle of exhaustion of local remedies originates in treaties. Consistent with this line of thought, the only value which he sees in the principle lies in the extent by which he expresses very restrictive ideas in general, it is as a condition for the institution of proceedings before an international tribunal. This author's position is, however, unique among Italian legal writers who are among those who have devoted most attention to our subject.

under the auspices of international organizations or by private scientific associations. The same principle is also included in drafts on the international responsibility of States for wrongful acts generally.

92. It therefore seems to be clearly established that general international law has traditionally affirmed the principle known as exhaustion of local remedies in relation to respect for international obligations which require the State to ensure that foreign natural and legal persons are accorded certain treatment. In the first part of this section, we stated that, in our view, the principle consists of a main proposition and a corollary. The proposition is that the breach of an international obligation, and the international responsibility arising from that breach, cannot be established so long as the individuals who complain of a situation due to the action or omission of a State organ and running counter to the result required by an international obligation have not endeavoured to redress that situation by resort to the other local remedies capable of still achieving the internationally required result. The corollary is that the State of which the said individuals are nationals is not authorized, so long as the condition referred to has not been met, to espouse their cause, that is to say, to take steps for their diplomatic or legal protection; in particular, it is not authorized to institute proceedings before an international tribunal.

93. The question may be asked, however, whether our finding that the requirement of exhaustion of local remedies has been affirmed in customary international law concurrently with the development of the rules concerning the status of aliens may not have led us to conclusions which sin both by over- and by understatement, particularly if it is applied exactly as it stands to existing international law. It may, for instance, be asked whether general international law itself does not nowadays provide at least for exceptions to the applicability of the principle in the determination of a breach of international obligations concerning the treatment of foreign natural and legal persons. Again, it may be asked whether the condition of exhaustion of local remedies by the individuals concerned should not likewise obtain in the determination of a breach of international obligations concerning persons other than those for whom the principle has traditionally been affirmed, and particularly for national natural and legal persons. Obviously, we ask these questions only in relation to general international law, for we are well aware that States sometimes avail themselves of the possibility of restricting or extending the scope of the principle by means of bilateral or even multilateral treaties.

94. Let us begin by considering the first aspect. Two different cases invariably prompt the question whether exhaustion of local remedies by the individuals concerned does or does not constitute a condition precedent for a State to find that there has been a complete breach by another State of an international obligation concerning the treatment to be accorded to its nationals, and so for the first State to be able to invoke the international responsibility incurred by the other State. The first case is where an initial course of conduct by organs of the State in whose territory the act took place (referred to here as the ‘territorial State’) has created a situation incompatible with the result required by an international obligation and injurious to certain persons as nationals of a particular foreign country. The second case is where the injury caused to the rights of foreign individuals has been done outside the territory of the State or to the detriment of persons either not resident in the territorial State or not having some voluntary link with the territorial State.

95. Admittedly, where there is a situation brought about by the conduct of a State organ which is injurious to a person through his possession of the nationality of a State which is the object of some special discriminatory intention, the State of which that person possesses the nationality sometimes reacts by invoking the responsibility of the territorial State, without waiting till the victim has had recourse to the local tribunals. Pertinent to this subject is a sentence from Denmark's reply...
to the request for information by the Preparatory Committee for the 1930 Codification Conference. In accepting the proposal that the right to invoke State responsibility under international law should be subject to the exhaustion, by those concerned, of the remedies available to them under the internal law of the State whose responsibility is alleged, the Danish Government adds:

It is understood, however, that the national authorities must not allow the matter to drag on unconscionably and there must be no obvious neglect of the foreigner’s right because he is a foreigner or a national of some foreign State. 222

But it would be reading too much into this observation to ascribe to it an intention clearly to affirm the existence in general international law of an exception to the general condition of exhaustion of local remedies. Like the attitude of some States in certain cases, it simply fits in with a normal and reasonable application of the principle. In other words, it may be that, in certain specific cases where the injury due to the action or omission of a State organ occurred within the context of a general feeling of hostility towards the nationals of some other foreign country, the State of which the injured persons were nationals did not wait, before intervening, until those persons had had recourse to the local remedies. The reason for that, however, is much simpler than any intention to claim an alleged exception to the principle. It is that, in the specific cases in question, the State of nationality of the injured persons realized that the situation in which its nationals were placed was beyond remedy at the level of internal law. It was convinced that it was impossible, in the circumstances, to secure the correction, by effective local remedies, of a situation created by the initial attitude of the territorial State. 223

In the light of these considerations, it is the Special Rapporteur’s firm belief that there is no reason to make express provision, in order to meet this particular case, for an exception to the normal application of the principle of the exhaustion of local remedies, since this principle applies only, as we shall have occasion to show once more, to “effective” remedies.

96. With regard to the second case mentioned in paragraph 94 it must be said at the outset, and no one would think of denying, that the principle of exhaustion of local remedies has often been defined with reference to a situation injurious to foreigners which has arisen in a State’s territory. Should that be taken to imply that the principle requiring such exhaustion would not apply in the case of injury caused by a State to foreigners outside its territory? Certainly not! Cases of injury caused by a State to foreigners in its own territory are, of course, by far the most common, which explains the formulation of the definitions in question, but there is no justification for reading into those definitions any intention to exclude the principle’s applicability to other cases. Neither State practice nor international jurisprudence offer the slightest explicit support for such a view, while analysis of alleged implicit affirmations of the inapplicability of the requirement of exhaustion of local remedies in such cases as damage caused to the property of foreigners on the high seas has proved most inconclusive. 224 In legal literature, some authors have rejected the notion that the exhaustion of local remedies principle is applicable in cases of injury caused by State organs to foreigners or their property outside the territory of that State. However, they cannot be said to have provided convincing support for their argument. 225 It should be added that codification drafts whose scope was not limited in advance to international responsibility for injury caused by the State in its own territory to foreigners or their property have not excluded the application of the principle to cases of injury caused to foreigners outside the territory of the State.

97. It must be said that, generally speaking, there is no real justification for such limitation. Those writers who have upheld it obviously have not considered the reason for and the true significance of the principle of requiring exhaustion of local remedies in cases where such requirement is justified. Why, indeed, should the act of an organ of the State constitute a completed breach of an international obligation relating to the treatment of aliens

222 In cases of the seizure of ships, especially private fishing vessels, on the high seas, the flag State has sometimes demanded immediate release of the vessel or compensation. That is what happened in the S.S. I’m Alone case between Canada and the United States tried by a court of arbitration in 1933 (United Nations, Reports of International Arbitral Awards, vol. III (op. cit.), pp. 1609 et seq.). In other cases, however, the flag State has refrained from intervention immediately (see the cases cited by Law, op. cit., pp. 103 et seq., and by Gaja, op. cit., pp. 90 et seq.). Practice in regard to fishing catches seems to support the idea of the applicability of the principle of the exhaustion of local remedies (see Reuter, loc. cit., pp. 161 et seq., and Gaja, op. cit., p. 91, note 17). In cases of aircraft shot down over the high seas, compensation has often been claimed and obtained without prior exhaustion of local remedies but by amicable settlement. Moreover, the private character of the aircraft shot down was often open to question. Instances of injury to aliens in the territory of another State are sometimes illustrated by reference to the case of the Consolidated Mining and Smelting Company at Trail, British Columbia ("Trail Smelter case") (United States v. Canada; for the arbitration court’s award, see United Nations, Reports of International Arbitral Awards, vol. III (op. cit.), pp. 1907 et seq.), in which the fumes from a foundry situated in Canada had caused damage in United States territory. However, the international obligation claimed to be breached was that of respect for the territory of another State rather than that of the treatment of individual aliens. Lastly, it should be remembered that, in many cases, non-application of the principle of the exhaustion of local remedies was due only to the absence of remedies really available to those concerned.


224 League of Nations, Bases for Discussion... (op. cit.), p. 136. The Rapporteur of the Sub-Committee, Ch. de Visscher, pointed out that affirmation of the principle does not prevent the State from claiming reparation, before the local remedies are exhausted, for prejudice suffered by the State which was distinct from but consequential upon the damage caused to persons because they were of a particular nationality.

225 It was difficult in these cases for the respondent State itself seriously to challenge the ineffectiveness of the available remedies. See again Gaja (op. cit.) on the possibility of explaining the very few cases that have occurred in practice in another way than by recognizing the alleged exception.
when the act affects property outside the State’s territory, but not when it affects property within its territory? Why should international responsibility and the faculty of invoking it arise from such an act immediately in the first case, but only after a subsequent act in the second case? In fact, the only valid criterion for determining, in the case of injury caused by a State to the person or property of foreign individuals, whether the principle of exhaustion of local remedies should or should not apply is the existence or absence of adequate and effective remedies available to those individuals. Admittedly, it is sometimes more difficult for injured foreigners to avail themselves of such remedies in case of damage to their property outside the territory of the State which has committed the injurious acts. However, where suitable effective remedies exist and those remedies are available to the individuals concerned, we can see no reason why the State should be denied the opportunity of discharging its obligation by taking, when appealed to by those individuals, the necessary steps to rectify the situation created by the initial conduct of its organs. It seems to us inconceivable that it should be denied that possibility solely because the situation to be rectified arose outside rather than within the State frontiers. Moreover, even if the principle of the exhaustion of local remedies is regarded as a purely “procedural” rule—which we dispute—it is difficult to see why the location of an individual’s property at the time when the damage is sustained should be decisive in determining whether or not the individual’s home State must wait until he has exhausted local remedies before being permitted to intervene itself on the ground of offering diplomatic protection.

98. The above arguments apply equally to the claim that an exception to the principle of exhaustion of local remedies should be made in the case of injury to foreigners not resident in the territory of the State causing the injury. This is just another attempt to introduce a territorial element which has nothing to do with the ratio of the principle of exhaustion of local remedies. The theory that the principle is not applicable to cases of injury to non-resident foreigners was upheld in practice by the French Government in the Norwegian Loans case in order to release French nationals who were holders of Norwegian bonds but resident in France from the obligation to resort to the remedies provided by Norwegian law. The French Government’s reply of 20 February 1957 states:

Although the rule under consideration is sometimes formulated in terms of the “prior exhaustion of domestic remedies”, it also, and perhaps more often, appears with such terms as “exhaustion of local remedies” and “local redress”, suggesting a nuance affecting the very substance of this rule and its justification.

... the only explanation of this rule lies in the requirement that a foreigner in dispute with the State under whose sovereignty he has chosen to live may not have his case submitted to an international tribunal without having first exhausted all local means of settlement.

The Norwegian Government strongly contested that view and maintained that there was no precedent to be found in the practice for the limitation attributed to the rule by the French Government. The Court was not called on to give any ruling on the point, but Judge Read strongly criticized the French Government’s position in his dissenting opinion, remarking that:

France has not been able to put forward any persuasive authority for accepting this limitation on the application of the rule and, indeed, the weight of authority is the other way.

It is not true, at present at least, that the exhaustion of local remedies requirement has been applied only to cases of injury caused to foreigners resident in the territory of the State causing the injury. To mention only two well-known cases, in the Finnish Ships case and the Ambatielos case the individuals injured were not resident in the territory of the State causing the alleged injury. Nevertheless, neither of the claimants—the Finnish Government in the first case and the Greek Government in the second—invoiced that circumstance to establish inapplicability of the principle.

99. It may be added that article 4 of the draft adopted on first reading by the Third Committee of the 1930 Hague Conference made no distinction between resident and non-resident foreigners. The same applies to all the other codification drafts adopted under the auspices of international organizations and drafts of private origin. And finally most writers reject the idea of a distinction on that basis. There is no need to say more about this limitation, which in our opinion is not justified by the logic of the principle and, in practice, would have unacceptable effects. It would exclude from the sphere of application of the principle many cases of nationalization of foreigners’ property or prejudice to foreigners’ investments, on the sole ground that the foreigners were not resident in the country. The desire to avoid imposing too heavy a burden on an individual who considers that he has suffered injury, by requiring him to exhaust the local remedies in a country other than the one in which he resides cannot warrant such a conclusion.

226. Ibid., pp. 452 et seq.
229. With the exception of D. R. Mummery (“The content of the duty to exhaust local judicial remedies”, American Journal of International Law (Washington D.C.), vol. 58, No. 2 (April 1964), pp. 390 et seq.), who considers the principle to be applicable in the case of resident aliens and in that of non-resident aliens whose property is in the territory of the accused State. According to D. P. O’Connell (International Law, 2nd ed. (London, Stevens, 1970), vol. II, pp. 950 et seq.), the principle would not apply if the foreigner was outside the jurisdiction of the State. Definitely against any limitation of this kind are A. D. McNair (International Law Opinions (Cambridge, University Press, 1950), vol. II, p. 219) and Gaja (op. cit., pp. 87 et seq.).
100. The idea of an exception which would exempt from application of the requirement of exhaustion of local remedies only foreigners not connected by any voluntary link to the State whose remedies are to be used is very similar in spirit to the idea of an exception for non-resident aliens, but is more restrictive in scope. This idea was developed before the International Court of Justice by the Government of Israel in connexion with damage caused to Israeli nationals by the Bulgarian anti-aircraft defence in shooting down an Israeli civil aircraft which had entered Bulgarian air space by mistake. The Bulgarian Government disputed the existence of this limitation; the United States, some of whose nationals had also been injured by the action of the Bulgarian authorities, claimed that the principle was not applicable in that specific case, but did not take the exception put forward by the Government of Israel. The Court did not have occasion to rule on this question, but the idea of introducing this exception subsequently found a few supporters in legal literature. At the present stage, however, it does not seem that an exception thus conceived, even of a very limited nature, has yet found support in international practice, and we would hesitate to propose its adoption, even from the point of view of the progressive development of international law. Even if this line were to be taken, it would seem to us more consistent with the reason for the existence of the principle of exhaustion of local remedies, and with the logic of that principle, to provide, in a form to be worked out, that the collaboration of individuals should not always be required in order to set in motion machinery enabling the State to redress, by a new course of conduct, a situation which is contrary to the result internationally required of it and which has been brought about by its original conduct. Such a provision would apply, for example, in the case of injury caused to a foreigner brought into the territory of a State, or conveyed in transit by air or over land, against his will. It might be found in fact that the burdens that would otherwise devolve upon such an individual would be too heavy to be justified. However, even without expressly providing for an exception which might compromise the soundness of the principle, would it not be possible to regard these few extreme cases as covered by the general requirement that local remedies should be effective, that requirement being understood to include the further requirement that such remedies should also be effectively usable, in the cases submitted, by the individuals concerned? And would it not be possible to envisage that, for such cases, the State should be able to establish procedures for the use of local remedies in order to avoid being placed, for reasons for which it is not to blame, in a situation involving its international responsibility?

101. Having examined the first of the two aspects mentioned above, let us now consider the second. The question is whether the traditional area in which the principle under discussion took shape has not been widened in modern international law. Is it not considered feasible nowadays to apply in other sectors too the requirement that the persons interested in the performance by the State of international obligations of concern to them must use and exhaust the available local remedies before the State can be accused of having breached one of those obligations and it can be claimed that the State has an international responsibility and may be called upon to discharge it?

102. Let it be said at the outset that there can be no question of extending the applicability of the principle to cases of injury suffered by persons acting in the country as organs of the State to which they belong. Mention has been made of an alleged exemption from applicability of the rule of exhaustion of local remedies for foreigners enjoying “special international protection” in the country. The 1956 resolution of the Institute of International Law was expressed in these terms. The expression may, however, be misleading. It might be thought to imply some sort of exception to an otherwise normal application of the principle, in virtue of the fact that certain foreigners, including diplomatic agents, consular agents and Heads of State, enjoy greater protection in the territory of the country than foreigners in general. In reality, however, there is no exception here. As we pointed out at the beginning of this section, the so-called principle of exhaustion of local remedies became established in general international law concurrently with the formation of international obligations laying down the treatment to be accorded by the State to foreign natural or legal persons. Having regard to the specific object of those obligations, to the fact that private persons were envisaged as the beneficiaries of their performance, it seemed normal that those same persons should have to set in motion the machinery that would enable the State to redress where necessary any adverse consequences of the original conduct of its organs and in that way still produce the result whose attainment might have been jeopardized by that original conduct. In other words, all this is meaningful precisely because it is concerned with the performance or breach of obligations concerning the treatment to be accorded to individuals. Foreign

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233 In his oral argument, the agent of the Government of Israel stated the following:

"There are a number of important limitations to the application in practice of this rule. In my submission ... it is essential, before the rule can be applied, that a link should exist between the injured individual and the State whose actions are impugned. I submit that all the precedents show that the rule is only applied when the alien ... has created ... a voluntary, conscious and deliberate connection between himself and the foreign State whose actions are impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there ... or by virtue of his having made some contract with the government of that State, such as the cases involving foreign bondholders; and there may be other instances." (I.C.J. Pleadings, Aerial Incident of 27 July 1955, pp. 531 et seq.)

234 Ibid., p. 565.

235 Ibid., pp. 301, 326 et seq.

236 Meron (loc. cit., pp. 94 et seq.), Head (loc. cit., p. 153), Jiménez de Arechaga (loc. cit., p. 583) and Chappez (op. cit., pp. 48 et seq.) have expressed themselves to that effect. Law (op. cit., p. 104) links the proposed exception to the case of absence of voluntary submission by the foreigner to local law and jurisdiction. Contra, Gújía, op. cit., p. 89.

237 See para. 93 above.

238 The resolution provided that the rule of exhaustion of local remedies would not apply "if the injurious act affect a person enjoying special international protection." (Annuaire de l'Institut de droit international, 1956 (Basel), vol. 46, p. 358.)
Heads of State, diplomatic agents, consular agents and members of special missions of a foreign State are not foreign individuals; they are State organs, they are the foreign State itself. Their case is therefore outside the scope of the possible application of the principle under discussion.\(^{239}\) This, and not the protection specially provided for them, is the reason why, if they suffer an injury which affects them in their official capacity, there is no question of requiring them to use local remedies. Such use could be required of them in a specific case in which they complained of a State action contrary to an international obligation which allegedly affected them in their private capacity, in a case, that is to say, in which they appeared only as individuals.\(^{546}\) But then, of course, we are dealing with a normal case of application of the principle and not with an exceptional extension of the principle to other areas.

103. An extension of the traditional sphere of application of the principle requiring the exhaustion of local remedies may come about automatically as a result of the growing participation of public capital in private companies. It is useful to bear this development in mind in delimiting the scope of the specific situations in which the use of local remedies must be reckoned with. The fact that the requirement of such use has been affirmed in connexion with international obligations governing the treatment to be accorded by the State to foreign individuals must not lead us, in this context, to assign to the word “individual” the same meaning it had a century ago. A foreign company financed partly or even mainly by public capital is bound, in the appropriate circumstances, to employ local remedies in exactly the same way as a purely private joint stock company. Indeed, the participation of public capital has never been put forward as grounds for non-applicability of the principle of exhaustion of local remedies to any legal person. For example, the United Kingdom Government made no such claim in the Anglo-Iranian Oil Company case. In the dispute over the Aerial Incident of 27 July 1955, counsel for the Bulgarian Government stated, in support of the applicability of the principle in the case in question, that:

Even if it was proved that El Al was a company... in which the State of Israel held a vast majority of the shares, I would say that altered nothing in the case.\(^{241}\)

Furthermore, without going into a question whose main features far transcend the bounds of our present concerns, we would simply observe that we do not believe that the applicability of the principle of exhaustion of local remedies should be ruled out in the case of foreign legal persons of a predominantly, if not exclusively, public character. It seems to us that, from this point of view, the main consideration should be, not the more or less public character attributed to the legal person in the legal order to which it belongs, but the fact that its activity in the territory of the foreign State is carried on in the same areas as those where the activities of private legal persons are usually carried on.\(^{242}\)

104. We think, however, that a genuine extension of the sphere of application of the principle of exhaustion of local remedies can be spoken of only in connexion with the applicability of the requirement imposed by that principle to the beneficiaries of the obligations now being laid on States with regard to the treatment to be accorded, no longer to “foreign” individuals alone, but also to “national” individuals. The problem is relatively new, because States have only recently recognized—and so far have recognized only to a limited degree—that international law lays duties upon them in this connexion. It should also be noted that the international obligations of the State with regard to the treatment of its own citizens are almost exclusively of a conventional nature and that, in the instruments imposing them, the requirement of exhaustion of local remedies by the persons concerned is nearly always explicitly stated. It is, however, acknowledged that the existence of a few customary rules on the subject at the present time cannot be entirely ruled out and that such rules will probably increase in number. Moreover, an attempt to clarify the question in the present draft may be of some use in the interpretation of conventions in which the problem of the applicability of the principle of exhaustion of local remedies is not explicitly solved.

105. This having been said, it seems to us clear beyond doubt that the principle discussed in this section should also apply to international obligations of the State concerning the treatment to be accorded to its own nationals. We see no reason whatsoever why the State should avoid incurring international responsibility by rectifying, necessarily on the initiative of the persons concerned, situations that are incompatible with the

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\(^{239}\) The same applies to other organs of a State which are called upon to perform functions in the territory of another State, and to organs of subjects of international law other than States, such as the Holy See or international organizations. In this context, it is interesting to note the individual opinion given by Judge Azevedo in connexion with the advisory opinion in the case of Reparation for injuries suffered in the service of the United Nations: "In the case of officials or experts appointed directly by the Organization, ... the Organization ... may make a claim without having to put forward a denial of justice, or even to show that domestic remedies have been exhausted." (I.C.J. Reports 1949, p. 195.)


\(^{242}\) Various writers incline—somewhat tentatively, it is true—to the view that the requirement of exhaustion of local remedies would gradually be extended to cases of injury caused to foreign public entities—including States—provided that, in the cases in question, they had acted \textit{jus disputandi} or \textit{jure gestionis}. For references, see Gaja, op. cit., p. 83, note 6. For the reasons indicated above (foot-note 240), we think that any exemption from local jurisdiction which these entities may enjoy is irrelevant to the solution of our problem.
result required by international obligations in cases where that result concerns foreigners and not in cases where it concerns nationals. Let us add that States are already disinclined to allow frequent intervention by other States where the stated purpose of such intervention is the protection of nationals of those other States; they will be even less inclined to allow interventions of this kind where the stated purpose is the protection of their own nationals. It is hence unthinkable that they should consent to forgo, precisely with regard to a possible breach of obligations concerning the treatment of their own nationals, the valuable “screening” afforded by the requirement of prior exhaustion of local remedies. The very fact that the principal international conventions relating to the protection of human rights expressly impose the requirement of prior exhaustion of local remedies rules out the possibility that States might lay aside this shield in the case of obligations of a customary nature. We therefore believe that we should take these considerations into account in the definition of the principle which we propose to formulate, and that, in particular, the reference to be made, in the text to be adopted, to the persons upon whom the requirement of exhaustion of local remedies is to be laid should not be restricted to foreign individuals. 106. It remains for us to give a brief explanation of precisely what is meant by the use and exhaustion of local remedies. It is obvious—and in a different context we have already pointed out—that the principle we are considering is based on the assumption that there are remedies open to the individuals concerned under the internal legal system of the State in question. If the measure initially taken by a State organ, whether it be a legislative, executive, judicial or other measure, is not subject to any remedy, the possibility of using other means to redress the situation created by that measure is ruled out. The breach by the State of its international obligation is complete ab initio. The international responsibility of the State has thus come into being already, and nothing can delay the possibility of taking action on it. The only qualification to be made to this statement refers to the case in which the lack of remedies open to the individual is due to his own negligence: for example, failure to lodge his appeal within the prescribed time-limit.

107. The real problems in interpreting the principle arise, therefore, when remedies against a given State measure exist in law and are available to individuals who consider themselves injured by that measure. It is universally recognized in principle, furthermore, that the mere existence of remedies does not automatically impose a mandatory requirement that the individuals concerned should make use of them. There is, however, less unanimity about identifying the cases in which it is permissible not to meet that requirement. The remedies vary considerably in form from one legal system to another; all international law can do, therefore, is to provide some guidance in principle for adaptation to each specific case. In any event, the real reason for the existence of the principle of exhaustion of local remedies must always be kept in mind: it is to enable the State to avoid the breach of an international obligation by redressing, through a subsequent course of conduct adopted on the initiative of the individuals concerned, the consequences of an initial course of conduct contrary to the result required by the obligation. From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken is concerned with all avenues which offer a real prospect of still achieving the result originally aimed at by the international obligation or, where appropriate, an equivalent result. But it seems equally plain that only avenues which offer such a prospect should be used. This idea is summed up in the general conclusion requiring that the remedies available should be “effective”.

108. It seems worth while to make a brief analysis of this conclusion. It implies, from the positive standpoint:

(a) That all available remedies capable of redressing the situation complained of, whether they be judicial or administrative, ordinary or extraordinary, of the first, second or third degree, should be used;  

(b) That all fitting legal grounds should be advanced with a view to securing a favourable decision. The same

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244 This is true of the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 26) (for reference, see foot-note 36 above); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 11, para. 3, and art. 14, para. 7(a) (idem, foot-note 8); the International Covenant on Civil and Political Rights (art. 41, para. 1((General Assembly resolution 2200 A (XXI), annex), and the Optional Protocol thereto (art. 5, para. 2(b) (ibid.).

245 See what was said in paragraph 42 about cases where the State encounters in its own system of internal law an insuperable obstacle precluding the possibility that it may still fulfil its obligation by remediating ex post facto, by the adoption of different conduct, a situation which is incompatible with the internationally required result and which was created by its initial conduct.  

246 See the observation made by United States Secretary of State Fish on 29 May 1873 to the effect that: "A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust" (J. B. Moore, A Digest of International Law (Washington, D.C., U.S. Government Printing Office, 1906), vol. VI, p. 677). For an analysis of State practice, international judicial decisions and the opinions of writers on this point, see Gaja, op. cit., pp. 123 et seq., note 29, and p. 85, note 9.

247 This aspect of the matter was considered in detail in connexion with the Finnish Vessels case. The validity of the qualification mentioned in the text is open to doubt, however, in a case where the time allowed for the exercise of a remedy is unduly short, for instance, if the injured foreigner is not resident in the territory of the State and it is thus materially impossible for him to take action in time. The tendency in such a case is to treat the situation as one in which there is no remedy at all.

248 Appeals to the highest judicial authority (court of cassation, supreme court) are of course included, along with such special remedies as application for review, appeal against the judges and appeal to the constitutional court where such a court exists and is open to individuals. For details of the practice of States in this matter, see Gaja, op. cit., pp. 123 et seq., Chappex, op. cit., pp. 181 et seq., Haessler, op. cit., pp. 28 et seq., 48 et seq. Amerasinghe (State Responsibility... (op. cit.), pp. 189 et seq.) would except administrative remedies. One doubtful point remains: that of "petitions for redress", not based on a precise legal claim. These were mentioned, as we have seen, in the Phosphates in Morocco case. Against the inclusion of this type of remedy among those to be used, see Chappex, op. cit., pp. 180 et seq., Haessler, op. cit., p. 29, and Amerasinghe, State Responsibility... (op. cit.), pp. 191 et seq.
applies to procedural means and other formal remedies. \[446\] In a word, the claimant must show that he wants to win the case, and not merely to lodge an appeal in order to meet the requirement for formal exhaustion of local remedies. He must prove his genuine intention to create the prerequisites for action by the State at the international level. It should be emphasized that, if the individual fails to advance in the course of the internal proceedings an argument which might have won him the case, and if that omission is later revealed by the use of that argument before an international court, the court may find that the requirement for exhaustion of local remedies has not been duly met.

109. From the negative standpoint, the conclusion reached above implies:

(a) That a remedy should not be used unless it holds out genuine—even if uncertain—prospects of success. In other words, the individual concerned is under no obligation to waste his time attacking before an internal court a State measure which is de facto final. He cannot be required to use a remedy which would be a mere formality, as for example where it is clear from the outset that the law which the court will have to apply can lead only to rejection of the appeal (the case of appeal against a measure taken under a law that cannot be overturned; of a court bound by a previous judgment rejecting a similar appeal, or by a well-established body of unfavourable case-law; of proven partiality on the part of the court, etc.); \[449\]

(b) That a remedy should not be used unless the success it may bring is not, in its turn, a mere success of form but can actually produce either the result originally required by the international obligation or, if that is no longer possible, an alternative result which is genuinely equivalent. \[450\]

\[446\] The question of using all procedural means was discussed in particular in the Ambatielos case (United Nations, Reports of International Arbitral Awards, vol. 301 (op. cit.), pp. 110-121). See Gaja, op. cit., pp. 119 et seq., Haessler, op. cit., pp. 28 et seq., 48 et seq., and 71 et seq., and Chappaz, op. cit., pp. 205 et seq.

\[449\] See Amerasinghe, State Responsibility... (op. cit.), pp. 192 et seq., 194 et seq., and Gaja, op. cit., pp. 109 et seq., notes 14 and 15.

\[450\] If the result required by the international obligation is, in fact, still attainable, it would appear that the individuals concerned cannot be compelled to settle for an equivalent result—in other words, for reparation instead of restitution. This point was discussed in the Phosphates in Morocco case, although the Court was not called upon to rule on it. Where the internationally required result has become de facto unattainable, it is plain that the individual concerned cannot be required to use a remedy unless it offers him prospects of adequate reparation at the very least. Among possible cases under this heading are those in which the course of justice is unduly slow or unduly expensive in proportion to the protective compensation. On these aspects of the matter, which were dealt with in the Finnish Vessels case and the Ambatielos case, see Amerasinghe, State Responsibility... (op. cit.), pp. 196 et seq., and Gaja, op. cit., pp. 106 et seq., notes 10 and 12.

We have already mentioned the specific case in which, for reasons such as the fact that the injured individual's residence is distant from the territory of the State that adopted the harmful measures, or that he has no voluntary link with that State, or for similar reasons, the obstacle to the use of local remedies is not necessarily due to a defect of the available system of remedies per se but to an objective situation which in practice makes it impossible for the individual concerned to use that system. As we said in paragraph 100 above, it is open to question whether 110. The exhaustive use of the available local remedies may prove fruitful where it is practised, and may thus lead to acceptance of the recourse lodged by the individual concerned. On the other hand, it may prove fruitless and result in rejection of the recourse. If the recourse is accepted, the effect of acceptance is the achievement of the result required by the international obligation or, where appropriate, the achievement of another result, economically equivalent to it. If the recourse is rejected, the breach of the obligation begun by the State conduct against which the recourse was lodged is consequently completed by the rejection, and an international responsibility comes into being for the State. A purely ostensible acceptance of the recourse—which, for example, did not lead to the internationally required result in a case where that result was still attainable, or which led to an alternative result that was not equivalent—would obviously be tantamount to rejection.

111. In conclusion, let us put forward some brief considerations de jure condendo. We are well aware that there are not solely advantages in the fact that general international law requires individuals injured by the action or omission of a State organ to seek redress of the situation injurious to them by having recourse to internal authorities and thus prompting a new course of State conduct that corrects the initial course of conduct. To put it more clearly, there are not solely advantages in the fact that a very large proportion of international obligations concerning the treatment of individuals ultimately allow the State to achieve, in stages, the result required of it. There are not solely advantages in the fact that such obligations accordingly allow conduct contrary to the internationally required result to be disregarded for the purposes of establishing international responsibility, provided that that result is eventually secured by subsequent conduct. All the practical disadvantages inevitably attendant on these facts explain why various conventions expressly preclude the application of the principle of exhaustion of local remedies in certain contexts. Again, the desire to avoid the hesitations and delays to which the principle may give rise, both in redressing situations incompatible with the result aimed at by an international obligation and in establishing that that obligation has definitely been breached, has led to the consideration and institution of alternative systems. As examples of such systems, we may cite the over-all compensation agreements reached in certain disputes over nationalization of foreign property, or the inclusion in contracts between States and foreign private companies of arbitration clauses in place of recourse to local courts. However this, in our view, offers no proof that States would be prepared today, having regard to the progressive development of international law, to abandon the principle of exhaustion of local remedies or severely to curtail its scope. It is true that the investing countries exhibit a growing awareness of the repercussions on the interests of the national community as a whole of encroachments upon the interests of their nationals operating on foreign soil.

\[450\] The general requirement that the available remedies should be effective ought not to be understood to imply also that they should be effectively usable.
They would consequently like to be free to lodge international claims as they see fit, independently of whether the individuals directly injured have exhausted the available local remedies or shown themselves neglectful in that regard. The proponents of the idea of a more direct, quicker and more effective form of protection of human rights, in their turn, see in the principle of exhaustion of local remedies an obstacle to the development to which they aspire. At the same time, the requirement that the individuals directly affected by measures on the part of an organ of the State in which they reside and in which they carry on their activity should exhaust the local remedies has always been a safeguard applied by the investing countries against a tendency to exaggerate obligations concerning the treatment of foreign natural and legal persons. Those countries see in this requirement a protection against the unduly facile attempts traditionally made to place on the level of international relations disputes which have often belonged only to the internal level. The inclination of the developing countries would thus be, in the context of general international law, to favour strengthening rather than weakening the principle of exhaustion of local remedies. Let us add that the minds most heedful of today’s problems and of the difficulties in solving them realize that compliance with this essential requirement may well be the best guarantee of further substantial progress in the acceptance of new obligations with regard to human rights. In the circumstances, the Special Rapporteur considers that it would be injudicious to tamper with the existing general scope of the principle in the name of an alleged progressive development which others might regard as a step backwards in the matter of guarantees of equal sovereignty for all States.

112. The definition given to the principle in the rule we are about to formulate needs to be, in our opinion, flexible enough for adaptation to a variety of specific situations. In addition, a summary wording seems to us preferable to a detailed list of different aspects of the principle, which, in the multiform nature of international life, could never be exhaustive.

113. In view of these considerations and of the arguments advanced and evidence cited in the foregoing paragraphs, the Special Rapporteur proposes that the Commission should adopt the following text:

**Article 22. Exhaustion of local remedies**

There is a breach of an international obligation requiring the State to achieve a particular result, namely, to accord certain treatment to individuals, natural or legal persons, if, after the State's initial conduct has led to a situation incompatible with the required result, the said individuals have employed and exhausted without success the local remedies which were available to them and which possessed the necessary effectiveness to ensure either that the required treatment would continue to be accorded to them or, if that should prove impossible, that appropriate compensation be awarded to them. Consequently, the international responsibility of the State for the initial act or omission and the possibility of enforcing it against the State are not established until after local remedies have been exhausted without satisfaction.