THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY

BY

H. LAUTERPACHT
L.L.D., Dr. Jur., Dr. Sc. Pol.
Lecturer in Public International Law in the London School of Economics and Political Science

OXFORD AT THE CLARENDON PRESS 1933
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. 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 an abuse of rights each time the general interest of the community is injuriously affected as the result of the exercise 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 time is then ripe for judicial 'manufacturing of a new tort'—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 1898 Heilborn, in his System des Völkerrechts, 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.' 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 feudal restrictions.' 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.

We find Ullmann pointing out that intervention is necessary, seeing that national law does not provide a remedy against abuse of rights, or, again, Heilborn saying that the purpose of the law of intervention is to protect the right to commit without external interference, so injurious to the world at large as to justify the imposition of feudal restrictions.
§ 16. The Practice of International Tribunals. Recently the doctrine of abuse de droit 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 permitted 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.' 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. 

In this case the Court, while agreeing that, by virtue of certain international obligations entered into in 1814, France was precluded from levying at the political frontier duties on the importation or 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}

1 Loc. cit. For a number of other references see Cavagnolli, op. cit., p. 44.
3 Series A, No. 24.
4 As in Judgement No. 7, the Court added that such an abuse of rights could not be presumed.

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 introductory example. That there exists such an absolute right has been maintained by many a writer. Thus, for instance, Oppenheimer maintains that a State can expel every alien according to discretion, and that the expulsion of an alien without just cause cannot constitute a legal wrong. 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, whilst establishing 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 Buffle case. The same principle has been expressed in a number of other awards, 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. 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 several 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 2 June 1929, P.C.I.J., Series A/B, No. 66, p. 355, and i, p. 372.
2 pp. 361, 362. See also, to the same effect, the final judgment in this case given on 2 June 1929, P.C.I.J., Series A/B, No. 66, p. 355, and i, p. 372.
3 Ibid., p. 372.
4 The Chacao case, ibid., p. 371; Paquier case, ibid., p. 373; Perren case, Moore, pp. 396, 397, and see ibid., pp. 334-35 for a number of other cases. See also, to the same effect, the final judgment in this case given on 2 June 1929, P.C.I.J., Series A/B, No. 66, pp. 355, 356. See also, to the same effect, the final judgment in this case given on 2 June 1929, P.C.I.J., Series A/B, No. 66, pp. 355, 356. See also the Mado case, Ralston, "Venezuelan Arbitrations," p. 514.
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 9th 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 Portlandic in the French colony of Senegal. 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 Faba case concerning the closing of the ports of the Catatumbo and Zulia rivers by Venezuela. Thibaud, Empereur, who otherwise spoke a very Austrian language on the nature of international law, refused to question the right of the State to prohibit navigation on rivers which flow in the sea, nevertheless qualified his attitude by adding the phrases 'temporarily' and 'if necessary to the peace, safety, and convenience of her own citizens'.

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'.

§ 17. The Practice of Quasi-International Tribunals. The doctrine of abuse of rights is 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 unwise 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 in as to affect injuriously the health of citizens of another State, or legislation interfering with the supply of certain commodities to the other State; the Swiss Federal Court has been confronted with similar problems. In the dispute between Aargau and Zurich in 1876 it affirmed the principle that, in the case of public water which extends over several cantons, "none of them may, without the permission 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 others, or which exclude the joint use thereof or amount to a violation of territory". And it emphasized the duty of the States to act according to the spirit of international law, and the definiteness of the award of the tribunal of the case of the Hague.

1 Missouri v. Illinois (1901), 180 U.S. 208. In the case of Louisiana v. Texas (1906), 198 U.S. 1, in which the plaintiffs asked for a ruling enjoining the defendants from further quantitale pollution of the Mississippi River, the Court dismissed the action on the ground that the controversy was one in violation of a treaty between the States of Mississippi and Texas which prevented further pollution of the river. See also Nys v. New York, 260 U.S. 287, and generally on the whole subject of interstate waters, see the Award of the Permanent Court of International Justice in the case of the United States v. Yalta, 267 U.S. 27 (1925), in which the tribunal considered and decided in favor of the United States in its claim to the use of the Yalta river for the purpose of irrigation and navigation.

2 Perugia v. New York (1916), 258 U.S. 523. See also New York v. New Brunswick (1917), 258 U.S. 526, and New York v. New Jersey (1917), 258 U.S. 544, 549, in which the Supreme Court held that the State of New York had no right to prevent the State of New Jersey from using the Delaware River for the purpose of navigation and commerce. The decision in the case of the United States v. Texas (1906), 198 U.S. 1, in which the Court decided that the State of Texas had no right to prevent the State of Louisiana from using the Red River for the purpose of navigation and commerce, is also important.

3 United States v. Texas (1906), 198 U.S. 1, in which the Court held that the State of Texas had no right to prevent the State of Louisiana from using the Red River for the purpose of navigation and commerce.


5 ibid., p. 260.

6 ibid., p. 266.

7 ibid., p. 267.

8 Recueil des Arrêts, 17e série, tome iii, 174, cited after Schindler in Stumpf, p. 259. See also Nys v. New York, 260 U.S. 287, and generally on the whole subject of interstate waters, see the Award of the Permanent Court of International Justice in the case of the United States v. Yalta, 267 U.S. 27 (1925), in which the tribunal considered and decided in favor of the United States in its claim to the use of the Yalta river for the purpose of irrigation and navigation.
§ 18. The Doctrine of Abuse of Rights as a General Principle of Law. It 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 law it refers to the conception of abuse of rights apparent at first sight foreign to its own law. He will point to damnum sine injuria; he will refer to the case of Mayor of Bradford v. Pickles, in which it was held that if the owner sink 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 lawful if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious'; he will point to cases like Allen v. Flood, in which it was held that whereas his motives may be a person does not act unlawfully if he persuades or induces a man, without having recourse to

3. (1867) A.C. 587.
4. Lord Watson, ibid., p. 598.
5. (1867) A.C. 1.

§ 18. The Question of Malice unlawful means, to do something which is not prohibited by law, although such act may injure another person.

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. Linehan, [1927] A.C. 145, the remarks there made on the point of malice still hold good.
3. 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 annoy the plaintiff is another thing and a wrong. See Willmott, Responsibility for Torts: The Common Law Approach (1927), p. 59, who says that the principle sic utere tuo ut alienum non laedere is seldom early fixed judgments, and can clearly be traced even when it is given an English garb, and quotes Holt, C.J., in Towns v. Goldsith, 2 D. Raym. 1089 (1705), and Gibbs, C.J., in Sattus v. Clarke, 6 I. Ac. 39 (1815), and it was on occasion in which even in respect of damage v. estate it was admitted that animal showed might make a difference. Thus Lord Watson, while referring to the case in Acton v. Bell, 11 L. Eq. 285, 67 R. 361 (1843), the Court relied on a passage from the Digest (D. 29, 4, 62, at 9), in which another stone masons is regarded as material, explained that those passage referred to cases where there was a purpose of Nt and can as well be 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: "Marcelinus scribit cum eo, qui non frumenti vitam sequitur alterius, nihil posse agi, nec de deo aedificiis et sono autem habentibus, aut vini aut vinorum, nec quasi aequum faciendum id factit.\" This Roman prototype of Mayor of Bradford v. Pickles is of recent interest, as there has been a tendency recently to attach decisive importance to the Roman law maxims in the law of nuisance, and the modern jurisprudence of nuisance, and to try to exclude it altogether from the law on the abuse of legal process (including malicious prosecution), libel, and nuisance. Apart from the relevance of nuisance 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, or whether it is a branch of law governed by the comprehensive and

2. See Willmott, Responsibility for Torts: The Common Law Approach (1927), p. 59, who says that the principle sic utere tuo ut alienum non laedere is seldom early fixed judgments, and can clearly be traced even when it is given an English garb, and quotes Holt, C.J., in Towns v. Goldsith, 2 D. Raym. 1089 (1705), and Gibbs, C.J., in Sattus v. Clarke, 6 I. Ac. 39 (1815), and it was on occasion in which even in respect of damage v. estate it was admitted that animal showed might make a difference. Thus Lord Watson, while referring to the case in Acton v. Bell, 11 L. Eq. 285, 67 R. 361 (1843), the Court relied on a passage from the Digest (D. 29, 4, 62, at 9), in which another stone masons is regarded as material, explained that those passage referred to cases where there was a purpose of Nt and can as well be 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: "Marcelinus scribit cum eo, qui non frumenti vitam sequitur alterius, nihil posse agi, nec de deo aedificiis et sono autem habentibus, aut vini aut vinorum, nec quasi aequum faciendum id factit.\" This Roman prototype of Mayor of Bradford v. Pickles is of recent interest, as there has been a tendency recently to attach decisive importance to the Roman law maxims in the law of nuisance, and the modern jurisprudence of nuisance, and to try to exclude it altogether from the law on the abuse of legal process (including malicious prosecution), libel, and nuisance. Apart from the relevance of nuisance 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, 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. Linehan, [1927] A.C. 145, the remarks there made on the point of malice still hold good.
3. 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 annoy the plaintiff is another thing and a wrong. See Willmott, Responsibility for Torts: The Common Law Approach (1927), p. 59, who says that the principle sic utere tuo ut alienum non laedere is seldom early fixed judgments, and can clearly be traced even when it is given an English garb, and quotes Holt, C.J., in Towns v. Goldsith, 2 D. Raym. 1089 (1705), and Gibbs, C.J., in Sattus v. Clarke, 6 I. Ac. 39 (1815), and it was on occasion in which even in respect of damage v. estate it was admitted that animal showed might make a difference. Thus Lord Watson, while referring to the case in Acton v. Bell, 11 L. Eq. 285, 67 R. 361 (1843), the Court relied on a passage from the Digest (D. 29, 4, 62, at 9), in which another stone masons is regarded as material, explained that those passage referred to cases where there was a purpose of Nt and can as well be 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: "Marcelinus scribit cum eo, qui non frumenti vitam sequitur alterius, nihil posse agi, nec de deo aedificiis et sono autem habentibus, aut vini aut vinorum, nec quasi aequum faciendum id factit.\" This Roman prototype of Mayor of Bradford v. Pickles is of recent interest, as there has been a tendency recently to attach decisive importance to the Roman law maxims in the law of nuisance, and the modern jurisprudence of nuisance, and to try to exclude it altogether from the law on the abuse of legal process (including malicious prosecution), libel, and nuisance. Apart from the relevance of nuisance 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, or whether it is a branch of law governed by the comprehensive and
prevailing rule that 'it is a wrong to do the wildl harm to one's neighbour without lawful justification or excuse', so that prima fact 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 caliber of Lord Bowen, Mr. Justice Holmes, and Sir Frederick Pollock—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. For the problem of abuse of rights is only to a limited extent identical with the question of malicious


1 At Common Law there was a cause of action whenever one person did wrong to another wrongfully and without just cause or excuse.—Sherman & Co. v. Speer & Co., [1857] 6 B. & Ad. 271, 307. And, to the same effect, Mayor Shertneck v. Connolly, (1860) 25 N. Y. Div. at p. 559.

2 In Allen v. Wisconsin, 195 U. S. 37 at p. 47; Justification... may depend upon the fact for which the act is done, . . . it is no sufficient answer to the one 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 occasioned.

3 Loc. cit. See also to the same effect Winfield in Columbia Law Review, xxvi (1927), pp. 1-17.

4 Article 226 of the German Civil Code lays down that 'the exercise of a right is not permissible 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, 5th ed., i. (1925). This article obviously refers to malicious abuse of rights, and ought to be distinguished from Article 863, which, in terms, does not sufficiently indicate damage another person is bound to compensate the damage.

5 Article 3 of the Swiss Civil Code provides: 'Every person is bound to exercise his rights and fulfill his obligations according to the principle that his actions shall cause damage, and the use of any right is subject to the duty of abstention from causing damage.' See on this the article 10 and 11 of Reichel's Commentary on the Swiss Code (1917).

6 In France the doctrine of abuse of rights because of malicious motive—nouveauté sans profit pour soi-même—although without direct foundation in the Code and possibly even antedated by Article 344 of the Code, has been recognized and developed by the consistent practice of courts. In France the influences of the English practice in the matter, Walton, 'Nolite as a Element in Torts in the Common and in the Civil Law', in Harvard Law Review, xxii (1908-9), pp. 621-1. However, the English common sense recognizes that such abuse of rights therefore not that damages follow with that have been in all instances 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 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 different 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 nimirum fore suo alterum non laedas. This, it is believed, is the proper theoretical basis of the law of torts. The usefulness, therefore, of statements like the one that 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 for 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. 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

Professor Winfield enumerates 'exercitum as common right' among the ultimate limitations on the right of courts to manufacture new torts (op. cit., p. 19). 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 _injury_ 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 _injury_ 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 comes 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 rights, of course, be said that the conception of abuse of rights is a misnomer, inasmuch as there is no infinite legal right to use one's rights in a manner prohibited by the law. Thus Plantard argues with some impatience that the idea of an abusive use of a right is impossible in juridical logic. For the simple reason that such an act cannot be the same one as in accordance with the law and contrary to it. _Tentamen_ 4th ed., vol. v, No. 87. See also for a clear statement of the argument and a criticism of it, Walshe, op. cit., pp. 204-5.

§ 39 ABUSE OF RIGHTS AND THE LAW OF TORTS is not always easy to follow. Thus it may be difficult to understand why a person should be protected against noise2 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,3 or may even be malicious.4 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.5 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.6

1 See B. L. Gas. 349. 3 See Ames, _ILaw 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) concerning the persistent ringing of a bell belonging to a Roman Catholic church which, it was pointed out in the judgment, cannot claim the same privileges as a parish church in the matter of bell-ringing.

2 See, for example, _Chase v. Mayor of Brantford_, 4 H.L. Cas. 195; 1952, who, in deciding a case in which the plaintiff sued the defendant for allow the law to continue to ring its bell, where the defendant had a legal right to do so, the court held that the defendant had a legal right to do so, and that the plaintiff had no right to be protected from the interference with his comfort or convenience.

3 See _Mason v. Bradfield_, 1 Ch. 527 (1868). A.C. 527.

4 See A. T. B. v. _Mayor of Brantford_, 4 H.L. Cas. 195; 1952, who points to the Statute of Edward I (St. Westminster 2, 13 Ed. I, c. 24) concerning the persistent ringing of a bell belonging to a Roman Catholic church which, it was pointed out in the judgment, cannot claim the same privileges as a parish church in the matter of bell-ringing.

5 See Ames, _ILaw 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) concerning the persistent ringing of a bell belonging to a Roman Catholic church which, it was pointed out in the judgment, cannot claim the same privileges as a parish church in the matter of bell-ringing.

6 See Lord Truro in _In re Edward_ (St. Westminster 2, 13 Ed. I, c. 24) concerning the persistent ringing of a bell belonging to a Roman Catholic church which, it was pointed out in the judgment, cannot claim the same privileges as a parish church in the matter of bell-ringing.

7 See _Levi Strauss_ (St. Westminster 2, 13 Ed. I, c. 24) concerning the persistent ringing of a bell belonging to a Roman Catholic church which, it was pointed out in the judgment, cannot claim the same privileges as a parish church in the matter of bell-ringing.

8 See _Levi Strauss_ (St. Westminster 2, 13 Ed. I, c. 24) concerning the persistent ringing of a bell belonging to a Roman Catholic church which, it was pointed out in the judgment, cannot claim the same privileges as a parish church in the matter of bell-ringing.

9 See _Levi Strauss_ (St. Westminster 2, 13 Ed. I, c. 24) concerning the persistent ringing of a bell belonging to a Roman Catholic church which, it was pointed out in the judgment, cannot claim the same privileges as a parish church in the matter of bell-ringing.
§ 20. The Function of the Doctrine of 'Abuse of Rights' 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 it is a purely natural law doctrine is hardly convincing. With paragraph 3 of Article 36 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 element of general principles of law (Official Journal, No. 1, 1922, p. 24). 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 Allied Islands: Official Journal of the League of Nations, Special Supplement, No. 1. (1923), p. 34.

See Cavagnoli, op. cit., p. 46. One of the objections raised by Professor Cavagnoli against the doctrine of abuse of rights was that, in his opinion, it is adopted only by a law of a limited number of States. However, it is submitted in this paper that the doctrine of abuse of rights is 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.

§ 20. INTERNATIONAL LAW AS INDIVIDUALISTIC SYSTEM

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 has landus 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. 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 doctrine 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 the possibility 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.

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. For in a large number of cases it is on account of such developments that...
for an interesting juxtaposition of the doctrine of factors of stability and change.

for political or other offences committed abroad against the legislation may adversely affect legitimate rights of foreigners, both of which are conceived of as the theoretical residua. It saddles them with stateless persons whom they has raised some difficult questions of 'statelessness'. Such States within whose territory the denationalized person in consequence of certain offences against the law, or for other reasons, or it may decree the denationalization of its subjects for practical purposes, more than a few hundred feet high.

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 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.

§ 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, 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 Tournier, Philosophy in the Development of Law (Eng. trans. 1922), p. 575, for an interesting juxtaposition of the doctrine of abuse of rights with the 'state law' movement in Germany, both of which are conceived of in the theoretical expressions of creative judicial activity effecting a compromise between the factors of stability and change.

§ 21 NATIONALITY. AIR LAW

the implied undertaking of their parent State that they would be received if deported from the foreign country. 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.1

(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 abuse 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 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. 137-43. See also Rundstein in Der Entstehung der Konventionen, vol. 11, 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. 100 the observations of M. Rundstein to the effect that if it is a principle of customary law that rights may not be abused, see p. 197 for the proposal of M. Stauder and M. Rundstein to incorporate the notion of abuse of rights in the Convention on nationality. See also Rundstein in Z. F. vi (1931), pp. 41-5.