ABHANDLUNGEN

The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights

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(1) Introduction

This paper sets out briefly to consider the rule that domestic remedies must be exhausted in relation to the implementation of the protection of human rights. It may be observed initially that the rule would seem to be an obstructive element in the protection of human rights and that some effort should be made to contain it. It seems to be the practice generally to insist on the rule on the analogy of the application of the rule to the law of diplomatic protection. This manner of thought has its limitations, because it may be argued that there are significant differences between the law of diplomatic protection and the protection of human rights, as such, although diplomatic protection does purport to protect human rights in a limited area. The institution of diplomatic protection has grown up over a period of years and its structure has been determined by its history. Strictly speaking, there is no intrinsic reason that the same history should be injected into the protection of human rights so as to determine the structure of the protection of human rights in general. There are several considerations which distinguish the protection of human rights from the institution of diplomatic protection, so that valid distinctions may be made.

While it is important to note the differences that are relevant to a consideration of the problem, it is also relevant to consider the similarities that arise as a result of express invocation of the principles of the law of diplomatic protection, so that an examination of some of the details of the application of the rule in the practice of organs concerned with the international protection of human rights, such as the European Commission of Human Rights[1]), is called for. Here too caution must be exercised and

[1]) A general consideration of the question of domestic remedies in the context of the European Convention on Human Rights is to be found, among others, in W. K. Geck, Die Erschöpfung der "domestic remedies" gem. Art. 26 der Europäischen Menschenrechtskonvention, Deutsches Verwaltungsblatt (1957), pp. 41 *et seq.*, H. Wiebringhaus, La règle de l'épuisement préalable des voies des recours internes dans la jurisprudence de la Commission Européenne des Droits de l'Homme, Annuaire Français de Droit international 5 (1959), pp. 785 *et seq.*, A. J. P. Tammes, The Obligation to Provide Local Remedies, Volkenrechtlijke Opstellen (Kampen 1962), pp. 152 *et seq.*

with regard to certain aspects there may be need for a more critical approach to the problems that arise.

It is with these considerations in mind that the present paper approaches the study of the rule of domestic remedies in the framework of the international protection of human rights dealing both with matters *de lege ferenda* as well as *de lege lata.*

(2) The Policies behind the Rule of Local Remedies in General International Law

In the *Interhandel Case* the International Court of Justice said:

"The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law[2])".

The rule has been invoked in several international proceedings as a means of excluding the jurisdiction of international tribunals or organs[3]). Since the rule is so well recognised in general international law in the context of diplomatic protection, it is important to see what the purpose of the rule is in that context and to understand what are the interests that the rule purports to protect and the other interests involved before the application of the rule to the international protection of human rights can be examined.

The rule that local remedies must be exhausted as a rule of international law is designed to implement certain values regarded as important within the international legal system. These values are given effect to in an attempt to reconcile the conflicting interests which are involved in the situation in which the rule is deemed to be applicable. Thus, by seeing what conflicting interests are relevant in the application of the rule it will be possible to see how values and policies are reflected in connexion with it and to forecast to some extent how the rule is likely to develop in the future. This is important for the study of the rule in the framework of the international protection of human rights, because there the interests involved and their respective importance may be different and this may lead to a different choice of values in the implementation of the rule.

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[2]) I.C.J. Reports 1959, p. 27.

[3]) See C. F. Amerasinghe, The Formal Character of the Rule of Local Remedies, Zeitschr. für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), 25 (1965), pp. 445–446. For literature on the subject see C. F. Amerasinghe, *loc. cit.*, p. 445 note 2.

Borchard gave five reasons for the existence of the rule in the law of diplomatic protection:

(i) citizens going abroad are presumed to know and should ordinarily be required to take into account means of redress for the wrong furnished by the local law;

(ii) sovereignty and independence warrant the local State demanding freedom from interference, on the assumption that its courts are capable of doing justice;

(iii) the government of the injured alien can be expected to recognise that the local government must have an opportunity of doing justice to the injured alien in its own regular way;

(iv) if the injury is committed by an individual or a 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;

(v) if the injury is the deliberate act of the State, the exhaustion is necessary to make certain that the State is unwilling to have the wrong put right[4]).

This statement of reasons is open to criticism on various grounds[5]). To some extent it makes some very pertinent observations but, in principle, apart from other defects of content, it would seem that it is not scientific enough in that it takes into account only the interest of the respondent State. There is good reason for examining and giving weight to the other conflicting interests which are involved in a situation in which the rule becomes applicable. To explain the rule as a recognition of the rights of the respondent State would seem to be inadequate, because there are certain aspects of the rule which are justified only on the basis that there are other interests which the law takes into account and so purports to reflect. Thus, it becomes necessary to examine the rule in the context of the interests involved in connexion with it.

There are, broadly, three main interests involved. First, there is the in-

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[4]) E.M. Borchard, The Diplomatic Protection of Citizens Abroad (New York 1915), p. 817. See also the Harvard Research in International Law, Responsibility of States (Cambridge/Mass. 1929), p. 152, F.V. García-Amador, Third Report on State Responsibility, Yearbook of the International Law Commission, vol. 2 (1958), pp. 55 *et seq.*

[5]) See J.E.S. Fawcett, The Exhaustion of Local Remedies, Substance of Procedure?, The British Year Book of International Law (BYBIL), 31 (1954), p. 452, H.W. Briggs, The Law of Nations (New York 1952), p. 633, C.F. Amerasinghe, State Responsibility for Injuries to Aliens (Oxford 1967), pp. 171 *et seq.*, C.F. Amerasinghe, Exhaustion of Procedural Remedies in the Same Court, The International and Comparative Law Quarterly (ICLQ), 13 (1963), pp. 1287 *et seq.*, C.H.P. Law, The Local Remedies Rule in International Law (Geneva 1961), p. 16.

terest of the respondent State. Second, the interest of the alien, which has traditionally been regarded as that of his national State but is in reality that of the alien, particularly in regard to the implementation of the rule of local remedies, has also been given some weight. The interest of the international community is the third interest involved.

(a) The interest of the respondent State

The respondent State's interest has been given special prominence by international law in connexion with the rule of local remedies. In a sense it would appear that of the three interests involved this is the highest policy interest given recognition. It is clearly very much in the interest of the respondent State that it should have the opportunity of doing justice in its own way and of having an investigation and adjudication by its own tribunals upon issues of law and fact which the alien's claim involves in order to discharge its responsibility[6]). The International Court of Justice gave this as the rationale of the rule when it said in the *Interhandel Case:*

> "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"[7]).

In the *Norwegian Loans Case* Judge Read agreed with this view of the reason behind the rule and also referred to the fact that the local courts should give a ruling on the law and facts involved:

> "it is important to obtain the ruling of the local courts with regard to the issues of law and fact involved, before the international aspects are dealt with by an international tribunal. It is also important that the respondent State which is being charged with breach of international law should have an opportunity to rectify the position through its own tribunals[8])".

Judge Read seems to limit the function of the local courts to determining matters of municipal law but it is within the conception of the rule that the municipal courts should deal specifically with the international law aspects of the case, even if this be done through the mechanism of municipal law. If this necessity were absent, the rule would be without point, since the object of the alien is to obtain a remedy for a violation of international law, where the rule operates.

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[6]) See the *Finnish Ships Arbitration* (1934), U.N. Reports of International Arbitral Awards, vol. III, p. 1501.

[7]) *Loc. cit. supra note 2*, p. 7.

[8]) I. C. J. Reports 1957, p. 97.

Thus, it would seem that primarily the rule is regarded as a concession to the respondent State by virtue of its sovereign character. What is in essence the determination of a dispute by a process controlled by the organs of a party to the dispute[9]) and, therefore, a partisan method of settlement, is countenanced by the international order because of the special position accorded to the sovereignty of the State. Further, it may be added that the respondent State has an interest in the reduced cost of proceedings which it is likely to enjoy by settlement through its own means, and in the absence of publicity which will naturally result if the dispute is settled by resort to domestic remedies as opposed to an international adjudication.

(b) The interest of the alien

The alien has an interest in a situation in which the rule of local remedies becomes applicable. He would like to have what he alleges to be an international wrong settled, by judicial means generally, and remedied in the quickest and most efficient way possible. As far as the alien is concerned, if resort to local remedies is going to involve him in undue expense and delay without much prospect of a settlement of his dispute, it would militate against his interest. It is clear that he can get a suitable decision by resort to an international adjudication, so that it is only if local remedies are likely to prove suitable at less cost that it would be in his interest to resort to them. Even if international law does not give the alien's interest of this nature primary importance, it would seem that it does give his interest some value if the limitations upon the rule that local remedies must be exhausted are examined. Some recognition must be given to the alien's interest and this fact was acknowledged by arbitrator Bagge in the *Finnish Ships Arbitration* when he said:

> "it appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts, only to exhaust what to him – at least, for the time being – must be a very unsatisfactory remedy[10])".

Just how far the alien's interest is to be recognised is not clear. It is certain that it is not a primary value in the application of the rule, since the

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[9]) The doctrine of *dédoublement fonctionnel* is not in conflict with this view, although it tends to assume that the remedial processes of a State can be equated with the organs of international law: see G. Scelle, Manuel élémentaire de droit international (Paris 1948), p. 22, A. V. Freeman, The International Responsibility of States for Denial of Justice (London 1938), pp. 408–409, M. Bourquin, Règles générales du droit de la paix, Académie de Droit International, Recueil des Cours (RdC) (1931 I), p. 81, Law, *op. cit. supra* note 5, pp. 143–146.

[10]) *Loc. cit. supra* note 6, p. 1497.

interest of the respondent State is foremost. Nevertheless, its importance cannot be entirely denied and it must be taken into account in the implementation of the rule, although its effective influence may be limited.

c) The interest of the international community

The interest of the international community, though rarely mentioned in connexion with the rule of local remedies, cannot be ignored. The rule of local remedies is procedural in character[11]) and is, thus, a means of settling an international dispute. The rule, as presently envisaged, enjoins that the respondent State which is a party to the dispute to settle the dispute by reference to its appropriate organs. The international community has an interest in seeing that this privilege granted to the respondent State is not abused. Its interest in having a fair and efficient disposition of the dispute has an important bearing on the behaviour required of the respondent State and the procedures it may employ in settling the dispute. Thus, the duty that the respondent State has to help solve the dispute fairly, which determines some of the limitations on the rule of local remedies, may be attributed to this interest of the international community. In general, the interest of the international community should tend to lean more in favour of the alien, because it should be interested in helping him, as the party with less power and in greater need of protection, to have an alleged wrong rectified, as far as the rule of local remedies is concerned, though in the past it has tended to lean in the other direction. The community interest cannot strictly protect excessively what is in the nature of a privilege enjoyed by the respondent State.

(d) The hierarchy of values in the implementation of the rule

Traditionally, as the cases cited above show, the tendency of the law has been to emphasize the interest of the respondent State and consequently to give less weight to certain interests of the alien and the international community in having the dispute settled. It is arguable that logically this interest of the international community should have been given pride of place. Then, the interest of the respondent State would have been the least important, since it is the alleged wrongdoer in the dispute, while the interest of the alien as the victim of an alleged wrong committed by a powerful legal

[11]) See C. F. Amerasinghe, The Formal Character ... *loc. cit. supra* note 3, pp. 458–462.

personality against a private person, should have had priority over that of the respondent State.

However, the present position in international law does not exclude consideration of the interests of the alien and the international community, although the interest of the respondent State is regarded as the most important in connexion with the rule of local remedies. Thus, in the application of the rule it has been held that an alien did not have to resort to an appeal which was obviously futile[12]). In coming to this conclusion the arbitral tribunal clearly took into account the interests of the alien. But it will also be seen that too much weight was not given to these interests in the reasoning of the tribunal. The tribunal saw the problem as one of choosing between the position that the alien need not resort to remedies only where the remedies are obviously futile and that in which the alien could dispense with such resort where the remedies merely appeared to be futile. If greater weight had been attached to the interests of the alien, the tribunal might have chosen the position that where the remedies reasonably appeared to be futile, the alien was exempted from resorting to them. On the other hand, if no importance had been given to the interests of the alien, the answer would have been given that the alien had to resort to remedies always, irrespective of their efficacy or how futile they in fact were. Although the solution adopted by the tribunal has been criticized[13]), it would appear that the tribunal arrived at its conclusion by a certain balancing of interests. It chose a position between allowing the alien to avoid recourse to local remedies in any circumstances in which he chose, whether on a *bona fide* estimate of the effectiveness of the remedies available or not, and laying upon him the absolute obligation of appeal to all sources of justice in all circumstances. Nevertheless, it would seem that even in choosing this solution excessive weight was given in the reasoning, though not in the result, to the interests of the respondent State, so that this bears out the view that, even though some value is given to the interests of the alien in the implementation of the rule, the greatest emphasis is given to the interests of the respondent State.

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[12]) The *Finnish Ships Arbitration, loc. cit. supra* note 6, p. 1504. It was held that where a finding of fact by a Board under an Indemnity Act of the United Kingdom was final and the success of the claimant's case depended on a different finding of fact, an appeal to a higher court or a reference to a different court or body was obviously futile. It was also held that appeal to the King by petition of right was not necessary, as such a recourse could obviously not succeed in cases that did not involve contracts and the claimant's case was not based on contract.

[13]) See A. P. Fachiri, The Local Remedies Rule in the Light of the Finnish Ships Arbitration, BYBIL 17 (1936), p. 36.

As for the interests of the international community, these should tend generally to coincide with those of the alien, in connexion with the rule of local remedies, as pointed out above, so that in so far as this is the case they would enjoy the same position in the hierarchy of values as the interests of the alien. When they do not so coincide, as where in the interests of justice the international community demands a sharper reconciliation of interests so as to favour the respondent State, their importance does not seem to have been clearly tested. On the whole the tendency in international law in the application of the rule of local remedies has been to emphasise the position of the respondent State, so that the interests of the international community have not been directed at bringing about a reconciliation of interests which would redound to the benefit of the respondent State. Thus, it may be concluded that at the present time, in the implementation of the rule of local remedies the interest of the international community should be largely identified with that of the alien, in order to secure for him a more equitable position, so that it enjoys a position similar to that of the alien in the present context of international law.

(e) General principles relating to the exhaustion of local remedies

In the light of the analysis made above of the policies behind the rule of local remedies in connexion with diplomatic protection it may be possible to extract certain general principles which are relevant to this rule. This may be useful to meet the possible situation in which the general principles of international law relating to the exhaustion of local remedies are applied by analogy to the protection of human rights, assuming that some form of the rule of local remedies is applicable by treaty or convention or otherwise to the protection of human rights.

Two main general principles which emerge may be stated as follows:

(i) Generally it is necessary that all local remedies be exhausted by the alien in the State concerned.

(ii) There are exceptional situations based on the recognition of the interest of the alien and the international community in which exemption is allowed from resort to local remedies.

The more detailed rules involved in the implementation of the rule of local remedies need not be treated as general principles but as detailed rules. The policies outlined above have a bearing also on the working out of the actual detailed rules relating to the exhaustion of local remedies, but their importance at this point lies in the assistance they give in elucidating the general principles relating to the rule of local remedies.

(3) The Policies behind the Rule in Relation to Human Rights

The next question that arises is whether in the application of the rule of local remedies in connexion with human rights the policies envisaged behind the rule in the law of diplomatic protection undergo any change. It has been said that "there is a link between respect for freedom within the State and the maintenance of peace between States" [14]), so that it follows that the international community has a vital interest in the protection of human rights and "the recognition and the protection of fundamental human rights became incumbent upon the international community, inspiring rules which now form an integral part of the international legal order" [15]). Traditionally there have strictly been no general rules of international law pertaining to human rights, apart from the few there were which were built around the law of diplomatic protection and the disputed rule that a State could justifiably use force "for the purpose of protecting the inhabitants of another State from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice" [16]). The law of diplomatic protection has been limited generally to the protection of a State's nationals against infringements of the law by other States, while the exact scope and very existence of the rule of humanitarian intervention has been questioned [17]), although if it were admitted to exist, it would give a very limited protection. The systematic protection of the national against his own State or the stateless individual against States can only be based on a broader acceptance of rules and principles relating to human rights which international law is in general at the moment not prepared to concede. It would be a natural consequence that such protection of human rights must come through the medium of conventions and agreements. In any event the implementation of protection can only be determined by the provisions of such instruments, since there is no procedure at customary or general international law to secure the implementation of such protection, so that it is to the instru-

[14]) Ch. De Visscher, Report on the Fundamental Rights of Man, Annuaire de l'Institut de Droit International, 1947, p. 155; see also E. Hamburger, Droits de l'homme et relations internationales, RdC (1959 II), p. 298, R. Cassin, Protection internationale des Droits de l'homme, Encyclopédie Française (1964), p. 377, M. Moskowitz, Human Rights and World Order (New York 1958).

[15]) H. Golsong, Implementation of International Protection of Human Rights, RdC (1963 III), p. 10.

[16]) E. C. Stowell, International Law Part 4 (London 1931), p. 349. See also H. Grotius, De Jure Belli ac Pacis, Book II, Chapter XXV, viii, 2, H. Lauterpacht, The Grotian Tradition in International Law, BYBIL, 23 (1946), p. 46.

[17]) See R. Chakravarti, Human Rights and the United Nations (Calcutta 1958), p. 19.

ments by which such protection is implemented that resort must be had in order to find out whether a rule that local remedies must be exhausted is part of the scheme of protection.

This would be the general approach, but in connexion with the rule of local remedies certain problems of a general nature may be adverted to:

(a) Does the rule operate in the absence of specific inclusion in a treaty or convention?

(b) If the rule is operative in a given context, are the policies in the light of which it is to be interpreted, in the absence of express indication in the instrument, different from those connected with the rule embodied in the law of diplomatic protection?

(a) The problem of applying the rule by implication

The question whether in the absence of specific mention in the treaty or convention, the rule that local or domestic remedies must be exhausted can be implied in connexion with the procedure of enforcement or implementation of protection cannot apparently be answered by reference to the generally accepted rule that in the case of diplomatic protection the rule is applied in the absence of any indication that it should not apply[18]). The rule as a part of the law of diplomatic protection is arguably distinguishable.

In the case of diplomatic protection the rule grew up as a result of the practice of States before it came to be recognised as a requirement[19]) but in the case of the protection of human rights there is no such practice that has yet evolved. It would follow, then, that, since the protection of human rights is dependent on convention or treaty, the presumption would be that the rule is not applicable to it in the absence of express provision or by necessary implication. Unless the protection given takes the form of diplomatic protection, in which case the rule would be implied even within the regime of the express protection of the human rights convention. Formally, this is the true position.

Substantively also there would seem to be some reason to make a distinction between the institution of diplomatic protection and the protection of human rights. The rule of local remedies was developed in connexion with the institution of diplomatic protection at a time when the State's control was regarded as exclusively appropriate for matters taking place within

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[18]) For this general approach see Borchard, *op. cit. supra* note 4, pp. 818–819.

[19]) This is implicit in the authorities: see *e.g.* C. Eagleton, The Responsibility of States in International Law (New York 1928), p. 95.

its jurisdiction[20]). It was very grudgingly that interference with the State's exclusive jurisdiction was accorded in the field of diplomatic protection and the price paid for the surrender of the State's exclusive control was that it insisted on partisan methods of settlement prior to the invocation of an international jurisdiction, which were conceded. The international community was still tied to a very rigid theory or sovereignty. It is doubtful whether in situations where the duty to respect human rights is recognised by a State it can be said that the surrender of what would have been termed sovereignty must today be conditional upon the recognition of partisan methods of settlement before the issue can be examined at an international level. There is a tendency to revere still the exclusive jurisdiction of States but it would seem to follow logically from the recognition of the fact that individuals have fundamental human rights, even though they may have no connexion with foreign States, that a concession has been made which involves the surrender of exclusive jurisdictional rights, so that theoretically there should be a presumption that violations of such rights should be susceptible of examination at an international level without the need for the exhaustion of local remedies[21]). It would follow that, for instance, under the U.N. International Covenant on Economic, Social and Cultural Rights, since no provision is made for the requirement that local remedies should be exhausted in connexion with the enforcement procedure, there is no need that they be exhausted before that procedure, though rather rudimentary, comes into operation. It will not be an argument for excluding the competence of the relevant organs that local remedies had not been exhausted. The position would be different under the International Covenant on Civil and Political Rights where under art. 41 (c) local remedies must be exhausted. Also directly under the Charter of the United Nations it would not be necessary that local remedies be exhausted before the United Nations decides to take action under arts. 55 and 56.

In any event it is difficult to see how the rule of local remedies can be applied to situations where the complaint is not by a particular individual of the violation of his individual rights but is of a prevailing condition which is a violation of human rights. Here the complaint does

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[20]) See *e.g.* H. Wittenberg, La recevabilité des réclamations devant les juridictions internationales, RdC (1932 III), p. 51, Eagleton, *op. cit.*, p. 95.

[21]) See also the Austrian argument before the European Commission of Human Rights; Application No. 788/60, Yearbook of the European Convention on Human Rights (hereinafter cited as Yearbook), vol. IV, pp. 146–148. The Commission itself apparently thought that there was a good case for believing that the rule applied *a fortiori* to the case of State applications on behalf of nationals of the respondent State, though this statement was not necessary for the decision in the case; Yearbook, vol. IV, pp. 148–150.

not relate to a particular individual, although individuals are affected. The question, then, is whether one, some or all the individuals concerned who may or may not be identifiable, must exhaust local remedies before action can be taken on an international plane. Such a position would seem to be untenable, where remedial action is invoked by a foreign State or other entity than an affected individual, because the whole purpose of the remedy would be defeated, if such a complainant must wait till some individual has exhausted local remedies. It is submitted, therefore, that in such a case the rule of local remedies does not apply at all[22]).

(b) The policies behind the rule in the context of the protection of human rights in formal instruments

Where the rule is applicable, it will depend on the instrument embodying the rule what specific form the rule will take. But problems of interpretation might arise and here it would be necessary to determine what policies lie behind the rule in relation to the protection of human rights.

As already pointed out, the rule of local remedies in the law of diplomatic protection revolved mainly around three interests; first of all, the interest of the respondent State in using its own methods of settlement, secondly, the interests of the alien in having his dispute settled in the most efficient, equitable and cheap way possible, thirdly, the interests of the international community in securing an equitable and effective settlement of the dispute. In relation to the rule of local remedies in the context of diplomatic protection it was found that the law tends to give primary recognition to the interests of the respondent State, while giving a definitely second place to the other two interests involved.

In the case of human rights, if the rule is applicable, it will be on the basis clearly that primary recognition is given to the respondent State's interest in preventing

> «la substitution d'une procédure internationale aux voies de recours internes en vue de permettre à l'Etat de réparer ses torts par ses propres moyens»[23]).

This has been recognised by the European Commission of Human Rights on more than one occasion. Thus it has been said that:

> "the rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that the

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[22]) See *infra* for a further discussion of this point.

[23]) C. T. Eustathiades, La Convention Européenne des Droits de l'Homme et le Statut du Conseil de l'Europe, Die Friedens-Warte, 52 (1953/54), pp. 355–356.

respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual" [24]).

This policy would be accepted by analogy with the governing policy in the case of the rule of local remedies relevant to diplomatic protection.

Equally, it would seem by analogy that the interests of the individual and the international community should be given, at least, secondary weight. However, it is arguable that in the case of the protection of human rights, the interests of the individual and the international community should be given more weight than in the case of diplomatic protection, because the situation is different from diplomatic protection. In both fields the object is to protect the individual, but in the case of human rights the scope of protection is more widely extended both in area and in precise definition, so that it would seem that there is greater importance attached to the individual. Thus, the international community and the individual call for greater recognition in regard to their interests in this connexion than in the case of diplomatic protection, where, moreover, the interest of the alien was more evidently identified with that of his national State [25]), which is a more impersonal entity. Although the European Convention on Human Rights provides a collective guarantee [26]), there was every intention that the rights guaranteed be conferred on individuals, so that the violation of such rights are not regarded merely as the breach of an obligation owed to the guaranteeing States but as interference with the rights of the individuals concerned. This lends support to the view that slightly different considerations could apply in the evaluation of the interests of the individual and the international community in the implementation of the rule in connexion with the protection of human rights. This should result in greater scope being given for instance for the exceptions to the rule and the procedure involved in the application of the rule and the burden of proof connected with the rule, even though the general principles of the rule as recognised in international law are regarded as applicable [27]). For, the general principles only require broadly that the positive aspects of the rule and the

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[24]) Application No. 343/57, Yearbook, vol. II, p. 438. See also *Austria* v. *Italy*, Application No. 788/60, Yearbook vol. III, p. 148.

[25]) See the Reparation for Injuries Opinion, I.C.J. Reports 1949, pp. 181, 209, *Mavrommatis Palestine Concessions Case* (Jurisdiction), P.C.I.J. Series A No. 2, p. 12.

[26]) See K. Vasak, La Convention Européenne des Droits de l'homme (Paris 1964), p. 10, A. H. Robertson, Human Rights in Europe (Manchester 1963), p. 10.

[27]) See art. 26 of the European Convention on Human Rights, art. 41 (c) of the International Covenant on Civil and Political Rights, art. 50 of the Inter-American Convention on Human Rights.

principle of exceptions be recognised and not necessarily that the detailed application of all aspects of the rule be accepted.

It may be possible, for instance, that the burden of proof in the application of the rule be relaxed in favour of the individual by requiring that the respondent State prove that remedies existed and had not been exhausted, instead of insisting that the complainant prove that remedies had been exhausted, or that the complainant be exempted from resort to local remedies where remedies reasonably appear to be ineffective rather than that the exemption should depend on the obvious futility of remedies[28]).

(c) The formulation of the rule in instruments on human rights

General policy considerations are subject to express or necessarily implied contradiction or modification in operative conventions or treaties. Thus, express formulations of the rule of local remedies in conventions on human rights may make it necessary that the rule be applied before the relevant international proceeding is commenced. Of the current instruments the U.N. International Covenant on Economic, Social and Cultural Rights has no reference to the rule of local remedies[29]). It is submitted that in this case the rule is irrelevant, as has been stated above. The same applies to the provisions of the Charter of the United Nations relating to human rights.

There are four current instruments in which the rule is referred to and which call for comment.

(i) The U.N. International Covenant on Civil and Political Rights requires in art. 41 (c) that the Human Rights Committee

> "shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognised principles of international law".

The article also makes an explicit exception where the application of the remedies is unreasonably prolonged.

It is clear that the rule of local remedies is expressly intended to be applicable. Secondly, it is clear that the rule is to be applied in accordance

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[28]) On the first point the European Commission of Human Rights has taken a different view: see Application No. 232/56, Yearbook, vol. I, p. 143, Application No. 788/60, Yearbook, vol. III, p. 168, Application No. 1727/62, Yearbook, vol. VI, p. 370. On the second point the view taken by the European Commission is in accord with the above view: see Application No. 289/57, Yearbook, vol. I, p. 148, Application No. 712/60, Yearbook, vol. IV, p. 400.

[29]) This is probably because the implementation system is rudimentary. The rule was not even discussed in this connexion in the organs of the United Nations: see U.N. Doc. A/2929, pp. 333 *et seq.*, U.N. Doc. A/6546, pp. 9 *et seq.*

with the generally recognised principles of international law, so that, provided recognition is given broadly to the principle that local remedies must be exhausted and to the principle that there are exceptions to this rule, the interests of the individual and of the international community can be given greater prominence and the exceptions moulded to be more in favour of those interests. Thirdly, the express provision that the Committee must ascertain whether the local remedies have been invoked and exhausted would seem to introduce a somewhat stricter measure for the applicability of the rule than in general international law. In general international law the rule can only be invoked if the respondent State raises an objection based on it[30]). Under this Convention it would seem that the matter must be raised by the Committee *proprio motu* as a matter of course, if it is not raised by the respondent State, and a finding must be made that the rule has not been infringed before further action can be taken. Fourthly, an exception to the need for fulfilling the requirements of the rule is made specifically in the case of undue delay by the respondent State in the provision of remedies. This merely embodies a recognised exception to the rule that local remedies must be exhausted. The fact that it is expressly mentioned does not mean that the maxim *expressio unius exclusio alterius* can be applied to exclude other possible exceptions to the rule. It would not be possible to argue that the rule of local remedies does not apply when an alien is not involved, as this would defeat the purpose of incorporating the rule in this system of protection of human rights. It is noteworthy that art. 2 of the optional Protocol to this Covenant also has a requirement relating to the exhaustion of domestic remedies.

(ii) The European Convention on Human Rights states in art. 26 that the Commission

> "may only deal with the matter after all domestic remedies have been exhausted according to the generally recognised rules (principes) of international law ...".

The *travaux préparatoires* give little indication of how this article is to be interpreted[31]). However, it would seem that the exhaustion of local remedies is required according to the generally recognised principles of international law as opposed to the detailed rules surrounding the subject. Here too it is possible for the interests of the individual and of the international community to be given greater weight than in connexion with diplomatic

[30]) See the practice of the Permanent Court on International Justice and the International Court of Justice in the cases listed in C. F. Amerasinghe, *loc. cit. supra* note 3, ZaöRV, p. 446.

[31]) Eustathiades, *loc. cit. supra* note 23, pp. 354–356.

protection. Secondly, it would seem that the Commission must investigate the question of local remedies *proprio motu*, even if the matter is not raised by the respondent State. This has been the view taken by the Commission[32]). This is a departure from the ordinary practice in regard to the rule in connexion with diplomatic protection. Thirdly, under art. 27 (3) the Commission must reject any petition which it considers inadmissible under art. 26. The Commission has taken the view that this does not prevent the joinder to the merits of the objection to admissibility[33]), although it may appear that the intent of art. 27 (3) is otherwise. The Court cannot concern itself with the rule of local remedies in the absence of express provision, but since a case can only be taken up by the Court after the Commission has dealt with it, the Commission would already have dealt with the rule[34]).

(iii) The Inter-American Convention on Human Rights states in art. 50 that:

> "1. Except for those cases in which justice has been denied, the Commission shall take cognizance only of matters submitted to it after all domestic remedies have been applied and exhausted, in accordance with the generally recognised principles of international law ...
>
> 2. If the Commission should have knowledge that the petitioner was arbitrarily denied access to judicial remedies by the authorities of his country, the Commission may accept the complaint submitted to it".

The position seems to be similar to that prevailing under the European Convention on Human Rights with one important exception, that there is express provision that the rule does not apply where there has been a denial of justice, presumably in the narrow sense of infringements of rights by the courts. Arbitrary denial of access to the courts by the authorities of a person's own country is also specifically mentioned as giving rise to a situation where local remedies need not be exhausted but this would be an accepted exception on the analogy of general international law. Express reference to the obstructing State as the national State of the complainant does not preclude the application of the exception where the obstructing State is not the national State of the complainant, by analogy with the principles of international law.

(iv) The U.N.International Covenant on the Elimination of All Forms

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[32]) See Application No. 524/59, Yearbook, vol. III, p. 354. See also the present Rule 45 of the Rules of Procedure of the Commission.

[33]) *Alam and Singh* v.*U.K.*, Council of Europe Legal News, C (67) 28 of 17th July 1967, p. 2.

[34]) See *infra* for a discussion of this point.

of Racial Discrimination states in arts. 11 (3) (and 14 (1) (a)) that the Committee on the Elimination of Racial Discrimination shall deal with a matter referred to it

> "after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognised principles of international law".

This article also makes an explicit exception where the application of remedies is unreasonably prolonged. The effect of these provisions is the same as that of art. 41 (c) of the U.N. International Covenant on Civil and Political Rights which has been discussed above.

(d) Problems connected with the application of the rule to various proceedings

Problems may arise as a result of there being multiple proceedings available in a given situation. These problems generally arise in connexion with treaty provisions relating to the enforcement of human rights. Two kinds of problems that arise under the European Convention on Human Rights may be mentioned here.

(i) First, the question arises whether the rule of local remedies can be invoked in proceedings before the Court of Human Rights. The jurisdiction of the Court in a given case depends on the jurisdiction having been accepted by States on a quasi-compulsory basis under art. 46 or by special agreement. These acceptances under art. 46 may be conditional or on the basis of reciprocity or unconditional. Apart from this provision the jurisdiction conferred on the Court by art. 45 extends to all matters concerning the interpretation and application of the Convention which are referred to it. There is no express provision that local remedies should be exhausted before the jurisdiction of the Court is invoked. It would follow, according to the position adopted above, that it cannot be implied that such remedies must be exhausted before the Court assumes jurisdiction. However, if it is permissible for a State accepting the Court's jurisdiction to make this an express condition of the acceptance of jurisdiction in the instrument accepting the jurisdiction of the Court[35]), it is only if the condition were expressly mentioned that the fulfillment of the rule would be a condition precedent to the exercise of jurisdiction by the Court. In such a case the normal procedure, as in the case of the application of the

[35]) It would seem that the instruments so far deposited, accepting the jurisdiction of the Court on a compulsory basis, do not embody such a condition: see Yearbook, vol. II, pp. 72–76, vol. III, p. 66, vol. IV, pp. 32–36, vol. V, p. 5, vol. VII, pp. 16–22.

rule in the field of diplomatic protection, would be that the respondent State would have to raise an objection based on the rule before the Court could examine the position and failure to raise the objection would operate as an implied waiver of the requirement. In the absence of express inclusion of the rule of local remedies in the instrument accepting the jurisdiction of the Court, though the Court cannot countenance an objection based on the non-exhaustion of local remedies, it follows from the requirement in art. 47 that the Court may only deal with a case after the Commission has failed to secure a friendly settlement, that the Commission would already have had the power of dealing with the question of local remedies when the case came before it. This means that the determination of the Commission on the issue of local remedies would be final and without appeal to the Court. It may be noted that the Commission may not be as effective a mode for determining the question as the Court might be, so that the fact that the Court would not have the power normally to deal with an objection based on local remedies assumes importance.

(ii) The second problem arises from there being more than one source of settling disputes. This may happen, for instance, where the State has the choice of exercising diplomatic protection over a national[36]) and seeing its national seek a remedy under a Human Rights Convention, such as the European Convention on Human Rights. The content of the rule of local remedies may be different and stricter under the former mode of settlement than under the latter. Such a conflict of jurisdictions can only be settled by agreement in the absence of which the provision which may be chosen will be at the discretion of the claimant. In the case of the European Convention provision is made for the solution of such conflicts of jurisdiction. By art. 62 the parties

> "agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention".

This means that if, for instance, a State is in a position to exercise diplomatic protection by reference to the International Court of Justice or other tribunal or to bring a case or allow the bringing of a case before the European Commission of Human Rights, it cannot in the absence of special agreement avoid the latter mode of settlement, nor can the respondent

[36]) Under art. 48 (b) of the European Convention on Human Rights special provision is made for the exercise of diplomatic protection. This means that a similar problem may arise within the purview of the Convention.

State secure for itself a possibly more advantageous position by referring the dispute to a different organ of settlement.

(4) The Nature of the Rule – Procedural or Substantive?

It has been submitted elsewhere[37]) that the nature of the rule of local remedies in general international law is procedural and not substantive in the sense that the rule comes into operation to regulate the procedure of settlement on the occurrence of an initial violation of international law. It is not a rule which operates to create a breach of international law by the failure of local courts to do justice before which failure there would be no breach of international law[38]). The fact that the rule is procedural has its effect on many matters. It determines, among other things, the cause of action and the time of incidence of international responsibility. It also has an effect on what has to be proved and the burden of proof. These are but a few of the effects of the view that the rule is procedural[39]). And conversely, the fact the law regards these matters as it does has provided proof of the fact that the rule is procedural and not substantive. Thus, the fact that the cause of action in a case involving the rule of local remedies is the initial violation of international law and not the failure of the courts of the respondent State to do substantial justice is evidence that the rule is procedural; for the rule comes into operation on the initial breach of international law as a means of regulating procedure. Or the fact that the burden of proof is divided is also evidence of the procedural character of the rule, since, if the rule were substantive in character, then it would be necessary for the claimant State entirely to prove its case that there had been a violation of international law by the failure of the local courts to do justice[40]).

(a) The effect on the nature of the rule of the formulation in conventions

Where the rule of local remedies has been incorporated in conventions on Human Rights, there is no reason to suppose that the nature of the rule

[37]) See C. F. Amerasinghe, *loc. cit. supra* note 3, ZaöRV pp. 445 *et seq.*, where the whole problem is discussed.

[38]) Judge Hudson incorrectly thought that the rule was substantive: dissenting opinion in the *Panavezys-Saldutiskis Railway Case*, P.C.I.J. Series A/B No. 76, p. 47. See also Judge Morelli, dissenting opinion in the *Barcelona Traction Co. Case*, I.C.J. Reports 1964, p. 114.

[39]) See further C. F. Amerasinghe, *loc. cit. supra* note 3, ZaöRV, pp. 448–455.

[40]) See on this point C. F. Amerasinghe, *loc. cit. supra* note 3, ZaöRV, pp. 448–455.

has changed. The relevant provisions, which have already been cited, of the European Convention on Human Rights, the U.N. International Covenant on Civil and Political Rights, the U.N. Convention on the Elimination of All Forms of Racial Discrimination, and the Inter-American Convention on Human Rights, contemplate that the violation of human rights which is complained of is a violation of the relevant convention and international law and that the exhaustion of local remedies is required merely as a procedural condition for the incidence of the international jurisdiction.

Further evidence for the view that in the regime of these conventions the rule is procedural is to be found in the attitude of the European Commission of Human Rights.

(i) In spite of the fact that on one occasion the Commission stated that responsibility of the State arose only after domestic remedies had been exhausted[41]), the general view taken by the Commission has been that the rule of local remedies is a condition precedent to the exercise of diplomatic protection in general international law, and so also under the European Convention, to the invoking of the Commission's jurisdiction[42]).

(ii) As a result of art. 27 (3) of the European Convention on Human Rights the Commission always treats the matter of exhaustion of local remedies as one of procedure, because that article requires the Commission to reject as inadmissible any petition which it considers inadmissible under art. 26[43]).

(iii) The Commission has decided that in addition to the initial wrong there need not be a denial of justice by the highest municipal court after the exhaustion of local remedies for responsibility to arise, it being sufficient that the applicant has failed to obtain adequate redress[44]).

(iv) The burden of proof is divided, which can only be possible if the rule of local remedies is procedural. Thus, the respondent State must prove that the remedy which has not been exhausted in fact existed, while the applicant must prove that the remedy was obviously futile[45]).

(v) It appears to be accepted that the rule of local remedies may be waived by the respondent State even after the Commission has *proprio motu* raised an objection based on the rule[46]), and that there are general

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[41]) Application No. 235/56, Yearbook, vol. II, p. 304.

[42]) See *e.g.*, Application No. 788/60, Yearbook, vol. IV, p. 148

[43]) See Application No. 788/60, Yearbook, vol. IV, p. 116.

[44]) See Application No. 788/60, Yearbook, vol. IV, p. 148, Application No. 1727/62, Yearbook, vol. VI, p. 401.

[45]) Application No. 1727/62, Yearbook, vol. VI, p. 398.

[46]) Application No. 1994/63, Yearbook, vol. VII, p. 260.

exceptions to the rule[47]).This approach would only have been possible on the basis that the general principle that the rule of local remedies is procedural had been accepted.

(b) The effect of the argument that the rule does not apply in inter-State disputes

It has been argued that the rule of local remedies does not apply in inter-State disputes under the European Convention[48]). This argument has been based on the view that when an individual wishes to institute proceedings before the European Commission he has nothing to complain of before he has been denied a remedy by the domestic courts after exhaustion of local remedies, whereas when a State complains, it complains of a breach of the Convention and cannot and need not exhaust local remedies. This argument involves the acceptance of the substantive nature of the rule as applied to individual applications, as has been pointed out already, so that a distinction based on this notion between inter-State and individual applications cannot be accepted. Apart from that, that particular view of the rule of local remedies is defective.

The question whether an exemption from the rule can be recognised in all inter-State disputes can, however, be discussed on a different basis, namely that the rule is not specifically mentioned in connexion with inter-State disputes referred to the European Commission of Human Rights under art. 24. This argument would be in accord with the view that the rule of local remedies cannot be implied in connexion with the implementation of the protection of human rights in the absence of express provision or of necessary implication. Whatever the merits of this argument are, and this will be discussed below, it does not rest on a view of the rule as one of substance. Hence, it is possible to accept the view that the rule is not applicable to inter-State disputes without doing damage to the procedural nature of the rule.

(5) Incidence of the Rule

It has already been stated above that the rule of local remedies is probably not applicable to regimes for the protection of human rights in the absence of express provision or necessary implication for its application. There are a few specific problems which arise in connexion with the applicability of the rule where it is specifically mentioned. These may be discussed as follows:

[47]) See *e.g.*, Application No. 899/60, Yearbook, vol. V, p. 144.
[48]) See Application No. 788/60, Yearbook, vol. IV, pp. 146–148.

(a) Does the rule apply to inter-State disputes particularly under the European Convention on Human Rights?

(b) Does the rule apply to a "direct injury"?

(c) Is there any need for a jurisdictional connexion before the rule becomes applicable?

(d) Other factors.

(a) Inter-State disputes

The question is whether, under the European Convention on Human Rights particularly, the rule of exhaustion of local remedies applies to inter-State disputes. In principle there is nothing to prevent its being applied to such disputes, provided specific provision is made for its application, though there may be every reason to avoid such specific mention. The issue whether such specific provision was made for its application in the European Convention on Human Rights was raised in a case before the Commission in which Austria instituted proceedings against Italy.

Two situations must be distinguished. The first is where the breach of the Convention is not in connexion with any particular individual or individuals. Here, as has been already submitted, there is no need for the exhaustion of local remedies. The Italian government was virtually prepared to concede this point[49]). Also the Commission had accepted this view in an earlier case[50]).

The second situation is where the complainant State takes up a case in respect of individuals in respect of whom the Convention has been violated. The argument presented by the Austrian government may be presented as follows, as it was understood by the Commission:

> "for the purposes of Articles 26 and 27 paragraph (3) of the Convention, applications by States were quite different from individual applications; ... States were not entitled to institute proceedings in the courts of other States for alleged breaches of the Convention; ... with the possible exception of complaints lodged in the exercise of the right to afford diplomatic protection, the exhaustion of domestic remedies would accordingly not be a condition of admissibility for applications by States, these being based on the concepts of collective guarantee and the public interest; ... the precedents referred to by the Italian government were relevant only in respect of proceedings instituted by a State on behalf of one of its own nationals; ... the same was true of the Granada Resolution; ... furthermore, this Resolution stated that the rule

[49]) Yearbook, vol. IV, p. 146.

[50]) Application No. 176/56, Yearbook, vol. II, p. 184. It is conceivable that even in such a situation as these domestic remedies may have to be exhausted, if domestic remedies are provided, as by way of resort to a constitutional court for the nullification of legislation.

was not applicable when the action complained of affected a person enjoying special international protection; ... persons living in the territory of Contracting States were in fact enjoying the special international protection of the European Convention" [51]).

The argument contained here that the European Convention places individuals under special international protection and, therefore, excludes the application of the rule of local remedies is a cogent one in the absence of provision to the contrary in the Convention. But the real question was whether the provision made in the Convention was explicit enough to cover the case where States were instituting proceedings. Art. 26 does not explicitly refer to nor exclude such cases.

The European Commission took the view that art. 26 applied to inter-State applications. After recounting the basis and status of the rule of local remedies in general international law, the Commission stated that the system of protection of the Convention extended to nationals of the respondent State and that, therefore, the rule of local remedies should apply *a fortiori* to a system of international protection which extends to a State's own nationals as well as to foreigners, and that the system of collective guarantee did not weaken the case for the applicability of the rule. These statements were not really necessary in the context, because the decision rested on the interpretation of art. 26. More specifically, the Commission dealt with the relevant articles as follows:

"Whereas Article 26 of the Convention, in providing that 'the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law', does not, in express terms make any distinction between matters referred to the Commission by a High Contracting Party under Article 24 and matters referred to it by an individual, non-governmental organisation, or group of individuals under Article 25; whereas, furthermore, Article 27, which sets out certain grounds upon which the Commission is required to reject applications referred to it, expressly limits the grounds set out in paragraphs 1 and 2 to petitions under Article 25, but does not so limit paragraph 3, which requires the Commission to reject an application when the domestic remedies have not been exhausted; whereas the contrast in this respect between paragraph 3 and the other two paragraphs of Article 27 clearly shows, in the opinion of the Commission, that it was not the intention of the Contracting States that the rule of exhaustion of domestic remedies should not apply to applications brought by States; whereas, also, the Commission is unable to find in the words, 'according to the generally recognised rules of international law' any indication that the High Contracting Parties intended to limit the

[51]) Yearbook, vol. IV, pp. 146–148.

operation of this rule to matters submitted to the Commission by an individual, non-governmental organisation, or group of individuals; whereas, if it is true that under the generally recognised rules of international law the domestic remedies rule has no application to international claims presented in respect of non-nationals of the claimant State, it is equally true that it has no application to claims presented to international tribunals by individuals; whereas in both types of cases the reason simply is that the claims themselves are inadmissible under general international law, irrespective of the exhaustion of domestic remedies; and whereas it follows that if the insertion of the words 'according to the generally recognised rules of international law' were to be taken as indicating an intention to exclude the operation of the domestic remedies rule in the case of Applications brought by States under Article 24, it would equally be necessary to interpret them as excluding its operation in the case of applications brought by an individual, non-governmental organisation, or group of individuals under Article 25; whereas, however, it is beyond question, as the Austrian Government itself recognises, that the domestic remedies rule laid down in Article 26 of the Convention operates in the case of applications brought under Article 25; ..."

the Commission rejected the argument that the local remedies rule was not applicable to inter-State applications[52]). The conclusion reached was clearly based on an interpretation of art. 26, according to which it was held that the article did cover inter-State applications because of the express internal evidence contained in art. 27 (3) and the absence of any limitations in art. 26. This view has been criticized[53]) but it would seem difficult to controvert the reasoning on the basis of the wording of the European Convention on Human Rights. It is clear that art. 26 makes no distinction between proceedings which might be based on diplomatic protection and other proceedings brought by States nor between proceedings instituted by individuals and those brought by States, nor does art. 27 (3) make such a distinction, so that the conclusion is inevitable that the rule applies *prima facie* to all forms of proceedings before the Commission except to those impeaching general measures. This is so, although it is true that in principle the rule may not apply to proceedings under Conventions collectively guaranteeing human rights in the absence of express provision or necessary implication, because the European Convention must be taken to have express provisions to the contrary.

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[52]) Yearbook, vol. IV, pp. 150–152.

[53]) Vasak, La Convention Européenne ..., *op. cit. supra* note 26, p. 114, C. T. Eustathiades, Les recours individuels à la Commission Européenne des Droits de l'Homme, Problèmes fondamentaux de droit international, Mélanges Spiropoulos (Bonn 1957), pp. 111 *et seq.*

(b) The "direct injury"

The question that arises in this connexion is whether the rule applies to all inter-State applications without any other exceptions, provided the qualification in the case of applications impeaching general measures is accepted. Can any other distinction be made which results in the exclusion of the rule in the case of certain inter-State proceedings?

It has been contended that in general international law, the rule does not apply where there is a "direct injury" to the claimant State[54]). In one case in which this argument was raised, the injury involved the shooting down of a private Israeli plane over Bulgarian territory by Bulgaria. It is not clear on what grounds Israel described this injury as a "direct injury". The question of the exception of the "direct injury" in general international law has been discussed elsewhere[55]). The position may be summarised as follows:

(i) There is a situation in which local remedies need not be exhausted before an international proceeding is instituted based on the fact that a "direct injury" has been committed by the respondent State against the claimant State.

(ii) The mere fact that an injury to an alien is a violation of an international agreement or contrary to an international judgment does not mean that local remedies need not be exhausted.

(iii) *A fortiori* the mere fact that an injury to an alien is a violation of customary international law does not mean that local remedies need not be exhausted[56]).

(iv) Positively, it is submitted that, while the subject of the dispute and the nature of the claim[57]) may not be directly relevant to the determination of the issue whether an injury is a "direct injury", the nature of the

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[54]) See the Israeli argument in the *Aerial Incident Case*, I.C.J., Pleadings, Oral Arguments and Documents, 1959, pp. 530 *et seq.* and 589 *et seq.* See also the French contention in the *Norwegian Loans Case*, I.C.J., Pleadings, Oral Arguments and Documents, 1957, vol. I, pp. 182 *et seq.* and the Swiss argument in the *Interhandel Case*, I.C.J., Pleadings, Oral Arguments and Documents, 1959, p. 403.

[55]) C. F. Amerasinghe, State Responsibility..., *op. cit. supra* note 5, pp. 174–182. See also for a slightly different view T. Meron, The Incidence of the Rule of Exhaustion of Local Remedies, BYBIL, 35 (1959), pp. 84–94. See also Eagleton, *op. cit. supra* note 19, pp. 51, 103, Freeman, *op. cit. supra* note 9, p. 404, P. C. Jessup, A Modern Law of Nations (New York 1956), pp. 118 *et seq.* In relation to human rights see also H. Golsong, Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention (Karlsruhe 1958), pp. 87–88.

[56]) For conclusions (ii) and (iii) see Judge Lauterpacht in a separate opinion which did not contradict the view of the Court in the *Norwegian Loans Case*, I.C.J. Reports 1957, p. 38, and the Court in the *Interhandel Case*, I.C.J. Reports 1959, pp. 27–28.

[57]) See Meron, *loc. cit. supra* note 55, pp. 86–87.

injury provides a criterion by which to judge whether the injury is of this kind. If the State's right which has been injured has for its object the protection of its nationals as such and if this is the main interest sought from it, the injury which has been committed is not a "direct injury" and the rule of exhaustion of local remedies is applicable. If the essence of the right violated is different, then the rule of local remedies would not apply to a claim based on the wrong committed by the violation of this right. Thus, when a diplomat is injured by a State, the diplomat's State can assert that a right has been violated which has for its object the carrying on of the functions of State and not merely the protection of nationals. In such a case, even though a claim may be made for the recovery of damages for the loss suffered by the diplomat, local remedies need not be exhausted in respect of that claim. A tribunal may have to weigh conflicting interests and objects behind a substantive right so as to determine whether the predominant interests is that of protecting a national[58]).

As applied to the question of human rights, where the rule of local remedies is applicable according to general principles of international law, it would seem that the exception pertinent to the case of the "direct injury" should be applicable to cases which are conducted at an international level. Thus, where a State wishes to bring before the European Commission a case in which one of its diplomats has been maltreated in violation of the European Convention on Human Rights, it is not necessary that the diplomat should first exhaust domestic remedies before the case is brought before the European Commission. It is irrelevant here that the State is making use of protection given by the European Convention on Human Rights to protect its own interests; for it will only be able to claim a remedy for the violation of human rights and no more under the Convention. The problem arises where the individual tries to secure a remedy for himself by bringing an individual petition under the Convention. Should the rule of local remedies apply to his claim? It is submitted that it would not, because according to general international law the presentation of his claim would not have been obligatory in the domestic courts because he would have enjoyed diplomatic immunity.

[58]) This approach is compatible with Judge Basdevant's view in the *Interhandel Case*, I.C.J. Reports 1959, p. 30, and that of the Court in the same case, I.C.J. Reports 1959, p. 29.

(c) Jurisdictional connexion

Under the European Convention art. 1 states that the parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Thus, the Convention applies in respect of persons within the jurisdiction of the State concerned. The U.N. International Covenant on Civil and Political Rights in art. 2 (1) describes the obligation to respect and ensure human rights in terms of persons within the territory and subject to the jurisdiction of the State concerned. It is clear that in these Conventions and others like them a State is at the most under an obligation to respect human rights only in respect of persons within their jurisdiction. Thus, where State A prevents X, a national of State B who is in its territory from having access to his family who are nationals of State B and are in State B, State A violates the family rights of X but not those of X's family, because the family is not within the jurisdiction of State A.

Problems may arise in connexion with the rule of local remedies where jurisdiction and territory are not co-extensive. Thus, where Y, a national of State C who is in State D, is arbitrarily deprived of his liberty by officers of State C acting officially in State D, State C has interfered with the rights of Y but the question may arise whether this violation of Y's human rights amounts to a violation of the relevant Convention. Since Y is a national of State C, it may be contended that he is within State C's jurisdiction and State C has violated the relevant Convention. In such a case does Y have to exhaust local remedies in State C before he can bring his case before an international instance. Is the incidence of the rule of local remedies co-extensive with any violation of the relevant Convention?

It is submitted that here the reference to the general principles of international law which is contained in the current Conventions offers an escape; for it means that the limitations on the incidence of the rule in general international law can appropriately be applied to the rule as it is applicable to the violation of human rights by analogy. In any event the principle would seem to be a sound one that limitations at least similar to those applicable to the rule of local remedies in diplomatic protection should be applicable to the rule as applied to human rights.

It has been submitted elsewhere that in general international law it is not in every circumstance that State P injures a national of State Q that such national has to exhaust local remedies in State P, but that there are certain limitations on the incidence of the rule based on "jurisdictional

connexion"[59]). There it appeared that the rule of customary international law relied on the location of the wrong or the place where the wrong was committed as the criterion which determines whether local remedies should be exhausted or not[60]). Thus, it is only if a wrong is committed in State P that an injured national of State Q would have to exhaust local remedies in respect of that wrong. Where State P commits a wrong outside the territory of State P against a national of State Q, there would be no need for such national to exhaust local remedies. By analogy, in the case of a violation of human rights the jurisdictional connexion required for the incidence of the rule of local remedies would be that the violation of the Convention should take place on the territory of the respondent State and not without it. This is an important point, because jurisdictional connexion in this sense may not be the same as jurisdiction for the purposes of determining whether the relevant Convention has been violated so as to make it possible to invoke the machinery under that Convention.

(d) Other factors

There may be other factors which limit or should limit the incidence of the rule of local remedies in connexion with human rights. They will depend on the assessment of the interests involved in connexion with the rule. As pointed out earlier, there is no reason why in principle the interests of the individual and of the international community should not be given more prominence in this field. In line with this view it may be contended, for instance, that where a case is already pending before the relevant international authority, which involves a particular alleged violation of human rights, exemption from the exhaustion of domestic remedies should be granted to other individuales who allege the same violation of human rights in similar situations in their cases, until a decision is arrived at in the first case, so that, if the decision is in favour of the complainant in that case, there will be some chance of the others getting redress without having to spend time and money on resorting to domestic remedies. However, this exemption must lie at the risk of the other individuals who may have to show that they have exhausted domestic remedies, if they wish to institute proceedings after an adverse decision is given in the first case. The risk seems to be inevitable unless the need for the exhaustion of local remedies is eliminated altogether.

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[59]) C. F. Amerasinghe, State Responsibility..., *op. cit. supra* note 5, pp. 182–187.

[60]) See also the *Interhandel Case*, I.C.J. Reports 1959, p. 27.

(6) Scope of the Rule

(a) The judicial nature of the remedy

It is important to determine to what kinds of remedies the rule of local remedies applies. In connexion with general international law, an examination of the rule in its application shows that the remedies covered by the rule are those of a judicial nature, although these may not be available through the regular courts of law, and not to all remedies of an administrative, executive or legislative nature[61]). The characteristic of this judicial nature is that the remedy enjoys a character which ensures impartial determination of disputes according to law and not purely by discretion. This principle is applicable to the rule of domestic remedies in the context of human rights.

The jurisprudence of the European Commission of Human Rights[62]) shows that it has been aware of the problems connected with the scope of the rule and that it has been concerned with delimiting that scope.

(i) It has been pointed out that there is no distinction between ordinary and extraordinary remedies, the criterion of whether they need be resorted to being their legal nature[63]). It is not clear what is meant by legal nature but it is presumed that this concept would be compatible with the concept of judicial nature current in general international law.

(ii) Such remedies may include reference to a special constitutional court[64]), or to administrative courts of different kinds, such as administrative courts of first instance[65]), superior administrative courts[66]), administrative courts of appeal[67]), a federal administrative court[68]), or an administrative Detention Commission[69]). They may include a disciplinary action

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[61]) See C. F. Amerasinghe, State Responsibility..., *op. cit. supra* note 5, pp. 188–192.

[62]) See for the jurisprudence of the Commission on the rule of local remedies as such, Vasak, *op. cit. supra* note 26, pp. 113–131, Golsong, *loc. cit. supra* note 15, RdC pp. 111–115, A.-M. Nay-Cadoux, Les conditions de recevabilité des requêtes individuels devant la Commission Européenne des Droits de l'Homme (Turin 1966), pp. 88–103. See also for a discussion of the rule Golsong, Rechtsschutzsystem..., *op. cit. supra* note 55, pp. 72–81.

[63]) Application No. 343/57, Yearbook, vol. II, pp. 439–440.

[64]) Application No. 27/55, Yearbook, vol. I, p. 138, Application No. 254/57, Yearbook, vol. I, p. 150, Application No. 604/59, Yearbook, vol. III, p. 296, Application No. 899/60, Yearbook, vol. V, p. 136.

[65]) Application No. 1197/61, Yearbook, vol. V, p. 92.

[66]) Application No. 289/57, Yearbook, vol. I, p. 148.

[67]) Application No. 254/57, Yearbook, vol. I, p. 150.

[68]) Application No. 232/56, Yearbook, vol. I, p. 143.

[69]) Application No. 493/59, Yearbook, vol. IV, p. 302.

of a special nature against the officer concerned before a person or committee with judicial powers[70]), or they may involve an appeal to the Attorney-General acting in a quasi-judicial capacity[71]), or an application for the transfer of a case to another court on the grounds of prejudice which would have involved a rehearing[72]), or an appeal which would have resulted in the rehearing of the case[73]).

(iii) There may also be the need to seek alternative remedies successively. Thus, where in a federal State there is a Federal Constitutional Court and a State Constitutional Court both of which have jurisdiction over the same matter, it will be necessary to litigate in both courts in order to have exhausted local remedies[74]).

(iv) However, it is important to note that a merely discretionary remedy such as one whose object is to obtain a favour and not vindicate a right need not be resorted to, because it cannot be regarded as legal or judicial. Thus, in the *De Becker Case*, which was decided by the European Commission on Human Rights, it was held that an action for reinstatement under a statute, which would have enabled the complainant to resume his profession if it succeeded was not a remedy to which he should have had recourse because "its purpose is to obtain a favour and not to vindicate a right"[75]). Similarly, it is submitted that other administrative remedies of a discretionary nature or a non-judicial nature need not be resorted to. Application for release by giving a promise that the applicant would respect the laws and constitution which was not provided for by law was held merely to be a discretionary remedy to which resort did not have to be had by the applicant[76]).

(b) The extent of resort necessary

It is an important question how far resort to available remedies must be carried.

(i) There must be resort to the competent tribunals or courts. Thus, if the claimant is injured by an administrative act, he ought, in most cases,

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[70]) Application No. 297/57, Yearbook, vol. II, p. 204.

[71]) Application No. 254/57, Yearbook, vol. I, p. 150.

[72]) Application No. 1727/62, Yearbook, vol. VI, p. 370.

[73]) Application No. 434/58, Yearbook, vol. II, p. 354.

[74]) Application No. 302/57 (not published), cited by Vasak, *op. cit. supra* note 26, p. 120.

[75]) Application No. 214/56, Yearbook vol. II, pp. 237–238. Other decisions where the remedy has been regarded as discretionary are Application No. 458/59, Yearbook, vol. III, p. 234 (appeal for pardon), Application No. 299/57, Yearbook, vol. II, p. 192 (petition to the Queen in the U.K. which is a measure of grace).

[76]) Application No. 332/57, Yearbook, vol. II, p. 326.

to institute proceedings before administrative courts[77]). In the same way a decision of a social insurance bureau must, in the Federal Republic of Germany, be contested by recourse to the social tribunal that has competence *ratione loci*[78]).

(ii) When proceedings are instituted, they must be validly instituted. Thus, under German law, it is necessary that a person who has been deprived of his civil rights should be represented by a tutor in legal proceedings. This provision must be satisfied if local remedies are to be regarded as exhausted[79]).

(iii) There must be a completion of proceedings in the sense that proceedings must not be still pending nor must they have been discontinued. Thus, when an appeal in a German court was still pending it was held there had been no exhaustion[80]). Where the complainant had lost his case in the court of first instance and an appeal could have been taken which would have meant a rehearing of the case, it was held that local remedies had not been exhausted[81]). Where an appeal had been withdrawn and a plea of nullity had been raised, the decision of the court was held to have been *res judicata* but it was held that the appeal should have proceeded, so that local remedies had not been exhausted[82]). Where proceedings were provisionally discontinued because of the applicant's health and at his request, it was held that there had been no exhaustion of local remedies, in respect of a complaint that the applicant was being persecuted by the institution of vexatious charges[83]).

(iv) In order that proceedings may have been validly completed, the time limit prescribed by the internal law for the institution of proceedings must have been observed. Thus, where an appeal to a federal court is required to be made within one month of the date of the decision of the relevant lower court, this rule must be observed if local remedies are to be regarded as having been exhausted[84]).

(v) Local remedies are not regarded as having been exhausted unless there is a final decision. That is to say, it is necessary that there be a decision of a court which is the highest in the hierarchy of courts to which

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[77]) Application No. 279/57 (not published), cited by Vasak, *op. cit. supra* note 26, p. 128.

[78]) Application No. 410/58 (not published), cited by Vasak, *op. cit.*, p. 128.

[79]) Application No. 225/56 (not published), cited by Vasak, *op. cit.*, p. 128.

[80]) Application No. 115/56, Yearbook, vol. I, p. 137.

[81]) Application No. 434/58, Yearbook, vol. II, p. 354.

[82]) Application No. 1237/61, Yearbook, vol. V, p. 96.

[83]) Application No. 722/60, Yearbook, vol. V, p. 104.

[84]) Application No. 352/58, Yearbook, vol. I, p. 342. See also Application No. 1404/62, Yearbook, vol. VII, p. 262.

the applicant can have resort in the domestic legal system, provided he is not exempted on the recognised grounds from proceeding to such highest court[85]). The question what court is a final court for these purposes has been discussed in relation to the rule in art. 26 of the European Convention on Human Rights that a complaint to the Commission must be made within a period of six months from the date on which the final decision is taken. Thus, it has been held that the final decision was that given by a Special Court of Revision in Denmark, although there was no time limit for an appeal to this special court from the court of first instance, and proceedings could then, have been prolonged[86]). It was possible that if proceedings were delayed too long by the applicant, there might be room for saying that he had failed to exhaust local remedies. In the *Lawless Case* the date of the failure of the appeal to the Irish Supreme Court in regard to the application for *habeas corpus* was regarded as the final decision for the purposes of the complaint relating to damages for false imprisonment before the Commission[87]). As far as the claim for damages was concerned, there had been no proceedings before the local courts but it was after the Supreme Court decision on the application for *habeas corpus* that it became evident that such a claim would not succeed, so that the Commission was justified in regarding that decision as the final decision of the highest relevant court for the purposes of the claim for damages. In Application No. 654/59 it was clearly stated that the "final decision" for the purposes of art. 26 was to

> "be considered as referring exclusively to the final decision resulting from the exhaustion of all domestic remedies according to the generally recognised rules of international law"[88]).

In this case, rather curiously, where a petition was rejected by the Supreme Regional Court at C in Germany, proceedings for reopening the case before the Federal Constitutional Court were not regarded as remedies to be exhausted and the decision of the Supreme Regional Court was regarded as the final decision. It is questionable why the resort to the Federal Constitutional Court was not regarded as essential under the principles of international law, if it was an effective remedy.

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[85]) This is the principle propounded in the *Finnish Ships Arbitration, loc. cit. supra* note 6, pp. 1495 *et seq.*

[86]) Application No. 343/57, Yearbook, vol. II, pp. 441–444.

[87]) Application No. 332/57, Yearbook, vol. II, p. 327.

[88]) Yearbook, vol. IV, p. 276.

(7) Conditions of Substance and Procedure

In the application of the rule of local remedies there are certain conditions of substance and procedure which have to be fulfilled if the complainant is to be regarded as having exhausted local remedies. The jurisprudence of the European Commission of Human Rights contains some discussion of these points but it will be found that that Commission has followed generally the principles of international law relating to them.

(a) Substance

The applicant must raise at the national level all arguments open to him on which he bases his case before the European Commission. He may frame his case in any way he likes as far as the international proceedings go, but the arguments he raises at an international level must be taken at the national level. This is the converse of the proposition enunciated in the *Finnish Ships Arbitration* that the claimant in international proceedings need only raise those arguments in national proceedings which he raises in international proceedings[89]).

In keeping with the above principle it has been held that, where the applicant before the Commission had failed to raise in a national court of appeal the argument that he had been denied justice which he raised before the European Commission, he had not exhausted domestic remedies and his application was inadmissible[90]). Similarly, the point that the applicant had been denied access to his case-file and not been allowed to take written notes thereof which was raised before the European Commission as a violation of the Convention on Human Rights, had not been raised before the national court of appeal and it was held that there had been no exhaustion of domestic remedies[91]).

It is submitted that for the purpose of human rights it may be necessary to interpret this rule somewhat liberally, so as not to impose too heavy a burden on the individual who contends that his rights have been violated. If the argument has been raised in substance before the domestic tribunal, even though it is not raised in the particular form which it takes before

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[89]) *Loc. cit. supra* note 6, pp. 1495 *et seq.*

[90]) Application No. 263/57, Yearbook, vol. I, p. 146. See also Application No. 1103/61, Yearbook, vol. V, p. 168, Application No. 1816/63, Yearbook, vol. VII, p. 204, Application No. 2002/63, Yearbook, vol. VII, p. 262.

[91]) Application No. 617/59, Yearbook, vol. III, p. 370. For other cases supporting the rule see, *e. g.*, Application No. 712/60 Yearbook, vol. IV, p. 400, Application No. 1661/62, Yearbook, vol. VI, p. 360.

the international instance, this should be sufficient for the purpose of the exhaustion of local remedies[92]).

(b) Procedure

In the *Ambatielos Claim* the arbitral tribunal indicated that in general essential remedies must be resorted to in the field of procedure[93]). This, it has been submitted, means that of remedies of a procedural nature which are discretionary only those which are probably likely to result in a favourable decision to the claimant must be resorted to, provided they can reasonably be foreseen to be so effective by a reasonable counsel[94]). As a general principle the same rule is applicable to the exhaustion of domestic remedies in connexion with the protection of human rights. On the other hand, rules of procedure which have obligatory force should be resorted to in the proceedings, provided such rules do not fall below the international minimum standard[95]).

The European Commission does not appear to have had occasion to pronounce specifically on questions of procedure, although it has had to deal with the question of raising arguments in domestic courts, as has been shown above. However, it is submitted that the general principles applicable in this regard to the rule of local remedies in general international law would properly apply. Thus, if the question arose as to whether a particular witness should have been called in the local courts or whether a particular document should have been called for, the above principle would apply. The requirements of this principle which arise in cases where evidence is suppressed by a party[96]) will also be applicable in the normal way. It is not proposed here to discuss these details.

(8) Exceptions Permitting the Non-exhaustion of Remedies

In general international law there were circumstances in which an alien was exempted from the obligation to seek a remedy through the means of redress available in the respondent State. It was generally stated that this occurred when there were no remedies to exhaust. In the *Finnish Ships*

[92]) See for a case which supports this contention, Application No. 788/60, Yearbook, vol. IV, pp. 172, 174–176.

[93]) U.N. Reports of International Arbitral Awards, vol. XII, p. 128.

[94]) C. F. Amerasinghe, *loc. cit. supra* note 5, ICLQ, pp. 1302–1307. See also Application No. 788/60, Yearbook, vol. IV, p. 172.

[95]) C. F. Amerasinghe, *loc. cit.*, ICLQ, pp. 1293–1296. See also Application No. 788/60, Yearbook, vol. IV, pp. 170–172.

[96]) See C. F. Amerasinghe, *loc. cit.*, ICLQ, pp. 1313–1319.

Arbitration the general rule was formulated that where the remedy was obviously futile the alien was not obliged to resort to it[97]). This was explained as meaning that it must appear that there was no possibility of success before the exception could operate as opposed to a reasonable probability that the remedy could not succeed. This may be open to criticism in relation to the application of the rule to the case of human rights on the ground that it casts too heavy a burden on the individual, if he has to determine whether a remedy is obviously futile in this sense before he can safely refrain from resorting to it. Perhaps, the general rule should be that if it is reasonably probable that a remedy cannot succeed, the individual need not resort to it. This is less harsh than a rule which requires that the remedy be absolutely impossible of success. So much for general principle but there are other rules built around this rule in the implementation of it and closely connected with it which are more concrete. The European Commission on Human Rights has had occasion to apply these rules and its jurisprudence may usefully be examined to see how the exceptions may be conceived. These exceptions are important, for they help to redress the balance which is tipped against the individual from the start.

(a) Delay

The principle has been accepted that undue delay in the provision of redress by the authorities of the respondent State, where a remedy has been invoked, will result in the exemption of the individual from the pursuit of these remedies. In one case in which the matter was discussed[98]), there was no proof, however, of undue delay in the circumstances. What is undue delay will naturally depend on the circumstances of each case. There are other cases in which the principle has been mentioned[99]).

(b) Inadequacy for object

It has been held that the remedy must be adequate for the object which the individual desires to achieve[100]). If the object desired cannot be a-

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[97]) *Loc. cit. supra* note 6, pp. 1495 *et seq.*

[98]) Application No. 222/56, Yearbook, vol. II, p. 344. See also Application No. 214/56, Yearbook, vol. II, p. 238.

[99]) Application No. 214/56, Yearbook, vol. II, p. 238, Application No. 343/57, Yearbook, vol. II, p. 440.

[100]) Application No. 1008/61, Yearbook, vol. V, p. 82. See also Application No. 332/57, Yearbook, vol. II, pp. 318, 326. See also, *e. g.*, the Inter-American Convention on Human Rights, art. 50 which specifically makes provision for the non-operation of the rule in cases of undue delay.

chieved and this is the basis of the international claim, there is no need for the exhaustion of that remedy.

A peculiar situation arose in Application No. 332/57[101]). The applicant claimed for 153 days detention. There was an effective remedy for damages for the detention during two hours of this period. It was held that a judgment in his favour in any action for false imprisonment for this two hours could not have altered his position with respect to the subsequent period of detention in respect of which there was no remedy. Therefore, such an action would have been an ineffective remedy with respect to the claims which were the subject of his application and, therefore, he was not under an obligation to pursue it.

In Application No. 788/60 it was said:

"whereas it is commonly admitted, in this respect, that only the non-utilisation of an 'essential' recourse for establishing the merits of a case before the municipal tribunals leads to non-admissibility of the international complaint . . .; whereas, in addition, the rule of local redress confines itself to imposing the 'normal' use of remedies 'likely to be effective and adequate' . . ." [102]).

This supports the view that only those remedies which are adequate for the object which the complainant wishes to secure can be regarded as being exhaustible. The contention was raised in this case that the individuals concerned had not resorted to a particular remedy provided by a particular section of the Italian Code of Criminal Procedure. The Commission said that:

"whereas if they had expressly referred to it, the young men of Fundres/Pfunders would therefore not have raised any supplementary argument but simply would have put forward one more argument which in practice coincides, by its intention, with those they derived from the Code of Criminal Procedure; whereas consequently, to all appearances, there is no reason for assuming that their appeal would, in this manner, have met with a different and more favourable reception";

the remedy was not subject to exhaustion. On the other hand, in regard to a different remedy consisting of the invocation of another article of the Italian Code of Criminal Procedure it was said that:

"whereas the explanation of the Italian Government concerning the pertinent legislation and practice tend to indicate that an application lodged in pursuance of Article 55 (2) of the Code of Criminal Procedure would have constituted such a remedy in the case in issue; whereas it appears, in particular,

[101]) Yearbook, vol. II, p. 318.
[102]) Yearbook, vol. IV, p. 172.

> from these explanations that according to the case-law of the Court of Cassation of Italy an application of this kind can validly be based on circumstances such as those invoked by the Austrian Government, that the Public Prosecutor is obliged to refer it to the Court of Cassation and that the latter must examine and decide on it; whereas it seems that the request in question would therefore have had considerable prospects of success and that, if the Court of Cassation had accepted it, there would have been a possibility of the trial taking place in an atmosphere different from that which, in the eyes of the Austrian Government, prevailed at Bolzano/Bozen and at Trent" [103]);

there had been no proper exhaustion of local remedies. Here the decision was based on the notion that the remedy in question was adequate for the object which it was intended to achieve.

(c) Probability of a repeated decision

It has been held that where an adverse decision is likely to be repeated there is no need to resort to local remedies. Thus, where the applicant contended that there had been a violation of art. 6 of the European Convention and there already existed an authoritative Austrian decision that Austrian courts could not entertain a complaint that art. 6 of the European Convention had been violated, it was held that he did not have to resort to the local courts [104]). Similarly, in a case where the applicant claimed that the Austrian Courts had deprived her of custody of her child, and it was likely that, since no new information had emerged since her last appeal to the courts, the decision would have been repeated, it was held that the applicant did not have to seek a remedy once more in the Austrian courts before appealing to the European Commission [105]). These cases support the proposition that the previous decision which is likely to be repeated may be in the same case or in a different case of a similar nature. In either case the applicant is exempted from recourse to domestic remedies. It is important to note that what has been held is that there must only be some probability of the adverse decision being repeated and not a certainty of an obvious nature that the decision will be repeated.

(d) Improbability of success

Apart from the above case, it has been said that where it is reasonably probable that the applicant cannot succeed in the domestic courts, he need

[103]) Yearbook, vol. IV, p. 168.
[104]) Application No. 808/60, Yearbook, vol. V, p. 108.
[105]) Application No. 515/59, Yearbook, vol. III, p. 202. See also Application No. 1936/63, Yearbook, vol. VII, p. 224.

not resort to them. In the *Lawless Case*[106]), the applicant had failed in his bid to secure a writ of *habeas corpus*, so that it was clear that he could not succeed in an action for damages for false imprisonment for the same detention for release from which he had requested that a writ of *habeas corpus* be issued. It was said by the European Commission that the action for damages had "no reasonable prospect of success and must be regarded as ineffective remedies . . ." and therefore, under general international law the applicant did not have to resort to them[107]). It will be noted that the Commission mentioned "a reasonable prospect of success" as the criterion of whether the remedy was effective. This is different from saying that the remedy must be obviously futile in order to be ineffective. The latter criterion is more disadvantageous to the individual. In so far as the Commission thought that the former was the criterion in the general international law of diplomatic protection, it was under a misapprehension but, nevertheless, its statement of the law as applied to human rights is appropriate and acceptable. It is in keeping with the general principles of international law in so far as an exception of a general nature is recognised. The exact rule is, however, different from the rule in the law of diplomatic protection.

Conversely, it has been said that:

> "if there is any doubt as to whether a given remedy is or is not intrinsically able to offer a real chance of success, that is a point which must be submitted to the domestic courts themselves before any appeal can be made to an international court"[108]).

The question whether under German law a foreign corporate body could avail itself of certain provisions of the German Constitution was held to be of this nature, as far as the German Constitutional Court was concerned (although at the time the issue was to be litigated there may have appeared to be no doubt on the question). This principle is in keeping with the general principle that there must be an improbability of the remedy being effective for exemption from the need to resort to domestic remedies to apply. In cases in which the above principle is applicable that improbability does not exist, as it did not exist in the case cited above. On the same lines it has been held that the personal opinion of the applicant that a remedy is unlikely to succeed is inadequate to bring the exception

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[106]) Application No. 332/57, Yearbook, vol. II, p. 318.

[107]) *Loc. cit.*

[108]) Application No. 712/60 *(Retimag Case)*, Yearbook, vol. IV, p. 400. The decision has been criticised on the facts by K. V a s a k, Conseil de l'Europe, Journal du droit international, 1964, pp. 362–364.

into operation, if it is not supported by the facts of the case judged objectively[109]).

(e) Waiver

The benefit of the rule that local remedies must be exhausted may be waived by the respondent State. As will be seen, the European Commission is of the view that it can investigate *ex officio* whether the rule has been satisfied. In the light of this holding it has also been that, when the Commission examines the facts and the law relating to the rule, if the respondent State refuses to take up the case that local remedies have not been exhausted when it is requested to do so by the Commission, it is deemed to have waived the benefit of the rule[110]). It will be submitted that the procedure adopted by the Commission is inappropriate and improper under the terms of the Convention. As a result of that submission, waiver could operate whenever the respondent State refused to raise the objection that local remedies had not been exhausted.

(f) Prevention of access to remedies

Denial of justice in the form of denial of access to remedies is accepted in general international law as a factor which exempts from observation of the rule of local remedies[111]). Some of the Conventions on Human Rights make particular provision for this possibility by mentioning denial of justice as an exception to the application of the rule. Unfortunately, in the case of the European Convention on Human Rights the European Commission, while not denying that the principle is applicable, has interpreted the exception very narrowly. Thus, there are cases where the applicant has been prevented from entering the respondent State but nevertheless it has been held that he should have exhausted local remedies because he could have communicated with and retained counsel in order to assert his rights against the State and even his right of entry into the State[112]). This, it is submitted is not a proper construction of the exception. Personal access to remedies would seem to be essential if they are meant to be exhausted.

(g) Denial of justice

Unlike the European Convention, there are some other Conventions which except the operation of the rule of local remedies where there has

[109]) Application No. 289/57, Yearbook, vol. I, p. 148.
[110]) Application No. 1994/63, Yearbook, vol. VII, p. 252.
[111]) See C. F. Amerasinghe, State Responsibility . . ., *op. cit. supra* note 5 p. 196.
[112]) Application No. 1211/61, Yearbook, vol. V, p. 224, Application No. 172/56, Yearbook, vol. I, p. 211.

been a denial of justice[113]). This must mean improper conduct by the judicial authorities concerned. It is submitted that this is a desirable exception. It is reasonable that an individual should not be expected to resort to higher levels in the hierarchy of courts if he is denied justice in the formal sense by the lower levels of the system of courts.

(h) Factors that do not create exceptions

The European Commission has also pronounced on some factors which do not exempt the individual from resorting to domestic remedies.

(i) It has been held that the insufficient means of the applicant are not adequate grounds for his not having resorted to local remedies[114]). This is rather unfortunate and the more so because the European Commission has made no provision for the award of costs.

(ii) The absence of knowledge of the existence of a remedy[115]) or the fact that the applicant is unaware of the precise extent of a court's jurisdiction[116]) does not absolve him from the obligation to exhaust domestic remedies.

(9) Proof and Procedure

The distribution of the burden of proof and the procedure involved in the application of the rule of local remedies in relation to the protection of human rights is of considerable importance. Considering that the rule favours the respondent State, it would be in keeping with the principle that the interests of the individual and of the international community should be given greater prominence that the respondent State should have to raise the issue that domestic remedies had not been exhausted and fully prove the absence of exhaustion. On both matters the European Commission has, rather unfortunately, taken a different view.

(i) On the question of the burden of proof it has been held that (a) the respondent State, if it raises the objection that domestic remedies have not been exhausted, need only and must establish that in its municipal system

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[113]) See the Inter-American Convention on Human Rights, art. 50.

[114]) Application No. 181/56, Yearbook, vol. I, p. 139.

[115]) Application No. 1918/63, Yearbook, vol. VI, p. 484. See also Application No. 1404/62, Yearbook, vol. VII, p. 124.

[116]) Application No. 1094/61, Yearbook, vol. V, p. 214. See also Application No. 1661/62, Yearbook, vol. VI, p. 360, and Application No. 1211/61, Yearbook, vol. V, p. 224.

there existed remedies which had not been exercised[117]), and (b) the applicant must prove that he has exhausted every remedy available to him[118]), or if he has not resorted to any remedies that have been proved to exist, that such remedies were unlikely to be effective and adequate in regard to the grievance in question[119]). (c) Presumably the applicant must also prove the existence of other excuses for not having resorted to available remedies. The rule in general international law is similar[120]), but it is submitted that it lays too heavy a burden on the individual in relation to the protection of human rights.

(ii) In regard to the procedure of proof, although mention has been made, as has been seen above, of the right of the respondent State to raise the objection that domestic remedies have not been exhausted, it does not seem that the European Commission has taken the view that the respondent State must raise the objection if the issue is to be litigated. This is the position in general international law. The Commission has taken a different view. It holds that it can *ex officio* raise the issue of the exhaustion of domestic remedies and thus examine it[121]), although the benefit of the rule can be waived by the respondent State's refusing to accept any burden of proof placed upon it[122]). It also holds that it can *ex officio* examine whether there are any grounds for exempting the applicant from resorting to domestic remedies[123]). This is more in favour of the individual and, therefore, correctly reflects the policies that should be involved.

(iii) Another rule which is rather anomalous is that the applicant must provide information enabling it to be shown that the exhaustion of domestic remedies had taken place. This is the result of the present Rule 42 of the Rules of Procedure of the European Commission of Human Rights. Earlier the rule was even stricter. The rule, even as it stands, seems to favour the respondent State too much and is, thus, misconceived. It is certainly not in keeping with the principles of the rule of exhaustion of local remedies in general international law, where the burden of proof is divided and, therefore, the duty to provide information is also divided. In

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[117]) Application No. 788/60, Yearbook, vol. IV, p. 168, Application No. 1727/62, Yearbook, vol. VI, p. 398, Application No. 299/57 (unpublished), cited by Vasak, La Convention Européenne . . ., *op. cit. supra* note 26, p. 115.

[118]) Application No. 232/56, Yearbook, vol. I, p. 143.

[119]) Application No. 788/60, Yearbook, vol. IV, p. 168.

[120]) See Judge Lauterpacht in the *Norwegian Loans Case, loc. cit. supra* note 8, p. 39.

[121]) See Application No. 263/57, Yearbook, vol. I, p. 146, Application No. 343/57, Yearbook, vol. II, p. 413, Application No. 524/59, Yearbook, vol. III, p. 354.

[122]) See *supra* where this question is discussed.

[123]) Application No. 297/57, Yearbook, vol. II, p. 204.

connexion with the protection of human rights it would seem to be even more out of place.

(iv) To make matters even more difficult for the individual the Commission has held that, though the objection that domestic remedies had not been exhausted is raised for the first time during the oral explanations provided for by Rule 46 of the Rules of Procedure, the respondent State is not precluded from having the benefit of the rule of local remedies[124]). This position seems to give undue weight to the interests of the respondent State. It is submitted that whether the respondent State raises the issue or under the present system the Commission takes up the matter *ex officio,* this should only be possible at the inception of the proceedings.

(v) In Application No. 332/57 a rule of procedure was formulated which benefits the individual and is, therefore, of value in the context of human rights where the rule of domestic remedies is at present weighted too much in favour of the respondent State. This rule is that, even if there was a remedy which would have made the original application in its original form inadmissible, when the application was first filed, the application may be amended at a later stage, if there is a change of circumstances consequent upon the filing of the application, so that the defect may be cured[125]). It was said that there was no need to treat matters of form with the same strictness as in municipal law. In accordance with this principle it was held there that, even if the applicant had not exhausted all domestic remedies in order to get himself released from detention at the time the application was made, when the application was amended after his release so as to be concerned only with damages for unlawful detention, it was possible for the amendment to stand so as to make the application admissible because there were no remedies to exhaust.

(10) Conclusion

It is hoped that this study would have shed some light on the considerations that govern the question of exhaustion of local remedies in regard to the protection of human rights at an international level and on how the rule should operate, if it is invoked expressly or applies by necessary implication. The following broad submissions may be made on the basis of the study.

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[124]) See *e. g.*, Application No. 712/60 *(Retimag Case),* Yearbook, vol. IV, pp. 398–406, Application No. 1727/62, Yearbook, vol. VI, p. 396.

[125]) Yearbook, vol. II, p. 326.

(i) Certain interests of the individual and the international community should be given somewhat greater importance in the international protection of human rights.

(ii) It would seem that probably the rule that domestic remedies must be exhausted before an international organ is seised of a case does not apply to the normal situation where human rights are violated, unless express provision is made for the application of the rule in the governing instrument or the rule applies by necessary implication.

(iii) Where the rule is expressly provided for, the limitations and restrictions which are provided for in respect of its application in general international law must be strictly observed, so that, for instance, the rule does not cover non-judicial remedies nor does it apply in the case of a direct injury.

(iv) Further, some of the requirements of general international law must be broadly construed in favour of the individual, in respect of certain exceptions such as the exception that the rule does not apply where the remedy is not an effective one.

(v) In regard to proof and procedure too, there is room for the adaptation of the rules of general international law so as to benefit the individual. On these matters the tendencies shown in the practice of the European Commission on Human Rights are rather restrictive when compared with the position that is desirable.