And, if we conclude that it is important in the public interest of international society as a whole that the Convention, in its entirety (including, above all, part XI), be brought into force soon, we should do what we can, as participants in the international democracy, to see that that event occurs.

Then, whatever the imperfections and limitations of the Convention, it can enter into the reality of international society as a powerful creative force, preparing the minds of all to manage a world in which global social problems call for solutions that far exceed the potentialities of traditional diplomacy and traditional international law. There is nowhere better than the universal social phenomenon of the sea to begin learning to integrate universal social phenomena into the self-socializing of the human species.

PHILIP ALLOTT*

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

I am grateful to you for agreeing to publish a reply to the review by A. A. Cançado Trindade of my book, *Local Remedies in International Law* (86 AJIL 626 (1992)). I shall try to be as succinct as possible with a view to taking up the least possible space.

The reviewer has made a fundamental error in regard to the object of the book. The review assumes that the book is intended to be a study of the rule of local remedies as it is implemented in the protection of human rights. That this is not the case would strike a reader very early, as in chapter I (p. 5) it is made clear that the center of the study "is not the application *per se* of the rule of local remedies by particular organs or to specific areas outside diplomatic protection." The study is directed to the rule of local remedies as such, primarily as a rule linked with diplomatic protection but which has also been developed outside this area, viz., principally in that of human rights protection. There is always a conscious effort to keep the rule as it originated in connection with diplomatic protection of aliens in the forefront while trying to see how the rule has developed outside that area, particularly with a view to finding the similarities and differences in its development in human rights protection and in diplomatic protection, as well as the lessons its application elsewhere may furnish for its application in the law of diplomatic protection. The focus is certainly not on the law of human rights protection, as such or for its own sake. The study is of the rule in its totality, the interest in human rights protection being essentially because it has also been applied since the 1950s in that area. Though the book is 384 pages long, not more than 90 are concerned with human rights protection as such—less than 25 percent—though sometimes, but not often, where the subject matter permits, human rights protection and diplomatic protection are considered together. In fact, on some aspects of the subject there is little or no discussion of human rights protection (see, e.g., ch. IX) because there is little or no pertinent material. For these reasons also, the inclusion of chapters II, III and XIII was justified. The reviewer in effect reviewed only a small part of the book by evaluating it as a work only on human rights protection and confining his comments to this area. It will also be

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readily apparent that the content, tenor and methodology of the book are totally different from those of the reviewer's book, which was published in 1983 (completed before 1980, I believe) and concerned human rights protection as such, though it had a broader title, and which is the first work on human rights mentioned in chapter I (p. 6 n.13) of my book.

As a consequence of the limited scope of the review, the valuable material, analysis and discussion regarding the rule of local remedies in general are totally ignored. Thus, one may wonder whether it is useful to make a defense against the criticism of the approximately 25 percent of the book that deals with human rights protection. Be that as it may, I will attempt to comment on the criticisms made.

In regard to the quarter of the book reviewed, the reviewer has adopted a rather nit-picking approach to scholarship and consequently has failed to see the wood for the trees. More will be said below about the methodology of the book. For the present, suffice it to say that it was never my intention to espouse or propose an understanding of the rule of local remedies as applied to human rights protection as being the desirable or proper one, as the reviewer contends at the end of the review. Since the general object of examining and analyzing material on human rights protection was to see objectively and particularly how different or similar the approach taken by the relevant human rights organs was to that established for diplomatic protection, and perhaps whether the human rights experience could be usefully applied to diplomatic protection, it was not unlikely that departures, flexibility and inconsistencies would be noted. There is no contradiction in admitting that these exist or that there also are similarities. In fact, there is very little criticism of the approach taken by human rights organs, which is, in my view, acceptable—the technique was to analyze the material and present a canvass. It was not my intention to suggest that there be exact parallelism in the two areas and I do not think I did this. On the other hand, I did try to reconcile trends, wherever possible, without damaging the integrity of the source material. The reviewer detects a concoction of conflicts (he refers to pp. 202 and 296). The examination of the material in these parts of the book is consistent with the intention of showing where departures that are recognized have taken place. I do not see what the problem is. Where the analysis shows conflict in the jurisprudence of the human rights organs, this is admitted too. The object was never to force the jurisprudence into a pattern, though reconciliation, where this was possible, was attempted. Further, I do not think the evidence shows that human rights organs regard the rule applied in the human rights area as "fundamentally different" from that applied to diplomatic protection. Also, the criticism leveled in many instances shows a misinterpretation and misunderstanding of what was written in the book, sometimes because quotation is out of context.

In this connection, there is no authority for the reviewer's contention that the requirement that human rights organs apply the rule "in conformity with the generally recognized principles of international law" is a dead letter. That principle has never been denied by international organs and undoubtedly they have the rule as applied to diplomatic protection in mind when applying it to human rights protection. However, this does not mean that the application of the rule in the human rights area must relentlessly "mirror" its application to diplomatic protection. The book never suggests this, though it is possible to conclude that in many areas the application is similar—this conclusion emerges from the analysis.

Equally, I cannot subscribe to the reviewer's view that an important interest behind the rule as applied to human rights protection is not that of the state in having its sovereignty respected. There are certainly other important interests involved and these are discussed in chapter IV, but the interest of sovereignty cannot be denied. My reading of the cases and my discussions with judges of both the European Court of Human Rights (ECtHR) and the Inter-American Court of

Human Rights (IACtHR) certainly do not support the views expressed by the reviewer on both the above points.

In addition, some particular points may be addressed:

(1) The reviewer contends that human rights protection is not conventional anymore. He cites the work done under UN ECOSOC Resolution 1503 and of the Inter-American Commission on Human Rights. But, in effect, both these activities are conventional because they flow from provisions in or interpretation of the basic instruments of the United Nations and the OAS. In any event, my main concern in the book was with the enforcement of human rights protection based directly on treaties such as the European and American Conventions.

(2) It can legitimately be contended that organs such as the Human Rights Committee (HRC) act quasi-judicially, if not judicially. The contrast expressed in my book (p. 254) is between conciliation and acting quasi-judicially or judicially. I think the distinction is valid.

(3) I do not see the validity of the distinction the reviewer makes between redress and exhaustion of remedies in relation to the rule.

(4) I also do not see how the discretionary nature of diplomatic protection should generally make a difference to the implementation of the rule.

(5) "Direct injury" and "jurisdictional connection" are discussed in the book primarily in relation to diplomatic protection. They are then discussed for the sake of completeness in relation to human rights protection, though they are not so important in this connection. I do not see the reviewer's problem about these subjects, considering that what is said about them in relation to human rights protection can be theoretically supported, though there is no case law on the matter.

(6) Again, to say that human rights disputes are not international disputes, as the reviewer does, seems to me to take the whole area of human rights protection out of the arena of international law. This seems to be contrary to what is commonly understood. A human rights violation is a violation of international law, whether one looks to specific conventions or the UN and OAS Charters or resolutions.

(7) The reviewer also states, for instance, that I have not taken account of the cases where "estoppel" was admitted as an excuse for not exhausting local remedies. The "estoppel" that he refers to in the cases he cites in his footnotes 8 and 9 is dealt with on pages 268–70 of my book. I prefer to treat this kind of "estoppel" as an implied waiver, although the word "estoppel" is used in the ECtHR cases. This waiver arises from the failure to raise the objection to admissibility at the proper stage. The point was so obvious that it was unnecessary to list all the cases in which the implied waiver was held to operate. The term "estoppel" was reserved in the book for those situations where the rule does not apply because of the general or specific conduct of the state before proceedings are begun in the international forum (see pp. 272–75). This seems to be the meaning generally given to estoppel and is certainly the one used in the *ELSI* case.

The reviewer makes a few more points that are not addressed here because this reply would become inordinately long if they were. In these instances, too, the reviewer either shows a misunderstanding of my position, overlooks a possible interpretation of the source material, or holds a different view from mine, which he is legitimately entitled to do.

Lastly, the reviewer reprehends the technical methodology of the book. The two points he makes in the last part of his review are (1) that much of the book is dependent on the work of others, and (2) that a number of cases were not cited.

I would like to make a general point before addressing each of these criticisms in turn. The reviewer's approach to scholarship differs entirely from mine and

does not reflect, in my opinion, the consensus of international jurists and lawyers. It happens also to be a very dry and stultifying one. In any event, the book is not a Ph.D. thesis. To assume, as the reviewer apparently does, that all scholarship, in order to be a contribution, must present material that has not been unearthed before does not take into account that the best and greatest part of intellectual originality lies in analysis and creativity. Besides, source material is not the preserve of the person who first happens to find it. It can legitimately be utilized by any scholar who wishes so to do, however it is found. The short point is that it is not the finding by itself of new source material, which may or may not exist, that warrants the production of scholarly work; analysis of any material, whether discovered by the author or not, and creativity justify such work. My book was intended to be a study of the local remedies rule in international law, whether the material used was discovered by others or not. Whether the book is a contribution to literature should be judged in terms not merely of its usefulness as a source book but essentially of the analysis and creativity it contains.

To turn to the first point, let me set the record straight. Virtually the first pieces of work on local remedies after World War II were two articles by me published respectively in the *International and Comparative Law Quarterly* in 1963 and the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* in 1965. They were on the subjects of chapters IX and XIII of the book. These chapters derive from the earlier work, to which new material was added. In 1967 Oxford University Press published a book by me entitled *State Responsibility for Injuries to Aliens*, three rather long chapters of which (a sizable part of the book) dealt only with local remedies. One of these chapters, together with other material in that book, formed the basis of chapters IV, VI–VIII, X and XI of the book being discussed, which incorporates more material, including the work of the ILC, and develops the analysis and theory. As far as I know, in 1967 I was the first author to make a seminal systematic study of local remedies in the protection of human rights, which was at that time at an incipient stage, in a paper done for the Centre for Research of the Hague Academy of International Law (under the guidance of Dr. H. Golsong, then Director of the Human Rights Department of the Council of Europe). This paper was later published in both the *Zeitschrift* (1968) and the *Indian Yearbook of International Affairs* (1968). Much of the part of my recent book on human rights protection is based on that study, developed in the light of subsequent work, including my own and that of others, among whom is the reviewer. My works mentioned above, it will be noted, were all completed long before the reviewer published his book and before his articles appeared. In addition, I published a later (1976) article in the *Zeitschrift* on the local remedies rule in general. It will be noted that chapters I, V and XIV of the book under discussion are general in nature. Chapter III embodies a fresh look and analysis. The appendix contains a good deal of new material. To say, as the reviewer implies, that in, among others, chapters VI–VIII, X and XI work done by others is the gist of the studies is totally misleading. It gives the impression that nothing new was added. While work done by others is examined and discussed and earlier sources discovered by others are used, the analysis is original. Further, fresh material, insofar as any exists, was included, e.g., the pleadings in the *Barcelona Traction* case and the *Aerial Incidents* case and several human rights cases. Insofar as *ideas* used by others were included, these are acknowledged, no other acknowledgment having been deemed necessary. Sources are objective and may be researched by any scholar; ideas are subjective and should be acknowledged.

The reviewer notes that sources cited in chapters III and XIII particularly are similar to sources cited by others, particularly the reviewer. Sometimes sources are similar because they are the only or best sources. On the other hand, to single this feature out as a fault and to criticize the absence of proper acknowledgment is again misleading and unwarranted. In chapter III the relevant sources that may be identified as being so similar are dealt with in the first five pages or so of the chapter, particularly in the long footnotes 6–9. However, the meat of the chapter,

which is analysis and discussion and is originally mine, is in the next fifteen or so pages. Why should this be ignored? In any case, new sources are cited, e.g., the works of Mann and Schwebel and the *Barcelona Traction* case, particularly the pleadings. Likewise, in chapter XIII, which is truly largely based on my own earlier article and book, about ten pages at the beginning refer to what may be called similar sources. The remaining thirty pages consist mainly of original analysis and discussion and are built on my own earlier work and include other sources discovered by me. In both chapters what is important is the 75 percent or so that is not taken into account by the reviewer. Thus, can the reviewer's complaints about these chapters be justified?

It may be mentioned that I do not treat the work of the reviewer disparagingly in this book, though I may disagree with his views; rather, among other things, I refer to his views frequently, acknowledge his article on the subject of chapter II in footnote 1 of that chapter, and list numerous works by him in the select bibliography (a whole page of them). But the short point is that, though material may be used that was not originally discovered by me, the reader will realize, I think, that the material was researched by me and the analysis and views are originally mine. On the other hand, there is a good deal of material unearthed by me. The reader is also referred to chapter I, where the purpose of bringing up to date and reexamining material is specifically mentioned and many earlier works, including the reviewer's, are cited. There was no intention of being pretentious or hypocritical about the object of the book.

The second point made by the reviewer regarding the omission of cases overlooks the fact that the book was published in January 1990, having been completed late in 1988. Thus, the final judgment of the IACtHR in the *Honduras* case (1989), referred to in his footnote 6, had not been published at the time the book was written. Several cases referred to in his footnotes 8–11 were published after the book was completed; for example, the eleventh advisory opinion of the IACtHR, which is particularly useful. I have completed a contribution flowing from that opinion which will be published in a collection of essays in honor of an international legal scholar. The reason the *ELSI* case (1989) was included was that it was a very important decision to which I had access even before it was officially published. To be fair, the reviewer should have realized that decisions published in 1989 and 1990 could not have been included. The HRC decisions referred to in his footnote 7 appeared in volume II of the *Selected Decisions of the Human Rights Committee under the Optional Protocol,* published in 1990 after the completion and publication of the book. In any case, these cases merely support and do not add to what was said in cases already cited. I had access to some of these but decided not to use them because they did not add anything. Those cases which were available (not all the others were) were not included because they did not add anything to the discussion. I do not see the point in routinely packing footnotes with citations of cases that merely repeat what those already cited say. I have since rechecked and researched all the cases mentioned by the reviewer and, am happy to say, stand by my decision not to include those that were available.

The reviewer has found nothing right, positive or useful in the book. This seems a very unlikely conclusion to reach in relation to a work of this nature. While the reviewer is entitled to disagree with the author and hold steadfastly to his own views, among other things, the vitriolic manner in which he makes his criticism leads one to wonder what value there is in the review. That I leave to the reader to judge. What is important, if the book is to be of use, is to understand the object and methodology of the book, which is explained very clearly in chapter I.

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