

The general rule of public international law provides that before a state can espouse a claim of one of its citizens against another state the citizen must first pursue the remedies open to him within the domestic laws of the state against which the claim is made. The decision of the Government of Canada to espouse the claim of McTaggart is founded upon an exception to the exhaustion of local remedies rule, an exception which is based upon the same policy considerations which lead to the creation of the rule. If a person, who has suffered an injury at the instance of a state of which he is not a national, is a resident of that state, or present in the state when the injury occurs, or carrying on business with the state or its nationals it can be inferred that he submits, initially, to the jurisdiction of the State. The respondent state should then have the opportunity of redressing the grievance before the dispute acquires the characteristics of an interstate claim. If a claimant has not created a residential or contractual tie with the respondent state it is illogical in theory and often financially prohibitive in practice to expect him to pursue his remedies within the venue of the respondent state.⁽¹⁾ In the instant case Mr. McTaggart suffered his injury on the high seas and had not established the necessary factual "link" to require him to exhaust his legal remedies under French domestic law as a prerequisite to an espousal of his claim by the Government of Canada.

It is interesting that British common law supports the above analysis in that it distinguishes between remedies for tortious actions of agents of the Crown which are committed within the jurisdiction of the State from those committed abroad. In the case of *Johnstone v. Pedlar*, Lord Finlay said the following:⁽²⁾

"It is the settled law of this country ... that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be. This rule of law has, however, been held subject to qualification in the case of acts committed abroad against a foreigner. If an action be brought in the British courts in such a case it is open to the defendant to plead that the act was done by the order of the British Government, or that after it had been committed it was adopted by the British Government. In any such case the act is regarded as an act of the State of which a municipal court cannot take cognizance. The foreigner who has sustained injury must seek redress against the British Government through his own Government by diplomatic or other means."