

ORIGIN AND HISTORICAL DEVELOPMENT OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW *

by

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1. INTRODUCTION

The growing contemporary concern with the proper application of the rule of exhaustion of local remedies in international law (particularly in such experiments as those on the international protection of human rights) calls for a careful consideration of the origin and historical development of the rule. The task is made even more necessary by the fact that specialized literature on the subject¹ has so far been more heavily concentrated on

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¹ It is impossible to list within the confines of this study the immense specialized literature on the subject. But reference can be made to some of the more comprehensive works, such as the following doctoral theses: PANAYOTACOS C.P., « *La règle de l'épuisement des voies de recours internes* », Marseille, Mouillot, 1952; LAW C.H.P., « *The Local Remedies Rule in International Law* », Geneva, Droz, 1961; SARHAN A., « *L'épuisement des recours internes en matière de responsabilité internationale* », Université de Paris, 1962 (mimeographed); GAJA G., « *L'esaurimento dei ricorsi interni nel Diritto internazionale* », Milan, Giuffrè, 1967; CHAPPEZ J., « *La règle de l'épuisement des voies de recours internes* », Paris, Pédone, 1972; GIEBELER U., « *Die Erschöpfung der innerstaatlichen Rechtsbehelfe als Zulässigkeitsvoraussetzung der Menschenrechtsbeschwerde zugleich ein Vergleich mit der entsprechenden Regel des allgemeinen Völkerrechts und des Verfassungsbeschwerderechts* », University of Marburg, 1972 (Foto-Druck). Reference can also be made to the following relevant monographs: FRIEDMANN H., « *Epuisement des voies de recours internes* », *Revue de Droit international et de législation comparée* (1933) 318; TENEKIDES C. G., « *L'épuisement des voies de recours internes comme condition préalable de l'instance internationale* », *Revue de Droit international et de législation comparée* (1933) 514; AGO R., « *La regola del previo esaurimento dei ricorsi interni in tema di responsabilità internazionale* », *Archivio di Diritto pubblico* (1938) 181; TAMMES A.J.P., « *The Obligation to Provide Local Remedies* », *Volkenrechterlijke opstellen aangeboden aan G. van der Molen*, Kampen, 1962; MIAJA DE LA MUELA A., « *El Agotamiento de los Recursos Internos como Supuesto de las Reclamaciones Internacionales* », *Anuario Uruguayo de Derecho In-*

questions relating to the nature and scope of the local remedies rule than on its historical background. Yet, an examination of this aspect, to some extent overlooked, may not only help to clarify some of the problems surrounding the application of the rule, but also pave the way for a deeper understanding of an important question of international law.

In ancient law, the force of habit, the awe of traditional command and a sentimental attachment to it, the urge to satisfy the opinion of the social group, have all with some degree of speculation been conjointly accounted for as grounds for the binding force of custom, the formation of customary rules and *opinio necessitatis*². In this sense and context one has spoken of « law-creating facts », particularly in presence of a certain uniformity of conduct in similar circumstances, a reasonably long-established behaviour, and a pronounced psychological tendency towards behaving in accordance with custom³. Gradually a social machinery of binding force appears to take shape and become discernible in the strands of multiple relationships, the arrangement of reciprocal services, the ceremonial manner of performance of most transactions ; it is of course at a subsequent stage that organised society seems to recognize the obligations of one person in relation to the rightful *claims* of another, before one can speak of rights and even less of remedies⁴. But it is particularly in the legal framework of relations *between* social groups (rather than within them), or, more precisely, between members of different groups, that the essence of the subject under study lies. Thus, when nowadays one refers to the practice of States as custom, surely one has

oernacional (1963) 9 ; DAHM G., « Die Subsidiarität des internationalen Rechtsschutzes bei Völkerrechtswidriger verletzung von Privatpersonen, *Vom Deutschen zum Europäischen Recht — Festschrift für Hans Dölle*, II, Tübingen, 1963 ; AMERASINGHE C.F., « The Formal Character of the Rule of Local Remedies », *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1965) 445 ; AMERASINGHE C.F., « The Rule of Exhaustion of Domestic Remedies in the Framework of International Systems for the Protection of Human Rights », *Zeitschrift für ausländisches öffentliches Recht* (1968) 257 ; HAESLER T., « The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals », Leyden, Sijthoff, 1968 ; AMERASINGHE C.F., « The Rule of Exhaustion of Local Remedies and the International Protection of Human Rights », *Indian Yearbook of International Affairs* (1974) 3 ; TRINDADE A.A.C., « The Burden of Proof with regard to Exhaustion of Local Remedies in International Law », *Revue des droits de l'homme/Human Rights Journal* (1976) 81. Cf. further : VERZIJL J.H.W., « La règle de l'épuisement des recours internes » (rapports), *Annuaire de l'Institut de Droit International* (1954) 5 and (1956) 1 ; FAWCETT J.E.S., « The Exhaustion of Local Remedies : Substance or Procedure », *British Yearbook of International Law* (1954) 452 ; MERON T., « The Incidence of the Rule of Exhaustion of Local Remedies », *British Yearbook of International Law* (1959) 83 ; MUMMERY D.R., « The Content of the Duty to Exhaust Local Judicial Remedies », *American Journal of International Law* (1964) 389.

² MALINOWSKI B., « *Crime and Custom in Savage Society* », London, Kegan Paul, 1947, pp. 52, 55 and 59 ; Sir VINOGRADOFF Paul, « *Custom and Right* », Oslo, H. Aschehong & Co., 1925, pp. 27, 21 and 36.

³ KELSEN H., « *Pure Theory of Law* » (transl. 2nd German ed. by M. Knight), University of California Press, Berkeley/L.A., 1967, pp. 9, 225 and 53.

⁴ MALINOWSKI B., *op. cit.*, pp. 55 and 59 ; Sir VINOGRADOFF Paul, *op. cit.*, pp. 68/69, 73 and 87/89 ; and, on the importance attached to modes of redressing wrongs in archaic society, cf. Sir MAINE Henry, « *Ancient Law* », London, Dent, 1972, p. 216.

in mind not merely factual conduct, but more properly a general practice accepted as law (custom supported by *opinio juris*), comprising such elements as concordant and repetitive practice expressing a conviction of obligation, generally acquiesced by other States and consistent with prevailing international law ⁵.

It is generally accepted today that the international responsibility of a State (for injuries to aliens) can only be enforced at the international level after the exhaustion of local remedies by the individual concerned, *i.e.*, after the respondent State has availed itself of the opportunity of redressing the alleged wrong by its own means and within the framework of its own domestic legal system. The historical roots of the long evolution of this rule, as this latter is commonly understood today, can be traced back to the ancient practice of reprisals. Originally, reprisals constituted a blend of two notions, that of self-help and that of civic or communal solidarity and responsibility of individuals for acts of their co-nationals ⁶. They were noticeable in virtually all primitive legal systems ⁷, in the pre-history of international law ⁸ in Europe. In the earliest cases, probably due to a lack of coercion by the competent authorities, reprisals were carried out without the imposition of restrictions. Later they became associated with the idea that aliens (usually merchants) had a right to be accorded justice. Reprisals were then restricted to cases of denial of justice, which became a condition precedent to their application ⁹.

At that stage private reprisals were no longer « private » in their entirety ; an element of public authority could be detected in cases where reprisals became admissible in view of refusal by the sovereign of the wrongdoer to accord justice to the foreigner. More than that, reprisals became legitimate — in such cases of denial of justice — providing that the sovereign of the injured individual warranted them, recognizing them as justified. Such was the practice of the so-called *letters of marque*, granted by the sovereign for that purpose ¹⁰.

The injured foreigner, thus, was not entitled to make justice by his own hands. Public authority intervened to limit private vengeance. Subsequently, the granting of reprisals became associated with the notion of right (reparation to the injured individual), and jurists started referring to it as the *right of*

⁵ PARRY C., « *The Sources and Evidences of International Law* », Manchester, Manchester University Press, 1965, pp. 61/62.

⁶ SPIEGEL H.W., « Origin and Development of Denial of Justice », *American Journal of International Law* (1938) p. 64 ; de la BRIERE Yves, « Evolution de la doctrine et de la pratique en matière de représailles », *Recueil des Cours de l'Académie de Droit International* (1928)-II pp. 253 and 255.

⁷ SPIEGEL H.W., *op. cit.*, p. 64. The author refers to traces of denial of justice of great antiquity, in periods « immediately following the migration of nations » (*ibid.*, p. 63).

⁸ Lord McNAIR, « *International Law Opinions* », vol II, Cambridge, University Press, 1956, p. 297.

⁹ de la BRIERE Yves, *op. cit.*, p. 254 ; SPIEGEL H.W., *op. cit.*, pp. 64 and 81.

¹⁰ Lord McNAIR, *op. cit.*, vol. II, p. 297 ; la BRIERE Y. de, *op. cit.*, pp. 253 and 255.

reprisals. An injured alien, thus, should first have recourse to the local judges and authorities, and only if they denied him his rights — *ubi jus denegatur* — could he appeal to his sovereign for the sanction of reprisals¹¹.

The ultimate relationship in question was one of private law, of individuals in their relations with each other, even though the idea of public authority became more and more present¹². The default of the magistrates of a community became the ground for reprisals. For centuries denial of justice remained the only condition precedent to reprisals, for it was not until much later that one became detached from the other; once this happened the definition of denial of justice gradually contracted, coming to mean what it had originally meant, namely, a failure of protective justice. Denial of justice no longer provided the basis for self-help or reprisals, but rather for a reclamation by the State on behalf of its citizen abroad¹³.

Transposed into the more familiar language of the twentieth century, the culmination of the historical development of reprisals is tantamount to the view that although contentions of denial of justice may have the effect of engaging the international responsibility of a State, the *mise en œuvre* of that responsibility by the exercise of diplomatic protection cannot in principle be applied until it is clearly established that the requirement of prior exhaustion of local remedies has been duly complied with¹⁴. Let us examine more closely how this evolution came about in practice.

2. EARLY ANTECEDENTS FROM THE NINTH TO THE SIXTEENTH CENTURIES

As early as the ninth century, two treaties between Italian sovereign territories¹⁵ limited the application of reprisals to denial of justice suffered by a subject of one party within the territory of the other: one of the treaties allowed reprisals in such cases to be carried out even against the judges who denied the alien justice, whereas the other treaty prohibited reprisals against merchants¹⁶. The twelfth and thirteenth centuries witnessed early attempts

¹¹ la BRIERE Y. de, *ibid.*, p. 253; Lord McNAIR, *op. cit.*, vol. II, p. 297; SPIEGEL H.W., *op. cit.*, pp. 64/65.

¹² la BRIERE Y. de, *op. cit.*, pp. 248/249 and 252/253.

¹³ SPIEGEL H.W., *op. cit.*, pp. 67/68, 77 and 81.

¹⁴ FREEMAN A.V., « *The International Responsibility of States for Denial of Justice* », London, Longmans, 1938, p. 56.

¹⁵ Treaty of 836 between Sicard of Benevent and the Neapolitans, and treaty of 840 between Emperor Lotar I (on behalf of certain cities of the Italian Kingdom) with the Doge Petrus Tradenicus of Venice.

¹⁶ SPIEGEL H.W., *op. cit.*, pp. 64/65. They were followed in 1001 by a treaty of the same kind between Venice and the Bishop Grausa of Ceneda (*ibid.*, pp. 68/69).

to regulate restrictively the application of reprisals¹⁷. A pertinent provision for the study of the origin of the local redress rule was enshrined in a treaty concluded in 1265 between the Hanse cities Stralsund and Demmin for protection of commerce¹⁸. Gradually, treaties of commerce between Italian cities introduced the requirement that measures of execution of reprisals should be authorized by the territorial government which would regulate them only after due summons¹⁹.

In England as well, in the thirteenth century the principle whereby individuals were liable for the acts of their fellows of the same community had become accepted, as exemplified by the statutes of the Cambridge guild, which read: — « If one misdo, let all bear it, let all share the same lot »²⁰. Although reprisals between town and town in England (as between English merchants) had been prohibited by a statute of 1275²¹, letters of mayors and aldermen of the city of London written between 1350 and 1370 suggest that the practice persisted in London²² during that period. In 1333 King Edward III protested against a letter of reprisal of the King of Aragon, alleging that in the case England had not refused to provide reparation²³. A statute passed in 1353 during the reign of the same Edward III laid down restrictions to reprisals²⁴.

A remarkable illustration is afforded by the *Arnald de Sancto Martino v. The Castilians* case. The victim, together with other Bayonnese, complained against depredations and seizures of goods by the Castilians, and the matter

¹⁷ Two decrees (of 1188 and 1230) of King Alfonso IX of Leon, and a resolution of 1225 of the courts of Tortosa sponsored by King Jayme I of Catalonia; *in ibid.*, p. 66. A letter ratified by King Edward I of England in 1295 authorized a merchant of Bayonne to take reprisals against the Portuguese in the strictest sense of the word; *cf.* CLARK G., « The English Practice with Regard to Reprisals by Private Persons », *American Journal of International Law* (1933) p. 694; subsequent documents on private reprisals introduce the local redress requirement (*cf. ibid.*, p. 695).

¹⁸ *In* « *Die Recesse und andere Akten der Hansetage von 1256-1430* », vol. I, Leipzig, 1870, pp. 5/6, *cit. in* T. Haesler, *op. cit. supra*, p. 19. Private reprisals were also recognized in an Anglo-French treaty of 1235; *cf.* Robert Redslob, « *Histoire des grands principes du Droit des Gens* », Paris, Rousseau et Cie, ed., 1923, p. 189.

¹⁹ Examples can be found in the treaties of commerce between Tripoli and Genoa in 1236, and between Tripoli and Venice in 1256. *In* R. Redslob, *op. cit.*, pp. 189/190. An agreement of 1195 between Brescia and Ferrara went as far as proclaiming the abolition of private reprisals at that time: see *ibid.*, p. 190, and NYS Ernest, « *Les origines du Droit international* », Harlem, E.F. Bohn, 1894, p. 65.

²⁰ *Cit. in* SPIEGEL H.W., *op. cit.*, p. 66.

²¹ HOLDSWORTH W.S., « *A History of English Law* », vol. V, London, Methuen & Co., 1924, p. 74.

²² GARDINER D.A., « The History of Belligerent Rights on the High Seas in the Fourteenth Century », *Law Quarterly Review* (1932) vol. XLVIII, p. 538 n. 39.

²³ REDSLOB R., *op. cit.*, p. 190. King Edward III's protest of 6 October 1333 further stated that letters of reprisal could only be granted in case of denial of justice, after a prior and necessary request for reparation had been lodged and attempted (in vain); *in* NYS E., *op. cit.*, p. 67.

²⁴ SPIEGEL H.W., *op. cit.*, pp. 67/68; the author adds that this statute was « not always strictly interpreted » (*ibid.*, p. 68).

was brought before Edward I. Espousing Arnald's claim, the English King made repeated efforts to obtain reparation from the King of Castile, but unsuccessfully : despite endeavours justice was not shown (« *set omnino sibi in exhibenda justitia defuerunt* »). For twenty-three years the claimant tried to get the case settled, until finally in 1316, when the matter was brought before the new King Edward II, the monarch, taking account of his father's attempts to settle the case, and desirous to secure « an appropriate remedy for Arnald », ordered the seizure of the goods of a Castilian citizen then in Portsmouth as well as of all the goods and merchandise of the men and merchants of the King of Castile which came into Vasconia, up to the value sufficient « to make full satisfaction to Arnald for his loss »²⁵.

An account of the reprisal system as practiced throughout the fourteenth century reads : — « The inhabitants of one town might lawfully obtain redress for injuries inflicted by the inhabitants of another by taking reprisals, provided that they conformed to certain rules. The system could be operated either between towns of the same State or between towns of different States. In both cases although there might be variations the principle was the same : the claimant first sought justice in the appropriate court of his adversaries' town, and if he failed to obtain it, applied to the authorities in his own ; when these were satisfied that his complaint was justified, they arrested the goods of any citizen of the offending town who was in, or subsequently came within their jurisdiction, until sufficient had been seized to repair the damage done to the claimant »²⁶.

In fact, in the thirteenth and fourteenth centuries the restriction of reprisals after « exhaustion of local remedies » (to use a modern expression) to cases of denial of justice had become established²⁷, and a tendency to limit them further developed from the sixteenth century onwards, although the principle remained the same²⁸. In the early fourteenth century, for example, an agreement between Holland and England (1309) provided for the creation of what was in effect « a court of claims in each country to hear the complaints of the nationals of the other ». Records of negotiations between Edward II and a representative of Count William of Holland show that in fact « certain outstanding claims were adjusted » ; the documents of the agreement provided that « each ruler should appoint two judges whose duty it would be to hear, and decide promptly, claims of the subjects of the other. Swift and full justice was to be given, and safe conduct was guaranteed reciprocally to those who went from one country into the other to present claims »²⁹.

²⁵ CLARK G., *op. cit.*, pp. 705/707.

²⁶ GARDINER D.A., *op. cit.*, p. 538.

²⁷ SPIEGEL H.W., *op. cit.*, p. 64 ; CLARK G., *op. cit.*, pp. 695 and 722/723.

²⁸ la BRIERE Y. de, *op. cit.*, p. 252 ; and for conditions of granting reprisals other than the local remedies requirement, see NYS, *op. cit.*, p. 71.

²⁹ CLARK G., *op. cit.*, p. 709 ; a further example is provided by a treaty of 1386 between Portugal and England stating the duty to provide reparation for injuries caused by the subjects of either King against each other (Article IX), and further providing that forceful measures could only be resorted to « in case justice could not be secured by regular means » (*in ibid.*, pp. 709/710).

In 1354 Bartolus wrote the first monograph on reprisals, his « *Tractatus Repraesaliarum* », contending that reprisals were not quite important in Rome since « the centralization of power was sufficient to give redress »³⁰. He was followed by Giovanni da Legnano in 1360, who advocated in his treatise « great care in the application of reprisals »³¹, and by Brétigny, who touched on the question of reprisals in his diplomatic treatise of the same year (1360)³². Although the principles applied by fourteenth-century agreements (*supra*) were at the time accepted throughout Europe³³, the importance of the practice of reprisals, as pointed out by Bartolus, varied from country to country, according to each one's political structure. Thus, while in England reprisals in international relations were restricted by statute to cases of denial of justice (mid-fourteenth century), in Germany and Italy, as well as the whole of the Mediterranean territory, similar provisions were inserted into innumerable treaties (mainly thirteenth-century treaties of friendship), a development due to constant disputes between various small States. The restriction of reprisals to denial of justice was not of paramount importance in France, owing to the centralisation of government³⁴.

Less than a century after the settlement of the *Arnald de Sancto Martino v. The Castilians* case (*supra*), another striking illustration of the requirement of exhaustion of local means of redress was afforded by the equally long-standing *John de Waghen v. The Leydenese* case (concerning a claim for unpaid debt). The case remained unsettled for at least forty-seven years, until King Henry V, after taking account of the claimant's « many unsuccessful efforts to get satisfaction for the debt », decided in 1414 to espouse John de Waghen's claim; accordingly, he issued instructions to his officers to make reprisal seizures of the goods of the Leydenese within English territory and to turn them over to the claimant « on account of his debt »³⁵. In another remarkable example, a letter of reprisal (for seizure of goods) issued three years earlier (1411) by Henry IV to some English merchants against the French (at a time when the two countries were at war) went into a somewhat lengthy discussion of the exhaustion of efforts to settle the claim peacefully prior to the warrant of reprisals; but as those endeavours were exhausted in vain and local justice was not obtained, letters of marque were granted to the claimants³⁶. Again in 1413 the King of England granted letters of marque to some merchants — aided by the King's officers — against the Genoese (Genoa and England being at peace at the time), after exhaustion of peaceful

³⁰ In SPIEGEL H.W., *op. cit.*, p. 70; NYS E., *op. cit.*, 68/70.

³¹ In SPIEGEL H.W., *op. cit.*, p. 71.

³² la BRIERE Y. de, *op. cit.*, p. 256.

³³ CLARK G., *op. cit.*, p. 709.

³⁴ SPIEGEL H.W., *op. cit.*, pp. 68/69; the author remarks that this restriction to reprisals was for the first time laid down as a rule in a privilege granted by Emperor Frederick I to some merchants in 1173 (*ibid.*, p. 69).

³⁵ CLARK G., *op. cit.*, p. 707. — A statute of 1416 (under Henry V) contained a procedure to be followed to obtain from the King letters of reprisal, which would be granted « unless a treaty had abolished their use »; cf. NYS E., *op. cit.*, p. 73.

³⁶ CLARK G., *op. cit.*, pp. 712/713.

means of settlement of the case : the claimants had been « prevented from writing to their own magistrates upon the matter » and had been denied reparation by the Genoese ³⁷.

In the sixteenth century, likewise, a letter granted in 1565 by the Queen of England to some merchants against the Portuguese stated that as strenuous efforts to secure redress from the King of Portugal had been exhausted without effect, here injured subjects were thereby given « the right to get justice for themselves » ³⁸. An Anglo-French treaty of 1559 stipulated that letters of reprisal were to be restrictively issued from then onwards only in case of manifest denial of justice (Article XVII) ³⁹; and letters of reprisal granted by James IV of Scotland in the following year (1560) stated that the concession was based on a « denial of redress for injuries and of restitution of the good spoiled », and the grantee should exhaust all local means of redress — sue at law and use « all possible means of recovering » his ship ⁴⁰.

In his *Relectio « De Jure Belli »* prepared in 1532, Francisco de Vitoria, then Professor at the University of Salamanca, referred to reprisals without enthusiasm and with some reservations. Letters of reprisal, he contended, were granted when there had been failure of a State or a sovereign to remedy a prior wrong; although not unjust in themselves, they were hazardous ⁴¹. By the end of the sixteenth century Alberico Gentili distinguished between public and private acts when developing his theory of the rule of local redress. Only when the State itself was involved and failed to right the wrong was the community bound to war; thus, Gentili maintained in his « *De Jure Belli Libri Tres* » (1598) that « the State which knows because it has been warned, and which ought to prevent the misdeeds of its citizens, and through its jurisdiction can prevent them, will be at fault and guilty of a crime if it does not do so » ⁴². Thus, taking the distinction between private and public

³⁷ CLARK G., *ibid.*, pp. 714/715. — In the fifteenth century restrictive measures on reprisals were found in the treaties of 1440 and 1468 between England and France, and in the treaty of 1489 between England and Spain; cf. NYS E., *op. cit.*, p. 72.

³⁸ CLARK, *op. cit.*, p. 718, see pp. 717/720.

³⁹ The Kings of Portugal and Scotland adhered to the treaty (cf. *ibid.*, p. 710). Further rigid restrictions upon the issuing of letters of reprisal — although their legality was admitted — can be found in the treaty of 1495 (Article XXIX) between Henry VII of England and Philip, Archduke of Austria and Duke of Burgundy (cf. *ibid.*, p. 710).

⁴⁰ Lord McNAIR, *op. cit.*, vol. II, p. 297 n. 1.

⁴¹ FRANCISCO DE VITORIA, « *De Jure Belli* », appendix B in J.B. Scott, « *The Spanish Origin of International Law - Francisco de Vitoria and his Law of Nations* », Oxford, Clarendon Press, 1934, p. LXIV. — In his « *De Indis Relectio Posterior, sive de Jure Belli* » (containing the author's celebrated lectures of 1538/1539), Francisco de Vitoria expressed the same reservations to the practice of reprisals, but nevertheless conceded that reprisals could legitimately take place if the victim « *no pudierà recobrarlos (los bienes injustamente tomados) buenamente de otro modo* », in which case he became entitled to « *tomar satisfacción donde pueda* » (emphasis added); in « *Obras de Francisco de Vitoria* » (ed. T. Urdanoz), Madrid, B.A.C., 1960, pp. 845/846.

⁴² GENTILI A., « *De Jure Belli Libri Tres* », in « *The Classics of International Law* » (ed. J.B. Scott), vol. II, Oxford, Clarendon Press, 1933, book I, chapter XXI, p. 100. Gentili further stated that « accordingly, our legal experts state correctly and explicitly that an act is a public one when the State has deliberated upon it in legitimate assembly; and therefore that action is not public which has been taken by a magistrate or even by the entire populace in a different way as the result of some hasty resolution ». GENTILI A., *op. cit.*, p. 103.

injury as the basis for the rule of local redress, Gentili envisaged reprisals (and even war) as a means to settle only public disputes concerning States, and no longer to be used for the execution of private decisions.

3. DEVELOPMENTS IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES

Following the Thirty Years' War (1618/1648), the peace of Westphalia constituted a landmark in the origins and formation of modern international law⁴³, the time from which State practice in the modern sense of the term would begin to develop. In fact, treaty practice following the peace of Westphalia provides examples of regulations of reprisals; thus, a treaty of 1664 between Spain and the Netherlands provided for prior resort to domestic courts and procedures⁴⁴. Reference could also be made to two treaties signed in 1667: one between Sweden and the Netherlands, whereby the two countries agreed *not* to extend protection to either subjects or aliens privately engaged in taking ships abroad for the purpose of commerce⁴⁵; the other, an Anglo-Spanish treaty, was quite precise in its permission of reprisals: letters of reprisal would only be given to the aggrieved party in cases of undue delays in obtaining justice and when no satisfaction had been given within a period of « six months after the instances made »⁴⁶. Similarly, another treaty signed by Great Britain and Spain in 1670 provided: —« No letters of reprisal shall be given, or any other proceedings of that nature had, except justice shall be denied or unreasonably delayed; in which case it shall be lawful for that King, whose subject has suffered the injury, to proceed in any manner according to the law of nations till reparation shall be given to the injured party »⁴⁷. Shortly afterwards, by a 1673 treaty of alliance, Spain and the Netherlands engaged themselves to control reparations for damages inflicted upon their allies⁴⁸. A treaty of 1678 between France and the Netherlands went even further: after setting up time-limits for the taking of reparation for damages, the two countries declared that « toutes lettres de marque et de représailles qui pourraient avoir été ci-devant accordées pour quelque cause que ce soit, sont déclarées nulles »⁴⁹; they further agreed that in the future reprisals could only take place in case of « manifest denial of

⁴³ NUSSBAUM A., « *A Concise History of the Law of Nations* », rev. ed., N.Y., MacMillan, 1954, p. 115; DEVISSCHER Ch., « *Théories et réalités en Droit international public* », 4e ed. rev., Paris, Pédone, 1970, p. 17; and cf. further, on the 1648 peace treaty, REDSLOB R., *op. cit.*, pp. 213/217.

⁴⁴ PARRY C. (ed.), « *The Consolidated Treaty Series* », vol. 8, N.Y., Oceana, 1969, pp. 200/201. The complete collection will cover the period from 1648 to 1919.

⁴⁵ *Consolidated Treaty Series*, vol. 10, p. 207.

⁴⁶ In CLARK G., *op. cit.*, p. 711.

⁴⁷ Cit. in CLARK G., *ibid.*, p. 711. Earlier, in 1637, in the same way, an order of the English Privy Council referred to treaty provisions relating to reprisals (*ibid.*, pp. 710/711).

⁴⁸ *Consolidated Treaty Series*, vol. 13, p. 41.

⁴⁹ In *Consolidated Treaty Series*, vol. 14, pp. 403/404.

justice », and after communicating the matter to the minister of the country concerned, so that in a period of four months he could ensure that local justice was accomplished⁵⁰.

But despite this treaty practice, reprisals remained what for centuries they had been : not necessarily acts of war, but rather, and more precisely, legitimate measures of exerting pressure over a sovereign or a State (held responsible for an injury) in order to secure justice and obtain reparation, after other means of redress had been exhausted by the injured party and had failed⁵¹. The practice of (private) reprisals, however, could not last for long : after all, it was quite dangerous for the merchants, who took many risks to obtain satisfaction by forceful means, and it was also somewhat risky for the sovereigns who espoused their claims, for not seldom it could lead to war⁵². With the concentration of powers in the hands of the State, it became a rather archaic system, slowly being replaced by governmental action to protect exclusively the interests of nationals abroad⁵³. Thus, by the end of the seventeenth century⁵⁴ and beginning of the eighteenth century⁵⁵ private reprisals ceased to be authorized. The modern law on reprisals became something different. But the requirement of exhaustion of local means of redress, present in the old practice of private reprisals, persisted and survived in the modern theory of State responsibility.

The important trace left by the gradual disappearance of the practice of individual reprisals was in sum thus described by A. de La Pradelle : — « Quand les représailles individuellement concédées disparaissent, à peine gardées aux traités de Ryswick et d'Utrecht, avec l'adoucissement des mœurs et le progrès du droit, elles laissent leur trace dans le jeu quotidien de la procédure diplomatique, où l'épuisement des voies et moyens locaux rend le double service : aux agents, de les débarrasser des démarches prématurées de compatriotes trop pressés à se croire lésés ; aux Etats, de servir la paix en ralentissant de plus en plus, par des exceptions appropriées, l'imminence des conflits suivant cette maxime bien connue des Italiens que le temps est galant homme, *galante uomo* »⁵⁶. In fact, by the treaty of Ryswick of 1697 all letters

⁵⁰ *Ibid.*, vol. 14, p. 404. — In their turn, Great Britain and Spain, in the 1667 treaty of peace and friendship (*supra*), after restricting reprisals to cases of denial of justice, preferred to set up a time-limit of six months (running from the date of the demand for satisfaction) upon the expiry of which — undue delays — letters of reprisal or marque could be granted. *Consolidated Treaty Series*, vol. 10, p. 116.

⁵¹ REDSLOB R., *op. cit.*, pp. 243 and 465 ; CLARK G., *op. Cit.*, p. 723. — That reprisals at that time were not necessarily acts of war, but rather a recognized or legitimate means of securing justice in times of peace as well, was confirmed, e.g., by a French *ordonnance* of 1681, which specifically provided for reprisals in peace times. In CLARK G., *ibid.*, p. 711 ; cf. also REDSLOB R., *op. cit.*, p. 243.

⁵² REDSLOB R., *ibid.*, pp. 189 and 243 ; NYS E., *op. cit.*, pp. 64/65 and 70.

⁵³ DE VISSCHER Ch., « *Théories et réalités...* », *op. cit.*, p. 299.

⁵⁴ REDSLOB R., *op. cit.*, p. 190 ; NYS E., *op. cit.*, p. 77.

⁵⁵ CLARK G., *op. cit.*, p. 708.

⁵⁶ LA PRADELLE A. de, et al., « *Recueil des arbitrages internationaux* », vol. III, Paris, Les Editions Internationales, 1954, pp. 137/138.

of marque and of reprisals that could have been granted for one reason or another, were declared null ; that position was maintained in the congress of Utrecht and Article 3 of the Treaty of Utrecht of 1713 ⁵⁷.

Parallel to the practice of States, important doctrinal developments on the subject took place in the course of the period under review. In March 1625, in his « *De Jure Belli ac Pacis Libri Tres* », Hugo Grotius referred to what jurists of his time termed the « right of reprisals » (called *Withernamium* by the Saxons and Angles, and *lettres de marque* by the French), subject to denial of justice ⁵⁸. Grotius described the rule of the law of nations whereby for a debt due from any civil society or its head, « all the goods (...) of the members of the society are bound and liable ». This rule had been introduced into the law of nations by « a certain necessity, in that otherwise there would be great licence for the commission of injury, since the goods of the rulers often cannot so easily be got at, as those of private persons, who are more numerous » ; this was one of the rights « instituted by nations on the exigency of usage and to meet human necessities » ⁵⁹.

Grotius then distinguished between the subjects (« *subditi* ») of the same State and the foreigners (« *exteri* »). The practice of reprisals was « permitted by custom » whenever « a judgment against a criminal or a debtor cannot be obtained within a reasonable time », and « if judgment be given plainly against right ». But whereas « subjects of the same State cannot lawfully impede by force the execution even of an unjust sentence, on account of the authority of the law over them », this did not apply to foreigners, who had a *jus cogendi vis-à-vis* the sovereign. In touching upon this particular situation of foreigners, Grotius thus described the principle of exhaustion of local remedies : — « foreigners have the right of compelling : a right however which they may not lawfully use, so long as they can obtain by judgment what is their own » (« *exteri autem jus habent cogendi, sed quo uti non liceat quamdiu per judicium suum possint obtinere* ») ⁶⁰.

⁵⁷ LA PRADELLE A. de, *op cit.*, vol. III, pp. 137/138 n. 3. There was, however, one particular kind of letter that survived the seventeenth century : letters of marque (reflecting a public character), as distinguished from the old letters of reprisal (possessing a private character) ; see comments (in connection with the condition of prior exhaustion of all local means of redress) in *ibid.*, p. 139.

⁵⁸ « *Locum autem habet (...) ubi jus denegatur* » ; in : GROTIUS H., « *De Jure Belli ac Pacis* » — *Liber Tertius* (transl. W. Whewell), vol. III, Cambridge, University Press, 1853, *caput* II, IV, p. 48.

⁵⁹ GROTIUS H., *op. cit.*, II, II, pp. 42/43 ; and on types of reprisals (exaction of rights) cf. further *ibid.*, II, III, pp. 44/45, and II, IV, p. 48.

⁶⁰ GROTIUS H., *ibid.*, II, V, pp. 48/49. — Grotius further contended that the rule whereby for such a cause « either the bodies or the moveables of the subjects of him who does not grant me justice may be taken by me, is not indeed introduced by nature, but is everywhere received as usage » (*ibid.*, II, V, p. 49, and see further II, VI, p. 50). A distinction should be drawn between « what things are properly *juris gentium*, parts of the law of nations, and what is constituted by civil law or by compact » ; thus, « by the law of nations, all the subjects of him who does an injury are liable to be security for satisfaction, being subjects from a permanent cause, whether indigenous or immigrants ; (...) but by the civil or instituted law of nations, there are often

The usage referred to by Grotius of exhaustion by foreigners (allegedly wronged) of local remedies in pursuance of their rights was further confirmed by the practice of States in the years following the publication of this « *De Jure Belli ac Pacis Libri Tres* ». In 1655, a letter of reprisal granted by Cromwell to two English owners of a ship detained by Spaniards stated that « all fair courses and due proceedings » had been exhausted in seeking reparation, and yet restitution had not been obtained⁶¹. In a report of 1670/1671 to the King, Sir Leoline Jenkins stressed the « need of exhausting the local remedies before alleging a denial of justice and claiming reprisals »⁶². On another report of 1675 by the same officer it was expressly stated that the claimant should « exhaust every legal channel of obtaining compensation and every remedy before reprisals could be granted to him »⁶³ with regard to the capture of his ship by a Spaniard. In an earlier report of 1666 Sir Leoline Jenkins referred to (original text) the « usage of the Western world » whereby each sovereignty avoided to interfere into another's judicial proceedings, and added : — « As appears first by the modern treaties (...), persons wronged shall seek and pursue their remedies in law, not at their own homes, but in those countries where the wrongs have been done to them. (...) Reprisals (...) are then only well granted, when all the instances, first in the courts of judicature from the lowest to the highest, afterwards with the prince himself, have been attempted and pursued without success or effect »⁶⁴.

In an opinion of 1650, the Admiralty Judges declared that the Head of State was « under domestic obligation to redress wrongs done to his subjects » and that reprisals could legally be taken when « other means of securing justice had failed » ; in this case the authorization to take reprisals was granted to ships of the Commonwealth's fleet rather than to private persons, and in fact, as a general policy after the mid-seventeenth century, the English government practically ceased to issue letters of reprisal to private persons⁶⁵.

In the same year (1650), Zouche wrote (on reprisals) that under the law of nations « the goods of all subjects are liable in respect of debts owing by a civil society, or its head »⁶⁶. In 1737, Bynkershoek advocated great care in the

excepted from this liability the persons of women and children, and the property of literary classes, and of merchants ». Grotius also observed that « by the law of nations one may take surety for satisfaction (...). By the instituted law of many places, such satisfaction is to be sought from the supreme authority ; and in other places, from the judges » (*ibid.*, II, VII, pp. 51/52).

⁶¹ Cit. in Lord McNAIR, *op. cit.*, vol. II, p. 297 n. 1 ; for three other examples (dated 1639, 1649 and 1652), cf. *ibid.*, p. 297 n. 1.

⁶² Lord McNAIR, *ibid.*, p. 298, see pp. 298/300.

⁶³ *Ibid.*, p. 300.

⁶⁴ *Ibid.*, p. 312. — Another instance occurred in 1664, when Charles II issued a general authorization for issuing letters of reprisal against the Dutch, allowing the King's navy as well as private persons to take reprisals, thus bringing the State as such « as an agency for redressing wrongs to its nationals, after « unsuccessful attempts to get justice » ; cf. CLARK G., *op. cit.*, p. 721.

⁶⁵ CLARK G., *ibid.*, pp. 721-722.

⁶⁶ ZOUCHE R., « *Juris et Judicii Feccialis, sive Juris inter Gentes, et Quaestionum de eodem Explicatio* » — 1650 (transl. J.L. Brierly), vol. II, Washington, Carnegie Institution, 1911, p. 115.

granting of reprisals, to be allowed only — according to accepted usage — in case of clear denial of justice. Bynkershoek insisted upon the requirement of exhaustion of local remedies prior to reprisals, for only « an injury done by force and not rectified by the courts is repaired by force » ; only in such cases where no reparation was obtained could reprisals take place, according to custom « grown common », because in such cases reprisals became « the only remedies that independent sovereigns have for repelling unjust force » ⁶⁷.

Shortly after Bynkershoek, Wolff asserted in 1749 that a private individual could not make use of the right of reprisal unless allowed by the ruler of a State ; it was « not always advisable to use coercive remedies », even because the public authority of a country could well « persuade the ruler of another State to render justice to his citizen, so that there would be no need of coercive remedies » ⁶⁸. Wolff interpreted reprisals very restrictively, excluding them in all cases except when reparation for injuries was not given within a proper time ⁶⁹.

Thus, by that time it had become clear, both in theory and in practice, that the then current notion of reprisals had very little — if anything — in common with the ancient practice of reprisals. These latter were deemed permissible for denial of justice, « a collective term implying all those acts which are known as international delicts » ⁷⁰. Private reprisals, as known in ancient legal systems, disappeared from the law and custom in modern times ⁷¹ ; reprisals had become « a means of settling political controversies » ⁷².

In his « *Le Droit des Gens, ou principes de la loi naturelle* » (1758), Vattel insisted on the requirement that local remedies should first be exhausted before the prince could intervene on behalf of his subjects abroad. If someone had suffered an injury (abroad), he maintained, he should first have recourse to all peaceful means of obtaining reparation for the injury ⁷³ ; the prince's intervention on his behalf was warranted only in case of a manifest denial of justice ⁷⁴. Reprisals were used in international relations when local justice could not be obtained (i.e., in cases of denial of justice, undue delays or manifestly unjust and partial judgment) ⁷⁵ ; but even then denial of justice

⁶⁷ VAN BYNKERSHOEK C., « *Questionum Juris Publici Libri Duo* » — 1737 (transl. T. Franck), Oxford, University Press, 1930, vol. II, book I, ch. XXIV, pp. 133/136.

⁶⁸ WOLFF C., « *Jus Gentium Methodo Scientifica Pertractatum* » (transl. J.H. Drake), vol. II, Oxford, Clarendon Press, 1934, para. 590, p. 303, and see paras. 591/602, pp. 302/309.

⁶⁹ WOLFF C., *op. cit.*, para. 589, p. 302.

⁷⁰ SPIEGEL H.W., *op. cit.*, p. 74. The writer suggests that Wolff laid « the foundation-stone of the modern terms of “ international delinquency ” and “ international delict ” » (*ibid.*, pp. 74/75).

⁷¹ LA BRIERE Y. DE, *op. cit.*, pp. 248/249 and 257/258.

⁷² SPIEGEL H.W., *op. cit.*, p. 75 ; and also a means of « replacing war » (*ibid.*, p. 75).

⁷³ VATTEL E. DE, « *Le Droit des Gens, ou principes de la loi naturelle* » — 1758, tome II, Paris, Guillaumin & Cie., 1863, liv. II, ch. XVIII, para. 338, p. 316.

⁷⁴ VATTEL E. DE, *op. cit.*, II, VII, para. 84, p. 62 ; in the same sense, *ibid.*, II, VIII, para. 103, pp. 83/84, and II, XVIII, para. 350, pp. 329/330.

⁷⁵ VATTEL E. DE, *ibid.*, II, XVIII, paras. 342 and 350, pp. 320 and 329/330. Only the sovereign could allow reprisals (*ibid.*, para 346, pp. 324/325).

had to be manifest and evident, and in cases of doubt it would be advisable to oblige nationals abroad to abide by the decisions of foreign courts before which they pursued their cases ⁷⁶.

To Vattel's mind reprisals were only allowed under the law of nations for an « evidently just cause » and only after one had exhausted in vain all local means of redress (or when one had all reason to believe that these latter were wholly ineffective). Reprisals, thus, could only be taken when allowed by the sovereign in cases of denial of justice after exhaustion of local remedies ⁷⁷. The rationale of the local remedies rule was thus described by Vattel : — « Il serait trop contraire à la paix, au repos, et au salut des nations, à leur commerce mutuel, à tous les devoirs qui les lient les unes envers les autres, que chacune pût tout d'un coup en venir aux voies de fait, sans savoir si l'on est disposé à lui rendre justice ou à lui refuser » ⁷⁸.

In fact, the practice of States throughout the eighteenth century was clearly directed towards upholding the local remedies rule. In an opinion of 1711 on a petition of several English merchants whose ships had been taken by the Danes, the Attorney- and Solicitor-General insisted upon « the necessity of exhausting the remedy of proceedings in a foreign prize court before applying for letters of marque and reprisal » ⁷⁹. Similarly, in a report of 1729 to the British government, officer G. Paul advised that « local remedies must be exhausted (by the individual claimant) before invoking the support of the Crown, even if it means going to Malta or Genoa » to obtain reparation ⁸⁰. Further examples drawn from State practice could be referred to ⁸¹, the important over-all trend being that, while for centuries denial of justice after exhaustion of local remedies was the condition precedent to reprisals, the historical detachment of one from the other was reflected in the fact that in

⁷⁶ VATTEL E. DE, *ibid.*, II, XVIII, para. 350, p. 330.

⁷⁷ VATTEL E. DE, *ibid.*, II, XVIII, paras. 343 and 347/348, pp. 322 and 326/328.

⁷⁸ *Ibid.*, II, XVIII, para. 343, p. 322.

⁷⁹ Lord McNAIR, *op. cit.*, vol. II, pp. 301/302.

⁸⁰ Lord McNAIR, *ibid.*, pp. 302/303 ; in the same sense, cf. also the report of the Law Officers of 18 January 1753 (on the Silesian loan), in *ibid.*, p. 303. — For a further discussion and express assertion of the rule of exhaustion of local remedies, cf. account of the dispute between Prussia and Great Britain in 1745 (over the treatment accorded to neutral vessels in time of maritime war), reported in MARTENS CH. DE, « *Causes célèbres du Droit des Gens* », 2e ed., tome II, Leipzig, F.A. Brockhaus, 1858, cause VI, p. 139, see also pp. 97/106 and 167/168.

⁸¹ *E.g.*, Duke of Newcastle's communication of 1738 to the Spanish Minister in England conditioning reprisals to denial of justice and undue delays, cit. in Lord McNAIR, *op. cit.*, vol. II, p. 297 n. 1 ; letters of reprisal issued in 1778 by Louis XVI to two merchants from Bordeaux against England, after exhaustion of peaceful means of settlement of the case, cit. in Sir PHILLIMORE ROBERT, « *Commentaries upon International Law* », vol. III, 3rd. ed., London, Butterworths, 1885, p. 35. But as already observed, after the mid-seventeenth century the issue of letters of reprisal to individuals for redressing their own grievances had ceased to be practiced as a general policy by the British government (cf. G. Clark, *op. cit.*, p. 722, and Lord McNAIR, *op. cit.*, vol. II, p. 297 n. 1) ; and it was one century later, in the second half of the eighteenth century, that the origin of modern reprisals is believed to have occurred, a period in which the British practice was particularly relevant (cf. SPIEGEL H.W., *op. cit.*, p. 77).

more modern works on international law the law dealing with reprisals became distinct from the law on denial of justice⁸². The modern theory of international responsibility became visibly detached from the old notion and practice of reprisals⁸³.

The second half of the eighteenth century witnessed further illustrations from treaty practice⁸⁴. One could recall, for example, Article VI of the Jay Treaty of 1794 between the United States and Great Britain⁸⁵ — which marked the beginning of the modern stream of arbitrations⁸⁶, — concerning recovery of debts due to British creditors, which espoused the view that non-exhaustion of local remedies by the claimants was to be regarded as « a predominant causation of the losses », therefore not justifying compensation⁸⁷.

Thus, the requirement of the exhaustion of local remedies — prior to reprisals (in the Middle Ages mainly) and to intervention by the prince of the State (in modern times) — developed within the context of the relationship of communities or States with foreigners, particularly in the framework of relations stimulated by international trade and disputes arising therefrom, in whose settlement political factors and considerations could hardly be overlooked. Such considerations may have in fact played an important role in the gradual crystallization of the local remedies rule, reflected in modern times in, e.g., the assumed need to safeguard the sovereignty of States, or the desirability (on behalf of peaceful coexistence of States) to avoid as much as possible recourse to forceful measures in the settlement of international claims by insisting on the internal redress of wrongs within the State's own

⁸² SPIEGEL H.W., *ibid.*, p. 77.

⁸³ DE VISSCHER Ch., « Le déni de justice en Droit international », *Recueil des Cours de l'Académie de Droit International* (1935)-II, p. 373.

⁸⁴ E.g., Article XVIII of the treaty of peace and commerce of 1767 between the King of Denmark and the Emperor of Morocco, in *Consolidated Treaty Series*, vol. 44, p. 42; Article XIX of a treaty of 1784 between the Prince Sultan of the Kingdom of Johore and the Dutch East Indies Company (United Provinces of the Netherlands), in MARTENS Ch. DE, « *Recueil des principaux traités* », 2e ed. rev., vol. V, Gottingue, Librairie de Dieterich, 1826, p. 97; Article XXVII of the 1798 treaty of friendship, commerce and navigation between Portugal and Russia, in *Consolidated Treaty Series*, vol. 54, p. 371.

⁸⁵ In MOORE J.B., « *History and Digest of International Arbitrations* », vol. I, Washington, Government Printing Office, 1898, pp. 275/276.

⁸⁶ DUNN F.S., « *The Protection of Nationals* », Baltimore, Johns Hopkins Press, 1932, pp. 58/59; PARRY C., « Some Considerations upon the Protection of Individuals in International Law », *Recueil des Cours de l'Académie de Droit International* (1956)-II, p. 658; ROLIN H., « Le contrôle international des juridictions nationales », *Revue Belge de Droit International* (1967) pp. 4/5.

⁸⁷ HAESLER T., *op. cit.*, pp. 139/140. In fact, shortly before the Jay Treaty of 1794, the United States Secretary of State (Mr. Jefferson) reported to the British Minister (on 18 April 1793) that « a foreigner, before he applies for extraordinary interposition, should use his best endeavours to obtain the justice he claims from the ordinary tribunals of the country »; in John Bassett Moore, « *Digest of International Law* », vol. VI, Washington, Government Printing Office, 1906, p. 259. The local remedies rule was further upheld in two statements by the U.S. Attorney-General (in 1792 and in 1794); in MOORE J.B., *ibid.*, vol. VI, pp. 657 and 259, respectively.

domestic legal system. But it was mainly in the course of the nineteenth century, as it will be seen next, that the practice of States began to accord to the local remedies rule a clearer shape, or at least the more familiar one as it is presented today as a generally recognized principle of international law.

4. NINETEENTH- AND TWENTIETH-CENTURY STATE PRACTICE⁸⁸

a) EUROPE

The practice of the United Kingdom throughout the nineteenth century is illustrative of the observance of the requirement of exhaustion of local remedies prior to the exercise of diplomatic protection. The 97 volumes of facsimiles of the « *Law Officers' Opinions to the Foreign Office (1793-1860)* »⁸⁹ contain not less than *thirty* cases concerning the application of the rule of exhaustion of local remedies. Several of those cases of strict observance of the local remedies rule pertained to the duty of British citizens abroad (e.g., in Bavaria⁹⁰, Brazil⁹¹, France⁹², Cuba⁹³, Spain⁹⁴) to exhaust all local remedies before becoming entitled to diplomatic intervention on their behalf⁹⁵. Likewise, the local remedies rule was held applicable in regard to aliens in Britain, who were in the same way bound to exhaust domestic remedies as they claimed for protection to their own respective governments⁹⁶. On much fewer occasions was the local remedies rule considered as

⁸⁸ The present section's heading indicates not only what it covers but also what it excludes. The numerous arbitral awards and decisions of the International Court (PCIJ and ICJ) touching on the local remedies rule in the period considered are left outside the scope and purposes of the present study : while they have been widely discussed by contemporary expert legal writing on the subject (cf. footnote 1, *supra*), the practice of States, perhaps surprisingly, seems to have been to some extent neglected. This appears as a compelling reason for devoting the present examination to that practice in particular, to the exclusion of the more explored areas of the subject.

⁸⁹ Hereinafter referred to as « *Law Officers' Opinions* », edited by Clive Parry, Gregg International Publ. Ltd., 1970 ; vols. 96 and 97, ed. 1973.

⁹⁰ *Law Officers' Opinions*, vol. 12, p. 55, see pp. 53/55.

⁹¹ *Law Officers' Opinions*, vol. 17, p. 9, see pp. 5/15.

⁹² *Law Officers' Opinions*, vol. 32, pp. 225/226 and 593/594, and *ibid.*, vol. 34, pp. 174/181.

⁹³ *Law Officers' Opinions*, vol. 83, p. 123, see pp. 122/124.

⁹⁴ *Ibid.*, vol. 83, p. 209, see pp. 203/209.

⁹⁵ For further decisions consistently upholding the local remedies rule in regard to British citizens abroad, see *Law Officers' Opinions*, vol. 22, pp. 414/416, 486/488 and 506/507 ; vol. 43, pp. 208/218 ; vol. 53, pp. 114/116, 188/193 and 200/209 ; vol. 59, pp. 505/507 ; vol. 72, pp. 240/243 ; vol. 79, pp. 20/23 ; vol. 80, pp. 252/253 and 298/300, and pp. 5/8 and 73/76 ; vol. 81, pp. 293/295 ; vol. 82, pp. 162/165 ; vol. 83, pp. 9/11 ; vol. 94, pp. 199/201 ; vol. 95, pp. 40/43 ; and see further Lord McNAIR, *op. cit.*, vol. II, pp. 312/313.

⁹⁶ E.g., the case of the Russian vessel « *Alexander Newski* » (1806), reported in *Law Officers' Opinions*, vol. 62, pp. 17/19. And see further : *Law Officers' Opinions*, vol. 54, pp. 225/227 ; « *A British Digest of International Law* » (compiled principally from the archives of the Foreign Office), edited by Clive Parry and Sir Gerald Fitzmaurice, part VI, vol. 6, London, Stevens, 1965, p. 278.

having been complied with by the claimants. This occurred in cases of demands for compensation where local remedies were found to be insufficient or ineffective⁹⁷ or where undue delays and procedural irregularities rendered recourse to local remedies fruitless⁹⁸.

Early in the twentieth century the British government's adherence to the principle of exhaustion of effective and adequate remedies was reasserted in a case of claims arising out of the seizure of certain United States ships by Great Britain⁹⁹. Subsequent British practice in the present century continued to lend support to the local remedies rule, as exemplified by a dispute with Iceland (in 1962) over fishing limits line : following the arrest and conviction of a British trawler for allegedly illegal fishing despite contentions that it was outside Icelandic territorial waters, the owners appealed against the verdict. Questioned on the case in the House of Commons, and particularly on the advisability of the British government taking any action at that stage, the Under-Secretary of State replied that it would be « premature » to comment on it pending the outcome of the appeal in the Icelandic courts » and that as soon as the decision on the appeal was known submissions would be made to the Icelandic government if necessary¹⁰⁰. The local redress rule was also observed in a dispute between British nationals and the United States government over a contract for the construction of the new U.S. Embassy in London¹⁰¹; in the case of a trial in Ethiopia of a British Somali subject¹⁰²; in a case concerning actions brought in Dutch courts for the disposal of property in which a British teacher claimed an interest¹⁰³.

The rules regarding international claims issued by the British Foreign and Commonwealth Office in 1971 read : — « Her Majesty's Government will not normally take up a claim of a United Kingdom national against another

⁹⁷ *Law Officers' Opinions*, vol. 81, p. 114, see pp. 113/114.

⁹⁸ *Law Officers' Opinions*, vol. 79, pp. 380/381. — For further examples from the nineteenth-century British practice on the local remedies rule, cf. : Lord McNair, *op. cit.*, vol. II, pp. 314/319; « *Fontes Juris Gentium* » (Digest of the Diplomatic Correspondence of the European States — 1856/1871), ed. Viktor Bruns, I.a.o.R.V., Berlin, C. Heymans, 1932, Series B, sect. I, vol. I, part I, pp. 929/930; « *Fontes Juris Gentium* » (Diplomatic Correspondence — 1871/1878), *ibid.*, 1937, Series B, sect. I, vol. II, part II, pp. 377/379.

⁹⁹ *Cit. in American Journal of International Law* (1916), Supplement, p. 139.

¹⁰⁰ *House of Commons Debates*, vol. 658, cols. 1003/1004, *cit. in* « *The Contemporary Practice of the United Kingdom in the Field of International Law* » (by E. Lauterpacht), London, B.I.I.C.L., 1962, pp. 55/56.

¹⁰¹ *House of Commons Debates*, vol. 652, col. 47, *cit. in ibid.*, p. 56. *cf.* also, to the same effect, in another case, report of 21 December 1964 of the Minister of State for Foreign Affairs, *House of Commons Debates*, vol. 704, col. 184, *cit. in British Practice in International Law* (1964) pp. 206/207.

¹⁰² *House of Commons Debates*, vol. 552, col. 1633, *cit. in* « *The Contemporary Practice of the United Kingdom in the Field of International Law — Survey and Comment* » (by E. Lauterpacht), *in International and Comparative Law Quarterly* (1956) p. 426.

¹⁰³ *House of Commons Debates*, vols. 741 and 741, cols 57/58 and 173/174 respectively, *cit. in British Practice in International Law* (1967) (ed. E. Lauterpacht and G. White), London, B.I.I.C.L., pp. 109/110.

State until all the legal remedies available to him in the State concerned (*i.e.* municipal remedies) have been exhausted » ¹⁰⁴ (Rule VII). If in exhausting those municipal remedies the claimant has met with « a denial of justice, Her Majesty's Government may intervene on his behalf to secure redress of injustice » ¹⁰⁵ (Rule VIII).

The French government's reliance upon the rule of exhaustion of local remedies in the period under review is confirmed in the materials compiled in the « *Répertoire de la pratique française en matière de Droit international public* ». Besides examples drawn from French treaty practice ¹⁰⁶, reference could be made to the case of the arrest of a French national in Port-au-Prince brought to the attention of the French *Chambre des Députés*. Addressing the House (on 26 November 1904), the French Minister for Foreign Affairs promptly stated that as the French national concerned had not exhausted all local remedies in Haiti and as a manifest denial of justice had not been established, there remained no ground for diplomatic intervention on his behalf ¹⁰⁷. A similar decision in support of the local remedies requirement was taken in 1934 by the « Service Juridique » of the *Ministère des Affaires Etrangères* in a dispute between a foreign government and a consortium of French companies ¹⁰⁸. On another case discussed throughout the parliamentary debates of 1921 the French Minister for Foreign Affairs declared that diplomatic action could only be taken in case of a denial of justice after exhaustion of local remedies ¹⁰⁹. The representative of France (Mr. Matter) at the 1930 Hague Conference for the Codification of International Law was very categorical in addressing the Third Committee (on 21 March 1930), having declared that « there can be no action regarding the State's responsibility until the series of available remedies has been entirely exhausted » ¹¹⁰.

¹⁰⁴ Cit. in HARRIS D.J., « *Cases and Materials on International Law* », London, Sweet and Maxwell, 1973, p. 478. A comment appended to Rule VII reads that « failure to exhaust the local remedies will not constitute a bar to a claim if it is clearly established that in the circumstances of the case an appeal to a higher municipal tribunal would have had no effect » (*in ibid.*, p. 478).

¹⁰⁵ *In ibid.*, p. 478.

¹⁰⁶ The local remedies rule was enshrined in : Article 5 of the Franco-Venezuelan convention of 1885 for the reestablishment of friendly relations ; Article 11 (2) of a 1886 treaty of friendship, commerce and navigation between France and Mexico ; Article 5 of a 1928 treaty between France and the Netherlands on peaceful settlement of disputes ; cf. also Article 3 of the Franco-Roumanian convention on arbitration of 1926, Article 3 of the Franco-Yugoslav treaty of conciliation and judicial settlement of 1927, and Article 3 of the Franco-German convention on arbitration of 1925 ; cit. in KISS A.-C., « *Répertoire de la pratique française en matière de Droit international public* » (hereinafter referred to as « *Répertoire Pratique Française* »), tome III, Paris, éd. Centre National de la Recherche Scientifique, 1965, pp. 499 and 491.

¹⁰⁷ *In J.O., Débats Parlementaires, Chambre*, 1904, pp. 2706/2708, cit. in KISS A.-C., « *Répertoire Pratique Française* », III, pp. 499/500.

¹⁰⁸ KISS A.-C., « *Répertoire Pratique Française* », III, pp. 455/456 ; in further support of the local remedies rule, see case reported in *ibid.*, p. 491.

¹⁰⁹ *In J.O., Débats Parlementaires, Chambre*, 1921, p. 16, cit. in KISS A.-C., « *Répertoire Pratique Française* », III, p. 604.

¹¹⁰ *Minutes of the Third Committee, Acts of the Conference for the Codification of International Law*, vol. IV, League of Nations doc. C.351(c).M.145(c).1930.V, pp. 65/66.

The French practice on the matter has supported the rule of exhaustion of local remedies not only in regard to French nationals abroad but also in respect of foreigners in France¹¹¹. On one occasion the French government saw fit to point out that the local remedies rule is not an absolute principle and is subordinated to certain conditions, such as the regular course of proceedings (the case concerned the detention of French nationals in Poland for having committed a wrong before Polish fiscal authorities). The French government did not question the principle that its nationals should resort to local courts, nor did it object to criminal proceedings being taken against them for their alleged delict in Polish territory; what the *Ministère des Affaires Etrangères* objected to was their unreasonably prolonged detention amounting virtually to a denial of justice (the French citizens had not been able to see their lawyers), which paved the way for a demand for reparation by the French government. Eventually the dispute was settled diplomatically¹¹² in December 1934.

The French and Italian governments together pushed further the limitations of the local remedies rule in a case concerning a Franco-Italian company operating in Greece. A possible joint intervention by France and Italy on behalf of the company was promptly objected to by Greece, invoking local remedies and principles of international law, and alleging that instead of dissuading the claimant company to have recourse to local tribunals, the two countries concerned preferred to take the case into diplomatic discussion¹¹³. On behalf of the French and Italian governments, Mr. J. Ferry stated (on 25 September 1872) to the Minister for Foreign Affairs of Greece that in the case local remedies were not sufficient and adequate, and local legislation (enacted on 27 May 1871) left no remedy to the company to exhaust¹¹⁴.

The local remedies rule was set forth as a basic condition prior to the exercise of diplomatic protection in a communiqué of 1875 of the Secretary-General of the *Ministero degli Esteri* to the Italian *chargé d'affaires* in Asunción, which stated that before officially resorting to diplomatic interposition one ought first to assure that « la legislazione del paese non offre la via a regolari ricorsi giudiziari o che le autorità, con assoluto diniego di giustizia, hanno preclusa la via di tali ricorsi al reclamante straniero »¹¹⁵. The survey undertaken in « *La Prassi Italiana di Diritto Internazionale* » contains examples of observance of the local remedies rule by the Italian government

¹¹¹ As an illustration, see case of the incidents involving German tourists in Nancy (1913), in KISS A.-C., « *Répertoire Pratique Française* », III, pp. 604/606.

¹¹² In *ibid.*, pp. 500/501. And see also the *Lorando and Tubini* cases (1901), in *ibid.*, pp. 453/455.

¹¹³ KISS A.-C., « *Répertoire Pratique Française* », III, p. 495.

¹¹⁴ Cf. *Archives Diplomatiques*, 1874, tome III, pp. 328/335, cit. in KISS A.-C., *ibid.*, pp. 495/497.

¹¹⁵ Società Italiana per l'Organizzazione Internazionale — Consiglio Nazionale delle Ricerche, « *La Prassi Italiana di Diritto Internazionale* » (hereinafter referred to as « *Prassi Italiana* »), Prima Serie (1861/1887), vol. II, N.Y., Oceana, 1970, p. 663.

in its nineteenth-century practice on the matter ¹¹⁶. Reference could be made, *inter alia*, to its dispute with the Brazilian government (1864/1865) over a contract of an Italian company responsible for the lighting of the city of Niterói ¹¹⁷.

But in another case the Italian Minister for Foreign Affairs stated that as local remedies had been duly exhausted diplomatic intervention was thereby warranted ¹¹⁸. But besides such cases of observance of the local redress rule by the Italian government, there have also been in the period under review occasions where it deemed that local remedies needed not be exhausted : first, when special circumstances (of two distinct cases) were considered to relieve the claimants from the duty of exhaustion ¹¹⁹, and secondly, where local remedies were deemed ineffective or non-existent ¹²⁰, and further in a case of promulgation of *ad hoc* legislation detrimental to acquired rights ¹²¹.

On 4 September 1849, the Swiss Federal Council stated that in Switzerland's relations with other countries, « depuis très longtemps la règle de l'épuisement des recours internes fut connue et respectée par le gouvernement suisse » ¹²². Over a century later, in a note of 29 September 1972, the Division of Legal Affairs of the « Département politique fédéral » of the Swiss government, in reply to an enquiry as to how the Swiss authorities could aid a Swiss citizen (abroad) condemned to prison by the courts of a foreign State to obtain revision of his process, stated that « when feasible and where an effective remedy seems probable, all modes of appellate revision must be exhausted before diplomatic interposition becomes proper » ; the note of 1972 went on to assert that « il est également impossible d'exercer la protection diplomatique tant qu'une procédure judiciaire est en cours ou lorsque cette procédure est reprise, comme c'est le cas ici. Pour ce seul motif déjà, la Suisse ne pourrait pas intervenir par la voie diplomatique auprès des autorités » ¹²³ of the country concerned.

b) AMERICAS

There is ample historically verifiable evidence of observance of the rule of exhaustion of local remedies by the United States government in its nine-

¹¹⁶ Cf. cases reported in *Prassi Italiana*, II, pp. 666/668.

¹¹⁷ *Prassi Italiana*, II, pp. 660/662.

¹¹⁸ *Ibid.*, p. 665.

¹¹⁹ Cf. *ibid.*, pp. 662/665.

¹²⁰ Cf. case in *ibid.*, p. 667, see pp. 666/667.

¹²¹ Statement of 4 December 1871 by the Italian Minister for Foreign Affairs, in *Prassi Italiana*, II, p. 663.

¹²² In « *Feuille fédérale suisse* » (1850)-III, cf. *ibid.* (1851)-II p. 464, (1859)-I p. 266, (1864)-I p. 258 ; cit. in A. Sarhan, *op. cit. supra*, p. 33.

¹²³ In « *La pratique suisse en matière de Droit international public — 1972* » (by Lucius Caflisch), in *Schweizerisches Jahrbuch für internationales Recht/Annuaire Suisse de Droit International* (1973) pp. 359/360.

teenth-century practice. Reference could be made to not less than *fifteen* pertinent cases compiled by J.B. Moore¹²⁴, consistently upholding the local redress rule and rendering prominent its *preventive* character with regard to diplomatic interposition. Only in exceptional circumstances was it thought that local remedies needed not be exhausted : *e.g.*, where local justice was deficient or non-existent, as exemplified by Secretary of State Fish's often-quoted statement (of 29 May 1873) that « a claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust »¹²⁵ ; or where local remedies have been superseded¹²⁶, or else they were deemed insufficient¹²⁷. Such cases, however, shared the nature of exceptional situations, the general rule remaining unequivocally that the alien must have exhausted all available domestic remedies prior to diplomatic intervention by his State ; if the requirement was not complied with he would not be entitled to diplomatic protection¹²⁸.

The twentieth-century U.S. practice does not seem to have undergone any substantial change in that respect¹²⁹. On one occasion, *e.g.*, a U.S. manufacturing company inquired of the U.S. Department of State about the possibility of presentation of a claim to the Russian government for the value of goods allegedly destroyed by a mob while in transit by rail in Russia. The Department of State replied (on 22 January 1908) that it did not appear that any suit had been instituted in the Russian courts for recovery of damages for the alleged losses ; « in the absence of any attempt to secure redress through judicial measures, there could be no ground upon which the Department could take the matter up diplomatically »¹³⁰. Again in 1915 the Department of State stressed « the generally accepted rule of international law » whereby « the interested party must exhaust his local legal remedies before diplomatic intervention is appropriate »¹³¹. The principle was expressly reaffirmed by the Department of State on several subsequent occasions¹³².

¹²⁴ MOORE J.B., « *A Digest of International Law* », vol. VI, Washington, Government Printing Office, 1906, pp. 652/671.

¹²⁵ MOORE J.B., *op. cit.*, vol. VI, p. 677.

¹²⁶ Cf. MOORE J.B., *ibid.*, p. 682.

¹²⁷ *In ibid.*, p. 691. The sole « exception » to the principle of local redress was in case of denial of justice, a point corroborated by U.S. practice in the period under study ; cf. *ibid.* pp. 661 and 666/669.

¹²⁸ Cf. several cases illustrating various points, *in ibid.*, pp. 651/693.

¹²⁹ Cf. *Ferrara case*, *in ibid.*, pp. 672/675.

¹³⁰ MS. Department of State, file 10877, cit. in G.H. Hackworth, « *Digest of International Law* », vol. V, Washington, Government Printing Office, 1943, p. 501.

¹³¹ Cit. in WHITEMAN M.M., « *Digest of International Law* », vol. 8, Washington, Department of State publ., 1970, p. 770.

¹³² *In WHITEMAN M.M.*, *op. cit.*, vol. 8, pp. 771/772 ; HACKWORTH G.H., *op. cit.*, vol. V, p. 506. For earlier instances, HACKWORTH G.H. *ibid.*, pp. 505/507 and 510/511 ; WHITEMAN M.M., *op. cit.*, vol. 8, pp. 769/771 ; and further examples of application of the local remedies rule in BORCHARD E.M., « *The Diplomatic Protection of Citizens Abroad* », N.Y., Banks Law Publ. Co., 1916, pp. 817/832. — While a settlement of an estate involving property interests of American heirs was pending in the courts of Lebanon in 1957, even though denial of justice was alleged the U.S. Department of State took the position that as the case was still pending in domestic courts it

The strict adherence of United States policy on espousal of claims to the principle of prior exhaustion of local remedies was further reflected in the *express* inclusion of the local remedies rule in the *General Instructions to Claimants* issued by the U.S. Department of State on different occasions¹³³. Thus, in a memorandum of 1st March 1961, the U.S. Department of State reaffirmed: — « The requirement for exhaustion of legal 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 »¹³⁴. And in a 1965 opinion of the Inter-American Juridical Committee (*cf.* also *infra*) the position of the United States law and practice on the question of exhaustion of local remedies was stated as follows: — « The enforcement of the responsibility of the State under international law is ordinarily subordinated to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question »¹³⁵.

The application of the local remedies rule has found consistent support in recent Canadian claims practice. In reply to an enquiry concerning a claim for compensation against the government of India for loss of income from interests in India, the Canadian Under-Secretary for External Affairs stated in 1964 that diplomatic intervention could not be undertaken until local remedies had been exhausted in India¹³⁶. In reply to another request for assistance (with regard to a real estate development project in the United States), the Canadian Under-Secretary declared in the same year that « in accordance with well-established international practice, the Canadian government would not be justified in intervening where local remedies are available and have not been exhausted »¹³⁷. Similarly, in the case of a Canadian claim against an Eastern European country, the Under-Secretary

did not warrant diplomatic interposition by the U.S. government. In his instructions to the American Embassy in Beirut Secretary of State Dulles stated that an allegation of denial of justice should be convincingly corroborated and that exhaustion of available judicial remedies was « a prerequisite to a valid complaint of a denial of justice ». In WHITEMAN M.M., *op. cit.*, vol. 8, p. 772.

¹³³ *E.g.*, Section 8 of the General Instructions of 30 January 1920, *cit. in* EAGLETON Clyde, « *The Responsibility of States in International Law* », N.Y., New York University Press, 1928, p. 96 n. 4; Paragraph 8 of the General Instructions of 1st October 1934, *cit. in* FREEMAN A.V., *op. cit.*, p. 411. But in an opinion of 21 July 1930 the solicitor for the Department of State indicated exceptional circumstances in which local remedies needed not be exhausted, *e.g.*, where justice in the local courts was wholly lacking, or where local remedies had been superseded or were insufficient (G.H. Hackworth, *op. cit.*, vol. V, p. 511, and see p. 519, and *cf.* also *supra*).

¹³⁴ The memorandum concerned a case of exhaustion of local remedies by American nationals in Cuba; text in *American Journal of International Law* (1962) p. 167.

¹³⁵ OAS doc. OEA/Ser. I/VI.2-CIJ-78, September 1965, pp. 10/11.

¹³⁶ In « Canadian Practice in International Law during 1964 as Reflected in Correspondence and Statements of the Department of External Affairs » (hereinafter referred to as « *Canadian Practice* ») (ed. GOTLIEB A.E.), in *Canadian Yearbook of International Law* (1965) pp. 326/327.

¹³⁷ *Canadian Practice - 1964*, in *ibid.*, p. 327.

advised (on 18 October 1967) 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 ¹³⁸.

The same view was taken by the Canadian government on other occasions ¹³⁹. And on the Canadian claims practice in general, the Canadian Department of External Affairs informed on 19 August 1968 that « when a Canadian citizen brings to our attention a *prima facie* valid claim against a foreign State in respect of which he has exhausted all local remedies without success, it may be decided to intervene informally through the exercise of good offices or formally through the espousal of the claim in accordance with established principles of international law » ¹⁴⁰.

A study of the local redress rule in the practice of Latin American countries in the period under review could well be undertaken within the larger framework of the principle of the *duty of non-intervention* ¹⁴¹ as consistently developed by those countries. Such a task lying outside the purposes of the present study, we shall limit our examination to the position taken by Latin American countries on the question of exhaustion of local remedies in particular. This requirement has been raised in different cases of aliens' claims in Latin America ¹⁴² as well as of claims of Latin Americans abroad ¹⁴³.

By the mid-nineteenth century it had become established practice of some Latin American countries to enact legislation strengthening the principle of exhaustion of local remedies ¹⁴⁴. In some instances (e.g., Colombian law n. 145 of 1888, Article 15) it was provided that in a contract between the government and a foreigner a clause should be inserted whereby the latter was to « renounce to request the diplomatic protection of his country for anything touching upon the execution of the contract, except in case of a denial of justice » ¹⁴⁵. That was but one of the several cases of application of the so-called Calvo clause, whereby an alien, concluding a contract with a

¹³⁸ *Canadian Practice - 1967*, in *Canadian Yearbook of International Law* (1968) p. 263 ; cf. also *Canadian Practice - 1966*, in *Canadian Yearbook of International Law* (1967) p. 265.

¹³⁹ *Canadian Practice - 1967*, in *op. cit.*, pp. 264/265 ; cf. further *Canadian Practice - 1969* (ed. BEESLEY J.A.), in *Canadian Yearbook of INTERNATIONAL Law* (1970) p. 359.

¹⁴⁰ *Canadian Practice - 1968* (ed. GOTLIEB A.E. and BEESLEY J.A.), in *Canadian Yearbook of International Law* (1969) pp. 314/315.

¹⁴¹ Inter-American Juridical Committee, Opinion on « *Contribution of the American Continent to the Principles of International Law that Govern the Responsibility of the State* », Majority Opinion, OAS doc. OEA/Ser. I/VI.2 - CIJ-61, January 1962, pp. 3/27.

¹⁴² *Ibid.*, p. 38 ; *Mémoire des relations extérieures de la République Argentine* (1892) p. 500, cit. in YEPES J.-M., « Les problèmes fondamentaux du Droit des gens en Amérique », *Recueil des Cours de l'Académie de Droit International* (1934)-I, pp. 107/108 n. 1 ; « *Fontes Juris Gentium* », *op. cit.*, Series B, sect. I, vol. II, part I, pp. 507/509 ; and part II, pp. 370/372.

¹⁴³ Ministério das Relações Exteriores, « *Pareceres dos Consultores Jurídicos do Ministério das Relações Exteriores* » (1946/1951), ed. 1967, pp. 539/542.

¹⁴⁴ OAS doc. OEA/Ser. I/VI.2 - CIJ-61, January 1962, p. 39 ; FREEMAN A.V., *op. cit.*, p. 458.

¹⁴⁵ Cit. in YEPES J.-M., *op. cit.*, p. 106.

foreign government, agrees not to call upon his State for diplomatic protection on issues arising out of the contract, and to submit such issues to the competent local courts in conformity with the law of the host State ¹⁴⁶.

The precise relationship between the Calvo clause and the local remedies rule has been a matter of much discussion. Summing up, it has first been asserted that the Calvo clause, being a stipulation about the exhaustion of local remedies, becomes thereby a superfluous restatement of the local redress rule ¹⁴⁷. It has also been stated that the Calvo clause codifies the rule of exhaustion of local remedies ¹⁴⁸. Somewhat more elaborately, it has been contended that although there is an identification of the Calvo clause with the local remedies rule, the latter works as a rule of customary international law, while the former binds the alien under the territorial jurisdiction ¹⁴⁹ (of the State with which the alien concluded a contract containing the clause). In fact, by excluding requests for diplomatic protection the Calvo clause makes of the competence of domestic courts an exclusive competence, and not a *compétence préalable* as occurs with the local remedies rule ¹⁵⁰; it may thus be acknowledged — leaving aside diplomatic protection — that the clause is admitted in contractual matters (under municipal law and domestic courts) ¹⁵¹.

The closing years of the nineteenth century witnessed a large body of treaty practice providing for the exhaustion of local remedies, in an attempt to set limits to the exercise of diplomatic protection and to reserve to local courts the competence over all legal claims. Provisions of the kind were inserted into several treaties between Latin American and European countries ¹⁵² as well as various treaties concluded by Latin American countries among themselves ¹⁵³. Recognizing the engagement of State responsibility by denial of

¹⁴⁶ CALVO C., « *Le Droit international théorique et pratique* », 5e. ed., Paris, A. Rousseau ed., 1896, tome I, paras. 185/205, pp. 322/351; tome III, paras. 1280/1297, pp. 142/156; tome IV, para. 256, p. 231; and cf. also *ibid.*, tome I, para. 110, p. 267; tome III, para. 1278, p. 140.

¹⁴⁷ GUGGENHEIM P., « *Traité de Droit international public* », tome II, Genève, Georg & Cie, 1954, pp. 25/26; LIPSTEIN K., « The Place of the Calvo Clause in International Law », *British Yearbook of International Law* (1945) pp. 130/145. *A contrario sensu*, ARECHAGA E. DE « International Responsibility », in « *Manual of Public International Law* » (ed. M. SØRENSEN), London, MacMillan, 1968, pp. 590/593.

¹⁴⁸ SARHAN A., *op. cit.*, p. 77.

¹⁴⁹ LAW C.H.P., *op. cit.*, *supra*, pp. 127/130.

¹⁵⁰ CHAPPEZ J., *op. cit.*, *supra*, p. 76; the author suggests that the clause thus appears much closer to an objection of domestic jurisdiction than to an objection of non-exhaustion of local remedies.

¹⁵¹ CHAPPEZ J., *ibid.*, pp. 81/83. See further SHEA D.R., « *The Calvo Clause* », University of Minnesota Press, 1955, pp. 258/268.

¹⁵² Cf. seven such treaties listed in YEPES J.-M., *op. cit.*, pp. 104/105 n. 1; cf. also PANAYOTACOS C.P., *op. cit.*, *supra*, p. 56 n. 39.

¹⁵³ Cf. eleven such treaties, in YEPES J.-M., *op. cit.*, pp. 103/104 n. 1.

justice, those provisions stressed however « the necessity of a resort to local remedies in all cases where injuries are suffered by foreigners »¹⁵⁴.

Another experiment (resorted to by Mexico) was that of establishing domestic claims commissions (in 1911) to adjudicate upon claims of foreigners¹⁵⁵. In relation to settlement of disputes, Article VII of the Inter-American Treaty on Pacific Settlement (the so-called Pact of Bogotá of 1948) conditions diplomatic representations (in protection of nationals abroad) to prior exhaustion of domestic remedies¹⁵⁶. The practice of Latin American States on the exhaustion of local remedies also left its traces on attempts of codification of the law on State responsibility for injuries to aliens¹⁵⁷.

But a major attraction of the study of the position taken by Latin American countries on the local redress rule can be found in their vast practice of international conferences, which produced several relevant instruments containing assertions of the principle of exhaustion of local remedies¹⁵⁸. On 25 August 1961 the OAS Inter-American Juridical Committee delivered an Opinion on the « *Contribution of the American Continent to the Principles of*

¹⁵⁴ FREEMAN A.V., *op. cit.*, pp. 495 and 490/491. See further IRIZARRY Y PUENTE J., « The Concept of 'Denial of Justice' in Latin America », *Michigan Law Review* (1944) vol. 43, pp. 386 ns. 9 and 12, 387 n. 13, 388 n. 18, and 392/393. *But see*, for waiver of the local remedies rule, e.g., FELLER A.H., « *The Mexican Claims Commissions (1923-1934)* », N.Y., Mac Millan, 1935, p. 34 ; NIELSEN F.K., « *International Law Applied to Reclamations* », Washington, J. Byrne & Co., 1933, p. 70.

¹⁵⁵ In fact, such national commissions — applying international law — have been utilized in the last two centuries outside Latin America as well, there being instances where they have waived and not applied the rule of exhaustion of local remedies. BORCHARD E.M., *op. cit.*, p. 818 n. 3 ; THORPE G.C., « *Preparation of International Claims* », Kansas, Vernon-West Publ. Co., 1924, pp. 33 and 26 ; LILLICH R.B., « *International Claims : their Adjudication by National Commissions* », Syracuse University Press, 1962, pp. 71/75, 100 and for treaty practice, pp. 5/40.

¹⁵⁶ Text in OAS doc. OEA/Ser.I/VI.2 - CIJ-61, of 1962, p. 40. And cf reservations by Argentina and the United States, in *Inter-American Juridical Yearbook* (1952/1954) p. 61, see pp. 60/63, and further comments in : *Inter-American Juridical Yearbook* (1955/1957) pp. 96/97 ; A. MIAJA DE LA MUELA, « El Agotamiento de los Recursos Internos como Supuesto de las Reclamaciones Internacionales », *Anuario Uruguayo de Derecho Internacional* (1963) pp. 51/52.

¹⁵⁷ See mainly : *Rapporteur* GUERRERO G. (Sub-Committee, 1926), Report to the League of Nations Committee of Experts for the Progressive Codification of International Law, League of Nations doc. C.46.M.23.1926.V, in *League of Nations, « Committee of Experts for the Progressive Codification of International Law »*, vol. II - Documents (ed. S. Rosenne), N.Y., Oceana, 1972, pp. 116/117 and 127/128, see pp. 118/131 ; F.V. García Amador, First Report on State Responsibility, *Yearbook of the International Law Commission* (1956)-II, para. 169, p. 205.

¹⁵⁸ See mainly : First Conference (1889/1890) : statement by a commission of study ; Second Conference (1901/1902) : Article 3 of a convention on rights of aliens ; Sixth Conference (1928) : Article 2 of a convention on the status of aliens ; Conference of 1933 : Article 11 of the Convention on the Rights and Duties of States, and adopted resolution ; Eighth Conference (1938) : Mexican proposals echoing the Calvo clause and the Drago doctrine of prohibition of use of force for recovery of contract debts. Cf. « *The International Conferences of American States* » (1889/1928), ed. J.B. Scott, London, Oxford University Press, 1931, pp. 45/415 ; YEPES J.-M., *op. cit.*, pp. 93/111 ; FABELA I., « *Intervention* », Paris, Pédone, 1961, pp. 156/168 and 178 ; OAS doc. OEA/Ser.I/VI.2 - CIJ-61, January 1962, p. 39. And on the formulation of the Drago doctrine, see : « *The Hague Conventions and Declarations of 1889 and 1907* » (ed. J.B. Scott), 2nd. ed., London, Oxford University Press, 1915, pp. 89/91 ; YEPES J.-M., *op. cit.*, pp. 61/62.

International Law that Govern the Responsibility of the State ». The study was confined to the practice of Latin American countries, which the Committee deemed in many respects distinct from that of the United States (the latter based on principles upheld by European countries in the nineteenth century, rather than representing a new departure). The 1961 Majority Opinion represented the views of sixteen Latin American countries on the matter, while those of the United States were set forth in a subsequent Opinion delivered by the Committee in 1965¹⁵⁹. The Majority Opinion of 1961 emphatically subordinated all diplomatic claims to the principle of prior exhaustion of local remedies, a principle which in the American continent, the Opinion stated, « is not merely procedural but substantive »¹⁶⁰.

5. CONCLUSIONS

The study of State practice, often overlooked in the present context, is of fundamental importance for a proper understanding of the local remedies rule. If in the practice of arbitral and judicial organs on the subject legal principles have been applied in order to establish responsibility and determine the measure of reparation for the alleged injuries, in diplomatic practice, somewhat distinctly, the contending States have faced each other for the same purpose. Although there might arguably be an imperfect parallelism between the two practices as sources of law on the subject, there appears nevertheless to be a certain equilibrium between them in the shaping of customary rules of international law, for which both are equally important¹⁶¹. But if the case-law of international courts and tribunals on the topic may at times have been inconclusive¹⁶² (not to speak of juristic writing), State practice seems to provide reasonably clear indications for an understanding of the meaning, content and purposes of the rule of exhaustion of local remedies. However much arbitral and judicial decisions may have helped to clarify some of the obscure points surrounding the incidence of the local remedies rule, it is always advisable to embark on such a study with a clear outlook of the historical context within which the rule evolved in the course of many centuries¹⁶³.

¹⁵⁹ Majority Opinion of 1961 in OAS doc. cit., ref. CIJ-61, pp. 37/41 ; cf. also *Yearbook of the International Law Commission* (1969)-II, para. 19, p. 129. For the opposition of the United States government to the Latin American views (at the time the Majority Opinion was being drafted), cf. *Department of State Bulletin* (1959) pp. 666/669. Supplementary Opinion of 1965 (embodying the U.S. views) in OAS doc. cit., ref. CIJ-78, pp. 1/12.

¹⁶⁰ OAS doc. OEA/Ser.I/VI.2 - CIJ-61, of 1962, p. 37, see pp. 37/41.

¹⁶¹ REITZER L., « *La réparation comme conséquence de l'acte illicite en Droit international* », Paris, Sirey, 1938, pp. 131/133.

¹⁶² VERZIJL J.H.W., « *International Law in Historical Perspective* », vol. VI, Leiden, Sijthoff, 1973, pp. 634/636, see also pp. 637/639 and 731/735.

¹⁶³ Particularly in view of the seemingly growing influence of generally recognized rules of international law upon the formulation of foreign policy ; see EUSTATHIADES C.Th., « Evolution des rapports entre le Droit international et la politique étrangère », in « *Mélanges offerts à Henri*

Some conclusions can be submitted from the examination of the evidence assembled in this study of the origin and historical development of the local remedies rule. First, in medieval times and up to the end of the seventeenth century the requirement of prior exhaustion of local means of redress was commonly applied before the taking of reprisals, and subsequently and in modern times prior to intervention. Secondly, the local remedies rule (as it came to be known) applied only to the relationships between a State or a community and foreigners. In elder times, princes and sovereigns issued letters of reprisal only to their subjects (abroad), not to foreigners¹⁶⁴, and after they had exhausted all means of settling the case in the country of residence. In modern times, the rule has applied within the context of the law on State responsibility for injuries to aliens. In all cases one had a claimant complaining of an injury suffered in another country and allegedly engaging the latter's responsibility. Cases involving the local remedies rule always had a *private* origin, even if subsequently the claim was espoused by the sovereign or the State of the injured individual; even though « internationalized » by means of the espousal of the claim, the dispute remained originally one between an injured alien and the host State. Such was the classical field of application of the local remedies rule, with a foreigner requesting his sovereign or his State protection and assistance to obtain reparation for an injury suffered in another country.

These cases should be distinguished from two other kinds of situation. A dispute could also arise directly between two States (*e.g.*, for an alleged direct breach of international law causing immediate injury to one of them), in which case one could hardly expect, by virtue of their very sovereignty, that one State would be bound to exhaust available remedies in the territory of the other. This was sufficiently pointed out by Bynkershoek as early as 1737¹⁶⁵. Another type of situation, much more recent, occurs when an injured individual complains against his own country before an international organ. The local remedies rule has been called upon to apply in such cases as well. This presents many and difficult problems, which it is impossible to examine within the confines of the present study. At this stage it may be submitted as a cautionary remark that, throughout its historical development, the scope of the local remedies rule has been invariably limited to situations concerning foreigners (often wealthy merchants and businessmen or companies) residing or carrying business in another State. Historically, nationals fell outside the scope of the local remedies rule. The proposition that the rule should be applied *ipso facto* in the new situation as it has in the law on State responsibility for injuries to aliens requires careful reexamination.

Rolin », Paris, Pédone, 1964, pp. 80/92. On the role of foreign offices in complying or not with remedies rule, see F.G. DAWSON and I.L. HEAD, « *International Law, National Tribunals and the Rights of Aliens* », Syracuse University Press, 1971, pp. 23/24 and *cf.* p. 50.

¹⁶⁴ NYSÉ., *op. cit.*, p. 71.

¹⁶⁵ BYNKERSHOEK C. VAN, *op. cit.*, pp. 134/135, see pp. 133/137. And *cf.* further subsequent remarks by Vattel (in 1758) : VATTEL E. DE, *op. cit.*, vol. II, p. 313.

The third conclusion relates to the *preventive* character of the rule. By constituting a *conditio sine qua non* for the exercise of reprisals (in older times) and of diplomatic protection (in modern times), not seldom the rule impeded intervention, at a time when sovereigns and States were less reluctant to resort to physical force than they seem to be today. The rule thus played a prominent role in securing some measure of respect for the sovereignty of States, minimizing tensions and favouring conditions for peaceful intercourse and trade relations¹⁶⁶ among sovereigns and States, and setting up claims courts and remedies. Excepted from the application of the rule were cases of denial of justice, undue delays and other grave procedural irregularities.

Fourthly, by the end of the nineteenth century, as the rule had become consistently relied upon by States in their frequent insistence on settlements within the framework of their own internal legal system, it became difficult to deny that it had gradually crystallized into a customary rule of international law, as undisputedly acknowledged by State practice nowadays. Fifthly, there is some evidence in the surveyed State practice (particularly in the Americas) that the rule of exhaustion of local remedies, *in the context of diplomatic protection*, has had a substantive character. The question has led to endless doctrinal controversy (with which we are not concerned here), but, as to State practice, some States have maintained that the *birth* of a State's international responsibility (for the subsequent exercise of diplomatic protection) is contingent upon prior exhaustion of all available local remedies¹⁶⁷. Distinctly, however, in present-day experiments under treaties on human rights protection, for example, the rule has clearly operated as a dilatory objection or temporal bar of a procedural nature.

Sixthly and finally, it was after a long historical evolution that the local remedies rule acquired the shape and features familiar to us in modern days, including its contemporary denomination. In this regard, it seems that Anglo-American practice and juristic writing originally accorded to the rule a larger scope than did the countries and writers of continental Europe and Latin America. This is suggested by the terms used to define the rule¹⁶⁸. The English expressions¹⁶⁹ were wider in scope than their continental cor-

¹⁶⁶ On the influence of the rule upon the creation and development of « minimum standards », see SCHWARZENBERGER G., « *Foreign Investments and International Law* », London, Stevens, 1969, p. 23.

¹⁶⁷ The relationship of the local remedies rule to the *birth* of the international responsibility of States being always a different matter from that of its relation to the *exercise* of that responsibility by means of diplomatic protection.

¹⁶⁸ MUELA M. DE LA, *op. cit.*, pp. 33 and 9; PANAYOTACOS C.P., *op. cit.*, p. 52; TENEKIDES C.G., *op. cit. supra*, p. 520.

¹⁶⁹ *Local redress rule and rule of exhaustion of local remedies.*

responding terms ¹⁷⁰. It seems that — at least originally — while the continental expressions comprised only the jurisdictional *recours* (judicial and administrative), the Anglo-American « means of redress » embraced jurisdictional as well as non-jurisdictional means ¹⁷¹. Nowadays, however, after vast international practice and numerous decisions on the matter, the expressions seem to be used almost synonymously.

¹⁷⁰ *Die Erschöpfung der innerstaatlichen Rechtsbehelfe* (or *Rechtsweges*), *la règle de l'épuisement des voies de recours internes*, *la regola del esaurimento dei ricorsi interni*, *la regla del agotamiento de los recursos internos*, *a regra do esgotamento dos recursos internos*.

¹⁷¹ SARHAN A., *op. cit.*, p. 11.