Part I Prolegomena

1 Introduction

The subject

It is acknowledged generally that local remedies are relevant to the settlement of certain international disputes involving states. The rule that such remedies must be exhausted owes its origin to the diplomatic protection of aliens in which area it was first applied. That the celebrated 'rule of local remedies' is accepted as a customary rule of international law needs no proof today, as its basic existence and validity has not been questioned. The rule has been affirmed in recent diplomatic practice, particularly by developed countries against whom or in regard to whose nationals the rule is most likely to be invoked in regard to the protection of aliens.[1] It has been assumed to exist as a principle of customary or general international law in such conventions as the International Covenant

[1] See e.g. statement of the Division of Legal Affairs of the Département politique fédéral of the Swiss Government to the effect that in the case of Swiss citizens condemned to prison abroad 'when feasible and where an effective remedy seems probable, all modes of appellate revision must be exhausted before diplomatic interposition becomes proper', and that it was equally impossible to exercise diplomatic protection while the judicial process was running its course or as long as such process had been resumed: Caflisch, 'La Pratique suisse en matière de droit international public – 1972', ASDI (1973) pp. 359ff.; statement in a memorandum of 1 March 1961 of the US Department of State concerning the treatment of US nationals in Cuba that: 'The requirement for exhaustion of local remedies is based upon the generally accepted rule of international law that international responsibility may not be invoked as regards reparation for losses or damages sustained by a foreigner until after exhaustion of the remedies available under local law': 56 AJIL (1962) p. 167; statement of 18 October 1967 of the Canadian Under-Secretary that under well-established principles of international law the requirement of prior exhaustion of all local remedies must have been fulfilled to justify the espousal of a claim by diplomatic intervention by one state on behalf of one of its nationals against another state: Gotlieb and Beesley, 'Canadian Practice – 1967', 6 CYIL (1968) p. 263.

on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights.[2] Moreover, in recent history it has been invoked in international litigation before both the International Court of Justice (ICJ) and other arbitral tribunals in circumstances in which such international courts have conceded either expressly or implicitly that the rule exists. For example, the rule was invoked by the respondent state before the ICJ in the *Interhandel Case*, where the Court stated categorically that 'The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law'.[3] The rule was also accepted by the tribunals as a relevant rule of customary international law in both the *Finnish Ships Arbitration*[4] and the *Ambatielos Claim*.[5] More recently, the existence of the rule was implicitly conceded, albeit by the recognition that it did not apply in the circumstances because of implicit exclusion, by the Iran–US Claims Tribunal in its award in *American International Group, Inc.* v. *Iran*, when it held that 'The Algiers Declarations grant jurisdiction to this Tribunal notwithstanding that exhaustion of local remedies . . . doctrines might otherwise be applicable'.[6] These were all cases of diplomatic protection of aliens by national states.

While it is not the existence or validity of the rule that needs to be supported, there are many aspects and applications of it that need to be clarified. Thus, the statement made in 1956 that 'There is a well established but inadequately defined rule that the alien must exhaust local remedies before a diplomatic claim is made'[7] may still represent a challenging assessment of a situation which requires investigation. Further developments have occurred in the twentieth century, particularly since 1950. For example, the rule has been extended from its original area of application, namely, the diplomatic protection of nationals abroad, to

[2] Article 41(c) of the International Covenant on Civil and Political Rights, Article 26 of the European Convention on Human Rights and Article 46 of the American Convention on Human Rights. See also Article 11(3) of the International Convention on the Elimination of All Forms of Racial Discrimination.

[3] 1959 ICJ Reports p. 27. See also the *ELSI Case*, 1989 ICJ *Reports* p. 15, where the rule was applied, without any query, to a case of diplomatic protection under a treaty.

[4] The *Finnish Ships Arbitration*, 3 UNRIAA p. 1479 (1934).

[5] The *Ambatielos Claim*, 12 UNRIAA p. 83 (1956).

[6] Award No. 93-2-3, 4 Iran–US CTR at p. 102 (1983).

[7] Jessup, *A Modern Law of Nations* (1956) p. 104. The rule is being studied and codified by the ILC as a part of its work on diplomatic protection: see Dugard, 'Second Report on Diplomatic Protection', UN Doc. A/CN.4/514 (2001); and Dugard, 'Third Report on Diplomatic Protection', UN Doc. A/CN.4/523 (2002).

the protection of human rights, even though this has been done by express incorporation in agreements between states.[8] The impact of such extensions has been significant, since generally the rule referred to in these conventions is the rule as it is recognized in customary or general international law which pertains to diplomatic protection. A consequence of these developments is that international organs, such as the European Commission of Human Rights which was not essentially a judicial organ, although it acted in a quasi-judicial capacity in dealing with cases alleging violation of human rights, and the European Court of Human Rights, which is, have had to deal with the application of the rule of local remedies. It is important to recognize that it is the rule as accepted in general or customary international law that these organs have been applying.

The significance of the situation which has thus arisen is that the rule, albeit as understood in customary international law, has been applied outside the area of strict diplomatic protection of aliens to areas to which it was not originally intended to apply, namely, the protection of human rights per se, which could and generally do involve the rights of individuals against their own national states or of the stateless against other states. However, the purported content and limits of the rule being applied are those of the customary universal rule of international law. Also, in effect much of the relevant and documented application of the rule has been taking place in regional arenas, although the UN Human Rights Committee also applies it under the relevant instruments. The regional nature of the organs that have most frequently been dealing with the rule may not be critical, in so far as the organs are genuine international organs which are enforcing international obligations. On the other hand, the extension of the rule to areas which are different from the original area of its application, although perhaps still associated with the protection of the individual and therefore not fundamentally unconnected, has not only resulted in the expanded application of the rule but may also have had an influence on the basic theories underlying the rule itself and its nature. In any event, the rule has been developed importantly in its application, its limits have secured greater definition and, as a consequence, the practical effect of the rule in certain areas has been clarified to a large extent. The exposure of the

[8] See e.g. Article 26 of the European Convention on Human Rights and Article 41(c) of the International Covenant on Civil and Political Rights, Article 46 of the American Convention on Human Rights and Article 11(3) of the International Convention on the Elimination of All Forms of Racial Discrimination.

traditional rule to these new areas may have had a beneficial effect on it and on the institution of diplomatic protection to which it was originally confined.

It is also true that in the area of diplomatic protection or in the relationship between an individual and a foreign state there has been a growing tendency, where possible, to exclude by implication or express agreement the application of the rule of local remedies, as is demonstrated by the Convention on the Settlement of Investment Disputes between States and the Nationals of other States,[9] by many bilateral investment treaties, and by the Claims Settlement Declaration by Algeria of 1981 relating to the agreement between the US and Iran.[10] But such exclusion has always been a possibility in the history of international relations. The lesson to be learnt from this kind of practice is that the rule of local remedies is still regarded as very pertinent to the settlement of international disputes involving aliens and can only be excluded generally by a deliberate act of states involved in a dispute.[11] On the other hand, the fact that the application of the rule to areas other than diplomatic protection and disputes between states and nationals of other states has been developed, albeit by express agreement, signifies that the international community sees some positive use for it. Such considerations, and in particular the application of the rule in fields other than diplomatic protection, warrant a further study of the rule and its development with special emphasis on how it has been applied and defined in the post-Second World War period, having in mind that what has taken place is a proliferated application of the rule relating to the protection of nationals against foreign states which is still a rule of customary international law.

That having been said, it must also be remembered that of special importance is the fact that the development of the rule in recent times has

[9] See Article 26.
[10] See Article II.1: 1 Iran–US CTR p. 9.
[11] The fact that a state or states may agree to exclude the application of the rule in the settlement of a dispute does not detract from the quality of the rule as a customary rule of law. The incidence of this practice in recent years merely attests to the willingness of respondent states for a variety of reasons to submit disputes directly to international settlement in the interests of peace. That states consciously address the issue of the rule in connection with the settlement of disputes involving the protection of aliens is proof that the rule is otherwise viable and a serious impediment to the direct settlement of a dispute at the international level. It does not in fact reduce the importance of the rule or affect its relevance in the area of the diplomatic protection of aliens. Thus, it is in the interests of the international community that the rule be well defined and reasonably developed even for the purpose of the law relating to diplomatic protection.

been made possible to some extent by its extended applications, albeit by the solemn *fiat* of sovereign states, particularly to the field of human rights protection. While this may be a reassertion of the importance of the original rule, what is of special interest to modern practice and scholarship is how the rule itself has been developed, applied and possibly redefined as a result of this extended relationship to other areas. The fact that the rule relating to diplomatic protection was applicable under customary international law without the conventional agreement of states, while the rule, albeit of customary international law, is applicable in the newer fields to which it has been applied only by the express agreement of states, is not of significance. In effect, in so far as it is the rule of customary international law that is basically being applied, this is what is of relevance, so that it is not untrue to say that what has been developed is basically the rule of customary international law relating to diplomatic protection. Consequently, this study will also attempt to assess the impact of recent developments in the application of what is in essence a customary rule of international law in order to see how the rule has been shaped, how the theory behind it may have been affected, how its nature may have been redetermined and how its application in practice has clarified the ambiguities surrounding it. While the new fields in which the rule has found application will be examined, the developments that have taken place in the area of diplomatic protection will also indubitably be of significance. While the application per se, for example, of the rule of local remedies as an incident in the protection of human rights through international instruments will be examined, the evolution of the rule in its application as a rule of customary international law, originally linked with diplomatic protection, will certainly be a particular focus of attention.

The core of the present study is not the detailed application per se of the rule of local remedies by particular organs or to specific areas outside diplomatic protection. In so far as different areas are considered or the attitudes of international organs are examined, what will be of special interest is how the application of the rule by such organs or in different areas has informed and influenced the development of the rule itself as a customary rule of international law and has led to its clarification or logical and practical definition or redefinition. Recent developments show that the rule of local remedies is regarded not only as an existing rule but also as in many ways a useful one. Hence, it is not excessive intellectualism or a pure academic exercise to examine and discuss its development with particular emphasis on the post-Second World War era.

The question may also be asked whether the customary rule associated entirely and essentially with diplomatic protection, or adaptations of it, have become customary, as opposed to being conventional in one way or another, in other areas outside of diplomatic protection. This is a matter which will be explored later only peripherally, as it requires special attention in its own right. The question is not really *can*, or *is it useful that*, it be a customary rule outside of diplomatic protection, which may validly be asked, but has it become one.

Much of the recent history of the rule has been concerned with the decisions of international tribunals or organs rather than the diplomatic practice of states. Just as in other fields of international law the importance of judicial and quasi-judicial determination has been increasing and has had a decisive effect on the development of the law, so too in relation to the rule of local remedies is such activity of special significance. Thus, naturally, it is the decisions of international judicial and other organs that will constitute the main basis of discussion in the analysis. It is this source of decision-making that has contributed most to the development of the customary rule of international law on local remedies. Indeed, recent diplomatic practice in the matter is virtually non-existent, in so far as it has contributed to new developments in the application of the rule.[12]

A word needs to be said about the literature on the subject. There has been some specialized textual work on the rule in recent years, but this has concentrated to a great extent on the rule as applied in the field of human rights[13] or on limited aspects of the rule's development.[14] What the present volume purports to do is to paint a clearer integrated

[12] The development of the rule of local remedies in recent years has been dependent almost entirely on judicial or quasi-judicial determination by international tribunals or organs. Even in the past, diplomatic practice has generally been confined to general statements of the rule or to references to some of the exceptions to the rule such as the non-availability of remedies. There has never been any extensive discussion of the parameters or theoretical basis of the rule in diplomatic practice. For the substance of the rule and its application, the definition of its limitations and the identification of its bases it is predominantly to judicial or quasi-judicial decision that one has to look. For the rest, the rule and its underpinnings have been elaborated in textual authorities.

[13] Some of the works in which the rule of local remedies has been examined with particular reference to the protection of human rights are: Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), Chapter III, pp. 127–53; Castberg, *The European Convention on Human Rights* (1974); Ezejiofer, *Protection of Human Rights under the Law* (1964); Fawcett, *The Application of the European Convention on Human Rights* (1969); Monconduit, *La Commission européenne des droits de l'homme* (1965); Jacobs, *The European Convention on Human Rights* (1975); Nay-Cadoux,

Les Conditions de recevabilité des requêtes individuelles devant la Commission européenne des droits de l'homme (1966); Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (1983); Amerasinghe, 'The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights', 28 ZaöRV (1968) p. 257; Amerasinghe, 'The Rule of Exhaustion of Local Remedies and the International Protection of Human Rights', 17 IYIA (1974) p. 3; Grillo Pasquarelli, 'The Question of the Exhaustion of Domestic Remedies in the Context of the Examination of Admissibility of an Application to the European Commission of Human Rights', in Robertson (ed.), *Privacy and Human Rights* (1973) p. 332; Guinand, 'La Règle de l'épuisement des voies de recours internes dans le cadre des systèmes internationaux de protection des droits de l'homme', 4 RBDI (1968) p. 471; McGovern, 'The Local Remedies Rule and Administrative Practices in the European Convention on Human Rights', 24 ICLQ (1975) p. 119; Monconduit, 'Bilan des conditions de la recevabilité: les tendances de la jurisprudence', 8 HRJ (1975) p. 417; Robertson, 'The European Convention on Human Rights and the Rule of Exhaustion of Domestic Remedies', 4 RDH (1974) p. 199; Ruiloba Santana, 'La Regla de Agotamiento de los Recursos Internos a través de las Decisiones de la Comisión Europea de los Derechos del Hombre', in *Estúdios de Derecho Internacional Público y Privado – Libro-Homenaje al Profesor Luis Sela Sampil* (1970) p. 467; Schaffer and Weissbrodt, 'Exhaustion of Remedies in the Context of the Racial Discrimination Convention', 2 HRJ (1969) p. 632; Sørensen, 'La Recevabilité de l'instance devant la Cour européenne des droits de l'homme – Notes sur les rapports entre la Commission et la Cour', in *René Cassin Amicorum Discipulorumque Liber* (1969), vol. 1, p. 333; Spatafora, 'La Regola del Previo Esaurimento dei Ricorsi Interni nella Giurisprudenza della Commissione Europea dei Diritto dell'Uomo', 11 RDE (1971) p. 101; Robertson, 'Exhaustion of Local Remedies in Human Rights Litigation – The Burden of Proof Reconsidered', 39 ICLQ (1990) p. 191; Cançado Trindade, 'Exhaustion of Local Remedies in Relation to Legislative Measures and Administrative Practices – The European Experience', 18 MalayLR (1976) p. 257; Cançado Trindade, 'Exhaustion of Local Remedies in Inter-State Cases: The Practice under the European Convention on Human Rights', 29 ÖZÖR (1978) p. 212; Cançado Trindade, 'Exhaustion of Local Remedies in the 'Travaux Preparatoires' of the European Convention on Human Rights', RI (1980) p. 73. The Inter-American system of human rights protection was discussed in Cançado Trindade, 'Exhaustion of Local Remedies in the Inter-American System', 18 IJIL (1978) p. 345. Other areas of human rights protection were discussed in Cançado Trindade, 'Exhaustion of Local Remedies under the United Nations International Convention on the Elimination of All Forms of Racial Discrimination', 22 GYIL (1979) p. 374; and Cançado Trindade, 'Exhaustion of Local Remedies under the UN Covenant on Civil and Political Rights and its Optional Protocol', 28 ICLQ (1979) p. 734. Cançado Trindade has also dealt with human rights protection in some of the articles by him referred to below. In the context of human rights protection, the rule is described generally as referring to 'domestic' remedies. References to 'local' remedies in connection with the rule must be taken to include, where appropriate, such 'domestic' remedies and *vice versa*.

[14] Various aspects of the rule of local remedies have been examined in the past, e.g. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) pp. 169–286; Falk, *The Role of Domestic Courts in the International Legal Order* (1964); García Amador, *Principios de Derecho Internacional que Rigen la Responsabilidad – Análisis Crítico de la Concepción Tradicional* (1963); Amerasinghe, 'The Formal Character of the Rule of Local Remedies', 25 ZaöRV (1965) p. 445; Amerasinghe, 'The Exhaustion of Procedural Remedies in the Same Court', 12 ICLQ (1963) p. 1285; Amerasinghe, 'Limitations on the Rule of Local Remedies', in *Essays in Honour of Professor Manuel Diez de Velasco* (1992) p. 57;

picture of the rule as it now stands in its many ramifications. The object is to demonstrate that the original rule has renewed meaning for international law with a more solid content and a better defined basis and character. There will be less concern for polemics and more emphasis on the viability of the rule today which may also be a partial explanation

Amerasinghe,'Arbitration and the Rule of Local Remedies', in *Festschrift für Rudolph Bernhardt* (1995) p. 665; Amerasinghe, 'Whither the Local Remedies Rule?', 5 *ICSID Review* (1990) p. 292; Ruiloba Santana, 'La Oponibilidad de la Excepción del Inagotamiento de los Recursos Internos en el Arreglo Arbitral de las Diferencias Internacionales', 22 REDI (1969) p. 465; Sand, 'The Role of Domestic Procedures in Transnational Environmental Disputes', *Report to Bellagio Conference* (1974); Sperduti, 'La Recevabilité des exceptions préliminaires de fond dans le procès international', 53 RDI (1970) p. 470; Cançado Trindade, 'The Burden of Proof with Regard to Exhaustion of Local Remedies in International Law', 9 *Revue des droits de l'homme* (1976) p. 81; Cançado Trindade, 'Exhaustion of Local Remedies in International Law: Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century', 24 NILR (1977) p. 373; Cançado Trindade, 'The Time Factor in the Application of the Rule of Local Remedies in International Law', 61 RDI (1978) p. 232; Gutierrez Espada, 'La proteccion diplomatica, el agotamiento de los recursos internos y el arreglo de controversias en el Derecho positivo del espacio sobre responsabilidad', 74 RG de Legis. y Jurisp. (1977) p. 531; Stern, 'La Protection diplomatique des investissements internationaux: De Barcelona Traction a Elettronica Sicula ou les glissements progressifs de l'analyse', 117 JDI (1990) p. 897; and Adler, 'The Exhaustion of the Local Remedies Rule after the International Court of Justice's Decision in ELSI', 39 ICLQ (1990) p. 641. See also Doehring, 'Exhaustion of Local Remedies', in Bernhardt *et al.* (eds.), 3 EPIL (1997) pp. 238–42, for a brief account of the rule. Since 1950, there have been some studies of the rule of a somewhat general nature which have purported to examine the rule as a whole or as a complete subject but these have in most cases not considered all the material on the rule either because they are dated or for some other unexpressed reason and, therefore, are now of a limited character: see e.g. Chappez, *La Règle de l'épuisement des voies des recours internes* (1972); Gaja, *L'Esaurimento dei Ricorsi Interni nel Diritto Internazionale* (1967); Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (1968); Law, *The Local Remedies Rule in International Law* (1961); Panayotacos, *La Règle de l'épuisement des voies de recours internes* (1952); Sarhan, *L'Epuisement des recours internes en matière de responsabilité internationale* (1962); and Sulliger, *L'épuisement des voies de recours internes en droit international général et dans le Convention européenne des droits de l'homme* (1979). These works served their purpose and either were useful at the time they were written or were of value for the limited examination they made of the subject. In an article published in 1976 I took a brief and highly condensed look at the rule of local remedies as a whole: Amerasinghe, 'The Local Remedies Rule in an Appropriate Perspective', 36 ZaöRV (1976) p. 727. This did not, however, purport to be an exhaustive or detailed study of the rule as it has developed especially in the post-Second World War era. Mention must also be made of the work on the subject by the ILC, which, however, has been very uneven in quality: see Ago, 'Sixth Report on State Responsibility', 2 YBILC (1977), Part II, pp. 20–43; Crawford, 'Second Report on State Responsibility', UN Doc. A/CN.4/498 at pp. 56–61 and 67–8 (1999); Report of the ILC to the General Assembly, UN Doc. A/56/10 at pp. 304–7, (2001); Dugard, 'Second Report on Diplomatic Protection', UN Doc. A/CN.4/514 (2001); and Dugard, 'Third Report on Diplomatic Protection', UN Doc. A/CN.4/523 (2002).