ABHANDLUNGEN

The Formal Character of the Rule of Local Remedies

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It is an accepted and well-established principle of international law that an alien must exhaust the judicial remedies in a State alleged to be responsible for an injury to him before his national state may take up the case and bring it before an international tribunal[1]). Much has been written on its various aspects[2]) and it has been invoked on several occasions before the

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[1]) *Vide* The Interhandel Case 1959, I. C. J. Reports, pp. 6, 27: "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law".

[2]) E. g. Anzilotti, La Responsabilité Internationale des Etats, Revue Générale de Droit International Public, vol. 13 (1906), p. 8; Borchard, The Diplomatic Protection of Citizens Abroad (1915), p. 381; Eagleton, The Responsibility of States in International Law (1928), p. 95; Eagleton, Une théorie au sujet du commencement de la responsabilité de l'état, Revue de Droit International et de Législation Comparée (3rd Series) vol. 11 (1930), p. 643; Hoijer, La Responsabilité Internationale des Etats (1930), p. 374; Borchard, Protection diplomatique des nationaux à l'étranger, Rapport de . . ., Annuaire de l'Institut de Droit International, vol. 36 (1931 I), p. 424; Dunn, The Protection of Nationals (1932), p. 156; Witenberg, La recevabilité des réclamations devant les juridictions internationales, Académie de Droit International, R. d. C. vol. 41 (1932 III), p. 50; Friedmann, Epuisement des voies de recours internes, Revue de Droit International et de Législation Comparée (3rd Series) vol. 14 (1933), p. 318; Ténékidès, L'épuisement des voies de recours internes comme condition préalable de l'instance internationale, Revue de Droit International et de Législation Comparée (3rd Series) vol. 14 (1933), p. 514; Borchard, The Local Remedy Rule, The American Journal of International Law (A. J. I. L.) vol. 28 (1934), p. 729; Eagleton, in: Revue de Droit International et de Législation Comparée (3rd Series) vol. 11 (1935), p. 504; Fachiri, The Local Remedies Rule in the Light of the Finnish Ships Arbitration, The British Year Book of International Law (BYBIL) vol. 17 (1936), p. 19; Witenberg, L'Organisation Judiciaire, la Procédure et la Sentence Internationales (1937); Ralston, The Law and Procedure of International Tribunals (revised ed. 1926), p. 95, Supplement to the Law and Procedure of International Tribunals (1938), p. 38; Ago, La regola del previo esaurimento dei ricorsi interni in

Permanent Court of International Justice and the International Court of Justice[3]); but this does not mean that all the difficulties connected with it have been solved[4]).

It is submitted, however, that one of the fundamental questions in this field is that of the structural and formal meaning of the rule that local remedies must be exhausted in the context of international law. The traditional method of dealing with this problem has been to determine whether the rule is one of substance or one of procedure at international law.

The thinking on the problem and the solutions offered are of three kinds. For instance, Eagleton says, "Responsibility arises from an internationally illegal act and is not necessarily contingent upon local

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tema di responsabilità internazionale, Archivio di Diritto Pubblico, vol. 3 (1938), p. 181; Freeman, The International Responsibility of States for Denial of Justice (1938), pp. 407, 422; Lipstein, The Place of the Calvo Clause in International Law, BYBIL vol. 22 (1945), p. 130; Fawcett, The Exhaustion of Local Remedies: Substance or Procedure?, BYBIL vol. 31 (1954), p. 452; Verzijl, La règle de l'épuisement des recours internes (Huitième Commission), Exposé préliminaire, présenté par ..., Annuaire de l'Institut de Droit International, vol. 45 (1954), p. 5; *ibid.* vol. 46 (1956), p. 265; Ch. De Visscher, Le déni de Justice en Droit International, Académie de Droit International, R. d. C., vol. 52 (1955 II), p. 369; Oppenheim, International Law (8 th ed. 1955), p. 361; Shea, The Calvo Clause (1955); García Amador, International Responsibility: Third Report by ..., Yearbook of the International Law Commission vol. 2 (1958), pp. 47, 55; Bagge, Intervention on the Ground of Damage caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders, BYBIL vol. 36 (1958), p. 162; Law, The Local Remedies Rule in International Law (1961); Amerasinghe, Exhaustion of Procedural Remedies in the Same Court, The International and Comparative Law Quarterly vol. 12 (1963), p. 1285; Mummery, The Content of the Duty to Exhaust Local Judicial Remedies, A. J. I. L. vol. 58 (1964), p. 389; and other authors cited in this article.

There is much diplomatic correspondence which bears evidence to the existence of the local remedies rule, especially originating from the U.S.State Department (see, for example, authorities cited in Hyde, International Law, vol. 1, (1922), pp. 491–500). None of this deals with the problem which is the subject of this study nor is it indirectly helpful.

[3]) See The Chorzów Factory Case, P. C. I. J. Series A No. 9; The Mavrommatis Palestine Concessions Case, P. C. I. J. Series A No. 5; The Phosphates in Morocco Case, Series A/B No. 74; The Electricity Co. of Sophia Case, P. C. I. J. Series A/B No. 77; The Administration of the Prince of Pless Case, Order of 4th February 1933, P. C. I. J. Series A/B No. 54; The Losinger & Co. Case, Order of 27th June 1936, P. C. I. J. Series A/B No. 67; The Panevezys-Saldutiskis Railway Case, P. C. I. J. Series A/B No. 76; The German Interests in Upper Silesia Case, P. C. I. J. Series A No. 6; Anglo-Iranian Oil Co. Case 1952, I. C. J. Reports, pp. 93, 99; Ambatielos Case 1953, I. C. J. Reports, pp. 10, 13; Nottebohm Case 1953, I. C. J. Reports, pp. 4, 10; The Norwegian Loans Case 1957, I. C. J. Reports, pp. 9, 14; The Interhandel Case 1959, I. C. J. Reports, pp. 6, 11; The Aerial Incident Case 1959, I. C. J. Reports, pp. 127, 132; The Barcelona Traction Co. Case 1964, I. C. J. Reports, pp. 6, 12.

[4]) See e. g. Jessup, A Modern Law of Nations (1956), p. 104. ". . . there is a well established but inadequately defined rule that the alien must exhaust his local remedies before a diplomatic claim is made". (Italics added.)

redress"[5]). This represents the first view of the nature of the rule, and this would seem to mean that the rule is not always substantive in nature, and therefore implies that the rule may be procedural or substantive, depending on the circumstances. If State responsibility is contingent on local redress, the rule of exhaustion of local remedies is substantive. If such responsibility is not necessarily contingent upon local redress, it may arise even before local remedies are resorted to, thus giving the rule a procedural character.

A second group regards the rule as entirely substantive in character. Judge Hudson says,

> "It is a very important rule of international law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. This is not a rule of procedure. It is not merely a matter of orderly conduct. It is a part of the substantive law as to international, i. e. State-to-State, responsibility"[6]).

A writer who belongs to the third school, sets out "to consider in what classes of international claim it [the rule] is a rule of substantive law, or operates as a procedural bar only, or is wholly inoperative"[7]); and comes to the conclusion that there are some situations in which the rule is substantive in nature and others in which it is of a procedural character, while in some situations it would not be a defense at all[8]). It is believed that most, if not all, writers on this subject belong to one of these three groups[9]). Before looking more closely at these three views, however, it may be helpful to consider the meaning and consequences of the distinction between substance and procedure in connection with this rule.

The Distinction Between Substance and Procedure

The distinction between substance and procedure is common to all systems of law. On its relation to the rule of local remedies depend many consequences of importance[10]).

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[5]) Eagleton, *op. cit. supra* note 2, p. 97.

[6]) Dissenting opinion in the Panevezys-Saldutiskis Railway Case, P. C. I. J. Series A/B No. 76, at p. 47. See also the dissenting opinion of Judge Morelli in the Barcelona Traction Co. Case 1964, I. C. J. Reports, pp. 6, 114; comment to Article 6, Draft Convention on Responsibility of States for Damage (Harvard Law School 1929), p. 149; Verzijl, *op. cit. supra* note 2, at pp. 13 ff.

[7]) Fawcett, *op. cit. supra* note 2, at p. 452.

[8]) *Ibid.*, p. 457.

[9]) Some writers would seem to be of the view that the rule is entirely or solely procedural, but it is not absolutely clear that they take this view of the law: see Freeman, *op. cit. supra* note 2, at p. 407; Bagge, *op. cit. supra* note 2, at p. 166; Law, *op. cit. supra* note 2, at pp. 32 ff.; Mummery, *op. cit. supra* note 2, at pp. 411 ff.

[10]) See, however, the view expressed in García-Amador, *op. cit. supra* note 2,

(a) The Cause of Action

Whether the rule is substantive or procedural, will determine the international cause of action. If the rule that local remedies must be exhausted is to be regarded as merely procedural the cause of action obviously arises before resort to local remedies becomes necessary or is made, and is independent of the working of the local remedies in the State concerned. Resort to local remedies by the alien would then be no more than a condition precedent[11]) to the international right of action of the alien's national State[12]). The international cause of action and the international right of action are thus to be distinguished. The rule would operate virtually to create a system of appeals, of which the international tribunal would be the last in the hierarchy. The cause of action would have to be taken to the local courts as primary courts before a right of action before an international court would arise. On the other hand, if the rule be regarded as one of substance, the cause of action arises after the local remedies have been exhausted and not before, and without such exhaustion there could be no international cause of action. Also the cause of action then coincides with the right of action; unlike the situation where the rule is regarded as one of procedure. Moreover, if the rule is regarded as substantive, the deficiency in the local remedies provided is a material factor in the cause of action.

(b) The Time of the Incidence of International Responsibility

The time when international responsibility arises is also determined by the decision whether the rule is one of substance or procedure; and this may be important in deciding the jurisdiction of international tribunals where this depends on a *compromis* or other instrument of submission. Thus, where the *compromis* states that only disputes which arise after a certain date are cognizable by the tribunal, if the rule of local

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at p. 411 ff., that "while one aspect of the question is quite academic, and with that the Commission is not concerned, it has one practical aspect, and it is this which is really relevant to the purpose of the codification. So far as this practical aspect is concerned, neither theory nor practice leave room for the slightest doubt: the responsibility to make reparation for an injury caused to an alien is not exigible by means of an international claim so long as local remedies have not been exhausted". This view, it is respectfully submitted, may perhaps obscure some of the practical consequences of the distinction between substance and procedure.

[11]) And it may only be one condition. For example, exhaustion of administrative and legislative remedies may be others.

[12]) Cf. Fawcett, *op. cit. supra* note 2, p. 452.

remedies were regarded as procedural the dispute would arise at the time the initial wrong was committed, which may fall before the relevant date. On the other hand, if it were regarded as substantive, the dispute would arise at a different time, namely after the exhaustion of local remedies, which may occur after the relevant date[13]).

(c) The Point in the Proceedings at which the Issue must be Determined

From the point of view of the procedure of international tribunals, the characterization of the rule as substantive or procedural determines the point in the proceedings at which the objection that local remedies had not been exhausted can be decided. If it is regarded as a matter of substance, then the non-exhaustion of local remedies is relevant to the merits, since without that factor there could be no cause of action. Hence, it would always have to be dealt with as a matter relating to the merits. Judge Hudson adopted this view in the Panevezys-Saldutiskis Railway Case, where in a dissenting opinion he said,

> "I cannot agree with the conclusion reached by the Court that the second Lithuanian objection, based upon the alleged 'non-observance by the Estonian Government of the rule of international law requiring the exhaustion of the remedies afforded by municipal law', has a preliminary character which requires it to be dealt with apart from and prior to a consideration of the defenses presented on the merits, and which in this case justifies a holding that the Estonian claim cannot be entertained. In my view the objection lacks that character, and it ought to be rejected; hence the Estonian claim should be entertained, even if the principal Estonian submissions should later have to be rejected because of the non-exhaustion of local remedies" [14]).

In the very next passage the reason for this view appears. "This is not a rule of procedure". He says, speaking of the rule of local remedies, "it is not merely a matter of orderly conduct. It is part of the substantive law as to international, i. e. State-to-State, responsibility" [15]). Thus his opinion as to whether the question was one to be dealt with on the merits, or as a preliminary objection, depended on whether the rule had a substantive or procedural character.

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[13]) E. g. The Phosphates in Morocco Case, P. C. I. J. Series A/B No. 74 (1938).

[14]) See *supra* note 6, at p. 47.

[15]) See *supra* note 6. Judge Armand-Ugon in a dissenting opinion in The Barcelona Traction Co. Case was of the opinion that the distinction between substance and procedure was irrelevant to the question when the objection based on the non-exhaustion of local remedies should be decided: 1964 I. C. J. Reports, pp. 6, 164. It is submitted that Judge Hudson's view is more logical.

If, on the other hand, the rule is classified as procedural, then the issue must be dealt with as a preliminary objection to admissibility. It is clear that the Court differed from Judge Hudson on the nature of the rule and regarded it as procedural, thereby making it possible for the Court to deal with the issue arising from it as a preliminary objection. The holding of the Court was that

> "... the second Lithuanian preliminary objection having been submitted for the purpose of excluding an examination by the Court of the merits of the case, and being one upon which the Court can give a decision without in any way adjudicating upon the merits, must be accepted as a preliminary objection within the meaning of Article 62 of the Rules" [16]).

Although the objection was joined to the merits in this case it was decided and upheld as a preliminary objection and not as a defence to the merits.

(d) The Declaratory Judgment

A further consequence has been suggested: in a situation in which the rule is characterized as procedural the rule of the exhaustion of local remedies operates as a procedural bar to an international claim for damages, but is not necessarily a bar to a declaratory judgment by an international tribunal that there has been a breach of international law [17]). This view is based on the notion that, since the initial act alleged to be the cause of the wrong would be a breach of international law by the respondent State and not merely a breach of local law, a declaratory judgment on that issue would not be inapt and would help in fact to bring about a speedy resolution of the dispute. The correlation implied in this reasoning between a judgment by an international tribunal and a breach of international law is easy to accept and so is the idea that, while a judgment on the merits for damages would in such a case be barred, it would not be unreasonable to allow a declaratory judgment [18]). It is argu-

[16]) P. C. I. J. Ser. A/B No. 76, at p. 22 (1939).

[17]) Fawcett, *op. cit. supra* note 2, pp. 457, 458. See also German Interests in Upper Silesia, P. C. I. J. Series A No. 6 and No. 9; Beckett, Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de Justice internationale, Académie de Droit International, R. d. C. vol. 39 (1932 I), pp. 135, 164; Kaufmann, Règles générales du droit de la paix, *ibid.* vol. 54 (1935 IV), p. 456; The American argument in the Interhandel Case 1959, I. C. J. Pleadings, Oral Arguments and Documents, p. 502; Verzijl, La règle de l'épuisement des recours internes (Neuvième séance plénière) Rapporteur ..., Annuaire de l'Institut de Droit International, vol. 46 (1956), p. 302.

[18]) The conclusion does strike a compromise between the interests of the respondent State and those of the claimant and his State. By seeking and obtaining a declaratory judgment that the respondent State was in breach of international law, the claimant would be able to establish its position in international law, deriving all the psychological

able, however, whether the international tribunal should have the discretion to grant such a judgment, or whether the claimant State should be entitled to a judgment as a matter of absolute right; in any event the use of discretion should, if exercised, be according to fixed principles.

Whatever the conditions that might be required to grant a declaratory judgment, however, it is only when the rule of local remedies is conceived as having a procedural nature that such a judgment will be available before local remedies have been exhausted. It is only when the rule is procedural that an international tribunal can ignore it in giving a declaratory judgment.

(e) What has to be Proved

The distinction between substance and procedure has a bearing also on what has to be proved by an alien's State in an international action. If the rule is substantive, then it must be shown that, in addition to local remedies having been exhausted, there was a "denial of justice". For in that case the wrong lies not in the original act that was contested in the local courts, but in the misfeasance or nonfeasance of the local courts themselves. The term "denial of justice" is elusive, but in this context it signifies more than that the alien simply failed to obtain damages for the alleged wrong, or that the damages awarded were merely inadequate [19]). Some defect in the administration of justice which resulted in the alien's failure to obtain judgment or adequate damages must be proved, or it must be shown that the judgment lacked reason or an adequate basis. Such allegations are a substantive part of the cause of action.

If, on the other hand, the rule of exhaustion of local remedies is procedural, then the international wrong is in character the same as that contested before the local courts, and the character of the local proceedings is not an ingredient of the international wrong. The content of the wrong contested before the international court is virtually the same as that presented to the local court. It is sufficient in this case that local remedies have been exhausted simply without success or merely with

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advantage of such a position, while the respondent State would not be prejudiced in its chances of remedying the injury through local means. The plaintiff State retains the advantage of having the law on its side, if the respondent State is in violation of the law, while the latter retains the right of using its own means of redressing the wrong to the individual – a right which is a recognition of its responsible sovereign character – before being subjected to an international directive to perform its secondary obligation of redress in a particular way.

[19]) Fitzmaurice, The Meaning of the Term "Denial of Justice", BYBIL vol. 13 (1932), p. 93 ff., discusses the meaning of the term "denial of justice" in this connection.

inadequate redress. Proof of this fact would indicate that the procedural requirement had been satisfied if the issue is raised. For the rest, it would be sufficient to prove the facts and the law on which the original claim alleged to give rise to liability was based. That would be the cause of action before the international tribunal. Hence, all that need be shown in the case of this alternative, as far as local remedies are concerned, is that they had been utilised to the extent of exhaustion. There is no requirement that a "denial of justice" in the terms described above be proved[20]).

(f) The Burden of Proof

Whether the rule of exhaustion of local remedies is procedural or substantive affects the burden of proof as well. If the rule is one of substance, then there is no question that the burden must rest with the claimant State to show that the existing local remedies were resorted to by the alien concerned. It is part of the case of the claimant State that either there were no local remedies to exhaust or that they were exhausted with a consequent "denial of justice".

If, however, the rule is one of procedure, the respondent State, in raising the rule, merely alleges a defect in the procedure adopted for bringing the case before an international tribunal. It follows that the burden is on the respondent State not only to raise the issue of non-exhaustion of local remedies but also to carry the burden of proving its point. It would not be going too far to say that the respondent State must prove that local remedies existed and that they were not resorted to or not exhausted. Whether, after this stage, the burden of proof shifts in any way and if so how, is a difficult question. The view has been propounded that the burden of proof rests with the respondent State to show that the local remedies were available, but that once this burden has been discharged, it falls on the claimant State to show that the local remedies were ineffective under the circumstances[21]). Judge Lauterpacht in the Norwegian Loans Case also thought that there should be a division of the burden of proof[22]).

But whether the burden of proof shifts or not, it is important to note that there is a significant difference in the allocation of the burden of

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[20]) *Cf.* The Interhandel Case 1959, I. C. J. Reports, pp. 6, 26: "Indeed, by its [the preliminary objection's] nature it is to be regarded as a plea which would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled".

[21]) Fawcett, *op. cit. supra* note 2, p. 458.

[22]) 1957 I. C. J. Reports, pp. 9, 39. The question needs further examination.

proof depending on whether the rule is classified as substantive or procedural.

(g) Waiver, Forfeiture and Exceptions

An important question is whether the local remedies rule can be waived, expressly or impliedly[23]). The general mode of doing this would be by agreement between the national State of the alien and the State alleged to be in the wrong, either before or after the injury occurs. There are numerous reasons for States agreeing to waive the requirement of reference to the local courts, most important among which is the fact that the political or social climate in a foreign State may be adverse to the interests of the nationals of a particular State, and decisions of courts may tend crucially to be influenced by this climate. Another reason is that States regard direct reference to international tribunals as a saving in time and money resulting from the avoidance of a multiplicity of proceedings. But whatever the reasons, and these must remain largely political, it is certainly the case that there are numerous instances of States agreeing to waive the requirement of reference to the local courts.

If the rule of local remedies is one of procedure, then such a waiver is truly possible and comprehensible. Since the rule is only a means of establishing the orderly conduct of international litigation, an exception may be made to the rule and steps in the order excluded. The character of the alleged wrong will in no way be affected. It is only the method of settlement that undergoes a change. The wrong, which remains the same[24]), is conclusively determined and redressed by an international court directly, rather than by the usual preliminary court or courts.

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[23]) In connection with implied waiver it is a moot point whether signature of the "optional clause" of the statute of the International Court of Justice (and of the P. C. I. J.) under Article 36 (2) by which the compulsory jurisdiction of the court is accepted amounts to an implied waiver of the rule of local remedies, in the absence of the express retention of it. In a dissenting opinion in the Panevezys-Saldutiskis Railway Case, P. C. I. J. Ser. A/B No. 76, at p. 37 (1939), Judge Van Eysinga inclined to the view that a specifically unreserved acceptance of the compulsory jurisdiction of the court was an implied waiver of the rule of local remedies. The majority of the court disagreed with this opinion. On this point see also García-Amador, *op. cit. supra* note 2, comment to Articles 15 to 18. It is submitted that there is no good reason to interpret the signature of the "optional clause" without express reservation of the rule as an implied waiver of the requirement. The acceptance of the compulsory jurisdiction of the court does not militate against the preservation of the existing jurisdiction of municipal courts.

[24]) See Nielsen in the *International Fisheries Company (U. S. A.)* v. *United Mexican States,* Reports of International Arbitral Awards (R. I. A. A.) vol. 4 (1951), p. 713, who maintained that the rule of local remedies does not concern the fundamental question "whether a wrong was initially committed by authorities of a respondent government", albeit in an opinion which dissented on the main issue in the case.

If the rule is one of substance, it would follow that a waiver of the requirement that local remedies should be exhausted would not be possible. The resort to local remedies becomes a material part of the wrong being alleged before the international tribunal. Without that resort there could be no cause of action. If a waiver of the requirement were allowed, no cause of action involving international responsibility could be shown before an international tribunal. Either remedies will have to be exhausted with a denial of justice, or an absence of adequate remedies will have to be proved. To speak of a true waiver is incongruous in such a case [25]).

The same arguments apply to forfeiture of the benefits of the rule by estoppel or for any other reasons [26]). The rule can only be dispensed with in this manner before an international tribunal if, after it is forfeited, there is still an international wrong which an international tribunal can redress. This can only be so, if the rule is of a procedural character.

In the same way, true exceptions to the rule [27]) can only be allowed if the international tribunal has before it a case cognizable under inter-

[25]) In examining the historical evidence we must be careful to distinguish two sets of situations. There are several treaties in which clauses eliminating recourse to the local courts are found, e. g. the Claims Convention between U. S. A. and Panama, July 28, 1926, Art. 5, U. S. Treaty Series No. 842; see also Borchard, Diplomatic Protection . . ., *op. cit. supra* note 2 and Feller, The Mexican Claims Commissions 1923–1934, *passim* (1935). One category contains genuine waivers of the rule of exhaustion of local remedies in relation to a claim giving rise to international responsibility. The other embodies *quasi*-waivers. The claims are admitted to be independent of a basis in international law, although they are of an international character in that they originate in injuries done by States to aliens; international principles may be applied by international tribunals in the settlement of these disputes, but they are not claims based on breaches of international law; they are really claims rooted in municipal law which are decided by agreement between the parties by international tribunals applying international principles: see The Illinois Central Railroad Co. Case *(U. S. A* v. *Mexico)*, U. S. and Mexican Claims Commission Opinions 1926–1927, pp. 15, 17 (1927). Any waiver of resort to local remedies that may be included in treaties involving this situation is not really a waiver of the rule that applies to international wrongs. It is a waiver of a requirement of international law based on analogy, obviously made and explicitly included in such treaties to avoid misunderstanding. The truth of the matter is that ordinarily such municipal wrongs could not be brought before international tribunals unless some "denial of justice" had been perpetrated by the local courts, because there could not be an international wrong in the absence of that. Occasionally when it is agreed to bring municipal wrongs before international tribunals to be decided by the application of international principles, an express clause is included in the treaty whereby the absence of a "denial of justice" resulting from resort to the local courts ceases to be a ground for the tribunal's abdicating its jurisdiction.

[26]) See the French argument in the Norwegian Loans Case 1957, I. C. J. Pleadings, Oral Arguments and Documents, p. 407.

[27]) E. g., that the remedies were obviously futile: see The Finnish Ships Arbitration, R. I. A. A. vol. 3, p. 1479.

national law. This is so only if the rule of local remedies which is not applied, in a given case is of a procedural nature.

Thus, the consequences of the distinction between substance and procedure in the classification of the rule of exhaustion may be of great practical importance.

A Proposed Solution

Having shown the importance of the distinction between substance and procedure in connection with the local remedies rule we can now discuss what the structural nature of the rule really is. First, it is necessary to determine whether there is any real difference in the three schools of thought mentioned earlier; which is the correct one; or, if none are correct, which most nearly approximates the truth. Secondly, another approach to the problem will be suggested.

(a) An Analysis of the Three Schools of Thought

The school of thought represented by Eagleton's view starts from a consideration of the original act or omission in relation to which local redress is resorted to – "responsibility arises from an internationally illegal act" [28]). This immediately and rightly puts the matter into the perspective of international law. In brief, the starting point for thinking about the rule of exhaustion is the breach or violation of an international norm – the "internationally illegal act". Once this is found, responsibility arises automatically and logically, and it then ought not to be difficult to evaluate the rule relating to exhaustion. If responsibility has already arisen the rule cannot be more than a rule of procedure governing the orderly conduct of international judicial affairs. The municipal courts must be regarded as no more than preliminary courts which must be resorted to before an international tribunal can be reached. Yet, in considering the rule of local redress Eagleton does include situations in which there is no international illegality upon which the operation of the rule ought logically to be contingent [29]). He can thus state that "responsibility is not necessarily contingent upon local redress" [30]) instead of stating that responsibility is never contingent upon local redress where this rule is concerned. This manner of stating the conclusion means that responsibility may be contingent upon local redress in certain circumstances; viz. that there are situations in which the rule does operate substantively. How this position could logically have been reached by Eagleton, unless there had been a

[28]) Eagleton, The Responsibility of States ..., *op. cit. supra* note 2, p. 97.
[29]) *Ibid.*, Chapter V.
[30]) *Ibid.*, p. 97.

shift of focus from the internationally illegal act to the fact of resort to local courts by the alien, is difficult to appreciate. Thus, the rule of local remedies which ought, according to his logic, to be a procedural rule whose operation is contingent upon an internationally illegal act, partially changes its character because it is the alien's resort to the local courts that is thought of as the subject-matter to which the rule refers. This shift seems to have occurred because there are some acts or omissions, such as those of private individuals, and certain breaches of State contracts with aliens, which do not give rise *per se* to international responsibility. Here an extra factor must be looked for in order to create responsibility. A defect in the administration of justice is this extra factor. Since this requires taking into account the existence and working of local remedies, it has been taken to be a case of exhaustion of local remedies. But in strict logic this fact should not have changed the character of the rule of local remedies. The rule was not originally stated as referring to any resort to local courts by an alien, but instead to a resort after "an internationally illegal act". Hence all those instances of resort to local courts which are not made as a consequence of an internationally illegal act ought to have been excluded from consideration under the rule, and there would have been no need for the consideration of the rule as a substantive one in those cases in which international responsibility is contingent upon unsuccessful local redress.

The view supported by Fawcett[31]) uses a threefold analysis in discussing the rule. The analysis is based on a distinction between breaches of international law and breaches of the local law. In the first class of cases, where there is a breach of international law, *i. e.* a breach of treaty or other international obligation only[32]), the local remedies rule does not apply, since there are no remedies to exhaust[33]). The second situation is that in which there is a breach of local law but no breach of international law. Here the rule operates substantively and a denial of justice is required for international responsibility to arise – "it [responsibility] can only arise out of a *subsequent* act of the State constituting a denial of justice to the injured party seeking a remedy for the original action of which he complains"[34]). Thirdly, where the action complained of is a breach of both

[31]) *Supra*, p. 447.

[32]) Fawcett, *op. cit. supra* note 2, p. 455 cites "an injurious act of the legislative or highest executive authority in the State, where such act is not remediable by constitutional appeal or other process", as an example. Several more examples are given by Verzijl, *op. cit. supra* note 2.

[33]) Fawcett, *op. cit. supra* note 2, p. 455.

[34]) *Ibid.*, p. 456.

international law and local law, the rule is a procedural one and operates merely to regulate the order of judicial action at different levels. This analysis uses the notion of dual legal systems as a starting point and prefers to regard the local remedies rule as a rule of conflict. It, nevertheless, resembles Eagleton's rule in that it includes within it both those situations in which resort to local redress is necessary to the cause of action (because without it no defect in the administration of justice can be shown), and those in which such resort is not required for the cause of action but is part of the procedure of international redress. In fact there are two categories of situations governed by two different rules. Hence, the same criticism applies to this approach as to Eagleton's[35]).

Judge Hudson's view does not admit to a distinction either in the facts, the situation, or in the nature of the applicable rule. According to his view, it is always a defect in the administration of justice which gives rise to international responsibility[36]). Apart from the neatness of this unitary view, there does not, it is submitted, seem to be any reason for it. It does not take into account the fact that in a legal system the pronouncement of the final word on a breach of law must rest with the highest tribunal of that system. In the international legal system

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[35]) For a further criticism of Fawcett on practical grounds see the Norwegian argument in the Norwegian Loans Case 1957, I. C. J. Pleadings, Oral Arguments and Documents vol. 1, pp. 457–458. There it was pointed out that

(a) In certain countries international law prevails over international law before local courts and, therefore, the first part of the threefold analysis could be attacked;

(b) it cannot be said that there is a breach of international law without going to court.

[36]) *Supra* p. 447. Judge Hudson does speak in terms of "adequate redress" in the very next sentence after the passage cited *supra*, at p. 447: "If adequate redress for the injury is available to the person who suffered it, if such person has only to reach out to avail himself of such redress, there is no basis for a claim to be espoused by the State of which such a person is a national" (p. 47). It may be argued that Judge Hudson means that the adequacy of the redress is to be measured in terms of the international rules of compensation or redress and that, therefore, where the original act is an internationally illegal act, the judgment of a municipal court may be appealed merely on the ground that the redress given did not meet the requirements of the international law governing the situation as opposed to any other standards such as those set by municipal law. This would amount, in fact, to making the rule of exhaustion one of procedure, where the original act is an internationally illegal act. For, no defect in the administration of justice need be shown as is required for the purposes of a denial of justice. But there are objections to this interpretation. (a) Nowhere does Judge Hudson appear to want to contradict his statement that the rule is one of substance, and this interpretation would involve such a contradiction. (b) "Adequate redress for the injury" could very well mean adequate redress according to the municipal law. This meaning is not incompatible with the general tenor of the passage. Such redress could not be available only where the courts are corrupt or there are other defects in the administration of justice, which have resulted (or even would result) in a "manifestly unjust" judgment.

where the act complained of is the breach of an international rule, e.g. breach of a commerce treaty, it is proper that the highest tribunal in the hierarchy, namely an international tribunal, has the final word. Municipal courts are only steps in the ladder which must for various reasons of policy be used in order to reach the highest rung[37]). Then the rule that local remedies must be exhausted must have a procedural character. In making the rule a substantive one, this view requires that, in order that an international tribunal may be able to consider an alleged breach of international law by a State in relation to an alien, the courts of that State must have caused an additional denial of justice apart from mere error in giving a decision. This view is, with due respect, an extreme one and does not represent the true state of affairs. The views expressed by Fawcett and Eagleton seem to come nearer the true view of the law.

(b) A Suggested Solution

The proposed approach is to separate the rules applying to the different situations; for the policies which they are designed to implement are different from the point of view of international law[38]). The rule which makes a "denial of justice" by the maladministration of the judicial process an international offence is different in its content, its application and purpose from the rule requiring that local courts be resorted to before an international offence is presented to an international tribunal. The former rule is not an aspect of nor is it in any way connected with the local remedies rule. That resort to some local remedies is a common feature of both rules does not alter this fact.

With regard to the local remedies rule the following formulation is proposed. In any situation where there is a breach of international law in respect to an alien, that alien must resort to local remedies and exhaust them before bringing an action in an international tribunal.

The crucial factor, in this formulation, is the presence of a breach of international law. The rule operates only where a breach of international law has been committed. Breaches of local law or any other law are not relevant. They do not attract consideration even in an indirect way[39]).

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[37]) For the reasons of policy behind the local remedies rule see Borchard, The Diplomatic Protection . . ., *op. cit. supra* note 2, p. 817, and criticism and further analysis by the present writer in The Exhaustion of Procedural Remedies in the same Court, The International and Comparative Law Quarterly vol. 12 (1963), p. 1285.

[38]) See *supra* note 37.

[39]) Fawcett's analysis regards breaches of local law as relevant. This is a significant and vital point of difference in his approach: see *op. cit. supra* note 2.

Secondly, it is important to note that according to this formulation the rule will apply where the initial breach of international law lies in the maladministration of justice itself. Where the original act questioned by the alien is not a breach of international law but only a breach of local law, the alien will have to rely on maladministration of justice in order to justify litigation under international law. Of course, local remedies will have to be exhausted before bringing the action. Thus, where a court of first instance gives a decision which discriminates against the alien and deprives him of his proper redress, a breach of international law will arise. Under the rule, the alien must exhaust local remedies with respect to this international wrong before his State can bring an international action. This may be done by an appeal from the decision of the lower court to a higher court[40]). The maladministration of justice does not fall within the local remedies rule. It is not the resort to local courts resulting in maladministration that is part of the required exhaustion of local remedies; the rule comes into operation directly upon the commission of the act of maladministration of justice. Thus an appeal becomes a condition precedent to international litigation.

Thirdly, this formulation eliminates entirely any dichotomy in the rule. What is called the substantive aspect of the rule is not really an aspect of the rule at all. It is terminology incorrectly applied to an area of State responsibility for injuries to aliens which deals with breaches of international law committed in connection with the administration of justice. That which has been called the substantive aspect of the rule

[40]) For instance, in the Ambatielos Claim one of the issues raised under the head of treaty violation was the denial of justice involved in the withholding of documents by the Crown in the trial at first instance. Although the point as to the exhaustion of local remedies in respect of this alleged maladministration of justice was not taken by the defendant British government, the argument could have been made that, if the withholding of documents was a denial of justice, then Mr. Ambatielos should have exhausted his local remedies in respect of this act by appealing to the Court of Appeal and then to the House of Lords, if necessary, on this issue. In view of the fact that the arbitral tribunal held that the withholding of the documents was not a breach of the treaty, Commission of Arbitration, Ambatielos Case, Award (1956), pp. 19 to 27 (London, H. M. Stationery Office), the result in the case would not have been different even if this argument had been made. The importance of this argument is best illustrated by reference to the dissenting opinion of Professor Spiropoulos in which he follows a line of reasoning the trend of which is towards showing a denial of justice under the treaty; *ibid.* p. 38. If his view were accepted, then the question whether the local remedies had been exhausted in respect of this denial of justice would be highly relevant and if it had been raised it would have met with success; for in fact no appeal against this denial of justice had been taken. Moreover, it would not have been possible for the claimant State to argue that there were no remedies to exhaust in respect of this issue; for there was no certainty that the Court of Appeal or House of Lords would not have ordered discovery of the documents.

really relates to "denials of justice" and should be dealt with in those terms. In these situations the original acts resulting in litigation before local courts are not breaches of international law in themselves, but are only breaches of local law; hence, the first resort to the local courts does not constitute an "exhaustion of local remedies". The breach of international law occurs, if at all, only when the local court, or the State, commits some act in the administration of justice which results in the violation of international law. This violation of international law does not occur simply because the alien loses his claim under local law, or loses part of it, or is dissatisfied with the local decisions; something more substantial than that is required by existing rules of international law[41]).

Fourthly, this formulation recognizes the distinctive policies which the rules in the two fields are designed to implement. The policy basis for the rule of exhaustion of local remedies is, in general, respect for a State's sovereign prestige. The State is given an opportunity to rectify an international delinquency which it has committed before it is subjected to a mandatory sanction by an international tribunal. It is primarily a concession to the respondent State. In the case of a "denial of justice", the policy protects the alien against wrongs committed in the judicial proceedings of a sovereign State. Certain limitations on the actions of a State in the functioning of its judicial system are imposed in the interests of other members of the international community.

It could be argued that there is a fundamental defect in this view of the rule of local remedies. Its starting point is an act which is a breach of international law. How, it may be asked, can it be known that there has been a breach of international law in respect of which the local remedies are required to be exhausted? And, as a corollary, why should not the local courts pronounce on the situation to demonstrate a breach of international law so that this pronouncement alone is open to question before an international tribunal after local remedies have been exhausted. May it not then be argued that the view that the rule is always one of substance[42]) is right, since there is no breach of international law until the local courts have pronounced on the matter? These objections, it is submitted, are not valid, insofar as they make an international claim depend on the finding of a breach of international law by a local court.

The question whether an act is a breach of international law or not

[41]) The monograph by Freeman, *op. cit. supra* note 2, contains a discussion of this aspect of the law.

[42]) See Judge Hudson's view *supra*, p. 447. The above reasoning seems to be implied in some of the views that the local remedies rule is always one of substance, though not in Judge Hudson's view.

cannot be answered until a court has pronounced on this point. But this is the function which courts perform in any legal system. In a given situation it is the courts that decide whether a rule of law has been infringed or not. Until this decision is given it cannot effectively be said that an act is a breach of a rule of law in any particular system. Until that decision is made there can only be an allegation of a breach. Moreover, an international court is the proper organ to make the final decision that a rule of international law has been broken. Municipal courts may pronounce on the issue, but it is clear that the international legal system is not bound thereby. The fact that an act has not been pronounced on finally or at first instance as a breach of international law does not mean that the rule of local remedies cannot come into operation. The rule is intended to prevent actions by States on behalf of aliens, before the respondent State has been given an opportunity of correcting the wrong, while it is still only an alleged wrong. The wrong can be only an alleged wrong as long as an international tribunal has not pronounced finally on the acts concerned. It is from examining such an allegation that international law has been infringed that an international tribunal is prevented, by a showing that local remedies have not been exhausted. It is the allegation that certain acts constitute international wrongs that matters. If acts are alleged to be international wrongs, before that allegation can be pronounced upon by an international tribunal, the allegation must be presented to the local courts for appropriate treatment. That is what the rule of exhaustion of local remedies requires and means. For instance, if an alien has suffered an injury which he alleges to be a breach of international law, and if he wishes to have that allegation adjudged by an international tribunal, he must take it through the local courts first. Only then may he appeal to his government and have it taken before an international court. Thus, it cannot be argued that because a breach of international law cannot be shown until a court has pronounced on the allegation concerned and a breach of international law is all that can be questioned before an international tribunal, therefore, local remedies must be exhausted before an international wrong may arise. Not only is the finding of a local court not final in the international legal system on the question of a breach of international law, but the rule of local remedies applies to an allegation of a breach of international law as opposed to one already proven.

What is more, the following argument may be levelled against the contention rejected above. According to that view, there can never be a breach of international law where an alien fails in his action before the

local courts. For an unfavourable judgment means that no breach of any law, let alone international law, has been found. Since no breach of law has been found, there can be no international claim, as that view postulates the finding of a breach of international law as a prerequisite to an international action, and the question whether local remedies have been exhausted or not becomes totally irrelevant. But it is precisely situations such as these in which the alien has been denied redress by local courts for a legitimate grievance that the law of State responsibility is generally designed to meet. Thus it is on the allegation of an international wrong that attention must be focussed. Where acts are alleged to be breaches of international law, the alien must exhaust his remedies in relation to that allegation before it can be brought before an international tribunal.

The Evidence

Much evidence may be marshalled from decided cases to support the view that the rule of local remedies is always a procedural one. The Permanent Court of International Justice appears to have consistently maintained that the rule is one of procedure and acted accordingly.

(a) Judge Hudson's view in the Panevezys-Saldutiskis Railway Case that the rule of local remedies is one of substance[43]) was a dissenting one. In allowing the objection of the Lithuanian Government that local remedies had not been exhausted by the claimant-alien to be decided as a preliminary objection, the majority of the Court did not discuss the nature of the rule, but impliedly assumed that the rule was procedural.

(b) In the Case of Certain German Interests in Upper Silesia[44]), the Court held that failure to exhaust local remedies was no bar to a declaratory judgment. In a subsequent case when the claimant requested a verdict involving remedial sanctions, the court, while implying that the same objection would have been a bar to further proceedings before it, held that the objection had not been substantiated[45]).

(c) Whenever the objection was raised it was treated as a preliminary objection and not as a defence to the merits. In the Electricity Co. of Sophia Case the objection was upheld as a preliminary objection decided before the merits were heard on the basis of a treaty clause[46]).

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[43]) P. C. I. J. Series A/B No. 76, at p. 47.
[44]) P. C. I. J. Series A No. 6, at pp. 18 ff.
[45]) P. C. I. J. Series A No. 9, at pp. 27 ff.
[46]) P. C. I. J. Series A/B No. 77.

In two cases the preliminary objection was discussed as a preliminary objection heard and decided before the merits were examined[47]).

In one case the objection was upheld before the merits were examined[48]).

In three cases, the Administration of the Prince of Pless Case[49]), the Losinger & Co. Case[50]) and the Panevezys-Saldutiskis Railway Case[51]), although the objection was joined to the merits, it was not treated as a defence to the merits but as a preliminary objection.

(d) In the Phosphates in Morocco Case[52]) the fact that the rule was treated as procedural was allowed to determine the time at which the dispute arose when the court decided that the dispute arose before the crucial date specified by the instrument conferring jurisdiction.

The International Court of Justice too has contributed support for the view suggested above. In the Ambatielos Case (2)[53]) it heard the objection as a preliminary objection and discussed it before the merits were heard. In the Barcelona Traction Co. Case the objection was treated as one to admissibility and, therefore, regarded as a preliminary objection, though the Court decided to join it to the merits[54]).

Some light is shed on the problem by the arbitral decision in the Ambatielos Claim[55]). There were three claims submitted by the Greek government in respect of which objection was raised by the United Kingdom that local remedies had not been exhausted. If these claims were subject to the rule in the procedural sense, they should have been based directly on breaches of international law. The tribunal took this view of the Greek allegations when it said that

> "... the question raised by the United Kingdom government (relating to exhaustion of local remedies) covers all the acts alleged to constitute breaches of the treaty.
>
> The Commission will, therefore, examine the validity of the United Kingdom objection independently of the conclusions it has reached concerning the validity of the Ambatielos Claim under the treaty of 1886"[56]).

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[47]) Case of Certain German Interests in Upper Silesia, P. C. I. J. Series A No. 6; and The Chorzów Factory Case, P. C. I. J. Series A No. 9.
[48]) The Panevezys-Saldutiskis Railway Case, P. C. I. J. Series A/B No. 76.
[49]) P. C. I. J. Series A/B No. 54.
[50]) P. C. I. J. Series A/B No. 67.
[51]) P. C. I. J. Series A/B No. 76.
[52]) P. C. I. J. Series A/B No. 74.
[53]) 1953 I. C. J. Reports, pp. 18, 22, 23. See also the other cases discussed below.
[54]) 1964 I. C. J. Reports, pp. 6, 41, 46.
[55]) *Loc. cit. supra* note 40.
[56]) *Ibid.*, p. 27.

Two points emerge.

(1) The Commission was going to examine the application of the rule of local remedies to each claim, irrespective of whether or not the alleged wrongs were breaches of the treaty. In other words, the mere fact that in its claim the Greek government had alleged certain acts to be breaches of the treaty was sufficient for the Commission to deal with them in relation to the objection that local remedies had not been exhausted.

(2) The Commission did not deal with the question whether there were particular acts proved by the Greek government which did amount to a breach of treaty. The question whether a breach of international law had actually been proved was not relevant to the defence that local remedies had not been exhausted. An allegation of a breach of international law was the only relevant consideration. The rule was treated as a rule of procedure to be applied to an initial breach of international law alleged by the claimant government, namely a breach of treaty.

But there are three cases of special interest for the view suggested here which deserve a more detailed examination, one of them decided by an arbitrator and the other two by the International Court of Justice. They are the Finnish Ships Arbitration, the Norwegian Loans Case, and the Interhandel Case[57]).

The Finnish Ships Arbitration

The facts and the major issue of the case are too well known to require restatement. In coming to a decision on the major issue Arbitrator Bagge analysed the nature of the rule of exhaustion of local remedies and made some significant remarks which support the thesis presented above. Further, his whole approach revealed a firm conviction in the procedural structure of the rule.

The arbitrator squarely faced the differences of opinion as to the nature of the rule[58]). He conceded that there was a view that the rule of exhaustion of local remedies was of a substantive nature, which predicated the responsibility of a State on the rejection of the alien's claim by the municipal courts. He even went as far as to say that the acceptance of this view would not result in any difference in certain respects[59]). But the general tenor of his judgment is against that view.

(1) In the first place, it was said that the basis of the claim was an

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[57]) Respectively, R. I. A. A. vol. 3, p. 1479; 1957 I. C. J. Reports, p. 9, and 1959 I. C. J. Reports, p. 6.

[58]) R. I. A. A. vol. 3, pp. 1479, 1502.

[59]) *Ibid.*

initial breach of international law committed at the time the damage complained of was caused and not a subsequent failure of the British courts or legal system to mete out justice[60]). Both the British government and the Finnish government agreed that this was the basis of the claim[61]). The tribunal's holding reflects a decisive attitude toward the cause of action in a case involving the exhaustion of local remedies. It was accepted that the international cause of action arose at the time the initial injury was committed, and not at the time the British courts failed to give a remedy. Implicit is the distinction made earlier in this article between the cause of action and the right of action. According to this view, the cause of action arose on the commission of the initial injury. Thus, the arbitrator's approach is consonant with the view that the rule of exhaustion merely affects the incidence of the right of action and does not pertain to the cause of action.

(2) The arbitrator implicitly agreed with the British contention that the exhaustion of all judicial remedies, which had not been fulfilled, was a condition precedent to bringing an international claim[62]). He referred to the exhaustion of local remedies as a condition precedent to the r i g h t to make a diplomatic claim and not as a condition precedent to the existence of a basis for an international claim. This supports the procedural view of the rule.

(3) It was clearly stated that the failure to provide remedies on the part of the British judicial system was not an international wrong[63]). In regarding the failure to provide judicial remedies as irrelevant to the cause of action, the arbitrator was of the view that the rule of exhaustion could not be of a substantive character. A distinction was made between claims based on denial of justice by the courts, *i. e.* where there is a decision of a court that is "grossly unfair and notoriously unjust", and claims where local remedies have simply not been successfully exhausted. In the former case, there must not only be a judgment of a court in order to predicate liability, but it must be shown that it was grossly unfair and notoriously unjust, whereas in the latter liability existed on the merits of the claim itself.

(4) To the question what contentions of fact and propositions of law should be taken into consideration in determining whether local remedies had been exhausted, the answer was given that only those which were

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[60]) *Ibid.*, at p. 1501.
[61]) *Ibid.*, at pp. 1498 ff.
[62]) *Ibid.*, at p. 1488.
[63]) *Ibid.*, at p. 1501.

raised in the international proceeding were relevant[64]). This was so because the formulation of the claim based on an alleged breach of international law rested with the claimant State entirely. That formulation was then subject to investigation by the international tribunal before which the claim was brought on the merits so that ultimately it might or might not disclose a breach of international law by the respondent State. Clearly, if the point of focus were the failure of courts to provide a remedy for an alleged wrong, then other issues than those raised by the claimant government may become relevant to the argument that the respondent State had failed in its international obligations, since those issues themselves have no bearing on whether it is an international wrong that is being alleged or not, but it is the particular kind of failure to give a remedy that constitutes the alleged wrong; it may very well be that had different issues of fact and propositions of law been raised before the local courts the aliens would have succeeded in their claim. Thus, it was the failure to plead their case properly that lost them their remedy, and not any deficiencies on the part of the judicial system of the respondent State; since in this event the initial wrong is only a municipal wrong, the case must be pleaded according to the municipal law. Such a view was rejected by the arbitrator.

(5) Arbitrator Bagge's stand on the question what defences were available to the argument that local remedies had not been exhausted is important. The question relates broadly to what has to be proved in a claim where local remedies are put in issue. The arbitrator was of the opinion that it was not always a bar to the plea that local remedies had not been exhausted that the courts of the State had not been invoked[65]). The argument was that if the rule that local remedies must be exhausted was of a substantive nature, then there must be a decision by a court of law which was being impeached and no exemptions would be granted under the rule from a resort to the courts. The problem confronting the arbitrator in the case which he had to decide is not difficult to appreciate. If the view was accepted that resort to the local courts was necessary in order that remedies be exhausted, because without it no denial of justice would be proved, then it could not be held that resort to the local courts was not necessary, where the local remedies were obviously futile. In fact it was held that resort was not necessary in those circumstances, which meant that the rule of exhaustion could not be of a substantive nature.

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[64]) *Ibid.*, at p. 1502.
[65]) *Ibid.*, at p. 1502.

(6) Finally, the arbitrator's opinion on the purpose of the local remedies rule is revealing. He made two points[66]):

(i) The rule exists to give the respondent State an opportunity of redressing an alleged wrong irrespective of the question whether a wrong has actually been committed or not.

(ii) The respondent State is entitled to its own appreciation of the questions of law and fact involved in the claim.

Underlying this analysis is the notion that the alleged wrong is not principally subject to the adjudication of the municipal tribunals of the respondent State, but belongs to a different regime: namely, the international legal system. Both the above points testify to the fact that the rule is a concession to the respondent State, and is not intended to control the administration of justice by the respondent State as the rules relating to the denial of justice purport to do. They are in accord with the view that the rule establishes something like an appellate system in which the municipal courts are the primary courts and the international tribunal is the court of last resort.

Although the arbitrator took the view that the rule of exhaustion was of a procedural nature in the case before him, and his reasoning and decision were in all respects consistent with that view, the question still remains whether it was his opinion that the rule of exhaustion could not be of a substantive character. Although he did not explicitly support the approach suggested in this article that the rule should be regarded as entirely procedural, it would seem that a great deal of what he said was highly consistent with the view that the rules relating to the denial of judicial justice are of a separate nature and should be regarded as belonging to a different department of the law.

The Norwegian Loans Case

There is much material that supports the proposed solution in the Norwegian Loans Case[67]). The facts are well known.

In connection with the objection that the matter was entirely within the domestic jurisdiction of Norway, it was to the advantage of Norway to argue that there had been no breach of international law in its treatment of the French bondholders[68]). Nevertheless, the Norwegian government seems to have accepted the position that the dispute related to an

[66]) *Ibid.*, at p. 1501.

[67]) 1957 I. C. J. Reports, p. 9.

[68]) 1957 I. C. J. Pleadings, Oral Arguments and Documents, vol. 1, p. 273; see also, pp. 212 ff., 266 ff.

initial breach of international law for the purpose of the objection relating to exhaustion of local remedies, at any rate. This Norwegian objection demonstrated a procedural conception of the rule.

The first indication of the Norwegian attitude is to be found in the fact that it regarded the rule as pertaining to the admissibility of the claim and not to the merits. The objection was phrased in terms of *recevabilité* and not by reference to the basis of the dispute[69]).

Secondly, in explaining the reasons behind the rule of local remedies and the basis of the rule, the Norwegian government took the stand that it was purely to enable the competent organ of the State concerned to clarify the issues involved that the rule prevented an international jurisdiction from being invoked[70]). There was no implication that there must be some kind of judicial misconduct before the rule of exhaustion was satisfied. However, an element of confusion was introduced later in the argument, when it was said that the dispute became an inter-state dispute when local remedies had been exhausted, and it was taken up on the international plane by the national State of the injured individuals[71]). In such circumstances an inter-state dispute was substituted for an original dispute of private law[72]). These statements seem to imply that the original wrong was founded entirely on private law and had no basis in international law. It may be said, however, that though a dispute may originate in private law, this does not preclude it from being founded in international law as well, although it may not be an inter-state dispute in the sense that the national State of the alien may appear as a party before the local courts. Nevertheless, it is difficult to explain the statements, and they must perhaps be described as statements made *per incuriam*.

Thirdly, in keeping with the original stand of Norway was its clarification of the relevance of "denial of justice" to its objection based on the failure to exhaust local remedies. As will be seen, at one stage in its argument the French government raised the question of a possible confusion between the two concepts and clarified its own position[73]). In reply, the Norwegian government stated quite clearly that it was a mistake to confuse the two notions; it was not true to say that, in the event that the Norwegian courts had been resorted to and no redress had been obtained, the remedy for the French government would have been to allege a "denial

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[69]) *Ibid.*, p. 138.
[70]) *Ibid.*, pp. 276–277.
[71]) *Ibid.*, pp. 277–278.
[72]) *Ibid.*, p. 278.
[73]) *Ibid.*, p. 219.

of justice" by the Norwegian courts. It was prepared to admit that there could be breaches of international law by the legislature and the executive just as well as by the judiciary:

> «Les tribunaux norvégiens ont certes le devoir d'appliquer le droit norvégien; mais dans le cas où le droit norvégien serait contraire aux prescriptions du droit international, il n'est pas douteux que l'État norvégien en serait internationalement responsable» [74]).

It is clear that Norway regarded the local remedies rule as a procedural rule not to be confused with rules relating to denial of justice by the judiciary of a State.

Finally, in replying to the French argument that the right to rely on the rule of local remedies had been forfeited by not adhering to it from the beginning of the dispute, the Norwegian government appeared either to be rejecting the principle of forfeiture, or contending that, even were its validity to be admitted, there could be no forfeiture on the facts of the case[75]). In no event was the argument raised that because the rule of local remedies was of a substantive nature, France, in order to prove its case on the merits, must have resorted to local remedies, there being no possibility of anyone forfeiting rights under the rule. Such an argument would have been appropriate had Norway taken its stand on the substantive nature of the rule.

The French government on the other hand, in its defence to this preliminary objection, took up a different position. It argued that since the dispute arose initially from a violation of international law by Norway *vis-à-vis* France as a state, even though it was a matter of public loans given by French nationals, the rule of local remedies was inapplicable to the dispute[76]). If that exception was based on the idea that where the initial wrong is a breach of international law which must take place *vis-à-vis* another state, the rule of local remedies does not apply, it would seem to involve the position that the rule is relevant only where the initial wrong is solely a wrong according to municipal law and not a violation of international law. This resurrects the theory that the rule of local remedies is substantive in structure, for it implies that the rule is applicable only if there has been a resort to the local courts resulting in a denial of justice in connection with what is solely a violation of municipal law. The French government accordingly suggested that Norway was alleging

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[74]) *Ibid.*
[75]) *Ibid.*, p. 448 ff.
[76]) *Ibid.*, pp. 182 ff.

that the French action failed because there had been no denial of justice[77]). The French government took its stand unequivocally on the purely substantive interpretation of the rule of local redress. Although later in its argument it put forward the defence that the benefit of this rule had been forfeited by Norway, and that the rule either was inapplicable because the local remedies available were obviously futile, or applied only to aliens resident in the defendant State[78]) (ostensibly on the assumption *arguendo* that the rule was one of procedure), this was its *pièce de résistance.*

The court did not consider this particular objection because it dismissed the case on a different ground at the preliminary stage. Judge Lauterpacht considered the defence in a separate opinion as also did Judge Read in a dissenting judgment.

Judge Lauterpacht's approach is instructive. He paid special attention to two aspects of the rule of local remedies which are particularly relevant for the present thesis: namely, the nature of the defence that local remedies had not been exhausted, and the relevance of denial of justice to it.

On the second matter, Judge Lauterpacht was of the opinion that a denial of justice was not the foundation of an action where the rule of local remedies was implicated[79]). The exhaustion of local remedies without success merely opened the way for international proceedings relating to the initial breach of international law, denial of justice being irrelevant[80]).

As to the nature of the defence, Judge Lauterpacht emphasised that the defence was relevant only where an initial breach of international law formed the basis of a claim. Its function was not to convert into a breach of international law an act which was initially not such a breach by altering its content, nor to make possible a finding that there was a breach of international law as an essential prerequisite of international proceedings. It was essentially to be conceived as a bar to the jurisdiction of the court, not affecting the question whether Norway had violated international law. This stand is expressed in a strikingly forthright passage:

> "The relevance of these questions of international law cannot properly be denied by reference to the fact that unless and until Norwegian courts have spoken it is not certain that there has been a violation of international law by Norway. The crucial point is that, assuming that Norwegian law operates in

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[77]) *Ibid.*, p. 185.
[78]) *Ibid.*, pp. 407 ff.
[79]) 1957 I. C. J. Reports, pp. 9, 41.
[80]) *Ibid.*, at p. 41.

a manner injurious to French bondholders, there are various questions of international law involved. To introduce in this context the question of exhaustion of local remedies is to make the issue revolve in a circle. The exhaustion of local remedies cannot in itself bring within the province of international law a dispute which is otherwise outside its sphere. The failure to exhaust legal remedies may constitute a bar to the jurisdiction of the Court; it does not affect the intrinsically international character of a dispute" [81]).

Also of significance is the upholding of the objection at a preliminary level, which could only have been possible on the assumption that the rule was procedural.

Further evidence of Judge Lauterpacht's positive stand on the issue is to be found in his implicit dismissal of the French argument that the rule of local remedies did not apply to the present case solely because it consisted of an initial violation of international law *vis-à-vis* France. This is precisely the sort of situation in which the judge thought that the rule was applicable. France was trying to make an exception of the only circumstances in which the rule of local redress would operate procedurally in its argument that the rule was solely one of substance. In rejecting the contention implicitly, Judge Lauterpacht was also rejecting that particular view of the rule.

Finally, in his treatment of the question of the burden of proof in cases where the rule of local redress is pleaded, the judge again evinced a predilection for the view that the rule is one of procedure. It was his understanding that, although the objection was raised by the defendent State, the burden shifted to the claimant State to prove that remedies were not effective, presumably after the defendant State had shown that insufficient resort had been had to available remedies. But in the event that there was legislation apparently depriving the private claimants of a remedy, the burden shifted to the defendent State to show that the existence of a remedy could reasonably be presumed [82]). Such shifts in the burden of proof, as has been pointed out earlier [83]), cannot take place if the rule of local redress is one of substance. It is for the claimant State to establish that there was a "denial of justice" either after local remedies were exhausted, or through the absence of local remedies. It is only if the rule is of a procedural character that such changes can be permitted, for the burden becomes capable of division by the operation of presumptions.

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[81]) *Ibid.*, at p. 38.
[82]) *Ibid.*, at p. 39.
[83]) See *supra*, p. 452.

Although Judge Lauterpacht did not commit himself to the view that the rule of local remedies is s o l e l y of a procedural nature, there is every indication that he preferred to think of it in this way and to regard the law of denial of justice as a separate field of liability. On the other hand, his approach was clearly a denial of the theory that the rule of local remedies was solely a rule of substance.

Judge Read's dissenting judgment, it is submitted with respect, lacks the clarity and consistency of Judge Lauterpacht's separate opinion. Initially, it would appear that he was willing to concede that the rule had a procedural character in taking the view that it operates, where the respondent State was being charged with a violation of international law, to give the respondent State an opportunity of rectifying the position, although the violation of international law may be a larger aspect of what was also a breach of national law[84]). Again the fact that the objection that there were local remedies to exhaust was rejected as a preliminary objection[85]) would seem to indicate that the rule was regarded as procedural.

On the other hand, some confusion was introduced when the French argument that the rule of local remedies was not applicable where the initial wrong was one caused by the direct intervention of the respondent government itself was accepted[86]). An international wrong can only arise if the act complained of is attributable to the respondent government. Hence, the acceptance of the French argument involved the denial of the proposition that the rule of local remedies applies as a procedural requirement, the initial wrong being a violation of international law. For, the rule can operate procedurally only in such an event.

There is an element of uncertainty in regard to Judge Read's view of the matter. Although he accepted the view that the rule of local redress could have a procedural character, if not exclusively so, it may be that this was done for the sake of argument, for he held that the objection based on the rule could not be upheld. On the other hand, although he gave his assent to the view that the rule was of a substantive character solely and entirely, it cannot be asserted that he was not doing this equally for the sake of argument. For the present purposes, therefore, the opinion is unsatisfactory and unhelpful. Also, since it was a dissenting opinion, it is submitted that the views in Judge Lauterpacht's separate opinion are to be preferred.

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[84]) *Loc. cit. supra* note 79, at p. 97.
[85]) *Ibid.*, at p. 98.
[86]) *Ibid.:* presumably *vis-à-vis* another state.

In summary, it may be said that Judge Lauterpacht's view, which coincided with the Norwegian approach, supports the present writer's thesis. The French argument which supported the theory that the rule of local redress is purely one of substance led to unacceptable conclusions rejected by Judge Lauterpacht, and in so far as it was implicitly dissented from by that learned judge and only found favour in a limited and unsatisfactory way with a dissenting judge, it may be regarded as not representing the true position.

The Interhandel Case

In the Interhandel Case[87]), the International Court of Justice gave positive support for the view that the rule of local remedies is to be conceived as a rule of procedure. The facts of this case, too, are well known.

In its argument against the objection that local remedies had not been exhausted, the Swiss government made two submissions of particular relevance to the present thesis. First, it took the position that the rule of local redress did not apply where the wrong complained of was a d i r e c t violation of international law, which injured the claimant State, while admitting that the principle of the rule was relevant in general in determining whether a State was responsible, whether the original act was committed by an individual on the respondent State's territory or by an organ of that State itself[88]). In so far as the general rule was stated to be a condition precedent to establishing the international r e s p o n s i b i l i t y of a State for such an act – «avant qu' on puisse faire valoir la responsabilité de l'Etat»[89]) – it would seem that the Swiss government conceived the general rule as one of substance. At the same time, in arguing that the rule was inapplicable because what was being alleged was a direct breach of international law *vis-à-vis* the claimant State (in this case a violation of an international instrument, the Washington Accord), and of an international judgment: namely, the decision of the Swiss authority of Review[90]); the Swiss government took the view that the rule of local remedies could not be one of procedure. The Swiss argument was similar to Judge Hudson's view that the rule of local redress is one of substance only[91]).

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[87]) 1959 I. C. J. Reports, p. 6.

[88]) 1959 I. C. J. Pleadings, Oral Arguments and Documents, pp. 402, 547, 553.

[89]) *Ibid.*, p. 402.

[90]) Direct breach is synonymous with initial breach of international law: see *ibid.*, p. 403.

[91]) See *supra*, p. 469 for a similar French argument in the Norwegian Loans Case.

However, the Swiss government also contended that since its application disclosed a request for a declaratory judgment and not for a condemnation in damages, the rule of local redress could be dispensed with and judgment given on the principal issues by the court[92]). The argument assumes that there is a dispute on which an international tribunal can adjudicate. This must mean that there is a dispute relating to a breach of international law. Resort to local redress in such a situation acquires a purely procedural character. Hence, this contention involved an admission that the rule could be of a procedural character, though it did not specifically amount to a denial that the rule was also of a substantive character. In the other arguments of the Swiss government against the preliminary objection the same assumptions seem to have been implicit: for instance, when it argued that the objection should be defeated because the remedies available were obviously futile[93]), or because the U.S. had waived its right to invoke the rule[94]).

The United States government in replying to these contentions of the Swiss government seems to have relied on the procedural character of the rule. Firstly, it argued that, even assuming the direct violation of international law by the violation of a treaty, the doctrine of exhaustion would still apply, and the international wrong would not give rise to a claim between States, unless local remedies had been exhausted[95]). Although the language used in delineating the argument is ambiguous, its substance involves the notion that the rule is of a procedural character. Although it was said that the wrong would not be "sufficiently definite and complete" before local remedies had been resorted to, it is implied that it is the original international wrong that forms the subject matter of the international claim, and that it is not altered by the failure of the local courts to give redress.

Similarly, in regard to the point taken by the Swiss government that since the application was for a declaratory judgment the rule did not apply, the United States replied by accepting that principle, but contesting the issue that what was being requested was a declaratory judgment[96]). The acceptance of that principle could only have been made, if the rule was conceived as a procedural one.

Thus, the United States' preliminary objection rested on the lack of a

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[92]) *Loc. cit. supra* note 88, pp. 405, 564: see the rule in The German Interests in Upper Silesia Case, P. C. I. J. Series A No. 6.

[93]) *Ibid.*, at p. 403.

[94]) *Ibid.*, at p. 404.

[95]) *Ibid.*, at p. 505.

[96]) *Ibid.*, at pp. 316 ff., 501, 618.

procedural requirement in connection with an international wrong, which was a bar to the admissibility of the claim.

The Court upheld this particular objection and dismissed the action without examining any of the other objections. There are two important points borne out by its reasoning:

(1) It said that the objection was directed against the admissibility of the application of the Swiss government which would become devoid of object if the requirement of prior exhaustion of local remedies were fulfilled [97]). In as much as the plea was not regarded as pertaining to the merits of the case, and because the plea was viewed as a preliminary objection when considered and not as a defence on the merits, it is apparent that the rule of local remedies was conceived as not performing a substantive function.

(2) The Court took the view that the rule "has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law" [98]), and that the object of the rule was to enable the State where the violation occurred to redress it by its own means, within the framework of its own domestic legal system. This view that the cause of action is a violation of international law occurring at the time of the original wrong, and not a failure of the local courts amounting to a breach of international law, is in accord with the procedural nature of the rule of local redress. The Swiss interpretation of the rule was clearly rejected, for it was held that the rule applies where the initial wrong is a direct breach of international law. The disagreement was emphasised when the court said that the fact that the alleged wrong was based on an international judicial decision under an international instrument made no difference [99]).

By conceding the structural nature of the rule of local remedies, three of the six dissenting judges did not disagree with the salient principles laid down by the court. They admitted that the issue raised ranked as a preliminary objection to the admissibility of the dispute and was not a defence on the merits, but they regarded the matter as too complicated to be decided before the merits were heard, and held that the objection should be joined to the merits [100]). Judge Winiarski did not really dissent

[97]) 1959 I. C. J. Reports, pp. 6, 26.

[98]) *Ibid.*, at p. 27.

[99]) *Ibid.*, at p. 28.

[100]) Judge Klaestad, *ibid.*, at pp. 78, 80; Judge Carry agreeing with Judge Klaestad, *ibid.*, at p. 32; Judge Spiropoulos, *ibid.*, at p. 123. It is submitted that the Court was correct in deciding the preliminary objection when it did.

from the court's finding on the main issue[101]), while Judge Lauterpacht held that the issue of local remedies could not be decided before the objection arising from the "automatic reservation" was settled[102]). Although Judge Armand-Ugon held that the objection was to admissibility[103]), his opinion appears to follow a different line of reasoning by admitting the Swiss argument that the rule of local remedies did not apply to a case in which the act complained of was a breach of international law which directly injured a State[104]). This amounts to a denial that the rule can be of a procedural character. This view is in direct conflict with the court's opinion and cannot be accepted; nor is it in accord with the policies behind the rule upon which the judge agreed with general theory.

Although the court's approach reflects a positive attitude towards the character of the rule by declaring that the rule performed a procedural function[105]), it does not testify sufficiently to the exclusively procedural character of the rule. However, it may be said that the procedural character of the rule was admitted without any kind of concession being made as to the possibility of its having a substantive function. Thus, there is no reason to assume that the court would necessarily have agreed that the rule should be characterized in that way as well.

Conclusion

The burden of this article has been the thesis that the rule that local remedies must be exhausted by an alien is of an entirely procedural character.

The question of the structural or formal character of the rule demands fundamental re-thinking. Very little writing has been done on the topic, although its importance cannot be denied, and it is submitted that the views offered by the few textual authorities on the matter are unsatisfactory or lack clarity. These views have generally either settled for a complete substantive character for the rule or compromised with a mixed solution. All these views, however, do not distinguish satisfactorily or sufficiently between the rule requiring exhaustive resort to the judicial remedies of the defendant State and the rule relating to "denial of justice" by a malfunctioning of the judicial system of the defendant State. Because

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[101]) *Ibid.*, at p. 83.
[102]) *Ibid.*, at p. 100.
[103]) *Ibid.*, at p. 85.
[104]) *Ibid.*, at p. 89.
[105]) Four of the six dissenting judges virtually agreed with this view. Judge Lauterpacht, the fifth, had already expressed agreement in the Norwegian Loans Case.

both cases involve some resort to the local courts, the two rules have been telescoped into a single principle that local remedies must be exhausted by an alien in the defendant State before his claim can be presented to an international tribunal. This principle either has been given a totally substantive nature, or has been endowed with dual aspects, the substantive and the procedural.

It has been demonstrated that the consequences of the distinction between substance and procedure as applied to the local remedies rule are important and varied, ranging as they do from differences in the content of the cause of action to a different allocation of the burden of proof. Hence, clear-thinking and the correct perspective are essential in determining the structural character of the rule. A study of the problem reveals that the two rules, the one requiring exhaustive recourse to the judicial remedies in the defendant State and the other relating to the "denial of justice" by the malfunctioning of the judicial system of the defendant State, are not connected in any way, that the policies behind them are different, and their content is not the same. They must be clearly distinguished as fundamentally separate.

Once this position is accepted, it becomes easy to see that the local remedies rule in the true sense of the term applies to those situations in which a b r e a c h o f i n t e r n a t i o n a l law is alleged as the basis of the claim. In such a case, the rule operates with an entirely procedural effect. It requires that where an alien alleges a breach of international law as the basis of his claim he should resort to the means of redress provided by the defendant State in relation to that claim before his national State can bring an international action on it. Where a breach of local law alone, or a factor that is not a breach of international law, is the original basis of the claim, the rule does not apply to that basis of claim. This is a distinctly different situation from one in which a different rule applies.

The view that the rule requiring the exhaustion of local remedies is entirely of a procedural character is not only supported by the negative evidence that no international decision has regarded the rule as having a substantive aspect, but its operation has been amply demonstrated in numerous cases. The evidence offered by the Finnish Ships Arbitration, Judge Lauterpacht's opinion in the Norwegian Loans Case, and to some extent by the Interhandel Case, is particularly strong.