

DIPLOMATIC PROTECTION

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Second report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur

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A. Exhaustion of local remedies¹

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

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.²

In the *ELSI* case ICJ described it not merely as a rule, but as “an important principle of customary international law”.³

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

[F]irst, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the state; and fifthly, if it is a deliberate act of the state, that the state is willing to leave the wrong unrighted. It is a logical principle that where there is a judicial remedy, it must be sought. Only if sought in vain and a denial of justice established, does diplomatic interposition become proper.⁴

The foundation of the rule, according to Jiménez de Aréchaga, is “the respect for the sovereignty and jurisdiction of the state competent to deal with the question through its judicial organs”.⁵

3. An exhaustion of local remedies rule was included in article 22 in the draft articles on State responsibility adopted by the Commission on first reading.⁶ The commentary to that article⁷ described the requirement of the exhaustion of local remedies as “a principle of general international law”. The draft articles on State responsibility provisionally adopted by the Drafting Committee on second reading in 2000⁸ provide that the “responsibility of a State may not be invoked if ... [t]he claim is

one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted”,⁹ but leave the drafting of a comprehensive rule on this subject to the present study.

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

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.¹⁰

No attempt is made to emulate this feat in the present report, first, because the components of the exhaustion of local remedies rule considered in this report go beyond those addressed by Mr. Ago,¹¹ and secondly, because the goal of clarity is better achieved by a number of draft articles. Consequently Mr. Ago’s single article is replaced by several articles.

B. The general principle that local remedies must be exhausted

Article 10

1. A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, before the injured national has, subject to Article 14, exhausted all available local legal remedies in the State alleged to be responsible for the injury.

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

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

5. That the exhaustion of local remedies is a well-established rule of customary international law is not disputed. It has been affirmed by the decisions of international¹² and national courts, bilateral and multilateral treaties, State practice, codification attempts by governmental and non-governmental bodies and the writings of jurists. The fact that treaties, particularly investment treaties, may on occasion exclude the operation of the

¹ The Special Rapporteur wishes to acknowledge the invaluable contribution made to the preparation of the report by Ms. Zsuzsanna Deen-Racsmany of the University of Leiden.

² *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27.

³ *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 50.

⁴ *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, pp. 817–818. For further reasons, see Doehring, “Local remedies, exhaustion of”, p. 238; and Sepúlveda Amor, “International law and national sovereignty: the NAFTA and the claims of Mexican jurisdiction”, p. 586.

⁵ “International responsibility”, p. 584.

⁶ *Yearbook ... 1996*, vol. II (Part Two), p. 60.

⁷ *Yearbook ... 1977*, vol. II (Part Two), p. 31.

⁸ *Yearbook ... 2000*, vol. II (Part Two), annex, p. 65.

⁹ *Ibid.*, p. 69, art. 45.

¹⁰ *Yearbook ... 1977* (see footnote 7 above), p. 30.

¹¹ Mr. Ago acknowledged that article 22 did not pretend to cover all aspects of the exhaustion of local remedies rule, particularly those that went beyond the purpose of the draft articles, namely the codification of the general rules governing State responsibility (*ibid.*, pp. 48 and 50, paras. (52) and (61) of the commentary to article 22).

¹² See paragraph 1 above.

rule in no way detracts from the generality of the rule or the universality of its acceptance.¹³ The commentary to article 22 of the draft articles on State responsibility adopted by the Commission on first reading¹⁴ contains a litany of sources proclaiming its validity. There is no reason to rehearse those sources.

D. Persons required to exhaust local remedies

6. Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies where it engages in *acta jure gestionis*.¹⁵ Diplomats or State enterprises engaged in *acta jure imperii*, on the other hand, are not required to exhaust local remedies, as an injury to them is a direct injury to the State to which the exhaustion of local remedies rule is inapplicable.¹⁶

E. Primary and secondary rules

7. No attempt is made to define or describe the great range of internationally wrongful acts that give rise to State responsibility when an alien is injured to which the exhaustion of local remedies rule applies. To do so would be to trespass on the field of “primary rules” of international law which the Commission has studiously avoided in its draft articles on State responsibility, and which it has suggested should likewise be avoided in the study on diplomatic protection.¹⁷ This policy has served the Commission well in its approach to State responsibility. However, it should be stressed, first, that there is no clear distinction between primary and secondary rules; secondly, that the distinction rests on unclear jurisprudential grounds; and thirdly, that it is a distinction of dubious value in a study on the exhaustion of local remedies.

8. That a clear distinction between primary and secondary rules is unattainable is evidenced by the many occasions on which members of the Commission have disagreed over the classification of a rule as primary

or secondary.¹⁸ Scholars have likewise had difficulty in drawing a clear distinction.¹⁹

9. The distinction between primary and secondary rules was invoked by Special Rapporteur Mr. Ago as a tool for rescuing the Commission from the difficulties caused by Special Rapporteur Mr. García Amador’s proposals to codify the international minimum standard in his draft articles on State responsibility.²⁰ Little attention was paid to the jurisprudential basis of the distinction by Mr. Ago when he first introduced the distinction in his second report on State responsibility, in which he stated:

Responsibility differs widely, in its aspects, from the other subjects which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed ‘primary’, as opposed to the other rules—precisely those covering the field of responsibility—which may be termed ‘secondary’, inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules.²¹

Common-law lawyers familiar with the distinction between primary and secondary rules expounded by Hart in 1961 in *The Concept of Law*, which views secondary rules largely as rules of recognition designed to identify the primary rules of obligation,²² will immediately realize that Mr. Ago had some other jurisprudential explanation in mind. It is more likely that Mr. Ago was influenced by the writings of a jurist such as Ross,²³ who sees a legal rule as completed only when the “secondary norms” of effectiveness (or sanctions) are added to the “primary norms” of obligation.²⁴ Whatever the inspiration for the distinction between primary and secondary rules as employed by the Commission may be, it does not rest on a clear jurisprudential foundation.

10. While the distinction between primary and secondary rules has served its purpose in the field of State responsibility, it is a distinction that cannot be

¹³ *Yearbook ... 1977* (see footnote 7 above), p. 49, para. (55). See also Amerasinghe, “Whither the local remedies rule?”.

¹⁴ *Yearbook ... 1977* (see footnote 7 above), pp. 30–50.

¹⁵ *Ibid.*, p. 46, para. 45; sixth report on State responsibility by Mr. Ago, *Yearbook ... 1977*, vol. II (Part One), document A/CN.4/302 and Add. 1–3, p. 40, para. 103; see also International Law Association, *Report of the Sixty-Ninth Conference* (London, 2000), pp. 615–616; Herdegen, “Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen”, p. 65; and Law, *The Local Remedies Rule in International Law*, pp. 116–121.

¹⁶ See paragraph 27 below.

¹⁷ At its forty-ninth session a working group of the Commission recommended that the study of diplomatic protection “will be limited to codification of secondary rules: while addressing the requirement of an internationally wrongful act of the State as a requisite, it will not address the specific content of the international legal obligation which has been violated, whether under customary or treaty law” (*Yearbook ... 1997*, vol. II (Part Two), p. 61, para. 181).

¹⁸ The controversial article 19 in the draft articles on State responsibility adopted by the Commission on first reading (see footnote 6 above), dealing with international State crimes, has been frequently classified as a primary rule in a code of secondary rules. See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, p. 7, para. 18.

¹⁹ See Lillich, “Duties of States regarding the civil rights of aliens”, p. 373. See also Combacau and Allard, “‘Primary’ and ‘secondary’ rules in the law of State responsibility: categorizing international obligations”. This highly sophisticated article hardly produces clarity on the distinction between primary and secondary rules. Rather, it provides evidence of the difficulties inherent in drawing such a distinction.

²⁰ See Mr. Ago’s first report on State responsibility, *Yearbook ... 1969*, vol. II, document A/CN.4/217 and Add.1, pp. 125–141; and his second report, *Yearbook ... 1970*, vol. II, document A/CN.4/233, pp. 177–197.

²¹ *Yearbook ... 1970* (see footnote 20 above), p. 179, para. 11.

²² Wellens, “Diversity in secondary rules and the unity of international law: some reflections on current trends”, addresses the question of international law from the perspective of Hart’s distinction between primary and secondary rules. It does not, however, suggest that it was this distinction that inspired Mr. Ago’s approach to State responsibility.

²³ *On Law and Justice*, pp. 209–210.

²⁴ For an examination of this matter, see Goldie, “State responsibility and the expropriation of property”.

too strictly maintained in a study on the exhaustion of local remedies in the context of diplomatic protection, as the concept of denial of justice is intimately connected with the exhaustion of local remedies rule. Writers on the exhaustion of local remedies rule often include an examination of denial of justice as an integral component of the exhaustion of local remedies rule, or at least find it necessary to discuss the connection between denial of justice and the exhaustion of local remedies.²⁵ Moreover, attempts at codification of the local remedies rule often seek to give some definition to denial of justice.²⁶ Circumstances of this kind, coupled with the fact that denial of justice may be seen both as a secondary rule excusing recourse to further remedies (associated with the “futility rule”, discussed in article 15) or as a primary rule giving rise to international responsibility, suggest that the attempt at maintaining a rigid distinction between primary and secondary rules followed in the study on State responsibility should not be pursued with the same degree of rigidity in the present study. The commentary on article 22 of the draft articles on State responsibility adopted by the Commission on first reading warns that consideration of the topic of exhaustion of local remedies “must at all costs stop short of an examination of the content of ‘primary’ rules of international law”.²⁷ This warning was, however, in the context of the codification of State responsibility and does not preclude the Commission from adopting a different approach in a study on diplomatic protection.

F. Remedies to be exhausted

11. The remedies available to an alien that must be exhausted before an international claim is brought will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule govern-

²⁵ Amerasinghe, *Local Remedies in International Law*, chap. III, p. 31; Borchard, *op. cit.*, part I, chap. VIII, p. 330; Cançado Trindade, “Denial of justice and its relationship to exhaustion of local remedies in international law”; Eagleton, *The Responsibility of States in International Law*, p. 113, and “Denial of justice in international law”, p. 542; O’Connell, *International Law*, pp. 945–950; Jennings and Watts, eds., *Oppenheim’s International Law*, pp. 525 and 544; Head, “A fresh look at the local remedies rule”, p. 149; Adede, “A survey of treaty provisions on the rule of exhaustion of local remedies”, and “A fresh look at the meaning of the doctrine of denial of justice under international law”, p. 76 (“the doctrine of denial of justice and the local remedies rule are two sides of the same coin”); and Dunn, *The Protection of Nationals: A Study in the Application of International Law*, pp. 146–159.

²⁶ Arts. 4 and 9 of *Articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law* (The Hague, 1930) (League of Nations publication, *V. Legal, 1930.V.17*, document C.351(c)M.145(c).1930.V) (text in *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 225–226); art. IV, Project No. 16 on diplomatic protection prepared by the American Institute of International Law (1925) (*ibid.*, p. 227); arts. V–VI of the Draft on “international responsibility of States for injuries on their territory to the person or property of foreigners”, prepared by the Institute of International Law (1927) (*ibid.*, p. 228); draft Convention on responsibility of States for damage done in their territory to the person or property of foreigners (particularly art. 9), prepared by Harvard Law School (1929) (*ibid.*, p. 229); Principles of international law that govern the responsibility of the State in the opinion of Latin American countries (art. VIII), prepared by the Inter-American Juridical Committee in 1962 (text in *Yearbook ... 1969* (see footnote 20 above), p. 153); third report on State responsibility by Mr. García Amador, *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 55–61.

²⁷ *Yearbook ... 1977* (see footnote 7 above), p. 48, para. (52).

ing all situations. The words “all”, “available” and the limitation of local remedies to remedies before “judicial or administrative courts or authorities whether ordinary or special” offer some guidance but cannot hope to cover all circumstances. This article must, moreover, be read with article 15, which provides for exceptions to the rule that all available local remedies must be exhausted.

12. There is strong support for the view that all *legal* remedies that offer the injured individual a prospect of success must be exhausted. In *Nielsen v. Denmark*²⁸ the European Commission of Human Rights stated that the exhaustion of local remedies rule requires “that recourse should be had to all *legal** remedies available under the local law”; while in the *Ambatielos Claim*²⁹ the arbitral tribunal declared that “[i]t is the whole system of *legal** protection, as provided by municipal law, which must have been put to the test”. Writers too formulate the rule as requiring the exhaustion of *legal* remedies.³⁰ There is, however, some uncertainty as to the meaning of the term “legal” in the context of local remedies.

13. “Legal” remedies clearly include judicial remedies. The foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Courts in this connection include both ordinary and special courts since “the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress”.³¹

14. Legal remedies also include remedies before administrative bodies—provided the foreign national has a right to obtain redress from the tribunal. Some authorities have formulated the recourse to administrative authorities too broadly. The Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961³² states that local remedies shall be considered to be exhausted “if the claimant has employed all administrative, arbitral, or judicial remedies which were made available to him by the respondent State”.³³ Moreover, the explanatory commentary on the Draft declares that:

By administrative remedies are meant all those remedies which are available through the executive branch of the government, as well

²⁸ *B. Schouw Nielsen v. Government of Denmark*, European Commission and European Court of Human Rights, application No. 343/57, decision of 2 September 1959 (*Yearbook of the European Convention on Human Rights 1958–1959*, p. 412).

²⁹ *The Ambatielos Claim*, award of 6 March 1956 (UNRIAA, vol. XII (Sales No. 63.V.3), p. 120).

³⁰ See, for example, Jennings and Watts, eds., *op. cit.*, p. 523; Amerasinghe, *Local Remedies ...*, p. 157; and Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: its Rationale in the International Protection of Individual Rights*, p. 58.

³¹ *Nielsen v. Denmark* case (see footnote 28 above), p. 438. See also the *Lawless* case, application No. 332/57, decision of 30 August 1958 (*Yearbook of the European Convention on Human Rights 1958–1959*, pp. 318–322).

³² For the text, see *Yearbook ... 1969* (footnote 20 above), p. 142.

³³ *Ibid.*, art. 19, p. 146.

as special remedies which may be provided by legislative action if claims are routinely handled through private bills for relief.³⁴

This formula, supported by some writers,³⁵ suggests that the claimant is required to exhaust not only those remedies which lie as of right, in accordance with the maxim *ubi jus ibi remedium*, but may also be required to approach the executive (or legislature?) for relief in the exercise of its discretionary powers. Clearly, the exhaustion of attempts to obtain such relief does not fall within the scope of the exhaustion of local remedies rule. The local remedies which must be exhausted include remedies of a legal nature “but not extra-legal remedies or remedies as of grace”³⁶ or those whose “purpose is to obtain a favour and not to vindicate a right”.³⁷ Administrative or other remedies which are not judicial or quasi-judicial in character and are of a discretionary character therefore fall outside the application of the local remedies rule.³⁸

15. The *Ambatielos Claim*,³⁹ in which an arbitration commission, in finding that a foreign national had failed in his endeavour to exhaust local remedies by not calling a crucial witness, held that “‘local remedies’ include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals”, has been rightly criticized as imposing too heavy a burden on the foreign national.⁴⁰ It seems both impossible and unwise to draft a rule that accurately reflects the complexities of the *Ambatielos* case. It seems better simply to draw this case to the attention of litigants as a reminder that litigants cannot have a “second try” at the international level if, because of faulty preparation and presentation of the claim at the municipal level, they fail in their action in the course of exhausting local remedies.⁴¹

³⁴ Amerasinghe, *Local remedies* ..., p. 158.

³⁵ Adede, “A survey ...”, pp. 4–7.

³⁶ Briery, *The Law of Nations*, p. 281; Brownlie, *Principles of Public International Law*, p. 499; Amerasinghe, “The local remedies rule in an appropriate perspective”, p. 747; Aronovitz, “Notes on the current status of the rule of exhaustion of local remedies in the European Convention of Human Rights”; *Greece v. United Kingdom*, application No. 299/57 (*Yearbook of the European Convention on Human Rights 1958–1959*), p. 192; Claim of Finnish Shipowners against Great Britain in respect of the Use of certain Finnish Vessels during the War, decision of 9 May 1934 (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1479).

³⁷ *De Becker v. Belgium*, application No. 214/56, decision of 9 June 1958 (*Yearbook of the European Convention on Human Rights 1958–1959*), p. 238; and Jiménez de Aréchaga, “International law in the past third of a century”, p. 293.

³⁸ Cançado Trindade, *op. cit.*, p. 62; Amerasinghe, *Local Remedies* ..., p. 161; Fawcett, *The Application of the European Convention on Human Rights*, p. 295. In the *Velásquez Rodríguez v. Honduras Case*, Inter-American Court of Human Rights, Merits, judgement of 29 July 1988, Series C No. 4, the Court defined remedies as those “which are suitable to address an infringement of a legal right” (para. 64).

³⁹ See footnote 29 above.

⁴⁰ *Ibid.* See the dissenting opinion of Commissioner John Spiropoulos, *ibid.*, p. 128; Amerasinghe, *Local Remedies* ..., pp. 215–249; Jiménez de Aréchaga, “International responsibility”, pp. 586–587; and Verzijl, “La règle de l’épuisement des recours internes”, pp. 306–307. But on the contrary, Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals*, pp. 81–92; Law, *op. cit.*, pp. 83–91; and Jennings and Watts, eds., *op. cit.*, p. 524.

⁴¹ See O’Connell, *op. cit.*, p. 1059.

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

all the contentions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal Courts.⁴²

This principle has been confirmed by ICJ in the *ELSI* case.⁴³ Like the “rule” in *Ambatielos*, this principle seems to belong in the commentary as an admonition to prospective litigants rather than as a component of an article on the exhaustion of local remedies.

17. Article 10 makes it clear that the local remedies must be “available”. This means that the local remedies must be available both in theory and in practice. There is, however, some disagreement as to how far the foreign national must test or exhaust local remedies that on the face of it are available more in theory than in practice. In the *Forests of Central Rhodopia* claim,⁴⁴ the tribunal held that there was no remedy to exhaust where the sovereign was immune from suit under municipal law, while in the *Panevezys-Saldutiskis Railway* case⁴⁵ PCIJ refused to accept that there was no local remedy in respect of a challenge to the validity of an act of seizure *jure imperii* on the part of the Government. The Court held that:

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

It will be for the Court to decide on the facts of each case whether under the legal system of the State in question there is no available remedy. While counsel’s advice on the availability of a remedy should be given serious attention, it cannot be conclusive.⁴⁶ Issues related to availability of a remedy are further considered in article 15.

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

Article 11

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly

⁴² UNRIAA (see footnote 36 above), p. 1502. See also the *Ambatielos Claim* (footnote 29 above), p. 123.

⁴³ *I.C.J. Reports 1989* (see footnote 3 above), pp. 45–46. See also the commentary to article 22 of the draft articles on State responsibility adopted by the Commission on first reading, *Yearbook ... 1977* (footnote 7 above), p. 47, para. (49), which asserts the demonstration of an intent to win to be decisive.

⁴⁴ *Affaire des Forêts du Rhodope Central (fond)*, decision of 29 March 1933 (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1420).

⁴⁵ *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 19. See also Amerasinghe, “The local remedies rule ...”, pp. 752–754; International Law Association (footnote 15 above), p. 620; and Aronovitz, *loc. cit.*, pp. 78–79.

⁴⁶ Amerasinghe, *Local Remedies* ..., pp. 191–192.

on the basis of an injury to a national and where the legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]

18. The exhaustion of local remedies rule properly belongs to a study on diplomatic protection, as the rule applies only to cases in which the claimant State has been injured “indirectly”, that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State,⁴⁷ as here the State has a distinct reason of its own for bringing an international claim. Moreover, it could not be expected of a State to exhaust local remedies in such a case, as this would violate the principle of *par in parem non habet imperium non habet jurisdictionem*.⁴⁸

19. In practice it is difficult to decide whether the claim is “direct” or “indirect” where it is “mixed”, in the sense that it contains elements of both injury to the State and injury to the nationals of the State.⁴⁹ Many disputes before international courts have presented the phenomenon of the mixed claim. In *Aerial Incident of 27 July 1955*,⁵⁰ in which Bulgaria shot down an El Al flight, there was injury to both the State of Israel and to its nationals on the flight; in the *United States Diplomatic and Consular Staff in Tehran* case,⁵¹ there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case,⁵² there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Aerial Incident of 27 July 1955* it was not necessary for ICJ to make a decision; in the *United States Diplomatic and Consular Staff in Tehran* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that Switzerland had failed to exhaust local remedies.

20. Writers have suggested various tests that may be employed in deciding whether the claim is direct or indirect. However, the same decision is often employed

⁴⁷ Jennings and Watts, eds., *op. cit.*, p. 523; Amerasinghe, *Local Remedies ...*, pp. 107 *et seq.*; Freeman, *The International Responsibility of States for Denial of Justice*, p. 404; Jessup, *A Modern Law of Nations: an Introduction*, pp. 118–120; Cançado Trindade, *op. cit.*, p. 172 (with special reference to human rights cases); Meron, “The incidence of the rule of exhaustion of local remedies”, p. 85; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, p. 886; Herdegen, *loc. cit.*, p. 68; Adede, “A survey ...”, p. 1, footnote 1; and *Restatement of the Law Third, The Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1987), vol. 2, p. 348, para. 902 *k*. Cf. Brownlie, *op. cit.*, p. 498.

⁴⁸ Meron, *loc. cit.*, pp. 83 and 85. Cf. Brownlie, *op. cit.*, p. 498.

⁴⁹ Fitzmaurice, “Hersch Lauterpacht—the scholar as judge: part I”, p. 54.

⁵⁰ *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment, *I.C.J. Reports 1959*, p. 127.

⁵¹ *United States Diplomatic and Consular Staff in Tehran*, Judgment, *I.C.J. Reports 1980*, p. 3.

⁵² See footnote 2 above.

to support different tests and there is, moreover, some overlap in respect of the different tests. The following tests or factors are most commonly advanced to explain the distinction between direct and indirect claims: preponderance, subject of the dispute, nature of the claim, nature of the remedies and the *sine qua non* test.

21. In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant.⁵³ Support for this test is to be found in both the *Interhandel* case and the *ELSI* case. In *Interhandel* the Court stated that, although the dispute might contain elements of a direct injury,

such arguments do not deprive the dispute ... of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national.⁵⁴

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

the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations].⁵⁵

22. Closely related to the preponderance test is the *sine qua non* or “but for” test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered affirmatively, the claim is an indirect one and local remedies must be exhausted.⁵⁶ Reliance for this test is placed on the *ELSI* case, but as shown above, the *ELSI* case may also be invoked in support of the preponderance test.

23. There is little to distinguish the preponderance test from the “but for” test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. Conversely, if there is evidence to show that the claim would not have been brought but for the injury to the national, this evidence will usually demonstrate that the claim is preponderantly indirect. Article 11 adopts both tests, as together they emphasize

⁵³ According to the *Restatement of the Law Second, The Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1965), the exhaustion of local remedies rule is inapplicable if “the state of the alien’s nationality, which has espoused his claim, is asserting on its own behalf a separate and preponderant claim for direct injury to it arising out of the same wrongful conduct” (part IV, p. 618, para. 208 (c)). The *Restatement of the Law Third* (see footnote 47 above) contains the same principle:

“Under international law, before a state can make a formal claim on behalf of a private person ... that person must ordinarily exhaust domestic remedies available in the responding state ... Local remedies need not be exhausted for violations of international law not involving private persons; a state is not required to seek a remedy for violations of its rights in the courts of the responsible state, even where the state suffered injury to its own interests as a result of a violation of international law that also caused injury to its nationals.”

See also Meron, *loc. cit.*, p. 86; and Whiteman, *Digest of International Law*, p. 779.

⁵⁴ *I.C.J. Reports 1959* (see footnote 2 above), p. 28.

⁵⁵ *I.C.J. Reports 1989* (see footnote 3 above), p. 43, para. 52.

⁵⁶ Adler, “The exhaustion of the local remedies rule after the International Court of Justice’s decision in *ELSI*”.

the need for the injury to the national to be the dominant factor in the initiation of the claim if local remedies are required to be exhausted.

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

25. The *subject of the dispute* is clearly a factor to be considered in the classification of a claim as direct or indirect. Where the injury is to a diplomatic or consular official (as in the *United States Diplomatic and Consular Staff in Tehran* case)⁵⁷ or to State property (as in *Aerial Incident of 27 July 1955*⁵⁸ or *Corfu Channel*⁵⁹), the claim will normally be direct.⁶⁰ In most circumstances the breach of a treaty will give rise to a direct claim unless the treaty violation is incidental and subordinate to an injury to the national, as in *Interhandel* and *ELSI*.

26. Meron, in considering the *nature of the claim* as a factor to be taken into account suggests that “the true test is to be found in the real interests and objects pursued by the claimant State”.⁶¹ This determining factor has been elaborated upon by other authors. Thirlway states:

It appears therefore that, in the Court’s jurisprudence, what counts for the applicability or otherwise of the local remedies rule is the nature of the principal element of the claim. Obviously if the claim is such that it does not involve injury of a kind which could be remedied by recourse to the local courts, the rule is totally excluded; not however because purely inter-State rights are involved, but because the claim is of such a kind that redress *could* not be obtained in local courts. But if the essence of the matter is injury to nationals, whose claim is being espoused by their State, and redress by the local courts will effectively put an end to the dispute, then the rule will apply to render inadmissible also any subsidiary aspects of the claim which might be regarded as strictly matters of direct inter-State relations.⁶²

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

The rule of exhaustion relates to the right violated or the injury committed and not to the claim based on it as such, which reflects a secondary or remedial right. It is also the essence of the substantive right violated, as determined by the objects and interests promoted therein, that is of importance.⁶³

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

⁵⁷ See footnote 51 above.

⁵⁸ See footnote 50 above.

⁵⁹ *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4.

⁶⁰ Meron, *loc. cit.*, p. 87; and García Amador, *The Changing Law of International Claims*, pp. 467–468. See also the draft Convention on the responsibility of States for damage done in their territory to the person or property of foreigners, prepared by the Harvard Law School, and the commentary thereto, supplement to the *American Journal of International Law* (Washington, D.C.), vol. 23, special number (April 1929), pp. 156–157.

⁶¹ *Loc. cit.*, p. 87.

⁶² “The law and procedure of the International Court of Justice 1960–1989”, pp. 89–90.

⁶³ *Local Remedies ...*, p. 129.

The Court considers that one interest, and one alone, that of *Interhandel*, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings.⁶⁴

Clearly “the real interests and objects” of the claimant State in bringing the claim (Meron, *loc. cit.*, p. 87), “the nature of the principal element of the claim” (Thirlway, *loc. cit.*, p. 89) and “the essence of the substantive right violated” (Amerasinghe, *Local Remedies ...*, p. 129) are factors to be considered in the classification of the claim. None, however, is conclusive. Ultimately the question to be answered is whether the claim is preponderantly based on injury to a national and whether the claim would have been brought but for this injury.

27. The *nature of the remedy* sought by the claimant State will also assist in the classification of the claim. Where a State seeks purely declaratory relief the claim will be direct; while where a State seeks monetary relief or restitution for its national, the claim will be indirect. There is certainly support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted. In the *Air Service Agreement*⁶⁵ arbitration between the United States and France, the United States objected to decisions of the French Government causing damage to United States carriers that the United States alleged were in breach of a bilateral air services agreement. France contended that Pan American Airlines, the United States carrier most affected by France’s conduct, was required to exhaust local remedies before an international claim might be brought; while the United States argued that it was clear from the remedy it sought—an authoritative interpretation of the Air Services Agreement—that its interest in the arbitration extended beyond the problems experienced by Pan American Airlines to other United States-designated carriers. In upholding the United States’ argument the arbitration panel held that there was no need for local remedies to be exhausted, as the dispute involved “a right granted by one government to the other government”.⁶⁶ Further support may be found for this approach in the ICJ opinion in the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* in which the Court stated that the alleged dispute arising out of the United States legislation directed to closing the PLO Mission to the United Nations

relates solely to what the United Nations considers to be its rights under the Headquarters Agreement. The purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for

⁶⁴ *I.C.J. Reports 1959* (see footnote 2 above), p. 29.

⁶⁵ *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415); and ILR, vol. 54, p. 304.

⁶⁶ ILR, vol. 54, p. 324. See also *Swiss Confederation v. German Federal Republic*, ILR, vol. 25 (1958–I), p. 47, noted in *The British Year Book of International Law*, 1958, vol. 34, p. 363. Relying on these decisions, Adler has contended that “[a]uthorities prior to *ELSI* suggested that the nature of the remedy sought should determine whether the exhaustion rule applied to mixed claims” (*loc. cit.*, p. 643).

the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation.⁶⁷

28. Not infrequently States seek “mixed” remedies in international claims. In both *Interhandel* and *ELSI* the claimant State sought a declaratory judgement relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national. In neither case did the claimant State succeed in its bid to avoid the local remedies rule. In *Interhandel* ICJ held that the Swiss claim was primarily designed “for the purpose of securing the restitution to that company of assets vested by the Government of the United States”⁶⁸; while in *ELSI* the Court held that the United States claim for monetary damages on behalf of its nationals “colours and pervades the United States claim as a whole”.⁶⁹

29. *Interhandel* and *ELSI* indicate that local remedies must be exhausted where the request for a declaratory judgement is linked to other relief arising out of injury to a national. It seems, however, that a State may seek a declaratory judgement on the interpretation of a treaty relating to the treatment of nationals without exhausting local remedies provided it does not couple this request with a claim for compensation or restitution on behalf of its national.⁷⁰ This is an undesirable situation as it would allow a State “to circumvent the local remedies rule by promoting declaratory judgments which would acquire force of *res judicata* with respect to subsequent international proceedings seeking reparation”.⁷¹

30. It is impossible to draft a rule that subjects the claimant State to compliance with the local remedies rule in the above case without imposing an obligation on States to comply with exhaustion of local remedies in cases involving the interpretation of a treaty where this would be unwarranted.⁷² Article 11 does, however, make it clear that a request for a declaratory judgement *per se* is not exempt from the exhaustion of local remedies rule. Where the request for a declaratory judgement is incidental to or related to a claim involving injury to a national—*whether linked to a claim for compensation or restitution on behalf of the injured national or not*—it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgement is preponderantly brought on the basis of an injury to the national. Such a decision would be fair and reasonable where there is evidence that the claimant State has deliberately requested a declaratory judgement in order to avoid compliance with the local remedies rule.

31. Article 11 includes in parenthesis a number of factors to be taken into consideration in the classification

of a claim as direct or indirect. The Commission may, understandably, take the view that such factors are best left to the commentary for, as a rule, codification should avoid the inclusion of examples of this kind in a legislative text.

Article 12

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

Article 13

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

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

As long as the local remedies rule exists, controversy will remain as to the question of its conceptual nature, i.e. the question of whether the rule forms a part of procedural law or whether it operates as a part of substantive law.⁷³

This controversy, which has not left the Commission untouched, has produced three positions.⁷⁴ The first maintains that the internationally wrongful act of the wrongdoing State is not complete until local remedies have been exhausted without success; that the exhaustion of local remedies is a substantive condition on which the very existence of international responsibility depends. According to the second position, the exhaustion of local remedies rule is simply a procedural condition which must be met before an international claim may be brought. The third⁷⁵ distinguishes between an injury to an alien under domestic law and under international law. If the injury is caused by a violation of domestic law not constituting a violation of international law, international responsibility arises only from an act or omission constituting a denial of justice committed against the alien by the judicial organs of the respondent State in the course of his attempt to secure redress for the violation of domestic law. Here the exhaustion of local remedies rule is a substantive condition for the existence of international responsibility. In contrast, where the injury

⁶⁷ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 29, para. 41.

⁶⁸ *I.C.J. Reports 1959* (see footnote 2 above), pp. 28–29.

⁶⁹ *I.C.J. Reports 1989* (see footnote 3 above), p. 43.

⁷⁰ Adler, *loc. cit.*, p. 652; and Meron, *loc. cit.*, p. 86.

⁷¹ Jiménez de Aréchaga, “International law ...”, p. 293.

⁷² As in the cases described in paragraph 29 above.

⁷³ *Loc. cit.*, p. 240.

⁷⁴ Another position which has not received much support maintains that where the international responsibility of the State is established by the original injury, the exhaustion of local remedies is no longer required (see Verzijl, quoted in Briggs, “The local remedies rule: a drafting suggestion”, p. 923).

⁷⁵ Fawcett, “The exhaustion of local remedies: substance or procedure?”; and Brownlie, *op. cit.*, p. 497.

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

33. Some jurists have suggested that the debate over the question whether the exhaustion of local remedies rule is one of substance or procedure is purely theoretical.⁷⁶ This is manifestly incorrect as the critical time at which international responsibility arises will differ according to the approach adopted. If the rule is substantive, international responsibility will arise only after all local remedies have been exhausted, whereas international responsibility is incurred immediately on the commission of an internationally wrongful act if the rule is procedural. This difference has serious consequences for the principle of nationality of claims, which generally requires the injured alien to be a national of the claimant State at the time the international wrong is committed.⁷⁷ It may also affect the jurisdiction of a tribunal if a State party to a dispute has attached a time limit to its acceptance of jurisdiction, as occurred in *Phosphates in Morocco*.⁷⁸ Furthermore the position adopted on the nature of the rule has decisive implications for the rendering of a declaratory judgement in the absence of the exhaustion of local remedies, and for the waiver of the need for recourse to local remedies by the respondent State as, logically, neither would be possible if the rule is characterized as substantive.⁷⁹ Whether the rule is characterized as substantive or procedural may also affect the question whether it is to be treated as a preliminary objection (if it is procedural) or considered as part of the merits (if it is substantive) in proceedings before an international tribunal.⁸⁰

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

⁷⁶ According to Schwarzenberger,

“On the level of unorganised international society, it would be as pointless as in the case of the nationality test to attempt to classify the local remedies rule by reference to irrelevant distinctions between substance and procedure.” (*International Law*, p. 611)

See also Dunn, *op. cit.*, p. 156; and *Yearbook ... 1977* (footnote 7 above), p. 35, para. (14) of the commentary to article 22.

⁷⁷ Doehring, *loc. cit.*, p. 240.

⁷⁸ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10.

⁷⁹ Amerasinghe, *State Responsibility for Injuries to Aliens*, pp. 201–208; “The formal character of the rule of local remedies”, pp. 447–455; and *Local Remedies ...*, pp. 330–337.

⁸⁰ Amerasinghe, *Local Remedies ...*, pp. 333–335. But on the contrary, see *Yearbook ... 1977* (footnote 7 above), p. 42, para. (33).

H. Codification

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

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

No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due him.

Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages.⁸¹

Although hardly a model of clarity, this provision has been interpreted as a reflection of the view that the exhaustion of local remedies rule is concerned with the admissibility of the claim rather than the origin of responsibility. It does, moreover, suggest support for the view that responsibility arises at the time of the injury.⁸²

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

Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions [on State responsibility for denial of justice].⁸³

The text adopted in first reading by the Third Committee of the Conference for the Codification of International Law provided:

The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.⁸⁴

Both these formulations may be seen as examples of deliberate ambiguity.⁸⁵ On the one hand they suggest that international responsibility does not arise until local remedies have been exhausted, while on the other hand they suggest that responsibility is simply suspended pending the exhaustion of local remedies.⁸⁶

38. The provisions of the draft Convention on responsibility of States for damage done in their territory to the person or property of foreigners prepared by

⁸¹ *Yearbook ... 1956* (see footnote 26 above), annex 8, art. XII, p. 228.

⁸² Borchard, “Theoretical aspects of the international responsibility of States”, p. 235; and De Visscher, “Notes sur la responsabilité internationale des États et la protection diplomatique d’après quelques documents récents”, p. 245.

⁸³ *Yearbook ... 1956* (see footnote 26 above), basis of discussion No. 27, p. 225.

⁸⁴ *Ibid.*, annex 3, art. 4, p. 225.

⁸⁵ *Yearbook ... 1977* (see footnote 7 above), pp. 36–37, para. (19) of the commentary to article 22.

⁸⁶ See Caçado Trindade, “The birth of State responsibility ...”, pp. 157–158.

the Harvard Law School in 1929 lend support to the substantive position. They provide as follows:

Article 6

A state is not ordinarily responsible (under duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.

Article 7

(a) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(b) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.

Article 8

(a) A state is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(b) A state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

Article 9

A state is responsible if an injury to an alien results from a denial of justice ...⁸⁷

The resolution adopted at the Seventh International Conference of American States (Montevideo, 1933), in stating that “diplomatic protection cannot be initiated”⁸⁸ unless local remedies have been exhausted, gave further support to the substantive view.

39. In 1956, the Institute of International Law, after rejecting a radical proposal of Verzijl⁸⁹ to abandon the local remedies rule, adopted a resolution endorsing the view that the exhaustion of local remedies rule is procedural in nature:

When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a judicial body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the internal legal order of the

⁸⁷ *Yearbook ... 1956* (see footnote 26 above), annex 9, p. 229.

⁸⁸ *Ibid.*, annex 6, p. 226.

⁸⁹ In his preliminary report to the Institute Verzijl proposed:

“(I) Where the injury to the person or property of an alien does not in itself involve the international responsibility of the State on whose territory the injury was committed, no diplomatic claim may be brought before international responsibility exists as a result of a denial of justice ...

“(II) Where the injury to the person or property of an alien involves in itself the international responsibility of the State on whose territory the injury was committed, there is no valid motive for subordinating a diplomatic claim to the previous exhaustion of local remedies.”

(*Annuaire de l'Institut de Droit international*, vol. 45 (Aix-en-Provence session, 1954), p. 24). See further on this proposal Briggs, *loc. cit.*

State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient so long as the normal use of these means of redress has not been exhausted.⁹⁰

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

The following, among others, may be considered as exonerating circumstances [for international responsibility]:

(a) *Failure to resort to local remedies*, in the sense that, so long as these remedies have not been exhausted, an international claim will not lie and the duty to make reparation will not be enforceable.⁹¹

The commentary explains that

the rule implies a suspensive condition, which may be procedural or substantive, but to which the right to bring international claims is subordinated. Responsibility may or may not exist, as the case may be, but unless and until the said condition is fulfilled, the claiming State has only a potential right. Responsibility as such may be imputable, but the duty to make reparation cannot be claimed. Consequently, in pure legal theory, failure to exhaust local remedies may or may not be grounds for exoneration from international responsibility, according to the circumstances, but it will always constitute a complete bar to the bringing of an international claim.⁹²

In his third report he modified this provision to read:

An international claim brought for the purpose of obtaining reparation for injuries alleged by an alien ... shall not be admissible until all the remedies established by municipal law have been exhausted.⁹³

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

(a) An alien is entitled to present an international claim under this Convention only after he has exhausted the local remedies provided by the State against which the claim is made.

(b) A State is entitled to present a claim under this Convention only on behalf of a person who is its national, and only if the local remedies and any special international remedies provided by the State against which the claim is made have been exhausted.⁹⁴

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

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned

⁹⁰ *Annuaire de l'Institut de Droit International*, vol. 46 (Granada session, 1956), p. 364.

⁹¹ *Yearbook ... 1956* (see footnote 26 above), p. 220, basis of discussion No. V, para. (2).

⁹² *Ibid.*, p. 206, para. 173. The author expressed the same view in García Amador, “State responsibility: some new problems”, p. 449; and his third report, *Yearbook ... 1958* (see footnote 26 above), p. 56, para. 3 of the commentary to article 18.

⁹³ *Yearbook ... 1958* (see footnote 26 above), p. 55, art. 15, para. 1. The same provision is to be found in each subsequent draft submitted by the Special Rapporteur. For the last formulation, see *Yearbook ... 1961*, vol. II, document A/CN.4/134 and Add.1, p. 48, art. 18, para. 1.

⁹⁴ Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 1, para. 2, reproduced in Sohn and Baxter, “Responsibility of States for injuries to the economic interests of aliens”, p. 548.

have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.⁹⁵

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

42. The draft articles provisionally adopted by the Drafting Committee of the Commission on second reading⁹⁶ make only passing reference to the exhaustion of local remedies rule in article 45 and leave it to the present report on diplomatic protection to deal fully with the rule. Moreover, these draft articles abandon the distinction between obligations of conduct and of result upon which article 22 of the draft articles adopted on first reading is premised.

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

According to the general principles of international law the exhaustion of local remedies is a procedural precondition for the exercise of diplomatic protection.⁹⁷

I. Judicial decisions

44. Judicial decisions do not provide a clear answer to the question under consideration. Courts, like codification bodies, have often preferred to leave their reasoning on the nature of the local remedies rule deliberately vague. This explains why proponents of both the substantive and the procedural positions often rely on the same decision for support.⁹⁸

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

the responsibility of a State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question.⁹⁹

On the other hand, implied support for the procedural approach is to be found in the *Certain German Interests in Polish Upper Silesia* case,¹⁰⁰ which held that a

⁹⁵ *Yearbook ... 1977* (see footnote 7 above), p. 30. For the debate on this provision in the Commission, see *Yearbook ... 1977*, vol. I, 1463rd meeting, pp. 250–255, and 1465th–1469th meetings, pp. 258–282.

⁹⁶ See footnote 8 above.

⁹⁷ Kokott, “The exhaustion of local remedies”, p. 629.

⁹⁸ Here it is interesting to compare the reasoning of the principal proponents of the two schools, Amerasinghe and Ago. See Amerasinghe, *State Responsibility ...*, pp. 216–235; “The formal character ...”, pp. 462–476; and *Local Remedies ...*, pp. 337–356; and *Yearbook ... 1977* (footnote 15 above), pp. 27–32, paras. 62–79. See also *Yearbook ... 1977* (footnote 7 above), pp. 37–41, paras. 20–31.

⁹⁹ *Mexican Union Railway (Limited) (Great Britain) v. United Mexican States*, decision No. 21 of February 1930 (UNRIAA, vol. V (Sales No. 1952.V.3), p. 122).

¹⁰⁰ *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6.*

declaratory judgement could be given before local remedies had been exhausted, and in cases such as *Chorzów Factory*¹⁰¹ and *Electricity Company of Sofia and Bulgaria*,¹⁰² in which the local remedies rule was considered as a preliminary objection.

46. The *Phosphates in Morocco* case,¹⁰³ in which Mr. Ago appeared as counsel for Italy to argue the substantive position, has given rise to conflicting opinions:

In its preliminary application of 30 March 1932 to the Permanent Court of International Justice, the Italian Government asked the Court to judge and declare that the decision of the Mines Department dated 8 January 1925 and the denial of justice which had followed it were inconsistent with the international obligation incumbent upon France to respect the rights acquired by 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 such 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 of 1925 only became a completed breach following certain acts subsequent to 1931, in particular a note of 28 January 1933 from the French Ministry for Foreign Affairs to the Italian Embassy and a letter of the same date sent by the same Ministry to the Italian individual concerned. The Italian Government saw that note and that letter as an official interpretation of the acquired rights of Italian nationals which was inconsistent with the international obligations of France. It saw in them a confirmation of the denial of justice to the Italian nationals concerned, constituted by the refusal of the French Resident-General to permit them to submit to him a petition for redress ... The new denial of justice now consisted in the final refusal of the French Government to make available to the claimants an extraordinary means of recourse, whether administrative or other, in view of the lack of ordinary means. On the basis of these facts, the Italian Government opted for the thesis that an internationally wrongful act, though begun by initial State conduct contrary to the result required by an international obligation, is completed only when the injured individuals have resorted without success to all existing appropriate and effective remedies. It was thus from that moment that, in its view, the responsibility came into being.

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

“Here, therefore, the rule of the exhaustion of local remedies is *no more* than a rule of procedure. The international responsibility is already in being; but it cannot be enforced through the diplomatic channel or by recourse to an international tribunal or appeal to the Permanent Court of International Justice unless local remedies have first been exhausted.”¹⁰⁴

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:

¹⁰¹ *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9.*

¹⁰² *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77, p. 64.*

¹⁰³ See footnote 78 above.

¹⁰⁴ This account of the case is taken from *Yearbook ... 1977* (see footnote 7 above), pp. 38–39, paras. (25)–(27) of the commentary to article 22 in the draft articles on State responsibility adopted by the Commission on first reading.

“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. *This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States.*” In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.¹⁰⁵

Mr. Ago maintains that although PCIJ rejected Italy’s application it did not reject Italy’s argument that the local remedies rule was substantive in nature.¹⁰⁶ This argument is difficult to accept, particularly in the light of the Court’s finding that international responsibility was established “immediately as between the two States” following the decision of the Department of Mines and not after the exhaustion of local remedies.¹⁰⁷ For this reason the assessment of Amerasinghe on the finding of this case is to be preferred:

The PCIJ clearly held that the initial act, which was a violation of international law, gave rise to international ... responsibility, and that such responsibility did not arise solely after the later actions, relating to the exhaustion of local redress, alleged by the claimant State to have taken place. The time at which international responsibility arose was critical for this case and therefore the decision in the case is based on the understanding that international responsibility arose before any resort to local remedies might have taken place. This is clearly based on a procedural view of the rule of local remedies.¹⁰⁸

47. Although of limited value, the *Panevezys-Saldutiskis Railway* case provides some support for the procedural position in referring to the local remedies rule as one which “in principle subordinates the *presentation** of an international claim to such an exhaustion”.¹⁰⁹ Moreover, in that case, as in the *Prince von Pless Administration*¹¹⁰ and the *Losinger*¹¹¹ cases, although the objection concerning the exhaustion of local remedies was joined to the merits owing to the complexity of the issue, it was treated as a preliminary objection rather than a defence to the merits of the case.

48. The *Finnish Ships Arbitration*¹¹² is another case on which opinions are divided. According to the Commission commentary, Arbitrator Bagge “maintained a sort of neutrality between the two approaches to the re-

quirement of the exhaustion of local remedies”¹¹³ while other writers have seen in the award support for the procedural view.¹¹⁴ Arbitrator Bagge’s reasoning undoubtedly lends some support to Mr. Ago’s interpretation¹¹⁵ that the award is inconclusive on the nature of the local remedies rule. In an article published¹¹⁶ more than 20 years later, Bagge again failed to state his position on the question whether the local remedies rule is procedural or substantive but there is suggested support for the former view.

49. No ICJ decision gives support to the view that the local remedies rule is substantive in nature. While clear judicial support for the procedural view is not forthcoming either, there are some signs that this approach is preferred. In several decisions the local remedies rule has been treated as a preliminary objection¹¹⁷ or joined to the merits as a preliminary objection,¹¹⁸ which some writers see as signs of support for the procedural view¹¹⁹—although this is denied in the Commission commentary.¹²⁰ More important perhaps is the *obiter dictum* of the Court in the *ELSI* case that parties might agree in a treaty “that the local remedies rule shall not apply to claims based on alleged breaches of that treaty”.¹²¹ If the rule is procedural such a waiver presents no difficulty. If however the rule is substantive the question may legitimately be asked whether parties to a treaty can “decide to agree that action which would ordinarily not be a breach of international law unless and until it had given rise to a subsequent denial of justice, should, as between those parties, be treated *ab initio* as a breach of the treaty”.¹²²

50. The division of views on the nature of the local remedies rule is reflected in separate and dissenting judicial opinions. Support for the substantive position is to be found in the opinions of Judges Hudson,¹²³

¹¹³ *Yearbook ... 1977* (see footnote 7 above), p. 38, para. (24).

¹¹⁴ Amerasinghe, *Local Remedies ...*, pp. 344–347; and Fachiri, “The local remedies rule in the light of the Finnish Ships Arbitration”, p. 19.

¹¹⁵ See in particular the award (footnote 36 above), pp. 1502–1503.

¹¹⁶ “Intervention on the ground of damage caused to nationals, with particular reference to exhaustion of local remedies and the rights of shareholders”, p. 162.

¹¹⁷ *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, pp. 18 and 22–23.

¹¹⁸ *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 41–44.

¹¹⁹ Amerasinghe, *Local Remedies ...*, pp. 347 and 350–352.

¹²⁰ *Yearbook ... 1977* (see footnote 7 above), p. 42, para. (33).

¹²¹ *I.C.J. Reports 1989* (see footnote 3 above), p. 42, para. 50.

¹²² Thirlway, *loc. cit.*, p. 84.

¹²³ In his dissenting opinion in the *Panevezys-Saldutiskis Railway* case (p. 47), Judge Hudson stated:

“It is a very important rule of international law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. This is not a rule of procedure. It is not merely a matter of orderly conduct. It is part of the substantive law as to international, i.e. State-to-State, responsibility. If adequate redress for the injury is available to the person who suffered it, if such 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 person is a national. Until the available means of local redress have been exhausted, no international responsibility can arise.”

(See footnote 45 above)

¹⁰⁵ *Phosphates in Morocco* (see footnote 78 above), p. 28.

¹⁰⁶ *Yearbook ... 1977* (see footnote 7 above), pp. 39–40, para. (28).

¹⁰⁷ The sentence in italics in the passage in the Court’s judgment cited above, which seems to provide the key to the Court’s decision, is omitted from the account of the case in the Commission’s commentary, *ibid.*, p. 39, para. (27).

¹⁰⁸ *Local Remedies ...*, pp. 349–350.

¹⁰⁹ *Panevezys-Saldutiskis Railway* (see footnote 45 above), p. 18.

¹¹⁰ *Prince von Pless Administration, Order of 11 May 1933, P.C.I.J., Series A/B, No. 54*, p. 150.

¹¹¹ *Losinger, Order of 27 June 1936, P.C.I.J., Series A/B, No. 67*, p. 15.

¹¹² See footnote 36 above.

Córdova,¹²⁴ Morelli¹²⁵ and Schwebel.¹²⁶ On the other hand, Judges Lauterpacht,¹²⁷ Armand-Ugon¹²⁸ and Tanaka¹²⁹ have expressed opinions in favour of the procedural view.

J. State practice

51. State practice in respect of the nature of the local remedies rule is mainly to be found in arguments presented by States in legal proceedings before international tribunals. The value of such practice, if it can properly be so called, is highly questionable as inevitably States (or more accurately their counsel) have chosen to advance the procedural or substantive position for functional reasons and not out of conviction. Thus Italy in the Phosphates in Morocco case relied strongly on the substantive approach,¹³⁰ while 50 years later in *ELSI*¹³¹ it argued that the local remedies rule was procedural in nature! In these circumstances it is pointless to attempt to extract evidence of *usus* or *opinio juris* for a particular position from counsel's arguments.

52. On rare occasions States have taken positions on the nature of the local remedies rule outside the context of legal proceedings. In response to Mr. García Amador's first report on State responsibility, the United States Department of State prepared a memorandum which expressed strong support for the "third position" described in paragraph 32 above:

Under existing international law where the initial act or wrong of which complaint is made is *not imputable* to the State, the exhaustion of local remedies is required with a resultant denial of justice on the part of the State ... In this view, the exhaustion of remedies rule is a substantive rule, i.e., it is required from a substantive standpoint under international law in order to impute responsibility to a State.

On the other hand, where the initial act or wrong of which complaint is made *is imputable* to the State, substantively it is unnecessary to exhaust local remedies in order to impute responsibility to the State. If the draft ultimately prepared by the International Law Commission requires the exhaustion of local remedies in the latter situation, the rule of exhaustion of local remedies in such circumstance is procedural, i.e., a condition precedent to the presentation of a formal claim.

Accordingly, the rule of exhaustion of local remedies may be substantive in certain types of cases and procedural in others.¹³²

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

Rule VII

HMG [Her Majesty's Government] will not normally take over and formally espouse a claim of a UK national against another State

¹²⁴ *Interhandel* case (see footnote 2 above), pp. 45–46.

¹²⁵ *Barcelona Traction* case (see footnote 118 above), p. 114.

¹²⁶ *ELSI* case (see footnote 3 above), p. 116.

¹²⁷ *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 41.

¹²⁸ *Interhandel* case (see footnote 2 above), pp. 88–89.

¹²⁹ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 143.

¹³⁰ See paragraph 46.

¹³¹ *I.C.J. Pleadings, Elettronica Sicula S.p.A. (ELSI)*, Vol. III, pp. 156–165; and *I.C.J. Reports 1989* (see footnote 3 above), p. 21.

¹³² Reproduced in Whiteman, *op. cit.*, pp. 789–790.

until all the legal remedies, if any, available to him in the State concerned have been exhausted.

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

Rule VIII

If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf to secure redress of injustice.¹³³

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

K. Opinions of writers

53. Academic opinion is divided on the nature of the local remedies rule, but there is, in the words of the Commission commentary, "no clearly dominant opinion"¹³⁴ among authors. Moreover, it is difficult to speak of clear schools of thought "since the arguments advanced for or against a particular thesis vary so greatly from one author to another that writers sometimes arrive at similar conclusions from virtually opposite directions".¹³⁵ Subject to this admonition, Mr. Ago has produced a bibliography of the three different schools.¹³⁶ The present study makes no attempt to provide a comprehensive account of the different opinions of writers. Instead, it will draw attention to the views expressed by the main proponents of the three different schools.

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

In 1929, Borchard wrote:

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

...

However logical [the procedural] view may seem, it is apparently rejected in international practice, doubtless because in the majority of countries the local law has not yet advanced to the stage of regarding the state as immediately responsible for torts of its officers. But even apart from this fact, the view above set forth fails to perceive the vital distinction between *municipal* responsibility to the alien and *international* responsibility to his State. The majority view, to the effect that there is no *international injury* to the claimant state—and it seems proper to regard the international claim or injury as arising simultaneously with the right of diplomatic interposition and not before then—until the alien has exhausted his local remedies if available

¹³³ Rules applying to international claims, published in 1985, reproduced in Warbrick, "Protection of nationals abroad", p. 1008.

¹³⁴ *Yearbook ... 1977* (see footnote 7 above), p. 34, para. (13).

¹³⁵ *Ibid.*, pp. 35–36, para (13).

¹³⁶ *Ibid.*, p. 34, footnotes 135–137.

and effective, is strongly influenced by the fact that the alien must ordinarily accept the same treatment from the law that nationals enjoy, and that if nationals have recourse only against the wrong-doing officer, that is all that aliens can demand, and the state assumes no greater responsibility toward aliens than it does toward nationals. The view seems entirely sound.¹³⁷

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

It should be recalled that the fact of establishing that a State has committed, for example, a breach of an obligation laid on it by a treaty to accord a certain treatment to a national of another State, and has thus infringed the right of the other State that its national shall be accorded the treatment provided for in the treaty, is tantamount to saying that the first State has incurred, if all conditions for this are satisfied, an international responsibility towards the second State. And generation of an international responsibility is equivalent, in the example we have taken, to the creation of a new right of the injured State: the right to reparation for infringement of the right accorded to it by the treaty. But it would be difficult to conceive that this new right, attributed to the injured State by the international legal order, should depend on the result of proceedings instituted by a private individual at the internal level, which may lead to the restoration of the right of that individual, but not to the restoration of a right which belongs to the State at the international level and has been infringed at that level. If, so long as the condition of exhaustion of local remedies has not been satisfied, the injured State has no faculty to claim reparation for an internationally wrongful act allegedly committed to its detriment in the person or property of its national, it is because for the time being its new right to reparation of an injury suffered by it has not yet been created. In other words, a breach of the obligation imposed by the treaty has not yet occurred or, at least, has not yet definitively occurred. At this moment, therefore, the international responsibility, which in our case is reflected precisely in the right of the State to reparation of the injury suffered by it, has not yet arisen. In other words, the finding that the right of the State to demand reparation exists only after the final rejection of the claims of the private individuals concerned inevitably leads to the conclusion that the breach of the international obligation has not been completed before those remedies are exhausted, that is to say, before the negative effects of the new conduct of the State in regard to those remedies have been added to those of the initial conduct adopted by the State in the case in point, thereby rendering the result required by the international obligation definitively impossible of achievement.¹³⁸

Although his name is clearly associated with the substantive view, it should be pointed out that Mr. Ago's arguments concern only what he called "obligations of result",¹³⁹ i.e. obligations not concerned with the way the specified result was reached. In cases of violations of an "obligation of conduct", in other words where the mere conduct of the State violates an international obligation irrespective of the legality of the result reached, the international responsibility of the State is not conditional upon the exhaustion of local remedies. Indeed, although not spelled out in the report, it appears that the rule is not applicable at all in these cases in Mr. Ago's scheme.

55. Writers in favour of the substantive school include Gaja,¹⁴⁰ who argues that the exhaustion of local rem-

edies rule is a "presupposition" for unlawfulness, and O'Connell,¹⁴¹ who emphasizes the right of the State to attempt to redress the wrong within its own legal system.

56. The substantive view has drawn heavy criticism from legal scholars, particularly Amerasinghe who has published profusely in support of the procedural position.¹⁴² In his view there is something intrinsically incorrect about the substantive view's insistence that international responsibility is dependent upon local action and that the violation of international law—and international responsibility—is only completed once local courts have so pronounced.

In the case of international law, an international court is the proper organ finally to make the decision that a rule of international law has been broken. Municipal courts may pronounce on the issue, but it is clear that for the international legal system this cannot be final.¹⁴³

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

What international law prohibits is the initial injury to the alien. To say that international law merely prohibits the perpetuation of the injury after resort to local remedies, and therefore does not take particular note of the initial injury as a violation of international norms, provided the result is brought about that satisfaction is given to the injured alien, seems to twist the truth to suit the theory. In short, it seems difficult to accept an interpretation of the situation which requires the State merely to fulfil its secondary obligation, of making reparation through whichever means it chooses, as the result to be achieved by the obligation imposed by international law, and therefore characterizes this secondary obligation as the only one that has not been fulfilled, while not attaching special importance to the primary obligation not to cause injury to the alien in the first place. The local remedies rule really pertains only to secondary obligation, leaving the fact of the violation of the primary obligation substantially unaltered.¹⁴⁴

57. Doehring maintains that in certain cases it is impossible to argue that the original act is not a violation of international law.¹⁴⁵ Even though his example, the killing of an individual, may be more closely linked with the protection of human rights, it is also highly relevant from the perspective of treatment of aliens and is therefore of broader applicability.¹⁴⁶ Moreover, it is claimed that the exceptions to the local remedies rule—for instance, waiver by the State in an arbitration

¹⁴¹ *Op. cit.*, p. 1053:

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

See also Head, *loc. cit.*, p. 150; Daillier and Pellet, *Droit international public*, pp. 774–775, para. 490; and Combacau and Sur, *Droit international public*, p. 546.

¹⁴² *State Responsibility ...*, pp. 169–270; *Local Remedies ...*; and "The local remedies rule ...", p. 727.

¹⁴³ *State Responsibility ...*, p. 215.

¹⁴⁴ *Local Remedies ...*, p. 328.

¹⁴⁵ *Loc. cit.*, p. 240. Support for Doehring's views has been expressed by other German authors: Herdegen, *loc. cit.*, p. 65; Kokott, *loc. cit.*, p. 612; and Geck, "Diplomatic protection", p. 1056.

¹⁴⁶ In the context of human rights protection, the procedural nature of the rule of exhaustion of local remedies is more broadly accepted than with regard to diplomatic protection. See, for example, Amerasinghe, *Local Remedies ...*, pp. 354 *et seq.*

¹³⁷ Borchard, *loc. cit.*, pp. 236–237.

¹³⁸ *Yearbook ... 1977* (see footnote 7 above), pp. 35–36, para. (15).

¹³⁹ *Ibid.*, p. 9, para. 27.

¹⁴⁰ *L'Esaurimento dei ricorsi interni nel diritto internazionale*, pp. 12 and 33.

agreement—are incompatible with the idea that international responsibility arises only after the exhaustion of local remedies.¹⁴⁷ Also, the continuous nationality rule is illogical if the international wrong is committed only after the exhaustion of local remedies.¹⁴⁸

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

If it be assumed that no international delinquency exists at all until the local remedies have been exhausted, the rule is necessarily much more rigid than in the other construction, since in that case the international claim itself is provisionally devoid of any juridical foundation. If, on the contrary, its merely procedural nature is recognized, much greater freedom is left to mitigate and qualify the rule with a view to obviating the evident abuses which can be, and regrettably often are, made of the rule.¹⁴⁹

59. Although the American Law Institute's *Restatement of the Law Third* does not take a position on the nature of the local remedies rule, the *Restatement of the Law Second* provides:

Procedural nature of requirement of exhaustion. As indicated in §168, there are some types of conduct causing injury to aliens that are in themselves wrongful under international law and others that merely give rise to a duty to make reparation, in which case a violation of international law does not occur until and unless there is a failure to make such payment. However, once an international wrong has been committed, whether in causing the original injury or in failure to pay compensation, the international responsibility of the state is engaged and the exhaustion of available remedies is primarily a procedural requirement.¹⁵⁰

60. Reasons of the above kind have led many international lawyers to support the procedural position.¹⁵¹

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

in the examination of claims, it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign, from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct.

¹⁴⁷ Verdross and Simma, *op. cit.*, pp. 882–883, footnote 42. Other German authors have also adopted this view. See, for example, Kokott, *loc. cit.*, p. 612; Herdegen, *loc. cit.*, p. 65; and Schwarze, "Rechtsschutz Privater bei völkerrechtswidrigem Handeln fremder Staaten", pp. 428–429. See further Adede, "A survey ...", p. 15.

¹⁴⁸ Schwarze, *loc. cit.*, p. 429.

¹⁴⁹ Verzijl, *International Law in Historical Perspective*, p. 629.

¹⁵⁰ *Restatement of the Law Second* (see footnote 53 above), pp. 612–613, para. 206 d.

¹⁵¹ See De Visscher, "Le déni de justice en droit international", p. 421; Freeman, *op. cit.*, pp. 407 *et seq.*; Shaw, *International Law*, pp. 567–569; Jessup, *op. cit.*, p. 104; Geck, *loc. cit.*, p. 1056; Herdegen, *loc. cit.*, p. 65; Kokott, *loc. cit.*, p. 612; and Schwarzenberger, *op. cit.*, pp. 603–604. Arguably this is also the position taken in Jennings and Watts, eds., *op. cit.*, pp. 522–524) in the following statement:

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

The former serves to establish national responsibility; the latter to justify interposition.¹⁵²

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

62. The leading proponent of this school is Fawcett. In an article published in 1954¹⁵³ in which he seeks to distinguish clearly between the cause of action and the right of action, he set out three possible legal situations in which the operation of the local remedies rule must be considered:

Case I: The action complained of ... is a breach of international law but not of the local law.

Case II: The action complained of is a breach of the local law but not of international law.

Case III: The action complained of is a breach both of the local law and of international law.¹⁵⁴

...

In the first case, where the action complained of is a breach of international law but not of the local law, the local remedies rule does not ... come into play at all; for, since there has been nothing done contrary to the local law, there can be no local remedies to exhaust.¹⁵⁵

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

In the second case, where the action complained of is a breach of the local law but not initially of international law, the international responsibility of the State is not engaged by the action complained of: it can only arise out of a *subsequent* act of the State constituting a denial of justice to the injured party seeking a remedy for the original action of which he complains.¹⁵⁶

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

Where the act complained of is a breach both of the local law and of an international agreement or customary international law, the rule of the exhaustion of local remedies operates as a procedural bar to an international claim ...¹⁵⁷

¹⁵² Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, p. 493. See also Eagleton, *op. cit.*, pp. 97–100. Writers of this period who lean towards the third school include Dunn, *op. cit.*, p. 166 (this is implied in his interpretation and criticism of article 8 (a) of the draft Convention on responsibility of States for damage done in their territory to the person or property of foreigners prepared by the Harvard Law School in 1929); Fachiri, *loc. cit.*, p. 33; and Starke, "Imputability in international delinquencies", pp. 107–108.

¹⁵³ Fawcett, *loc. cit.*

¹⁵⁴ *Ibid.*, p. 454.

¹⁵⁵ *Ibid.*, p. 455.

¹⁵⁶ *Ibid.*, pp. 455–456.

¹⁵⁷ *Ibid.*, p. 458.

Fawcett's simple, but clear, analysis, which has won the support of Fitzmaurice¹⁵⁸ and Brownlie,¹⁵⁹ provides the answer to the debate over the nature of the local remedies rule. It is unfortunate that it received so little attention in Mr. Ago's study.¹⁶⁰ Amerasinghe has attempted to reconcile Fawcett's position with his own procedural view by arguing that Fawcett's second case, which adopts the substantive approach, has nothing to do with the local remedies rule.

What is called the substantive aspect of the rule is really not an aspect of the rule at all. It is misapplied terminology to an area of State responsibility for injuries to aliens which deals with breaches of international law committed in connexion with the administration of justice. That which has been called the substantive aspect of the rule really related to "denials of justice" and should be dealt with in those terms.¹⁶¹

Once this is understood, he continues, Fawcett's view can be reduced "to a basically procedural view of the rule".¹⁶²

L. Conclusion

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

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

65. There remains one last issue to be considered: whether a denial of justice further necessitates the exhaustion of remaining local remedies, not only in the context of the situation described in paragraph 64 above, but also where denial of justice follows a violation of in-

ternational law. Authors who have expressed an opinion on this issue in the works reviewed¹⁶³ support the view that local remedies need to be exhausted in such cases. This is logical if one perceives a denial of justice as a violation of international law. This view is not contradicted by codification attempts, international decisions or State practice.

66. The above draft articles seek to give effect to the conclusions reached in the present report. The decision to depart from the substantive position advanced by Mr. Ago in draft article 22 of the draft articles on State responsibility adopted on first reading has not been taken lightly. That position was, however, premised on the distinction between obligations of conduct and result, which has not been retained in the draft articles on State responsibility provisionally adopted by the Drafting Committee in 2000. The substantive view does not have substantial support from codification attempts, judicial decisions and writers. Moreover, the trend among writers since 1977 has been in favour of the procedural view or the third school. In these circumstances it is suggested that the Commission should approve the philosophy contained in draft articles 12–13.

M. Future work

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

Local remedies need not be exhausted where:

- (a) There are no effective remedies;**
- (b) The exhaustion of local remedies would be futile;**
- (c) The respondent State has waived the requirement that local remedies be exhausted;**
- (d) There is no voluntary link between the injured individual and the respondent State;**
- (e) The internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State.**

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

¹⁵⁸ *Loc. cit.*, p. 53.

¹⁵⁹ *Op. cit.*, p. 497.

¹⁶⁰ *Yearbook ... 1977* (see footnote 7 above), p. 34, para. 13, footnote 137.

¹⁶¹ Amerasinghe, *State Responsibility ...*, p. 214. A similar view is expressed by Law, *op. cit.*, p. 34.

¹⁶² *Local Remedies ...*, p. 326.

¹⁶³ Law, *op. cit.*, p. 34; Fitzmaurice, *loc. cit.*, p. 59; and Amerasinghe, "The local remedies rule ...", p. 732.