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THE RULE OF EXHAUSTION OF LOCAL REMEDIES AND LIABILITY FOR SPACE VEHICLE ACCIDENTS†

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It is well known in international law that before a State may espouse the claim of one of its nationals against another country, the individual should have exhausted the means, judicial or administrative, available to him in the State against which the diplomatic protection is exercised. This rule, the so-called rule of exhaustion of local remedies or local redress, has even been described in some cases by the International Court of Justice and its predecessor court as a general principle of international law.[1]

Respecting this rule, there is a United States proposal concerning "the drafting of a treaty on the liability for space vehicle accidents." It is dated 7 May 1962 and was submitted to the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space. It reads in part as follows: "We think that the presentation of a claim should not require the prior exhaustion of any remedies which may be available in the launching State."

Moreover, a further United States proposal,[2] dated 4 June 1962 and addressed to the same Legal Subcommittee, presents the same subject in the following terms:

> A claim may be presented internationally to the State or States or international organization responsible for the launching of a space vehicle causing injury, loss, or damage without regard to the prior exhaustion of any local remedies that may be available.

The following comments are suggested in this connection. The rule of exhaustion of local remedies together with the element of nationality continue to be, in principle, indispensable conditions of diplomatic protection.[3] It is through this diplomatic protection that the application of the international responsibility of States usually comes into being. On

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[1] The convention of 8 September 1923 between the United States and Mexico also dealt with this rule in Article V as a general principle of international law.

[2] A/AC.105/C.2/L.4: Liability for Space Vehicle Accidents.

[3] This is irrespective, of course, of the existing difference of opinion as to whether the rule of exhaustion of local remedies belongs to substance or to procedure.

the contrary, where there is no question of diplomatic protection, the rule of exhaustion of local remedies is not applied, as, *e.g.*, in the *Corfu Channel* case. For the purpose of clarification, this means that the rule of exhaustion of local redress arises only in the event that injury or damage was caused to a national or a private entity of another country. This might happen, for example, when a space engine falls on a State other than the launching one, and the former State espouses the claim of its national against the launching State.

On the other hand, a question of exhaustion of local remedies does not come up, when, *e.g.*, from the fall of a space vehicle damage is caused to the property of another State, or following a collision, a space engine and a state aircraft belonging to another country are destroyed.

In our view, even where a question of diplomatic protection arises, the rule of exhaustion of local redress has started to pass through a certain crisis. There are four reasons for this crisis.

First is the effort of the States to avoid the compulsory jurisdiction of the International Court of Justice when the Court has such jurisdiction. It is the "résistance à la juridiction obligatoire de la Cour" in the words of Charles de Visscher.[4] Some States use the preliminary objection of the non-exhaustion of local remedies in such a way as to be an abuse of right.

Secondly, the crisis has resulted also from the judgments of certain international courts. Those tribunals in some cases and for particular grounds have not regarded the rule in question as applicable. The Court of Justice of the European Communities so decided in the case of *Humblet v. Belgian State.*[5]

Thirdly, the crisis of the rule of exhaustion of local remedies stems also from the confusion which is noticed in practice between that rule and the objection of domestic jurisdiction provided for in Paragraph 7, Article 2, of the Charter of the United Nations. This has also been observed by the Permanent Court of International Justice in the *Losinger & Co.* case.[6] This confusion is somewhat explained by the fact that both objections are based on the protection of State sovereignty. At any rate, the overlapping, in actual practice, of the objection of local remedies with the one of domestic jurisdiction may bring about a limitation on the effectiveness of the objection of local redress. Indeed, the notion of the reserved domain of a State is restrictively interpreted by the practice of the United Nations and has not as yet been a serious obstacle to the activity of that organization.

Fourthly, our view of a crisis concerning the rule of exhaustion of local remedies is evidenced by the increasing influence of politics over the institution of diplomatic protection. The fact that diplomatic protection

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[4] Théories et réalités en droit international public 457 (1960).

[5] Case 6/60, at 18-20: " . . . la Cour étant compétente pour trancher la question de droit qui lui est soumise, dans les limites précises ci-dessus, le fait que le requérant n'a pas épuisé la voie judiciare devant les tribunaux de son pays ne s'oppose pas à la recevabilité du recours."

[6] See Waldock, Principles of Public International Law, Recueil des Cours, at 68-69 (1962) (mimeographed).

grows more and more sensitive to politics has resulted in instability and uncertainty, to some degree, of the rules governing this institution.

Now, as to the question raised by the previously mentioned two United States proposals, *i.e.*, the exhaustion of any local remedies should not be a requirement for the presentation of a claim, the following is to be pointed out.

For the exclusion of the application of the rule of local remedies in space law, the general rules and principles of international law would suffice. As a matter of fact, there is need of nothing more than insertion of a provision precluding the application of the rule in a general or special international agreement on space law. Indeed, the rule of exhaustion of local remedies is not a rule of obligatory application, but it can be avoided by a contrary wish of the parties.[7]

Moreover, the contention could be advanced, with a view to setting aside the rule under the particular circumstances, that in the launching State "there is no justice to exhaust" and especially when it is not to put confidence in the municipal courts or in the administrative authorities of the launching State. Mention of all the well-known exceptions to the rule of exhaustion of local remedies, which exceptions also apply herewith, is not necessary.

At all events, regardless of these exceptions, an international tribunal could prove unwilling to accept the rule of exhaustion of local redress in matters relating to space activities. Such a court would be helped in so doing by the crisis presently experienced by the rule of local remedies which has already been described.

Furthermore, the international action, especially under the form of a recourse to an international tribunal without a prior exhaustion of local remedies, would be necessary in "space cases." Indeed, special knowledge will be required in settling this kind of disputes. Moreover, the courts of the launching State may not have, under their municipal law, authority to deal with questions of international law.[8] Such questions would certainly come up in disputes arising out of space activities.

Some authors already highly praise the internationalization of the activities of outer space and the undertaking of these activities by the United Nations or a specialized agency. This issue is of course closely connected with the whole international situation and particularly with the problem of disarmament. Accordingly, the prospect of a general undertaking of space activities in the near future by an international organization is regarded as improbable.[9] However, there is such a move-

[7] See in this connection the reply of Secretary of State Stimson to the questionnaire submitted by the Preparatory Committee for the Codification Conference of 1930. An instance of an agreement where the parties expressly treated as not obligatory the application of the rule is the above mentioned convention of 8 September 1923 between the United States and Mexico.

[8] See Reuter, Principes de droit international, Recueil des Cours, at 138-39 (1961) (mimeographed).

[9] See Chaumont, Le droit de l'espace 68-69 (1960); N. Poulantzas, *Imperium or Dominium Within the Framework of Space Law*, Revue héllenique de droit international, Jan.-June 1962, p. 67; D. Poulantzas, *The Legal Status of Artificial Satellites*, Revue héllenique de droit international, Jan.-Dec. 1961, p. 225-27.

ment, but in limited scientific spheres, in the activities of the World Meteorological Organization. In any case, should such a future internationalization of space activities materialize, the rule of exhaustion of local remedies will encounter major difficulties in application.

To conclude, the rule of exhaustion of local remedies can and should be avoided in disputes arising out of space activities. Therefore, the United States proposals seem to be a good step in the right direction. The exclusion of the rule of exhaustion of local remedies will lead to improvement and an acceleration of the peaceful settlement of future "space cases."