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HE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY

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CHAPTER XIV

THE DOCTRINE OF ABUSE OF RIGHTS AS AN INSTRUMENT OF CHANGE

§ 15. History of the Doctrine. Although as yet unknown in text-books of international law, the doctrine of abuse of rights has recently attracted the attention of international lawyers.[1] The essence of the doctrine is that, as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right. For the determination of such abuse of rights the question of subjective fault and intention may, but need not always, be material. It is easy to see why the doctrine thus conceived can be regarded as one of great potentialities in the process of judicial legislation adjusting the law to new conditions and preventing unfair or anti-social use of rights. In many cases the use of a right degenerates into a socially reprehensible abuse of right, not because of the sinister intention of the person exercising the right, but owing to the fact that, as the result of social changes unaccompanied by corresponding developments in the law, an assertion of a right grounded in the existing law becomes mischievous and intolerable. The time is then ripe for judicial 'manufacturing of a new tort'[1]—a process, that is to say, which destroys the hitherto recognized freedom of action and creates a new right to legal protection from injurious interference. It is easy to see why in international society, in which there is no authoritative legislative machinery adapting the law to changed conditions, there may be both frequent occasion and imperative necessity for the judicial creation of new torts through the express or implied recognition of a principle postulating the prohibition of abuse of rights.

In fact, the view that the prerogatives of State sovereignty do not imply an unrestricted and indiscriminate use of formal rights has been expressed by many international lawyers of distinction. In 1896 Heilborn, in his *System des Völkerrechts*,[2] discussed the application to international relations of the conception of abuse of rights. Although, under the influence of the current attitude of scepticism towards analogies of private law, he admitted some hesitation in introducing it *eo nomine* into international law, he adopted it in substance. We find Westlake saying that 'no principle is more firmly established in the science of law than that which says to an owner *sic utere tuo ut alienum non laedas*'.[3] Professor Hyde has urged that 'the society of nations may at any time conclude that acts which an individual State was previously deemed to possess the right to commit without external interference, are so injurious to the world at large as to justify the imposition of fresh restrictions'.[4] A large part of the law of intervention is built upon the principle that obvious abuse of rights of internal sovereignty, in disregard of the obligations to foreign States and fundamental duties of humanity in relation to the State's own population, constitutes a good legal ground for dictatorial interference.[5] We find Ullmann pointing out that intervention is necessary, seeing that national law does not provide a remedy against abuse of rights,[6] or, again, Heilborn saying that the purpose

[1] In particular, Professor Politis has treated it systematically in a series of lectures given in July 1925 at The Hague Academy of International Law under the title 'Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux'. *Recueil des Cours*, 1925 (i), pp. 1–109. In these lectures, after drawing attention to certain limitations upon State sovereignty in modern international law and to the tendencies restricting the field of the so-called exclusive jurisdiction (*domaine réservé*), he attempted to show that the doctrine of *abus des droits* as applied by French courts and developed in detail by French writers constitutes a general principle of law which as such has a place in international law and is capable of application by international tribunals. See, e.g., Borel and Politis in *Annuaire*, xxxiii (2) (1927), pp. 750–5; Le Fur, ibid., pp. 786–8; Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht* (1928), pp. 35–8; Boeck in *Recueil des Cours*, 1927 (iii), pp. 627–40; Leibholz, 'Das Verbot der Willkür und des Ermessensmissbrauches im völkerrechtlichen Verkehr,' in *Z. f. a. ö. R. und V.*, i (1) (1929), pp. 76–125; Stowell, *International Law* (1930), pp. 122, 137, 143, 171, 376, 380; Scerni, *L'abuso del diritto nei rapporti internazionali* (1930). And see for frequent references to *abus des droits* in international law Josserand, *De l'esprit des lois et de leur relativité; Théorie de l'abus de droit* (1927), especially pp. 250–62. But see Cavaglieri, *Nuovi studi sull'intervento* (1928), pp. 42–52, who rejects the application of the doctrine in international law on the ground that it is a purely natural law conception and that it is ill-suited to the individualistic character of international law.

[1] See Winfield in *Columbia Law Review*, xxvii (1927), p. 11.

[2] (1896), pp. 358–61.

[3] *International Law*, 1st ed. (1907), ii. 322. The statement refers to the right of the belligerent to use floating mines.

[4] Op. cit., i (1922), p. 85.

[5] See Hyde, op. cit., i. 118.

[6] *Völkerrecht* (revised ed., 1908), p. 461.

of intervention is to prevent *summum jus* from becoming *summa injuria*.[1]

§ 16. The Practice of International Tribunals. Recently the doctrine of *abus des droits* seems to have secured some measure of recognition on the part of the Permanent Court of International Justice which has twice had occasion to refer to it in its judgements. In Judgement No. 7, in the case concerning certain German interests in Polish Upper Silesia, the Court was, *inter alia*, called upon to answer the question whether Article 256 of the Treaty of Versailles, which provided that the Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States, precluded Germany from disposing of her property from the day of the coming into force of the Treaty until the transfer of sovereignty over Upper Silesia in accordance with Article 88 of the Treaty. The Court held that Germany retained the right to dispose of her property until the actual transfer of sovereignty. Yet it qualified this permissive rule by saying that 'only a misuse of this right [*abus de ce droit*] could endow an act of alienation with the character of a breach of the Treaty'.[2] The Court added that 'such misuse cannot be presumed' and that 'it rests with the party who states that there has been such misuse to prove this statement'. The same terms were used in the Court's Order of 6 December 1930 in the case between Switzerland and France concerning the free zones of Upper Savoy and the district of Gex.[3] In this case the Court, while agreeing that, by virtue of certain international obligations entered into in 1815, France was prevented from levying at the political frontier duties on the importation and exportation of goods coming to and from France, rejected the Swiss contention that the duty to withdraw the customs-frontier behind the political frontier also implied the obligation not to levy duties and taxes other than those on the importation or exportation of goods. The Court held that, subject to specific obligations, France was entitled to apply her fiscal legislation in the territory of the free zones in the same manner as in any other part of French territory. But it added the *caveat* that 'a reservation must be made as regards the cases of abuses of a right [*pour le cas d'abus de droit*]'.[1] As in Judgement No. 7, the Court added that such an abuse of rights could not be presumed.

[1] Loc. cit. For a number of other references see Cavaglieri, op. cit., p. 44.
[2] Series A, No. 7, p. 30. [3] Series A, No. 24.

However, long before the doctrine of abuse of rights had been introduced, international tribunals applied it in substance in a number of cases. Their attitude towards the alleged right of expelling aliens at the absolute discretion of the receiving State may be mentioned as an instructive example. That there exists such an absolute right has been maintained by many a writer. Thus, for instance, Oppenheim maintains that a State can expel every alien according to discretion,[2] and that the expulsion of an alien without just cause cannot constitute a legal wrong.[3] It would be difficult to find a confirmation of this view in the practice of international tribunals which have been frequently called upon to adjudicate claims for wrongful and indiscriminate expulsion. In the great majority of cases, while admitting the general right of the State to expel aliens, international tribunals stressed at the same time the limitations of this right either in regard to the expulsion itself or to the procedure accompanying it. 'The country exercising the power of expulsion must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accept the consequences', said the arbitrator in a learned award in the *Baffolo* case.[4] The same principle has been expressed in a number of other awards,[5] either directly or indirectly, in the form of a refusal to grant compensation when there had been a clear reason for expulsion, for instance when the alien had taken part in subversive activities.[6] The conspicuous feature of these awards is the view that the undoubted right of expulsion degenerates into an abuse of rights whenever an alien who has been allowed to take up residence in the country, to establish his business and set up a home, is expelled without just reason, and that such an abuse of rights constitutes a wrong involving the duty of reparation. The same attitude has been adopted by some international tribunals in regard to the duties of States in connexion with

[1] Ibid., p. 12. See also, to the same effect, the final judgement in this case given on 7 June 1932, *P.C.I.J.*, Series A/B, No. 46, p. 167. [2] i. p. 279.
[3] pp. 561, 562. [4] Ralston, *Venezuelan Arbitrations of 1903*, pp. 696, 705.
[5] The *Oliva* case, ibid., p. 771; *Paquet case*, ibid., p. 265; *Ferman* case, Moore, p. 3348, and see ibid., pp. 3334–59 for a number of other cases. See for a survey of these cases, Ralston, Nos. 515–24; Politis, op. cit., pp. 101–8; Boeck, loc. cit.
[6] The *San Pedro* case, Moore, p. 3354. See also the *Maal* case, Ralston, *Venezuelan Arbitrations*, p. 914.

the closure of their ports to foreign commerce. While the right to decree such closure has never been questioned, it was held that the closing of ports without due notice to those regularly admitted to them constitutes a wrong which entails the duty of reparation. This was the award rendered on 30 November 1843 by the King of Prussia in the dispute between Great Britain and France concerning the blockade and the closure of the ports on the coast of Portendic in the French colony of Senegal.[1]

Disapproval of the anti-social use of rights has been voiced even in cases in which regard for the rights of State sovereignty appears to have been the decisive consideration. This may well be seen from the *Faber* case concerning the closing of the ports of the Catatumbo and Zulia rivers by Venezuela. Duffield, Umpire, who otherwise spoke a very Austinian language on the nature of international law,[2] and refused to question the right of the State to prohibit navigation on rivers which flow to the sea, nevertheless qualified his attitude by adding the phrases 'temporarily' and 'if necessary to the peace, safety, and convenience of her own citizens'.[3] He hastened to add that the State must be the sole judge whether the closure is so necessary, and that its decision must be final and not admitting of review. But he thought it necessary to point out 'that a case for the exercise of this discretion did exist is obvious', and his final pronouncement referred to the lawfulness of the closure 'under the circumstances which existed at the time'.[4]

§ 17. The Practice of Quasi-international Tribunals. The most numerous and instructive instances of the prohibition of abuse of rights are derived from the practice of quasi-international tribunals, i.e. tribunals administering law—municipal and international—between state-members of Federal States. In particular, the Supreme Court of the United States has had occasion to check the abuse of rights in matters frequently regarded as falling within the absolute discretion of the State. The question of interference with, or diversion of, waters of rivers flowing from one State to another has frequently been the subject of the jurisdiction of the Supreme Court restraining States from exercising their rights in an unsocial manner to the detriment of other States. The jurisdiction of the Supreme Court was exercised in a similar spirit in other complaints against the abuse of rights, such as the disposing of sewage by one State so as to affect injuriously the health of citizens of another State,[1] or legislation interfering with the supply of certain commodities to the other State.[2] The Swiss Federal Court has been confronted with similar problems. In the dispute between Aargau and Zürich in 1878 it affirmed the principle that, in the case of public waters which extend over several cantons, 'none of them may, to the prejudice of the others, take such measures upon its territory as . . . may make the exercise of the rights of sovereignty over the water impossible for the other cantons, or which exclude the joint use thereof or amount to a violation of territory'.[3] And it emphasized the duty of 'rational

[1] See for the award Lapradelle and Politis, I. 525, and generally on the whole case, ibid., pp. 512–44. However, see above, p. 96, on the award of the President of Chile in the dispute concerning the closure of Buenos Ayres. Cavaglieri, op. cit., p. 51, expresses the opinion that the award in the *Portendic* case can hardly be regarded as an affirmation of the doctrine of abuse of rights. In his view, the wrong consisted in the failure to comply with the duty of proper notification, a duty the existence of which a large number of international lawyers had previously assumed by analogy with the duty of notification of a war-blockade. Professor Cavaglieri's objection does not seem to the writer to be convincing. It does in effect amount to saying that the prohibition of the abuse of an otherwise uncontested right was established, not by the arbitrator in question, but by the previous consensus of international opinion.

[2] Ralston, *Venezuelan Arbitrations*, p. 555. [3] Ibid., p. 626.

[4] Ibid. See also Nys in *R.I.*, 2nd ser., v (1930), p. 517. See also the *David J. Adams* case decided on 9 December 1921 by the British-American Claims Commission (Nielsen's *Report*, p. 526), in which the Tribunal considered and attached importance to the question whether this was a case 'of a sudden and unexpected change of a government's conduct towards a foreigner suddenly surprised by that change'.

[1] *Missouri* v. *Illinois* (1901), 180 U.S. 208. In the case of *Louisiana* v. *Texas* (1900), 176 U.S. 1, in which the plaintiffs asked for a ruling enjoining the defendants from enforcing quarantine regulations injuriously affecting the citizens of Louisiana, the Court dismissed the action on the ground that the controversy was one in vindication of a grievance not of Louisiana as a whole, but only of a particular individual, and also because the Bill failed to show that Texas had authorized or confirmed the alleged action of her health officer.

[2] *Pennsylvania* v. *West Virginia* (1922), 262 U.S. 553. See *Kansas* v. *Colorado* (1901), 185 U.S. 125, in which the Court affirmed its jurisdiction in an action in which it was contended that the defendant State attempted to deprive the State of Kansas of the benefit of water from the Arkansas river which rises in Colorado and flows into and through Kansas; and, for the decision on the merits (1906), 206 U.S. 46. And see *Wyoming* v. *Colorado* (1922), 259 U.S. 419; *North Dakota* v. *Minnesota* (1923), 263 U.S. 365—an action in which the Supreme Court assumed jurisdiction in a suit against the maintenance by Minnesota of an artificial drainage system within its borders with the result that the natural capacity of the interstate stream was greatly increased and the water flooded the farms of the other State; *Wisconsin* v. *Illinois* (1929), 278 U.S. 367; (1929), 281 U.S. 179—a suit for enjoining the State of Illinois and the Sanitary District of Chicago from continuing to withdraw 8,500 cubic feet of water per second from Lake Michigan at Chicago. See below, p. 323.

[3] *Recueil des Arrêts*, iv. 46, 47, cited after Schindler in *A.J.* xv (1921), p. 170.

utilisation' of public waters 'so as not to injure the interests of the neighbours'. In the dispute between Solothurn and Aargau in 1900, a case arising out of the alleged endangering of the territory of Solothurn on account of target practice in Aargau, the Court, in answer to the plea that the latter may make use of its territory as it pleases, said that 'in international law, especially in relations within Federal States, the principle of law of vicinage holds good to the effect that the exercise of one's own rights should not prejudice the rights of one's neighbours', and that if these rights are of equal value 'a rational compromise must take place according to the natural conditions'.[1] The German *Staatsgerichtshof*, in the important case decided on 18 June 1927 between Württemberg and Prussia on the one hand and Baden on the other, not only affirmed the duty to refrain from undue interference with the flow of the river to the detriment of the lower riparian State, but also laid down that it is the duty of the riparian State to perform acts of a positive nature—like the strengthening of the banks and regulating the flow of the river—as a matter of normal policy in the interests of navigation of all riparian States.[2]

§ 18. The Prohibition of Abuse of Rights as a General Principle of Law. Is the principle of the prohibition of abuse of rights a general principle of law entitled, by virtue of its generality, to application by international tribunals? To the English lawyer the conception of abuse of rights appears at first sight foreign to his own law. He will point to *damnum sine injuria*; he will refer to the case of *Mayor of Bradford* v. *Pickles*,[3] in which it was held that if the owner sinks a well, not in order to get water for himself, but solely in order to drain his neighbour's spring, his act is not unlawful, because 'no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious';[4] he will point to cases like *Allen* v. *Flood*,[5] in which it was held that whatever his motives may be a person does not act unlawfully if he persuades or induces a man, without having recourse to

[1] *Recueil des Arrêts*, xxvi (1), pp. 450, 451, quoted after Schindler, op. cit., p. 173.

[2] *Entscheidungen des Reichsgerichts in Zivilsachen*, cxvi, Appendix, pp. 18–45; *Annual Digest*, 1927–8, Case No. 86.

[3] [1895] A.C. 587.

[4] Lord Watson, ibid., p. 598.

[5] [1898] A.C. 1.

unlawful means, to do something which is not prohibited by law, although such act may injure another person.[1]

How far the element of malice is entirely excluded from the domain of the English law of torts is not a matter which can be here examined in detail. It is possible to find cases, decided in a period when the individualistic doctrines of economic *laisser-faire* were less predominant, in which the question of malice plays a large part.[2] And it would be idle to try to exclude it altogether from the law on the abuse of legal process (including malicious prosecution), libel, and nuisance.[3] Apart from the relevance of malice the answer to the question under discussion will depend largely on the approach to the basic problem of the law of torts, that is to say, on the question whether the law of torts is a body of rules exhaustively establishing specific injuries, so that it lies in each case upon the plaintiff to show that the act complained of falls within some established rule of liability,[4] or whether it is a branch of law governed by the comprehensive and

[1] Probably the English lawyer will insist that whatever may be the fate of *Allen* v. *Flood* as the result of the decision in *Quinn* v. *Leathem*, [1901] A.C. 495, the remarks there made on the point of malice still hold good.

[2] See Lord Holt in *Keeble* v. *Hickeringill*, 11 East 574, n., 11 Mod. 74: 'Suppose the defendant had shot in his own ground, if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing and a wrong.' And see Wigmore, 'Responsibility for Tortious Acts: Its History' in *Selected Essays on the Law of Torts* (1924), p. 76, who says that 'the principle *sic utere tuo ut alienum non laedas* was early familiar to judges, and can clearly be traced even when it is given an English garb', and quotes Holt, C.J., in *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089 (1705), and Gibbs, C.J., in *Sutton* v. *Clarke*, 6 Taunt. 29 (1815). And it will be observed that even in *Mayor of Bradford* v. *Pickles* it was admitted that *animus vicino nocendi* might make a difference. Thus Lord Watson, while referring to the fact that in *Acton* v. *Blundell*, 13 L.J. Ex. 289, 67 R.R. 361 (1843), the Court relied on a passage from the *Digest* (*D.* 39, 3, *de aqua*, 1, § 12), in which *animus vicino nocendi* is regarded as material, explained that that passage referred to cases where the owner of the land can as well do the thing he wants to do without nuisance to his neighbour and yet wantonly does it at a place where it causes annoyance. The passage in question is: 'Marcellus scribit cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.' This Roman prototype of *Mayor of Bradford* v. *Pickles* is of some interest, as there has been a tendency recently to attach decisive importance to the Roman law maxims *feci sed jure feci* and *nullus videtur dolo facere, qui jure suo utitur* (*D.* 50, 17, 55) as expressive of the individualistic character of Roman law. See also *D.* 38, 6, 1: *neque malitiis indulgendum est*, and I. 1, 8, 2: *expedit rei publicae, ne quis sua re male utatur*.

[3] See Pollock, *The Law of Torts* (11th ed. 1920), p. 412, referring to *Christie* v. *Davey*, [1893] 1 Ch. 316, 326, and observing that although where nuisance is once proved the defendant's intention is not material, 'a proved intention to annoy the plaintiff may be relevant to show that the defendant is not using his property in an ordinary way such as good neighbours mutually tolerate, and it will naturally set the Court against him in all matters of discretion'.

[4] Salmond, *Law of Torts* (4th ed. 1916), p. 9.

pervading rule that 'it is a wrong to do wilful harm to one's neighbour without lawful justification or excuse',[1] so that prima facie the intentional infliction of damage is a cause of action requiring justification if the defendant is to escape. Which line of approach is the more in keeping with the actual content of the common law is a matter upon which the writer hesitates to pronounce an opinion. But if the latter view—advocated by authorities of the calibre of Lord Bowen,[2] Mr. Justice Holmes,[3] and Sir Frederick Pollock[4]—be correct, then it is submitted that the cleavage between English law and the modern Continental systems of law is not as deep as may be supposed.[5] For the problem of abuse of rights is only to a limited extent identical with the question of malicious

[1] Pollock, op. cit., p. 20.

[2] 'At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse.'—*Skinner & Co.* v. *Shew & Co.*, [1893] 1 Ch. 413 at p. 422. And, to the same effect, *Mogul Steamship Company* v. *McGregor*, [1889] 23 Q.B. Div. at p. 613.

[3] In *Aikens* v. *Wisconsin*, 195 U.S. 194 at p. 204; 'Justifications . . . may depend upon the end for which the act is done. . . . It is no sufficient answer to this line of thought that motives are not actionable, and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen.'

[4] Loc. cit. See also to the same effect Winfield in *Columbia Law Review*, xxvii (1927), pp. 1–11.

[5] Article 226 of the German Civil Code lays down that 'the exercise of a right is not permitted when its only object can be to cause damage to another'. For a wealth of literature and judicial authority which has grown round this subject see Staudinger's *Kommentar*, 9th ed., i. (1925). This article obviously refers to malicious abuse of rights, and ought to be distinguished from Article 826, according to which any one who deliberately inflicts damage upon another person is bound to compensate the damage.

Article 2 of the Swiss Civil Code provides: 'Every person is bound to exercise his rights and fulfil his obligations according to the principles of goodf aith. The law does not sanction the evident abuse of a person's rights.' See on this article pp. 10 and 11 of Reichel's *Commentary on the Swiss Code* (1911).

In France the doctrine of abuse of rights because of malicious motive—*nuire à autrui sans profit pour soi-même*—although without direct foundation in the Code and possibly not warranted by Article 544 of the Code, has been recognized and developed by the consistent practice of courts. See for an account of the French practice in the matter, Walton, 'Motive as an Element in Torts in the Common and in the Civil Law', in *Harvard Law Review*, xxii (1908–9), pp. 501–19. However, the learned author somewhat confuses *abus des droits* for malicious motives with *abus des droits* in general. Cases practically identical with *Mayor of Bradford* v. *Pickles* have arisen in France, and in each case it was held that the owners were liable in tort: see, for instance, *Badoit* v. *André*, *Cour de Lyon*, 18 April 1865, *Dalloz*, lvi (2), p. 199, and *Forissier* v. *Chaverot*, *Cour de Cassation*, 10 June 1902, *Sirey* (1903), i. 11. See also for a comparative study, Ames, 'How far an Act be a Tort because of the Wrongful Motive of the Actor', in *Harvard Law Review*, xviii (1905), pp. 411 et seq. (who shows that a large majority of American decisions follow the French and German practice), and 'Law and Morals', ibid., xxii (1908), pp. 97 et seq. And see Stoner, *The Influences of Social and Economic Ideals on the Law of Malicious Torts*, in 8 *Michigan Law Review*, p. 468.

exercise of rights. *Nuire à autrui sans profit pour soi-même* constitutes only one aspect of the problem. For it is possible to do damage to others *avec profit pour soi-même*, and it is then that the question arises whether the exercise of rights is lawful or whether it degenerates into an abuse of rights and becomes, accordingly, unlawful. It is believed that there is in this respect no difference of substance between English law and other legal systems. The major part of the law of torts is nothing else than the affirmation of the prohibition of abuse of rights. It is largely the result of a compromise, by reference to requirements of justice and of social needs, between the conflicting principles *sic utere tuo ut alterum non laedas* and *qui utitur jure suo alterum non laedit*. This, it is believed, is the proper theoretical basis of the law of torts. The usefulness, therefore, of statements like the one 'an act is lawful if done in the exercise of a common right' is limited. For the very question to be determined in each particular case is whether there has been an exercise of a common right, or whether, as the result of the manner and circumstances of its exercise, a right has ceased to be a legally protected common right.

§ 19. The Prohibition of Abuse of Rights as the Basis of the Law of Torts. The law does not identify the common right with an abstract right regardless of the manner of its use and of the interests of others. What is a common right is a matter for the law to say. And the law says that the use of any common right is subject to the duty of abstention from injuring others, of respect of their property, and of proper care to avoid causing harm. Only such exercise of common rights is lawful as does not interfere with the interests of others in a manner which is socially reprehensible.[1] This does not imply that the law makes it its business to protect every person from any kind of injury. An injury done as the result of the exercise of a right may be painful and even ruinous; but the law will refrain from protecting the person so affected if the social advantage resulting from the upholding of the legal freedom of action is more important than the prevention of the injury resulting from the exercise of a legal right. At a certain point the law, in the form of a legislative enactment or a judicial pronouncement, declares that the

[1] Professor Winfield enumerates 'exercise of common right' among the absolute limitations on the right of courts to manufacture new torts (op. cit., p. 10). It is respectfully submitted that the 'common right' is no more immutable than other rights affected by the creation of new torts.

exercise of a right has become abusive—not because of the malevolent intention of the doer, but because the interests injuriously affected by the exercise of the hitherto perfectly legal right are socially and morally more important. It is clear therefore that the phrase *damnum absque injuria* means very little as a statement of legal principle. For the question is in every case whether there has been *injuria* or not. In a number of cases the law tells us definitely that the specific exercise of a right is not permitted because the interest injuriously affected is more important than the right exercised. But this enumeration of specific causes of an *injuria* is not exhaustive and is not meant to be exhaustive. Policy, as exercised by courts in their law-making capacity or by the legislature, continuously adds new causes of wrongs, that is to say, it renders certain acts unlawful which have been hitherto exercised as a common right, and it converts into legal rights interests which have hitherto enjoyed no such protection. The process is essentially one of balancing of interests. The fact that one of these interests has hitherto enjoyed the protection of the law is certainly material, but it is not decisive. It ceases to be decisive as soon as policy decides that it is socially more advantageous to restrict a right in favour of an interest which henceforth becomes a legal right. The whole branch of the law of nuisance is an illustration of this process. Liability is excluded if an act is done in the exercise of a common right; but this common right is, in regard to the use of one's property, subject to the duty of using it so as not to interfere materially with the ordinary comfort and convenience of one's neighbours. When a person uses his legal right so as to interfere with the legally recognized right of his neighbour to comfort and convenience, he abuses his right, and the law will restrain him from using it in this way, regardless of his motive.[1]

The way in which the law draws the line between interests which are entitled to such protection in the face of existing rights hitherto regarded as absolute, and those which are not

[1] It might, of course, be said that the conception of abuse of rights is a misnomer, inasmuch as there is *ab initio* no legal right to use one's rights in a manner prohibited by the law. Thus Planiol argues with some impatience that the idea of an abusive use of a right is impossible in juridical logic, for the simple reason that the same act cannot at the same time be in accordance with the law and contrary to it. *Traité élémentaire*, 4th ed., vol. v, No. 871. See also for a clear statement of the argument and a criticism of it, Walton, op. cit., pp. 504–5.

is not always easy to follow. Thus it may be difficult to understand why a person should be protected against noise[1] or smoke if they interfere unduly with his comfort or convenience, while protection is refused to his interest in having the use of the waters of his well (if that well is fed from a spring proceeding in an undefined channel) when that water is intercepted for purposes which cannot be held to be ordinary,[2] or may even be malicious.[3] The difficulty is not solved by saying that a person has a legal right to be protected from undue interference with his health and comfort, whereas he has no right to the waters of an undefined channel. For the answer obviously begs the question. It reveals the inadequacy of the law of torts as based on abstract propositions like the one that the exercise of a common right can never constitute a wrong. The law of torts as crystallized in various systems of law in judicial decisions or legislative enactment is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights. That list is in a state of constant flux and—in view of the growing complexity of social relations and the diminishing rigidity of the law—of constant expansion. Under the influence of these factors new causes of action in tort may be and are constantly created.[4] Novelty of action is no bar to the recognition of a claim. For in addition to the recognized specific wrongs there is inherent in every system of law the general principle of prohibition of abuse of rights.[5]

[1] See, for instance, *Soltau* v. *De Held* (1851), 2 Sim. N.S. 133, 39, R.R. 245, concerning the persistent ringing of a bell belonging to a Roman Catholic church which, it was pointed out in the judgement, cannot claim the same privileges as a parish church in the matter of bell-ringing.

[2] *Chasemore* v. *Richards*, H. L. Cas. 349.

[3] *Mayor of Bradford* v. *Pickles*, [1895] A.C. 587.

[4] See Ames, 'Law and Morals,' in *Selected Essays on the Law of Torts* (1924), p. 9, who points to the Statute of Edward I (St. Westminster 2, 13 Ed. I, c. 24) as 'a perennial fountain of justice to be drawn upon so long as, in a given jurisdiction, instances may be pointed out in which the common law courts have failed to give a remedy for damage inflicted upon one person by the reprehensible act of another, and the continued absence of a remedy would shock the moral sense of the community'. The Statute provides as follows: 'Whensoever from thenceforth a writ shall be found in the Chancery, and in a like case falling under the same right and requiring a like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one; lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors.'

[5] See Lord Truro in *Egerton* v. *Brownlow*, 4 H.L. Cas. 1 at p. 195: 'Every man is restricted against using his property to the prejudice of others . . . the principle embodied in the maxim *sic utere tuo ut alterum non laedas* applies to the public in at least as full force as to individuals.' During the discussion of the passage of the present Article 38 of the Statute of the Court referring to general

§ 20. The Function of the Doctrine of 'Abus des Droits' in International Law. The doctrine of abuse of rights plays a relatively small part in municipal law, not because the law ignores it, but because it has crystallized its typical manifestations in concrete rules and prohibitions. In international law, where the process of express or judicial law-making is still in a rudimentary stage, the law of torts is confined to very general principles, and the part which the doctrine of abuse of rights is called upon to play is therefore particularly important. It is one of the basic elements of the international law of torts. Only by dint of the affirmation that international law is a rudimentary system of law concerned primarily, if not exclusively, with the prevention and suppression of recourse to force can the principle of the prohibition of anti-social use of rights be regarded as inoperative. In the last resort rights are conferred by the community, and the community must see to it that the rights are not exercised in an anti-social manner. To deny this in regard to international law is to maintain that in the international sphere rights are faculties whose source lies not in the objective law created by the community, but in the will and the power of the State.

The purpose of the excursion, undertaken in the previous section, into the theory of private law of torts was to show that, notwithstanding terminological differences, the prohibition of abuse of rights is a general principle of law. In view of its general recognition by almost all systems of law the objection that is a purely natural law doctrine[1] is hardly convincing. With paragraph 3 of Article 38 of the Statute of the Court in existence, and in the face of the undoubted reaction in the science of international law against a too rigidly positivistic interpretation of its sources, there is no longer room for a sweeping condemnation of beneficent

principles of law recognized by civilized States, one member of the Committee of Jurists charged with the drafting of the Statute invoked the principle which forbids the abuse of rights as an instance of general principles of law (*Procès-Verbaux*, p. 315). And see the reference to a 'manifest and continuous abuse of sovereignty' in the report of the Committee of Jurists which examined in 1920 the question of the Aâland Islands: *Official Journal of the League of Nations, Special Supplement*, No. 3 (1920), p. 5.

[1] See Cavaglieri, op. cit., p. 46. One of the objections raised by Professor Cavaglieri against the doctrine of abuse of rights was that, in his opinion, it is adopted only by the law of a limited number of States. However, it is submitted in the present section that the doctrine represents a general principle of law inherent in the law of torts as such. The differences between various systems of law consist mainly in a different treatment of the factor of malice.

principles forming part of the common stock of legal science on the ground that they are 'pure natural law' and have not secured explicit acceptance by States.

Equally, undue importance need not be attached to the argument that the maxim *sic utere tuo ut alterum non laedas* is ill suited to the requirements of an individualistic system of law like international law. An individualistic system of law is apparently one in which the law refuses to interfere with the legally recognized self-assertion and freedom of action of the individual members of the community, even if such conduct is contrary to principles of justice and social solidarity. There is no doubt that law, in its primitive stage, is in this sense individualistic. For in its primitive stage the prevention of violence and the maintenance of security are the paramount and exclusive considerations. They cease to be so with the growth of civilization and of the social integration of the community.[1] To say that international law must remain an individualistic system of law because it was so at a certain period of its existence, is to maintain, in fact, that it cannot hope to progress from a rudimentary to a more advanced stage. It is not by accident that the notion of abuse of right lies at the bottom of most attempts to give a juristic foundation to the doctrine of individual (as distinguished from collective) intervention as one of the typical manifestations of admissibility of self-help in international relations. But self-help as a normal method of redress is as typical of a primitive stage of legal development as it is the necessary consequence of a system which provides no adequate remedy, administered by impartial agencies, against abuses of legal rights.[2]

It would be unfortunate if mere general phrases were to deprive international law of the operation of a necessary principle of change like that inherent in the prohibition of abuse of rights. It is a principle which enables courts to take cognizance, without recourse to legislation, of changes in conditions and of social developments.[3] For in a large number of cases it is on account of such developments that

[1] See Anzilotti, *Cours de droit international* (trans. by Gidel, 1929), p. 14.

[2] See below, p. 392, and Stowell, op. cit., pp. 122, 137, 143, 376. Phillimore's chapter on Intervention (*Commentaries*, i. § 390) begins with a statement, supported by references to Roman law and general jurisprudence, on the limitations upon the exercise of legal rights.

[3] It is of interest to note that some French writers base the theory of *imprévision* —a variation of the doctrine *rebus sic stantibus*—on the theory of *abus des droits*. See Naquet in *Sirey* (1920), i. 105.

what has hitherto been a legally recognized right ceases to be so and becomes abusive, and as such contrary to law. Hence the doctrine of abuse of rights bears closely on the theory of the non-justiciability of disputes as based on the absence of an international legislature. It enables judicial organs to develop, without the necessity for legislative interference, the international law of torts in accordance with the requirements of the international community and with the growing interdependence of States.[1]

§ 21. Further Instances of the Application of the Doctrine of Abuse of Rights in International Law. The possibilities of the application of the doctrine of abuse of rights in relations among States are manifold. In addition to the instances, given above, of the utilization of the flow of a river, of the closure of ports, and of the expulsion of aliens, three further examples may be mentioned. One refers to the denationalization of the State's own subjects and to questions of nationality in general; the second to some questions of the sovereignty over the air; the third to the State's use of its own territory.

(*a*) *Nationality.* Matters of nationality are, subject to the international obligations of the State, left to its municipal law. A State may not only lay down rules concerning the acquisition of nationality. It may also deprive its subjects of their nationality in a variety of ways. Its law may lay down that women marrying a foreign subject lose their nationality; it may deprive its naturalized subjects of their newly acquired nationality as the result of prolonged residence abroad, or in consequences of certain offences against the law, or for other reasons; or it may decree the denationalization of its subjects for political or other offences committed abroad against the mother country. It is in particular this last category of case which, as the result of recent legislation in Russia and Italy, has raised some difficult questions of 'statelessness'. Such legislation may adversely affect legitimate rights of foreign States within whose territory the denationalized person resides. It saddles them with stateless persons whom they may find difficult to deport, but who were admitted under

[1] See Tourtoulon, *Philosophy in the Development of Law* (Eng. trans. 1922), p. 563, for an interesting juxtaposition of the doctrine of *abus des droits* with the 'free-law' movement in Germany, both of which are conceived of as the theoretical expressions of creative judicial activity effecting a compromise between the factors of stability and change.

the implied undertaking of their parent State that they would be received if deported from the foreign country.[1] There is no clear rule of international law at present which limits the freedom of action of States in this respect, but it is submitted that the indiscriminate exercise by a State of the right of denationalizing its subjects, when coupled with the refusal to receive them when deported from a foreign country, constitutes an abuse of rights which could hardly be countenanced by an international tribunal. The deliberations of The Hague Codification Conference of 1930 on the question of nationality have also shown that the notion of abuse of rights may not be altogether alien to the consideration of the question of the use made by the State of its right to regulate matters of nationality.[2]

(*b*) *Air Law.* While the solution of the problems arising out of abuse of rights in the matter of denationalization may still come within the purview of the violation of a legal, although not very clearly defined, right of other States, there are cases in which the abusive exercise of a right does not violate any legally recognized interest of the State injuriously affected. The exercise by a State of its rights over the air above its territory may be mentioned as an instance which is specially appropriate as illustrating the influence of a change in conditions upon the application of the doctrine of abuse of rights. At the time when Accursius, in the thirteenth century, lent his authority to the maxim *cujus est solum ejus est usque ad coelum*—a maxim adopted as the foundation of the modern principle of the State's absolute sovereignty over the air over its territory—the column of air above the land was not, for practical purposes, more than a few hundred feet high. Recent developments in aviation and wireless communication have effected an obvious change, and the law of various countries has not been slow in giving effect to this change.

[1] See on this subject Fischer Williams, *Chapters*, pp. 137–45.

[2] See Acts of the Conference, Meetings of the Committees, vol. II, Minutes of the First Committee, Nationality, for a discussion of the first Article of the Convention on Certain Questions Relating to the Conflict of Nationality Laws. That article lays down that 'it is for each State to determine under its own law who are its nationals', and that 'this law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality'. See p. 20 (the observations of M. Kosters to the effect that it is 'a principle of customary law that rights may not be abused') and p. 197 for the proposal of M. Standaert and M. Rundstein to incorporate the notion of abuse of rights in the Convention *eo nomine*. See also Rundstein in *Z. V.* xvi (1931), pp. 41–5.