Vanderbilt Journal of Transnational Law

Volume 9
Issue 1 *Winter 1976*

Article 2

1976

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Recommended Citation

Jerome B. Elkind, Footnote to the Nuclear Test Cases: Abuse of Right--A Blind Alley for Environmentalists, 9 *Vanderbilt Law Review* 57 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol9/iss1/2

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FOOTNOTE TO THE NUCLEAR TEST CASES: ABUSE OF RIGHT—A BLIND ALLEY FOR ENVIRONMENTALISTS

*Jerome B. Elkind**

I. INTRODUCTION

In a recent article entitled "French Nuclear Tests and Article 41: Another Blow to the Authority of the Court,"[1] the author questioned the approach of the learned Judges of the International Court of Justice to article 41 of the Court's Statute. The title of that article was intended to deplore the recent tendency of States (most particularly France, but also Iceland) who are parties to the Statute of the International Court of Justice to arrogate to themselves the right to determine whether the Court has jurisdiction. As a result of the judgments of December 20, 1974, in the *Nuclear Tests Cases* the Court has suffered another blow to its authority,[2] in this case self-inflicted. The Court dismissed for want of jurisdiction the action by New Zealand and Australia on the ground that a unilateral decision by the French Government to cease atmospheric nuclear testing was sufficient to terminate the dispute. Such a decision was gleaned from a number of documents, such as a communique of June 8, 1974, issued by the Office of the President of the French Republic stating that:

> in view of the stage reached in carrying out the French nuclear defense program France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for the summer is completed.[3]

Also cited was a note of June 10, 1974, from the French Embassy in Wellington to the New Zealand Ministry of Foreign Affairs to the effect that France

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1. 8 VAND. J. TRANSNAT'L L. 39 (1974).

2. One of the titles proposed for this article was "A Final Blow to the Authority of the Court."

3. New Zealand v. France, [1974] I.C.J. 457.

> at the point which has been reached in the execution of its program of defense by nuclear means, will be in a position to move to the stage of underground firings as soon as the test series planned for this summer is completed.[4]

Other similar communications were cited to demonstrate that France had indeed undertaken to cease atmospheric testing.[5]

The Court then examined communications by officials of the New Zealand and Australian Governments[6] to demonstrate that an assurance by France that nuclear testing in the atmosphere is finished "would meet the object of the New Zealand claim."[7]

Purporting to exercise its duty to ascertain the true subject of the dispute,[8] the Court declared that the dispute concerned atmospheric nuclear tests by France[9] and therefore that the dispute between France on the one hand and New Zealand and Australia on the other was mooted.[10]

That atmospheric testing may have been the issue is certainly not clear from the New Zealand Application, which states:

> The New Zealand Government will seek a declaration that conduct by the French Government of nuclear tests in the South Pacific region that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law, and these rights will be violated by any further such tests.[11]
>
> . . . .
>
> ACCORDINGLY, NEW ZEALAND ASKS THE COURT TO ADJUDGE AND DECLARE:
>
> That the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radioactive fallout consti-

4. *Id.*

5. Included were a Note of July 1, 1974, by the President of the French Republic to the New Zealand Prime Minister, a Statement on July 25, 1974, by the President of the Republic, a Statement of August 16, 1974, by the Minister of Defense, a Statement of September 25, 1974, by the Minister of Foreign Affairs in the United Nations General Assembly, and a Statement on October 11, 1974, by the Minister of Defense. The Court also cited a press conference by the President of the Republic on July 25, 1974, an interview on French television given by the Minister of Defense, an address to the United Nations General Assembly on September 25, 1974, by the Minister of Foreign Affairs, and a press conference by the Minister of Defense on October 11, 1974. *Id.* at 471.

6. *Id.* at 464-65.

7. *Id.* at 466.

8. *Id.* at 467.

9. *Id.* at 465-66.

10. *Id.* at 475, 477; Australia v. France, [1974] I.C.J. 253, 270, 271-72.

11. New Zealand Application, New Zealand v. France, [1974] I.C.J. 6, para. 10.

tutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests.[12]

The Australian Application more clearly makes atmospheric testing the issue:

> ACCORDINGLY, THE GOVERNMENT OF AUSTRALIA ASKS THE COURT TO ADJUDGE AND DECLARE THAT . . . the carrying out of further atmospheric tests in the South Pacific Ocean is not consistent with applicable rules of international law.[13]

In light of this disparity between the two Applications it is questionable whether the Court was justified in treating them in the same way.[14] It is by no means clear that underground nuclear tests are entirely free of radioactive fallout, and the extensive scientific evidence required to prove this the Court chose not to hear. It is thus submitted that the key issue raised by New Zealand in the *Nuclear Tests Cases* was the right of New Zealand in its territory and dependencies to be free of any nuclear fallout, whether from atmospheric or underground tests, created by France on *its* own territory. The legal ramifications of this issue are of vital interest to environmentalists and hence the bulk of this article will be devoted to some of the legal principles applicable to such an issue, as well as a discussion of the Court's treatment of it.

II. Unilaterally Assumed Obligations

New Zealand did not accept the unilateral declarations of the Government of France as an unqualified renunciation of atmospheric testing, but chose instead to form its own view of the meaning and scope intended by the French declarations,[15] and decided without further oral argument that the declarations did not comprise an unqualified renunciation.

What is astounding about the Court's opinion is the holding that France's unilateral declarations created binding legal obligations on the Government of France:

12. *Id.* at 16.

13. Australian Application, Australia v. France, [1974] I.C.J. 17.

14. This difference has been noted in *New Zealand v. France*, joint dissenting opinion of Judges Onyeama, Dillard, Jiminez de Arechaga, and Sir Humphrey Waldock, at 494-95, which dealt with the difference in another respect, namely whether the Court was justified in ignoring New Zealand's request for a declaratory judgment (a request which the Australian Application does not make explicitly) and holding, at 467 of the judgment, that "the original and ultimate objective of the applicant was and has remained to obtain a termination of those tests." The dissent did not question the assumption that the New Zealand application related only to atmospheric tests.

15. *Id.* at 469.

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking. The State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind if given publicly, and with an intent to be bound even though not made within the context of international negotiation is binding. In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration nor even any reply or reaction from other States is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the judicial act in which the pronouncement of the State was made.[16]

This assertion was made without citation of any authority, although henceforth this judgment will presumably be authority for the proposition that such declarations of a State's intentions are binding.

The legal principle mustered to give binding character to an international obligation assumed by unilateral declaration was the principle of good faith:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence is inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus required be respected.[17]

This is a unique application of the principle of good faith. There is authority for the presumption that legal obligations, once assumed, will be carried out in good faith. In the *Lake Lanoux Arbitration*[18] for instance, France wanted to undertake a project

16. *Id.* at 472.

17. *Id.* at 473.

18. Lake Lanoux Affair (Spain v. France), 12 U.N.R.I.A.A. 281 (1957). For a more complete discussion of this case see note 196-217 *infra* and accompanying text.

which would have the effect of diverting the waters of the lake for the purpose of generating electricity. The Government of France guaranteed the restoration of the waters, after use, to the River Carol which flowed into Spain. The Spanish Government objected on the ground that restoration of the waters would be rendered

> physically dependent on human will, which would result in the *de facto* preponderance of one party only, rather than the preservation of the equality of the two parties as provided for [*sic*] the Treaty of Bayonne of 26 May 1866 and by the additional Act of the same date.[19]

The Arbitral Tribunal nevertheless permitted the project, saying "there is a general and well-established principle of law according to which bad faith is not presumed."[20]

In the *Lighthouses Case*[21] Judge Seferiades said, in a dissenting opinion,

> [C]ontracting parties are always assumed to be acting honestly and in good faith. That is a legal principle which is recognized in private law and cannot be ignored in international law.[22]

He refused to accept that the Turkish Government intended to render a concession applicable to territories occupied by Greece. The Court, however, held that the concession contract entered into by the Ottoman Government with respect to the territory in question was operative against Greece as successor to the Ottoman Government.

Both of the above cases dealt with interpretation of contractual relations: the *Lake Lanoux Arbitration* with obligations under the Treaty of Bayonne, the *Lighthouses Case* with a concession contract. However, the judgment of December 20, 1974, dealt with no such contractual relation. In fact the Court was quite specific that no such relationship was necessary. Thus the presumption of good faith was used to shield France from an action seeking to bar it from conducting atmospheric nuclear tests in the Pacific, an activity which it had been conducting in defiance of an Interim Order of Protection.[23] The author has already pointed out in a previous

19. *Id.* at 295-96.
20. *Id.* at 305, translated 53 AM. J. INT'L L. 156, 162 (1959).
21. [1934] P.C.I.J., ser. A/B, No. 62.
22. *Id.* at 47.
23. New Zealand v. France, [1973] I.C.J. 135; Australia v. France, [1973] I.C.J. 99.

article[24] that this defiance was a violation of France's obligations under the United Nations Charter as well as the Statute of the International Court of Justice. Such violations are hardly promising evidence on which to ground a presumption that France will comply in good faith with its present undertaking. Thus, in effect, the Court either held that a unilateral declaration operates to estop the entire world from questioning whether the declarant will abide by its declaration or it has created a new International Legal Institution, the unilateral treaty.

In an editorial in the *American Journal of International Law*,[25] Thomas M. Franck enthusiastically calls the judgment a landmark decision comparable to *Marbury v. Madison*.[26] Admitting that it is "a mouse of a decision," he states that "cases need not have monumental outcomes to make monumental law."[27] He lauds it primarily because:

> Thanks to the Court's decision, each State must now recognize that what it solemnly says it will do, or, more important, what it says it will *not* do becomes a part of that trellis of reciprocal expectations on which the fragile international system grows.[28]

Perhaps it is desirable that unilateral declarations ought to be binding. But are they?

Franck overlooks one important distinction between the legal effects of the judgment of December 20, 1974, and those of *Marbury v. Madison*. Decisions of the United States Supreme Court have binding force by virtue of the principle of *stare decisis*, *i.e.* the Supreme Court can make law. The International Court of Justice, on the other hand, is precluded from doing so by article 59 of its statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case." Thus the judgment of December 20, 1974, is binding only as between France and New Zealand, and France and Australia. It cannot make new law as Franck suggests it does.[29]

In light of these limits on the Court's decision, the rule enunciated in the judgment can be binding on other States as a rule of international law only if we can authenticate it according to one

24. *Supra* note 1.
25. 69 AM. J. INT'L L. 612 (1975).
26. 5 U.S. (1 Cranch) 137 (1803).
27. *Supra* note 25, at 612.
28. *Id.* at 616.
29. *Id.* at 615.

of the sources of international law enunciated in article 38.

Article 38(1)(a) directs the Court to apply "international conventions, whether general or particular, establishing new rules expressly recognized by the contesting states." It certainly does not by itself comprehend that unilateral declarations can create legal obligations. Furthermore, evidence that such a sweeping rule as that enunciated by the Court is a rule of international customary law or a general principle of law is sparse.

Franck cites the *Eastern Greenland Case*[30] as one which "stands out in the jurisprudence."[31] There the Court examined the "Ihlen Declaration" by the Foreign Minister of Norway to the effect that Norway "would not make any difficulties in the settlement of this question" relating to Danish plans regarding Greenland. The Court held that the declaration was binding on Norway in international law as long as it was within the Minister's area of responsibility.[32] Franck does admit, however, to a distinction[33] between that case and the *Nuclear Tests* judgment. In the *Eastern Greenland* situation, Denmark undertook a reciprocal verbal commitment to raise no objections to Norwegian sovereignty over Spitzbergen. Thus there was an element of mutuality not present in the *Nuclear Tests* judgment.

But there is an even more fundamental distinction. The "Ihlen Declaration" was considered by the Court not as a source of legal obligations, but rather as evidence of Norway's recognition of Danish sovereignty over Eastern Greenland. It was considered along with other evidence, including various undertakings resulting from the separation of Norway and Denmark,[34] bilateral agreements concluded by Norway with Denmark, and multilateral agreements, to which both Denmark and Norway were contracting parties, in which Greenland was described as a Danish colony or as forming part of Denmark or in which Denmark had been allowed to exclude Greenland as a contracting party. Thus not only is the "Ihlen Declaration" a different species than the French declarations relied on in the judgment of December 20, it is not even of the same genus.

30. [1933] P.C.I.J., ser. A/B, No. 53.
31. *Supra* note 25, at 615.
32. [1933] P.C.I.J., ser. A/B, No. 53 at 71.
33. *Supra* note 25, at 615.
34. [1933] P.C.I.J., ser. A/B, No. 53 at 67. Judge Vogt in his dissent treated it as an agreement that had lapsed. *Id.* at 97.

It cannot be gainsaid, of course, that some kinds of unilateral acts, some declaratory by nature, can become sources of international legal obligations. Recognition itself may be established as the result of a unilateral act having legal implications. So may other specific unilateral acts, such as notification, waiver, and protest. But this is a far cry from saying that unilateral declarations per se have the effect given to the French declarations by the International Court of Justice. None of the declarations relied upon by the Court in the judgments indicate an intention of the part of the French Government to enter into a legally binding undertaking. They are all, at best, statements of a policy arrived at by the French Government after an assessment of the state of French nuclear technology, and thus subject to change upon reassessment.

Presumably the Court derived the principle of "good faith" on which it relied from article 38(1)(c), which directs the Court to apply "general principles of law recognized by civilized nations." But it was not so bold as to say that good faith was a source of the obligation, but rather a "principle governing the creation and performance of legal obligations whatever their source."[35] Furthermore, although civil law recognizes to a certain extent the binding legal effect of some unilateral declarations, the majority made no attempt to justify the decision in that way.

The judgment, if it is a landmark, is a landmark of political caution. It is, however, a startling piece of judicial innovation, and one which the Court will not be terribly happy with in the future when States attempt to enforce unilateral declarations before it.

III. The Problem of Conflicting Claims of Sovereignty

In rendering the judgment of December 20, 1974, the Court thereby sidestepped the necessity of deciding whether or not nuclear testing (whether atmospheric or not) which causes fallout on neighboring territory is lawful. But not only did the Court sidestep the sensitive political issue, it missed contributing to a vitally important branch of international law, international environmental law.

The specific issue has been framed in the following manner: "To what extent do extraterritorial effects of a state activity lawful per se give rise to state responsibility?"[36] At least one judge on the

35. *See* note 16 *supra* and accompanying text.

36. Handl, *Territorial Sovereignty and the Problem of Transnational*

International Court of Justice expressed frank confusion as to just what rule of international law France could be said to be violating.[37] Indeed, neither the Application of New Zealand nor the Application of Australia is very specific as to the rule of law that the Court was asked to apply. The New Zealand Application states the following grounds for objection to nuclear testing undertaken in the Pacific region:

> (a) it violates the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fallout be conducted;
>
> (b) it violates the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radioactive contamination of the territorial, maritime and aerial environment and in particular, of the environment of the region in which the tests are conducted and in which New Zealand, the Cook Islands, Niue and the Tokelau Islands are situated;
>
> (c) it violates the right of New Zealand that no radioactive material enter the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing, cause harm, including apprehension, anxiety and concern, to the people and the Government of New Zealand and of the Cook Islands, Niue and the Tokelau Islands. . . .[38]

The Australian Application is even less specific:

> The Australian Government contends that the conduct of the tests as described above has violated and, if the tests are continued, will further violate international law and the Charter of the United Nations and, *inter alia*, Australia's rights in the following respects:
>
> (i) the right of Australia and its people, in common with other States and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated;
>
> (ii) the deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent: (a) violates Australian sovereignty over its territory;
>
> (b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Aus-

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Pollution, 69 AM. J. INT'L L. 50, 52 (1975) [hereinafter cited as Handl].

37. Australia v. France, [1973] I.C.J. 99, 130 (dissenting opinion of Judge Ignatio-Pinto).

38. New Zealand Application, New Zealand v. France, [1974] I.C.J. 14-16, para. 29.

> tralia and its people shall be exposed to radiation from artificial sources.[39]

The problem that is raised is one of approach, and has stimulated at least three authors to write lengthy articles attempting to grapple with the problem from one standpoint or another.[40] Handl, in his article "Territorial Sovereignty and the Problem of International Pollution"[41] observes that a number of legal theories have been advanced to deal with restraints on territorial sovereignty: the doctrine of abuse of rights, the concept of "good neighborliness", and the notion of international servitudes which posits the right of a lower riparian State to receive the waters of a river flowing from an upper riparian State.[42] Uneasy with the legal content of "neighborliness" which he feels can only find its exact delimitation in concrete circumstances, Handl sees this essentially "as part and parcel of . . . the principle of abuse of rights."[43] As to the idea of international servitudes he says:

> Apart from the basic questions whether it has a proper place in international law at all—seems already *per definitionem* inapplicable to the circumstances of an international conflict arising out of transnational effects of a state activity lawful per se.[44]

This article will demonstrate that the notion of servitudes in the context we are discussing is but one municipal expression of the principle of neighborship (which term the author prefers to "neighborliness"), and that the abuse of right concept is really something else entirely. It will further be shown that it is this confusion between the two doctrines which has led international lawyers up a

39. Australian Application, Australia v. France, [1974] I.C.J. 16, para. 49.

40. Handl, *supra* note 36; Iluyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 HARV. INT'L L.J. 47 (1975); Tiewul, *International Law and Nuclear Test Explosions on the High Seas*, 8 CORNELL INT'L L.J. 45 (1975).

41. Handl, *supra* note 36, at 55.

42. *Id.* at 55. *See also* Lester, *River Pollution in International Law*, 57 AM. J. INT'L L. 828, 833-34 (1963).

43. Handl, *supra* note 36, at 56. Atmospheric nuclear tests have been specifically referred to as an "abuse of right." Asian-African Legal Consultative Committee, Conclusions Concerning the Legality of Nuclear Tests, U.N. Doc. A/CN.4/172 at 3-7 (1964), *reprinted in* 59 AM. J. INT'L L. 721 (1965).

44. Handl, *supra* note 36, at 56, citing LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 122-23 (1927). *See also* Lester, *supra* note 42, at 834.

blind alley in approaching the real issue in the *Nuclear Tests Cases*.

IV. The Difficulties of Applying the Principle of Abuse of Right to Conflicting Claims of Sovereignty

Iluyomade tentatively defines abuse of right as a "prohibition of the exercise of a right for an end different from that for which the right was created, to the injury of another person or the community."[45] But, as we shall see, this definition does not sufficiently emphasize that culpability in the form of negligence or malice is one of the key elements of the doctrine.[46]

The doctrine of abuse of right is generally acknowledged to be applicable to international law, if at all, under article 38(1)(c) of the Statute of the International Court of Justice.[47] But there are at least three problems implicit in the application of this principle to international environmental law. These are: (1) the paucity of international judicial authority applying the principle to environmental law; (2) doubts expressed by some jurists as to its place in international law and indeed its validity as a legal doctrine; and (3) the scope of its content.

A. *Paucity of International Judicial Authority*

As Handl points out,[48] the one case[49] which considered the violation of the sovereignty of one State by the acts of another State

45. Iluyomade, *supra* note 40, at 48.

46. *Id.* at 20.

47. *Id.* at 53, 57. *See also* Cheng, General Principles of Law as Applied by International Courts and Tribunals 105 *et seq.* (1953); Jenks, The Common Law of Mankind 106 (1958); Jenks, The Prospects of International Adjudication 266-315; Lauterpacht, *supra* note 44, at 63 *et seq.*; Gutteridge, *Comparative Law and the Law of Nations*, 21 Brit. Y.B. Int'l L. 1 (1944); Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 Am. J. Int'l L. 734 (1957); Verdross, *Les Principes Generaux du Droit Dans La Jurisprudence Internationale*, 52 Recueil des Cours 191, 220 (1935); Waldock, *General Course on Public International Law*, 106 Recueil des Cours 1, 54-69 (1962); Discussion, *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, in 38 The Grotius Society 125 (1953).

48. Handl, *supra* note 36, at 65-66.

49. We might conceivably derive some help from the *Corfu Channel Case*, [1949] I.C.J. 4, if we extract from it the broad general principle that a state may not "allow knowingly its territory to be used for acts contrary to the rights of other States." [1949] I.C.J. 4 at 22. But when we consider the case on its facts we are not much assisted with problems involving environmental pollution.

conducted on its own territory was the *Trail Smelter Arbitration*.[50] In that case, an International Arbitral Tribunal awarded damages against Canada of $78,000 for damages caused by the smelter and ordered that Canada require the Trail Smelter to refrain from causing damage in the State of Washington, U.S.A., through its fumes, the damages being such as would be recoverable under the decisions of courts of the United States in suits between private individuals.[51]

But nowhere in the award is the doctrine of "abuse of right" mentioned. In fact, as we shall see, the doctrine would be out of place considering the context. Furthermore, the terms of reference of the *Trail Smelter Arbitration* are somewhat suspect insofar as an attempt is made to claim for it the status of an authoritative statement of international environmental law.[52] Article IV of the *Compromis* governing the case authorized the Tribunal to apply "the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice."[53]

B. *Doubts As to the Place of "Abuse Of Right"*

There is a split of authority on the applicability of the doctrine of abuse of right to international law. The doctrine has been referred to both by the Permanent Court of International Justice[54] and by the International Court of Justice.[55] Among the publicists it is accepted by Cheng,[56] Sir Hersch Lauterpach,[57] and Fried-

50. Trail Smelter Case (United States v. Canada), 3 U.N.R.I.A.A. 1905 (1938, 1941).

51. *Id.* at 1966.

52. Handl, *supra* note 36, at 63.

53. 3 U.N.R.I.A.A. at 1908.

54. Case of the Free Zones of Upper Savoy and the District of Gex, [1932] P.C.I.J., ser. A/B, No. 46, 167. Case Concerning Certain German Interests in Polish Upper Silesia, [1926] P.C.I.J., ser. A, No. 7, 37-38.

55. Barcelona Traction Case, [1970] I.C.J. 4, 324; Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants, [1958] I.C.J. 55, 120; Nottebohm Case, [1955] I.C.J. 4, 37; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, [1954] I.C.J. 47, 70; Anglo-Norwegian Fisheries Case, [1951] I.C.J. 115, 149-50; Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I.C.J. 4, 15; Corfu Channel Case, [1949] I.C.J. 4, 71. *See also* Case Concerning Rights of Nationals of the United States of America in Morocco, [1952] I.C.J. 176, 212.

56. *Supra* note 47.

57. H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY,

mann,[58] among others,[59] as a general principle of law recognized by civilized nations and hence a valid principle of international law under article 38(1)(c). But other authorities, including Schwarzenberger[60] and Gutteridge,[61] tend to deny its validity.

The main ground for objection to the doctrine is that it is not universal to the legal systems of the world. Iluyomade has found evidence of the doctrine in the French Civil Code,[62] the German Civil Code,[63] the Swiss Civil Code,[64] the Soviet Code,[65] the Mexican Code,[66] and the Ethiopian Code.[67] The last two demonstrate that the doctrine is not unique to European legal systems. Although virtually every modern non-European Legal System derives either from the common law or the civil codes. But those who deny its validity are quick to point to its absence in the legal systems based on English common law.[68] To quote Gutteridge:

> If the doctrine is to be absorbed into the law of nations it may be that this decision is not one which a comparative lawyer would be justified in challenging, but it is submitted that he is entitled to lodge an objection against the description of the principle as one common to civilized nations. A comparison of the rules of various private-law systems can only have the result of proving that this is not the case.[69]

The view of the common-law lawyer is expressed by Schwarzenberger. After discussing a number of legal principles which allegedly stem from the principle of abuse or right, he observed:

> At least in part every single case of these rules is indebted to equitable considerations, including good faith as working principles behind international law which has assisted in bringing these rules

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Ch. XIII (1933). Handl, *supra* note 36.

58. Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 288-89 (1963).

59. *See generally* note 47 *supra*.

60. Schwarzenberger, *Uses and Abuses of "Abuse of Rights,"* 42 THE GROTIUS SOCIETY 147 (1956).

61. Gutteridge, *Comparative Law and the Law of Nations*, 21 BRIT. Y.B. INT'L L. 1, 7 (1944).

62. *Supra* note 46, at 55 citing C. CIV. arts. 1382, 1383.

63. *Id.* at 56 citing BGB § 226.

64. *Id.* citing art. 2.

65. *Id.* citing Preface and article 30.

66. *Id.* citing article 1912.

67. *Id.* at 57 citing article 1225.

68. Schwarzenberger, *supra* note 60; Gutteridge, *supra* note 61.

69. *Supra* note 61, at 7-8.

> into existence. Once, however, they have become operative, they themselves—and they alone—fulfill the regulative function which we claimed for the doctrine of abuse of rights. If a State infringes any such rule, it does not abuse its own right because it has no right. The alleged exercise of a right or discretion is a somewhat bad description of the invasion of the right of another State. For this reason, any such act is a breach of duties under international customary law, or, in other words, an international tort.[70]

Thus, in Schwarzenberger's view, each rule referred to represents not the abuse of a right, but its absence.

Civil law jurists have posed the same argument. The French jurist Planiol[71] argued that an act ceased to be the exercise of a right as soon as it acquired an abusive character. Thus, if the use of a right with the intention of harming another is wrongful, it is tortious and the actor has no right to do it. Josserand,[72] on the other hand, defended the doctrine. He drew a distinction between *droits subjectifs*, by which he meant specific rules of law, and *droit objectif*, by which he meant the general principles of law inherent in a given legal system. An *abus de droit* therefore consists of the exercise of a subjective right in such a way as to offend against *droit objectif*. Or to put it in terms which a common-law lawyer will more readily understand, abuse of right consists of using a right granted by the letter of the law to offend against its spirit.

This reasoning is perfectly acceptable in a civil law system because of the existence in most civil law jurisdiction of a civil code. Insofar as the existence of a right may be ascertained by reference to a specific article of a civil code we may say that the right exists. If the code says, for instance, that an individual may use his property in a particular way then he has a right to do so under subjective law. If he uses it in the permitted way, but in so doing he offends the rights of others, then we may inquire into whether he has offended objective law and thereby abused the right.

Thus when the owner of a house erected a tall dummy chimney on his roof solely for the purpose of depriving his neighbor of access to light, he was exercising a right granted by article 552 of the *Code Civile*[73] which permits the owner of land to plant or build on it whatever he thinks proper. The Court of Appeal of Colmar in 1855

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70. *Supra* note 60, at 154.

71. PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL, Tome 2, 811, 281 (8ieme ed. 1921).

72. JOSSERAND, DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITE (2d ed. 1939).

73. C. CIV. art. 552 (7le ed. Petits codes Dalloz 1971-72).

held that although the owner was exercising a right given to him, he was acting spitefully, in that he had no serious and legitimate interest in exercising it. Therefore, his act was treated as wrongful.[74] Likewise, when the defendant owner of land adjoining airship hangars and landing strips built large wooden structures studded with metal spikes to make it difficult to land the dirigibles, he was held liable for damages.[75] His primary intention was to force the adjoining owner to buy him out. But he was prepared to wreck airships to do it, and hence could not claim the protection of article 552.

As Gutteridge points out,[76] the principle of *stare decisis* renders the French case law very confusing to the English lawyer. It makes Josserand's argument meaningless. The common-law lawyer is much more concerned with specific incidents rather than with sweeping general principles contained in a code. Consequently, it would make no sense to a common-law lawyer or judge to say "he had a right, but he abused it." The lawyer would simply argue, and the judge would hold, that "he had no right," having distinguished the case on its facts from previous cases positing the existence of the right in question. Having thus established that the defendant had no right to do what he did, the court would thereby create a rule of law which would become binding precedent for the future. The rule thus established would subsist unless and until it was changed by statute or overruled.

Statutes, of course, create rights and for those rights there is a textually ascertainable reference. But if a right purportedly granted by a statute is used for purposes other than those for which the right was granted, common-law courts will not say that there has been an abuse of the right. Rather they will seek, through statutory interpretation, to establish whether or not the conduct in question actually falls within the ambit of the right created by the statute. They may decide either that the conduct does not fall within the statute, or they might conclude, albeit reluctantly, that applicable canons of interpretation do not justify its exclusion. In the latter case, the conduct will be permitted whatever the motive although the statute might be acknowledged to be defective. The only remedy would be to amend the statute at that point, for we would have what is called, in common parlance, a loophole.

74. [1855] D.P. VI. 10 (Trib. Civ. Colmar).

75. L'Affaire Clement-Bayard, [1913] D.P. II. 177 (Trib. Civ. Compiegne); [1915] D.P. 79 (Cass). *Cassation*, 3 ao 1915, Dalloz Periodique, 1971. 1. 79.

76. Gutteridge, *Abuse of Rights*, 5 CAMB. L.J. 22, 35 (1933-35).

Another ground for the rejection of abuse of right in the common law was enunciated in the English case of *Mayor of Bradford v. Pickles.*[77] In that case, the defendant had sunk a well on land which he owned for the sole purpose of depriving his neighbor of water. In doing so, he hoped to coerce his neighbor into selling the land to him. The House of Lords held, per Macnaghten, L.J., that although "the defendant's conduct might be churlish, selfish and grasping" there was nothing in the common law of England to prevent him from doing what he did. "It is the act, not the motive for the act, that must be regarded."[78] Said Lord Halsbury, L.C.:

> This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motives might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seems to me to be absolutely irrelevant.[79]

In other words, the common law will not inquire into the motives of a person in exercising a right, but only into whether he has that right.[80] The doctrine of abuse of right, stemming as it does from motives, would thus appear inapplicable.

The implications of that holding have not been accepted without objection by scholars. To quote Gutteridge:

> This is a conclusion which cannot be regarded with indifference by any good citizen, and it is somewhat strange that English textbook writers should apparently accept it with equanimity. The possibility that a legal right may be exercised with impunity in a spirit of malevolence or selfishness is one of the unsatisfactory features of our law, and there would appear a prima facie case for reform in this direction, a belief which is strengthened by the fact that ours is the only modern system which has not endeavored to evolve some means by which it may be ensured that a rule of law shall not be transformed into an instrument for the gratification of private spite or the promotion of chicanery.[81]

Iluyomade endeavors to demonstrate that the essence of the doctrine of abuse of right has been incorporated nevertheless into the

77. [1895] A.C. 587.
78. [1895] A.C. at 601.
79. *Id.* at 594.
80. *But see* note 151 *et seq.* and accompanying text *infra.*
81. *Supra* note 76, at 22.

common law system.[82] He succeeds in showing that the courts have subsequently mitigated the harshness of the rule laid down in *Mayor of Bradford v. Pickles* by increasingly taking into account motive. But, as we shall see, in all of the instances he cites, the structure of the courts' reasoning is strictly common law.

International law partakes of the characteristics of civil law in some respects and common law in others. For the purpose of international adjudication, international law resembles civil law in the sense that the principle of *stare decisis* is specifically excluded by article 57 of the Statute of the International Court of Justice. It further resembles civil law in the sense that there appears to be no rule prohibiting inquiry into motives. But, for our purpose, international law shares one important characteristic with the common law. Apart from treaties, which create rules binding specifically on the parties, there is no specific textual reference whereby the existence of a right can be ascertained. There are no *droits subjectifs*. Thus, except in the case of treaty law, Josserand's jurisprudence would hardly seem applicable. Where an issue involves a question of customary law it would therefore seem appropriate to argue that a right does not exist rather than that it has been abused.

C. *The Scope of the Doctrine of "Abuse of Right"*

If there is one thing that emerges from Iluyomade's article,[83] it is that the doctrine of abuse of right is one of considerable scope. From it, he has deduced the implicit existence of rules analogous to common law *ultra vires*,[84] good faith,[85] civil law *detournement de pouvoir* (abuse of public power),[86] equity,[87] and common law nuisance.[88]

In international law, as Iluyomade points out,[89] the principle has been adverted to a number of times. In the case of *Certain German Interests in Polish Upper Silesia*,[90] the German Government sold a factory to private individuals in a territory which was to pass into

82. *Supra* note 40, at 58-59.
83. *Supra* note 40.
84. *Id.* at 49-50.
85. *Id.* at 50-51.
86. *Id.* at 51-52.
87. *Id.* at 52-53.
88. *Id.* at 57-58.
89. Cases cited notes 54 and 55 *supra*.
90. [1932] P.C.I.J., ser. A/B, No. 46, cited Iluyomade, *supra* note 40, at 61-62.

Polish control under a treaty which had been signed but had not yet come into force. The Court held that the sale was not an abuse of right.

In the *Free Zones Case*[91] the Court held that the imposition of an import tax by the French was a customs tax in disguise and therefore a violation of France's treaty obligation toward Switzerland not to levy a customs tax in certain frontier zones. It was an abuse of France's undoubted right to maintain a control cordon at its frontiers. Iluyomade also points to glimmers of the abuse of right doctrine in many International Court of Justice opinions.[92] However, he noted with respect to those cases that such "pronouncements were unnecessary to the determination of the issue at hand, or were not more than guarded warnings against the abusive exercise of right."[93]

Iluyomade's examples of the application of abuse of right demonstrate that the doctrine is most fruitful in international law when it is used as a corollary of the principle of good faith[94] and particularly in the interpretation of treaties, since in that context there is a textually ascertainable right and it is quite proper to examine the motives of a State in exercising that right.[95]

However, for all of its breadth of scope, the doctrine is entirely too limited for the environmentalist in one important way: the motives of the polluter are of little consequence to environmental law. It is the fact of pollution which is all-important. Thus, to force the inquiry into the mold of abuse of right is to allow the innocent polluter to continue his depredation of the environment to the detriment of his neighbors. So motive is not really the issue. The problem was summed up pithily by Handl, who said:

> [T]o state that international responsibility arises from conduct attributable to and constituting a failure of a state to comply with an international obligation including one that incorporates the concept of abuse of right, simply begs the question of what the obligations of states are in a specific clash of interests in which the

91. [1932] P.C.I.J., ser. A/B, No. 46, cited Iluyomade, *supra* note 40, at 62.

92. *See* note 55 *supra* for a list of opinions in which the doctrine is clearly expressed. All are cited by Iluyomade, *supra* note 50 at 62-68. He also purported to find evidence of the doctrine in many other opinions not cited therein.

93. Ilyuomade, *supra* note 40, at 65.

94. *Id.* at 61-66.

95. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Ch. 4 (1953), and Fitzmaurice, *Law and Procedure of the International Court of Justice*, 30 BRIT. Y.B. INT'L L. 53, 91-92 (1953), use it in that way.

same legal justification, territorial sovereignty, is invoked by both parties.[96]

Thus, for the international lawyer faced with the absence of treaty law or customary law dealing with the problem of international environmental pollution, the task becomes one of ascertaining whether we can infer the existence *de lege lata* of a general principle of law more directly applicable to the problem.

V. General Principles of Law As a Source for the Principle of Neighborship

A. *A New Metholology*

At this point it may be useful to expand and extend a methodology that the author introduced in a previous article.[97] The methodology stems from an analysis of Cheng's view of article 38(1)(c) of the Statute of the International Court of Justice which directs the Court to apply, as international law, "general principles of law recognized by civilized nations."

Cheng saw article 38(1)(c) as recognizing essentially universally accepted principles of law:

> This point of international law does not consist therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short, Law.[98]

It would seem that to qualify for inclusion under article 38(1)(c), a principle would have to be one that is shared by all or nearly all legal systems. Hence comparative law would appear to be a useful tool in gleaning these principles. Cheng appears to accept this view;[99] however, he stresses that "general principles," though unformulated,[100] form part of existing international law. In a discussion before the Grotius Society he said:

> The reason why, in looking for general principles of law, International Courts frequently refer to municipal law is merely because municipal law has a much longer history and is much more developed, from which it is easier to deduce such principles. But these principles do not belong to municipal law exclusively and still less

96. Handl, *supra* note 36 at 58.
97. *Supra* note 1.
98. Cheng, *supra* note 95, at 24.
99. *Id.* at 25.
100. *Id.* at 123.

> to any particular branch of municipal law. An International Court, in referring to municipal law, is neither applying nor even borrowing from the latter; but merely seeks to discover therefrom the fundamental principles which are common to both municipal law and international law.
>
> In looking for the general principles of law in municipal systems, it is necessary to disregard the peculiarities of individual systems introduced on account of special circumstances. These general principles of law should not, therefore, be regarded as a kind of mathematical highest common factor of municipal law of all countries, including all their peculiarities.[101]

Thus Cheng does not appear to approve of the sort of wholesale importation of municipal law concepts into international law that is favored by Jenks[102] and Lauterpacht.[103] Consequently, the principles of substantive law which he accepts under this rubric are very few, limited primarily to good faith, international responsibility, estoppel, and corollaries derived from these principles.[104] The remainder are procedural rules relating to the conduct of international judicial proceedings.[105]

It is submitted that the principles which may be derived from article 38(1)(c) need not be nearly as universal as Cheng and other writers suggest. The words "all" or "nearly all" do not appear in the article. Legal systems differ with respect to the interests which they protect. To the extent that two or more legal systems assert the same or similar specific values we may be able to generalize a principle common to all such systems from the rules that are designed to protect that value in each of them. It is thus possible to derive rules common to a more limited number of legal systems and preserve the methodology described above.

In the article referred to above,[106] the author noted a strong similarity between the institution of territorial sovereignty and the institution of property.[107] Not all "civilized societies" have legal

101. Discussion *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, in 38 [The Grotius Society 125, 129-30 (1953).

102. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION, ch. 6 (1964).

103. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).

104. *See* CHENG, *supra* note 95, at 397-98.

105. Because of this he has been criticized by PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW, at 85 (1965).

106. *See, supra* note 1, at 69.

107. The author is indebted to Dr. Bookfield on the same faculty for pointing out that use of the term "sovereignty" without the adjective "territorial" could

systems based on property. Thus, principles of law designed to protect property rights are not generally valid for all legal systems. But where two or more legal systems have rules which are designed to protect property, a principle which can be abstracted from these rules may logically be said to constitute an essential element of juridical truth for such systems and may consequently be said to be applicable to international law.

B. *Roman Law*

The starting point for any such abstraction of general principles must be Roman law, for, as Gutteridge commented:

> [t]he basis on which the law of nations rests is made up of concepts taken from the civil law of Rome—however much these concepts may be disguised in the garb of custom, reason or the law of nature. Secondly, there is a growing tendency—at least in modern time—to look beyond Roman law for any materials which may be required for the purpose of filling gaps in international rules. This tendency has become crystallised in article 38(3) of the Statute of the Permanent Court of International Justice [now article 38(1)(c) of the Statute of the International Court of Justice].
>
> The first question which we have to consider is . . . the weight to be attached to the Roman and non-Roman elements respectively in private law, when an attempt is made to discover a principle which may be deemed to be of general application.[108]

He then went on to warn about the danger of ignoring "English Common Law when something like one-half of mankind is living under a regime of law which is of a different character, namely, that of the common law of England."[109]

It would be futile to deny that a good part of the impact of Roman law on international law stemmed from historical accident.[110] Nonetheless, there is, in some cases, a more rational basis for the application of Roman Law than other legal systems. Most importantly, the Roman economic system, like the economic system of many civil law countries and most common law countries, was based on property. One of the drafters of the Statute of the

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be somewhat confusing. This ought to clear up the confusion.

108. Gutteridge, *Comparative Law and the Law of Nations*, 21 BRIT. Y.B. INT'L L. 2 (1944).

109. *Id.* at 3.

110. *See* MAINE, ANCIENT LAW, 111 (new ed. 1930).

Permanent Court of International Justice, Mr. Raoul Fernandes, noted this in a slightly different context:

> In their relation with things, States, whether as subjects of private or public property, or in the sphere of territorial sovereignty, exercised *de jure* or *de facto* possession, sometimes over things, sometimes over servitudes and often—outside any conception of property—with regard to the complex of political powers which constitute sovereignty.
>
> In international law, these legal relations are based on principles borrowed from Roman Law.
>
> In Roman law, possessory protection including the possession of things and the quasi-possession of servitudes was assured by interdicts and the interdict procedure was adopted by the law of modern nations as a *sine qua non* of an economic system based on property such as we have inherited from the Romans.[111]

Mr. Fernandes was urging on the jurists the adoption of a system of Interim Protection which was eventually adopted as article 41, but the above quotation provides the clue for the methodology employed herein. If we can say of a principle found in Roman law that it was essential to a legal system based on property, then we may say of such principle that it is of general applicability.[112] The applicability carries further force if we can find analogous principles in modern civil law and English common law and perhaps conclusive force if we accept that similar values are implicit in territorial sovereignty and that these values are protected in international law.

One of the basic premises of Roman law was that owners enjoyed virtually unlimited powers over their property. This assumption has a long history and has been said to have influenced all Western legal systems that owe their ultimate allegiance to Roman law.[113] Nevertheless, as with lawyers and judges today, Roman jurists were concerned with reconciling competing claims of individual owners to have free use of their property:

> Approaching this problem in piecemeal fashion, which is typical

111. LEAGUE OF NATIONS, *Proces Verbaux* of the Proceedings of the Committee, 29th Mtg, Annex No. 3, at 608. For a further discussion of art. 41, *see supra* note 1.

112. " . . . we may dismiss the whole law of real property as being of secondary importance for our purposes." *Cf.* JENKS, THE COMMON LAW OF MANKIND, 108 (1958).

113. RODGER, OWNERS AND NEIGHBORS IN ROMAN LAW 1 (1972).

> of their work, the Roman jurists reconciled the competing claims of individual owners to have free use of their property. It is just because the various restrictions are imposed in so many different ways and are recorded in so many different parts of the Digest that we may underestimate their combined effect in ensuring that an owner observes the minimum requirements of life in a community.[114]

At Roman law there were two doctrines under which a party whose property rights are affected by his neighbors' use of their property might protect himself: absence of servitude and *damnum injuria datum*. We shall discuss each of these in turn.

Absence of servitude—Under Roman law the absolute right of ownership could be subjected to certain servitudes in favor of an adjoining land owner. Without going into ways to acquire servitudes, we may say that the adjoining owner could use a servitude only if he acquired it as a property right.[115] If, however, the adjoining property owner attempted to exercise a servitude which he did not possess, his neighbor could claim ownership free of the servitude by means of an *actio negatorio*, by which he demonstrated that the servitude did not exist.[116] This was an action in rem to clear the property of the wrongful servitude.[117]

Every owner of land was obliged to put up with a certain amount of smoke and water. A passage by Ulpian, in the Digest, tells us that one may make *non gravem* smoke on one's own land and no one may object.[118] But if the smoke is excessive or particularly noxious, allowing it is justified only if one has a servitude against the adjoining owner obliging him to receive either excessive or unusually noxious smoke.[119] In the absence of such a servitude, the adjoining owner might take an *actio negatorio* to rid himself of the offensive smoke.

This approach is almost unrecognizable to common law judges and jurists, but it illustrates our main point most forcibly, namely, that legal problems relating to pollution were closely related to the

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114. *Id.* at 4.

115. *See* BUCKLAND, A TEXT-BOOK OF ROMAN LAW, ch. V (2d ed. 1932); GAIUS, ELEMENTS OF ROMAN LAW WITH A TRANSLATION AND COMMENTARY BY EDWARD POSTE, 157-208 (2d ed. rev. 1875).

116. BUCKLAND, *supra* note 115, at 676.

117. GAIUS, *supra* note 115, at 488.

118. ULPIAN, DIGEST 8.5.8.6 at 121 (T. Mommsen ed., 1889). *See also* Transl. 3 S. SCOTT 311 (1933).

119. *Id.* at 8.5.8.5. The example given in the text deals with smoke emitting from a cheese factory which is unusually noxious. An alternative translation of the word "Casiaria" relates to smoke emitted by burning casia wood.

right of enjoyment or use of one's property.

Damnum Injuria Datum—This doctrine, found in *Lex Aquilia*, the law of Damage to Property, is probably more easily recognizable to us. To come under *Lex Aquilia* the act had to be an act of a positive nature, and not a mere omission.[120] It had to be wrongful (*injuria*)[121] and wilfull or negligent (*culpa*)[122] and had to involve damage or destruction to property (*damnum*).[123] If those elements were present, the owner of the property could proceed in delict for *damnum injuria datum*. If the damage had already occurred, the procedure was *actio in factum* to obtain direct damages. If the damage was anticipated, the owner could obtain *cautio damni infecti* or security for the anticipated damage.[124] Grounded as it was in culpability, which we have seen to be of little value in resolving environmental legal issues, this type of proceeding is less desirable for our purposes than the *actio negatorio*.

C. *Development of Civil Law*

Lawson describes the development of the civil law approach from the Roman *actio negatorio*:

> Then comes an extension in medieval and modern civil law. Suppose your neighbor does not walk across your land under a claim to an easement, but merely sends fumes across your land and makes life unbearable by noise; can he not be said to be really claiming something in the nature of an easement to do these things, even though no such easement would be recognized by the law? On that fictitious reasoning you can claim the freedom of land from encroachment as if it had been an easement and your action will be an *actio quasi negatoria*, which will sound in property and not in delict. From the substantive point of view, what will be in issue will be the ambit of ownership, not the personal duty of your neighbor not to commit a delict of encroachment.[125]

Thus, whereas in Roman law a property owner bothered by a non-culpable use to which adjoining property was put had to find an actual servitude to negate, in medieval law the requirement of an actual servitude was replaced by a fictitious one.

120. GREUBER, THE *Lex Aquilia* 208 (1886).
121. *Id.* at 214.
122. *Id.* at 223.
123. *Id.* at 233.
124. SANDARS, THE INSTITUTES OF JUSTINIAN, 341 (7th ed. 1927).
125. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 143-44 (1955).

German Law—The idea, attributed to Roman law, that owners enjoyed virtually unlimited powers over their property, heavily influenced the drafting of article 903 of the German Civil Code (BGB)[126] which provides:

> The owner of a thing may, in so far as the law or the rights of third parties admit, deal with the thing as he pleases and exclude others from any interference with it.[127]

But the rights of ownership are not absolute. Article 226, which we may regard as an unequivocal codification of abuse of right (*shikanverbodt*), provides one clear limitation on such rights: "The exercise of a right which can only have the purpose of causing injury to another is unlawful."[128]

Those seeking remedies against pollution under German law are not, however, compelled to rely on abuse of right. Article 906 may permit them alternative remedy. This article, phrased in a negative way, provides that the owner of a piece of land may *not* forbid the discharge of gases, vapors, odors, smoke, soot, heat, noise, vibrations and similar interferences proceeding from another piece of land, insofar as the interference does not materially injure the use of the land.[129]

Negative phrasing notwithstanding, article 906 clearly implies that an owner has the right to forbid such activity when it *does* materially affect the use of the land. The interpretation given to this article by the Courts tends to support this contention. They have barred not only activity harmful to the land per se but also activity harmful to things or persons on it. Furthermore, it has been considered unjustifiable to limit liability to physical harm. Thus activities causing mental and physical harm have been similarly barred.[130] Prohibited activities have included ionization; electromagnetic vibrations; smells caused by feeding pigs; smoke; soot from trains or factories; coal dust; sparks from fireworks; and vibrations from pile drivers, rotating presses, washing machines and bowling alleys.[131] Hence, we may regard the negative wording of article 906 more as a caution that the conflicting interests of own-

126. *See* RODGER *supra* note 113, at 2-3.
127. Transl. C.H. Wang, 201 (1907).
128. *Id.* at 51.
129. Palandt, *Kommentar BGB* (32 *Neubearbeitete Auflage*) (1973).
130. *Id.* at 948.
131. *Id.*

ers are to be balanced than as a prohibition of actions against other property owners.

The available remedies are spelled out in article 1004, which gives an owner of property the right to require abatement if his ownership is impaired in any way other than by deprivation or withholding of possession[132] or to get an injunction if continuance of the injury is apprehended.[133] Reflecting the Roman doctrine of servitudes, the article further provides that the claim is barred if the owner is bound to submit to the injury.[134]

However, the German Code is sufficiently specific so that a doctrinal jurisprudence dealing with the rights and duties of neighboring property owners is not essential. It is to the French law that we must turn for doctrinal elaboration.

French Law—One cannot find, in the French Civil Code, an article akin to article 226 of the German Code in which the doctrine of abuse of right is specifically set out. As we have seen, the existence of the doctrine in French law was the subject of a doctrinal dispute between Planiol and Josserand[135] which appears to have been settled by the jurisprudence of the Courts. Similarly, there is no section akin to article 906 of the German code which deals specifically with conflicting rights and duties of neighbors. The only article specifically relevant in French law is article 544, which adopts the Roman notion of absolute ownership: "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by law or regulations."[136]

The Code itself is not a very useful guide as to just what actions are prohibited by law or regulations. There has been, until recently, confusion among French jurists between what Mazeand[137] calls "*abus du droit de propriete*" (abuse of the right of ownership) and "*troubles de voisinage stricto sensu*" (problems of neighborship *stricto sensu*). In the first situation, the abuse does not differ in its conditions and effects from any abuse of rights. In the second case it has a unique quality.

The criterion for abuse of right is fault, or the Latin *culpa*, which may come about through malice, negligence, or from failure to

132. *See* Wang, *supra* note 127, at 226.
133. Palandt, *supra* note 129, at 1039.
134. *Id.*
135. *See* note 71 *supra et. seq.* and accompanying text.
136. THE FRENCH CIVIL CODE 175 (rev. ed. H. Cachard transl. 1930).
137. MAZEAND 5 LECONS DE DROIT CIVIL, 1094 (1962).

observe rules or administrative regulations such as regulations concerning the distance from the boundary at which a tree may be planted.[138]

Problems of neighborship *stricto sensu* arise when an owner, without any negligence or malicious intent, in the exercise of his rights by means of such things as noise, smells, radio electric waves or bacteria coming from his own property.[139] He may even take all possible care to minimize the annoyance, but will nevertheless be liable if his interference goes beyond the bounds of ordinary relations among neighbors.[140] Here once again we have a recognition that the interests of neighboring property owners must be balanced.

The basis of liability in this case comes from the fact that the effects of his activity have exceeded the boundaries of his own territory. Thus the theory on which liability for the problems of neighborhood *stricto sensu* is based is that of *empietement d'immissio*, traceable to Roman law.[141] *Empietement* may be translated as trespass[142] although it does not carry the technical legal meaning that trespass has in common law, namely, the commission of a delict. *Immissio* is a Latin term meaning "the action of allowing (things) to enter, flow into, etc., a property."[143] Thus, the act is unlawful because it constitutes an invasion of a neighbor's property to his damage or prejudice.[144] Therefore a person who commits acts that are strictly confined to his own property, such as erecting a false chimney or causing the collapse of a nearby building by construction on his own property, can be held liable only under the theory of *abus de droit*, which requires that the act contained an element of fault (*culpa*). This is so even if the owner by his act deprives his neighbor of a commodity which the owner

138. *Id.* For examples of the abuse of right of ownership see *supra* notes 74 and 75 and accompanying text.

139. *Supra* note 137.

140. [1932] D.P. ____ 123 (Trib. Civ. Amiens), dealing with an electrician who made and sold radio equipment.

141. *Id. See* notes 118, 119 *supra*. Mazeand traces the theory of *immissio* back to the same Roman texts that we looked at in our discussion of Roman law. He also cites Domat and Pothier to show that this theory was accepted by the drafters of the *Code Civile*.

142. 1 HARRAP'S NEW STANDARD FRENCH AND ENGLISH DICTIONARY E 26 (rev. ed. 1972).

143. OXFORD LATIN DICTIONARY 836 (1973).

144. *Supra* note 137, at 1095.

is actually getting from his own property.[145] But where the act involves *immissio*, the element of fault is not necessary.[146]

Italian Law—The Italian Civil Code adopts the same absolutist approach towards ownership as the French and German Codes. Article 832 provides: "the owner has the right to enjoy and dispose of things fully and exclusively, within the limits and with observance of the duties established by the legal order."[147] But the Italian Code is particularly interesting in that it adopts three ways of dealing with conflicts between neighboring property owners.

Article 833 specifically adopts the doctrine of abuse of right and applies it to property ownership: "The owner cannot perform acts that have no other purpose than that of harming or causing annoyance to others."[148]

Article 890 is an unusual and sensible provision in that it represents an attempt in the Code to prevent problems before they arise:

> One who intends to build furnances, chimneys, salt stores, stables and the like, or wishes to store moist or explosive or otherwise noxious materials or install machinery from which a danger or damage may arise near the boundary shall observe the distance established by regulations and, in their absence, those necessary to preserve neighboring land from any injury to stability, health and safety, even if there is a boundary wall.[149]

Finally, there is a provision for an *actio negatorio*, entitled as such, in Article 949:

> The owner can sue to have declared the non-existence of rights claimed by others in the thing when he has reason to fear prejudice from them.
>
> If disturbances or molestations also occur the owner can request their cessation, as well as judgment for compensation for damage.[150]

Summary of Civil Law Development—We can thus see that the two principles we have been discussing, neighborship (*voisinage*)

145. *Id.* at 1096. *Compare Mayor of Bradford v. Pickles*, [1895] A.C. 587.

146. *Supra* note 137, at 1095. Although Mazeand opines that there may be culpability in the sense that such use amounts to a disregard of the ownership rights of one's neighbor. *Id.* at 1096. *Compare* note 172 *infra*, and accompanying text.

147. THE ITALIAN CIVIL CODE, 227 (Beltrano, Longo & Merryman, transl.) (1969).

148. *Id.*

149. *Id.* at 240.

150. *Id.* at 255.

and abuse of right, stem from very different Roman antecedents. *Damnum injuria datum*, the antecedent of abuse of right, covered a broad number of situations sounding in delict. This explains the problems we have with abuse of right when we attempt to apply it to International Environmental Law, namely the breadth of its scope and the requirement of *culpa*, either in the form of malicious intent or negligence.

The *actio negatorio*, on the other hand, was a remedy designed to protect a right *in rem*, *i.e.*, the right to enjoy one's property free from interference by a neighbor who does not possess a servitude which would justify his harmful invasion. It is from this principle that the civil law principle of neighborship is descended.

One must avoid, however, becoming too rigid about categories for purposes of determining international law. *Empietement* translates as trespass. Those schooled in English or American common law may be thereby misled into believing that it is analogous with common law trespass and sounds in delict. It is not so regarded because the element of *culpa* which is essential to civil law delict is missing. However, the English common law doctrine which is designed to protect the same interests *does* sound in delict.

D. *The Common Law—Nuisance*

Buckland and McNair[151] believe that the common law parallel to both the Roman *actio negatorio* and *damnum injuria datum* is the doctrine of private nuisance. This doctrine also strikes a balance between conflicting property interests, but in a different way from Roman law or civil law.

Private nuisance has been described as "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it."[152] Winfield stresses the balancing aspect of the doctrine rather heavily:

> Stenches, smoke, the escape of effluent and a multitude of different things may amount to a nuisance *in fact* but whether they constitute *actionable* nuisance will depend on a variety of considerations, especially the character of the defendant's conduct, and a balancing of conflicting interests. In fact the whole of the law of private nuisance represents an attempt to preserve a balance be-

151. W. BUCKLAND & A. MCNAIR, ROMAN LAW AND COMMON LAW 392 (rev. 2d ed. 1965).

152. P. WINFIELD & J. JOLOWICZ, LAW OF TORT, 326 (9th ed. 1971). *See also* W. PROSSER, LAW OF TORTS § 89 (4th ed. 1971).

> tween two conflicting interests, that of one occupier in using his land as he thinks fit and that of his neighbour in the quiet enjoyment of his land. Everyone must endure some degree of noise, smell, etc. from his neighbour, otherwise modern life would be impossible and such a privilege of interfering with the comfort of a neighbour is reciprocal. (Emphasis supplied).[153]

Thus, like the two States, each of which rests their case on territorial sovereignty, each of the parties to a nuisance action rests his case on his right to the enjoyment of his own property. The law of nuisance serves to balance these interests. Thus "a man may use his land so as to injure another without committing a nuisance."[154]

Liability for nuisance need not arise from malicious intent.[155] In fact, the activity being carried out may be highly laudable. In *Metropolitan Asylum District v. Hill*,[156] the activity complained of was the operation of a smallpox hospital. This was held to be a nuisance because the presence of smallpox germs created a hazard to the health of property-owners in the vicinity.

The above case underlines the usefulness of the law of nuisance to environmental law. Had the *Nuclear Tests Case* proceeded to its merits, an analogy would no doubt have been drawn from it to show that an activity that, like nuclear testing, is allegedly hazardous to health creates an unwarranted interference with a State's right to the peaceful enjoyment of its own territory. Other activity which has been held under common law to constitute a nuisance includes operation of a copper smelter causing damage to plain-

153. WINFIELD *supra* note 152, citing *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 903; *Bamfield v. Turnley* [1862] 3 B. & S. 66, 79, 83-84. *See also* PROSSER *supra* note 152, at 577: "The Law does not concern itself with trifles and seek to remedy all of the petty annoyances and disturbances of every day life in a civilized community."

154. PROSSER, *supra* note 152, at 574-75, describes four types of conduct which may result in liability for nuisance. In addition to "a malicious desire to do harm for its own sake," nuisance may be intentional:

> . . . merely in the sense that the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiff's interests is substantially certain to follow.

155. *Id.* But a nuisance may also result from conduct which is merely negligent, where there is no intent to interfere in any way with the plaintiff, but merely a failure to take precautions against a risk apparent to a reasonable man. . . .

> Finally, a nuisance may arise where the defendant carries on in an inappropriate place an abnormally dangerous activity such as blasting, or the storage of explosives.

156. [1881] 6 App. Cas. 193 (P.C.).

tiff's trees,[157] creating unpleasant odors,[158] vibrations,[159] dust,[160] noises,[161] excessive light,[162] high temperatures,[163] gases,[164] and maintenance of a pond full of malarial mosquitoes.[165]

Ilyuomade has attempted to discover a common law doctrine of abuse of right. He cites a number of cases suggesting that the otherwise legitimate use of property may become an actionable nuisance if guided by the desire to annoy a neighbor.[166] Of these, the case of *Christie v. Davie*[167] is quite interesting. In that case North, J., held that continual playing of good music was not a nuisance of which the plaintiffs could complain, and granted an injunction prohibiting plaintiffs interfering with defendant's music-making. But he indicated that had there been a malicious intent behind their continual playing, he would have taken a different view in the case.[168]

Ilyuomade remarks of these cases:

> It is submitted that while the decision in a case may be rested upon principles of nuisance law, when a court looks into the motive of the actor rather than, or in addition to balancing competing rights and interests of the parties, the legal theory is indistinguishable from that of abuse of right and, therefore, supports the contention that this theory is accepted in the private law of common law countries.[169]

It is submitted that the legal theory is still quite different from abuse of right, notwithstanding that a court may take account of motive in some cases involving nuisance. Motive is merely a factor

157. St. Helen's Smelting Co. v. Tipping [1865] 11 H.L.C. 642.

158. Aldred's Case, 9 Co. Rep. 57 b, 77 Eng. Rep. 816 (1611); Higgins v. Decorah Produce Co., 214 Iowa 276, 252 N.W. 109 (1932); Alster v. Allen, 141 Kan. 661, 42 P.2d 969 (1935).

159. Alster v. Allen, 141 Kan. 661, 42 P.2d 969 (1935).

160. Mendolascino v. Superior Pelt & Bedding Co., 313 Ill. App. 557, 40 N.E.2d 813 (1942); Dill v. Dance Freight Lines, 247 S.C. 159, 146 S.E.2d 574 (1966).

161. Herbert v. Smyth, 155 Conn. 78, 230 A.2d 235 (1967); Guarina v. Bogart, 407 Pa. 307, 180 A.2d 557 (1962).

162. The Shelburne, Inc. v. Crossan Corp., 95 N.J. Eq. 188, 122 A. 749 (1923).

163. Sanders-Clark v. Grosvenor Mansions Co., [1900] L.R. 2 Ch. 373.

164. Towaliga Falls Power Co. v. Sims, 6 Ga. App. 749, 65 S.E. 844 (1909).

165. *Id.*; Yaffe v. City of Fort Smith, 178 Ark. 406, 10 S.W.2d 886 (1928).

166. Christie v. Davie, [1893] L.R. 1 Ch. 316; Hollywood Silver Fox Farm v. Emmett, [1936] 2 K.B. 468.

167. [1893] L.R. 1 Ch. 316.

168. *Id.* at 327.

169. Iluyomade, *supra* note 40, at 58-59.

that may be taken into consideration in balancing the interests. Thus in *Christie v. Davie*,[170] malicious intent would have swung the balance in favor of the plaintiff.

Prosser puts the matter in better perspective:

> Another fertile source of confusion is the fact that nuisance is a field of tort liability rather than a type of tortious conduct. It has reference to the interests invaded, and not to any particular kind of act or omission which has led to the invasion.[171]
>
> There are relatively few situations in which it makes very much difference which basis of liability is to be relied on. For this reason . . . the courts seldom have made the distinction and have been content to say merely that a nuisance exists. Another reason for this is the fact that the great majority of nuisance suits have been in equity, and concerned primarily with the prevention of future damage. Under such circumstances the original nature of the defendant's conduct frequently loses its importance, since his persistence over the plaintiff's protest . . . is sufficient to establish its character as an intentional wrong. In the usual case, therefore, the problem is not discussed, but intent is the apparent basis of liability.[172]

Thus, the structure of common law reasoning is different from civil law reasoning, even if the results are sometimes the same.

E. *Neighborship in Non-Western and Socialist Legal Systems*

The principle of neighborship is not exclusive to Western legal systems. There is a principle of nuisance in Jewish law very similar to the Roman law of servitudes.[173] Among Third World countries many of the present day systems of law derived from English common law or continental civil law systems. Thus the common law doctrine of nuisance is well established in East Africa.[174] Article 1225 of the Civil Code of Ethiopia has been cited by Ilyuomade as an expression of the abuse of right doctrine[175] (it is in fact entitled "abuse of ownership"). But it seems more like an expression of the neighborship or nuisance doctrine. It provides:

(1) The owner shall not cause nuisance or damage to his neighbor.

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170. [1893] L.R. 1 Ch. 316.

171. *Supra* note 152, at 573.

172. *Id.* at 576.

173. 1 HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW, 365-70 (2d ed. 1965).

174. *See, e.g.*, VEITCH, EAST AFRICAN CASES ON THE LAW OF TORT, Ch. 4 (Law in African Series No. 21, 1972).

175. Iluyomade, *supra* note 40, at 57.

(2) He shall not cause smoke, soot, unpleasant smells, noise or vibrations in excess of good neighborly behavior.[176]

In fact, the doctrine of abuse of right is not encouraged in the Ethiopian Civil Code. Article 2034 provides:

> Subject to the provisions of the preceding Articles, the manner in which a right is used may not be challenged on the ground that it is contrary to the economic or social purpose of that right.[177]

Socialist legal systems are not based on the institution of private property. Yet the principle of neighborship is not entirely alien to the Soviet legal system. Thus, article 24 of the Soviet Land Code, R.S.F.S.R. (1922) provided:

> A user of land has the right under existing law to do the following things on his plot:
> (a) Conduct agricultural operations on the land with such tools as he may select, subject to the limitations set forth below, and (b) raise, arrange and use structures and dwelling requirements. The user of land has no right to commit acts or arrange structures on his allotment of land which violate substantial interests of neighboring users of land.[178]

176. Published by the Government of Ethiopia, 1966.

177. Cited by Iluyomade, *supra* note 40, at 57.

178. HAZARD & WEISBERG, CASES AND READINGS ON SOVIET LAW, 261 (1950). The principle of "abuse of right" has also survived in Soviet and Eastern European law and was, at one time, a major instrument for flexibility in the law. Article 1 of the Soviet Civil Code, R.S.F.S.R. 1922 was originally used in aid of Lenin's dictum that "all law is public" as an instrument whereby the courts could interpose socialist policy upon the strict application of the Code. HAZARD, COMMUNIST AND THEIR LAW 77 (1969). The principle was included, over some opposition, as Article 5 of the Civil Code of 1961:

> Civil Rights are protected by law, except in instances when they are exercised in a manner inconsistent with their purpose in a socialist society in the period of the building of communism. In exercising their rights and performing their obligations, citizens and organizations must observe the law, and must respect the rules of socialist communal living and the moral principles of a society which is building communism. *Id.* at 79.

Hazard has said, *Id.* at 80, that this Article has meaning in the general Western-European sense to prevent unneighborly acts, and is not applied as was Article 1 of the earlier Code in the implementation of a policy of "class justice". Article 5 differs to this extent:

> With the new Code Article 5 is designed to strike down not the class enemy but the citizen devoid of what is required of a good neighbor. If the Soviet Code is novel in comparison with those of Western Europe, it is because of the definition of "neighbor". He is no longer only the man next door, or the villager who passes in the street. He is the citizen in general, the member of society as a whole . . . . *Id.*

But we should note that it still requires an "abuse", some sort of *culpa*.

VI. ELEMENTS OF THE COMMON PRINCIPLE OF NEIGHBORSHIP

The systems of law which we have discussed treat the rights of a property holder to be free of pollution created by his neighbors in very different ways. But whether the problem is treated as nuisance, trespass (*"impietement d'immissio"*), or absence of a servitude, we may extract a common principle of neighborship which has a number of constituent rules which we may now attempt to formulate. There is one word of caution which ought to be introduced before we do indeed formulate the principle. When we are looking for a general principle, we do not need to find a rule bearing the same name or even one which operates by the same techniques. The important questions are firstly whose interests are protected by the rule and secondly, what is the essential basis for that protection in the relevant legal system? Elaboration in the form of a technique of approach or a set of sub-rules is normally done by the courts and publicists. The techniques and sub-rules will thereby be those most appropriate to international law needs. So the purpose of formulation here is primarily the creation of a model against which we can examine the principle as it operates in international law.

1. A property owner may do what he likes with his own property so long as his activity does not invade his neighbor's property. Activity which is motivated by culpable behavior such as malicious intent or negligence falls into the category of abuse of right which is the subject of an entirely different set of rules.
2. A property owner is bound to accept a reasonable amount of smoke, noise, pollution, and similar inconvenience from his neighbor; but where activity causes an invasion of or trespass (*empietement*) on one's neighbor's property by smoke, noise pollution, or similar interference in a degree which exceeds that which is reasonably necessary for use or enjoyment of one's own property, then the neighbor has a legal remedy whereby he can either prevent the interference or seek some form of damages.
3. This remedy stems from the fact of unreasonable invasion and not from his neighbor's culpability although questions of negligence or malicious intent may be relevant to assessing whether or not the invasion was reasonable.
4. Where an owner harms his neighbor by an activity carried out solely on his own property and not constituting an invasion of his neighbor's property then the principle of neighborship does not apply.[179] If his activity is not culpable, *i.e.* motivated by negligence or malicious intent, then his neighbor has no remedy. If his activity

179. *Cf.* PROSSER, *supra* note 155, relating to "spite fence cases." These cases are the closest that Anglo-American common law has come to accepting some form of abuse of rights.

is due to culpable behavior, then whether or not his neighbor has a remedy will depend on whether the legal system recognizes the separate and distinct doctrine of abuse of right.

The fact that the application of the principle turns on the reasonableness of the neighbor's invasion means that we are dealing with a norm of variable content. This norm will change accordingly as those who apply it perceive the hazards of air pollution and the social desirability of suppressing it. The principle thus can be expressed by the Latin maxim *"sic utere tuo ut alienum non laedas"*—use your own property so that it will not injure others.

VII. The Applicability of the Principle of Neighborship to International Law

A. *Trail Smelter*

With the principle of neighborship in mind, we can now take another look at the *Trail Smelter Arbitration.*[180] In that case, the arbitral Tribunal found that the smelting of zinc and lead ores at Trail in Canada had resulted in the emission of sulpher dioxide fumes,[181] which had caused damage to "cleared land used for crops" in the State of Washington in the United States of America.[182] The Tribunal awarded damages amounting to the reduction in value of use or rental value of the land caused by the fumes,[183] as well as damages for harm to uncleared land and improvements,[184] particularly for damage to timberland.[185] The Tribunal, however, did reject claims for damage to livestock, damage done to property in the town of Northport, and "damage in respect of business enterprises", on the grounds that these three categories of damages were either unproved or too indirect and remote.[186]

A claim by the United States designated as a claim for "damages in respect of a violation of sovereignty" arose from expenses incurred by the United States Government in investigating the problems created in the United States by the operation of the Trail smelter. This claim was rejected because the Tribunal felt that such damage was not within the terms of article III of the *Compromis* which permitted the Tribunal only to consider damages

180. Trail Smelter Case (United States v. Canada), 3 U.N.R.I.A.A. 1905, (1938, 1941).
181. 3 U.N.R.I.A.A. at 1917.
182. *Id.* at 1924-25.
183. *Id.* at 1924.
184. *Id.* at 1926-67.
185. *Id.* at 1929-31.
186. *Id.* at 1931-32.

caused by the Trail smelter.[187] We must not be misled by the fact that this claim was designated as a claim for "damages in respect of a violation of sovereignty" while the other claims were not so designated. All of the claims involved the violation of United States territorial sovereignty by fumes from the smelter at Trail. Indeed, the Tribunal held that:

> . . . [u]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein, when the cause is of serious consequence and the injury is established by clear and convincing evidence.[188]

Consequently, the Court directed the Government of Canada in the following manner:

> So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington.[189]

As to its authorization to consider United States law, the Tribunal recognized that this was limited:

> It is further to be noted that the words "law and practice followed in the United States" are qualified by "in dealing with cognate questions." Unless these latter words are disregarded, they mean a limitation of the reference to national law.
>
> . . . [T]he "cognate questions" parties had in mind in drafting the Convention were primarily the questions which in cases between private parties, find their answer in the law of nuisances.[190]

This reference to the "law of nuisances" ought no longer to bother us now that we understand the law of nuisance to be but one expression of the principle of neighborship which we have abstracted from the various municipal systems we have examined.

Far from casting doubt on the authenticity of *Trail Smelter* as an international judicial precedent, the use to which American law has been put lends force to our thesis that the principle of neighborship is applicable to international law. The cases cited are not private municipal law cases but suits between American States in their quasi-sovereign capacity:

187. *Id.* at 1939. *See also Id.* at 1942.
188. *Id.* at 1965.
189. *Id.* at 1966.
190. *Id.* at 1950.

> No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But here also, no decision of an international tribunal has been cited or has been found.
>
> There are, however, as regards both air pollution and water pollution certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in the field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and *no reason for rejecting such precedents can be advanced from the limitations of sovereignty inherent in the Constitution of the United States.*[191] (Emhasis added).

Thus, the Court relied on United States cases[192] limiting the rights of States to permit activities on their territories causing air and water pollution damaging to the territories of neighboring States. The Tribunal concluded that "what is true between States of the Union is, at least, equally true concerning the relations between the United States and the Dominion of Canada."[193] It is thus clear from the United States cases cited that the Tribunal is not talking of property but of territorial sovereignty.

The Tribunal also cited United States cases rejecting the claim by one state against another on the grounds that:

> the case should be of serious magnitude, clearly and fully proved, and the principle should be one which the court is prepared deliberately to maintain against all considerations on the other side before the court should intervene.[194]

These cases are also perfectly consistent with the principle of neighborship formulated above.[195]

Thus, far from being a suspect authority, the *Trail Smelter*

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191. *Id.* at 1964.

192. New Jersey v. City of New York, 283 U.S. 473 (1931); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907). This case dealt with a suit against a private company. The tribunal noted that Georgia had first sought relief from the State of Tennessee on whose territory the polluting smelters were located. The Supreme Court at 237 defined the suit as ". . . a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *See* 3 U.N.R.I.A.A. at 1965.

193. *Id.* at 1964.

194. *See* Missouri v. Illinois, 200 U.S. 496, 521 (1906). *See also*, Kansas v. Colorado, 185 U.S. 125 (1902); New York v. New Jersey, 256 U.S. 296 (1921).

195. *See* note 179 *supra* and accompanying text.

Arbitration is very sound authority for the principles of international law which it lays down, primarily because the American cases cited demonstrate the aptness of the analogy between property and territorial sovereignty.

B. *Lake Lanoux Arbitration*

We may round out the application of the principle of neighborship to international law by contrasting *Trail Smelter* with the *Lake Lanoux Arbitration*.[196]

The border between France and Spain had been settled by the Treaty of Bayonne of May 26, 1866. An "Additional Act" of the same day contained special provision "for the enjoyment of waters of common use. . . ."[197] The provisions required consultations and agreement before any interference with the rights or interests of either Party could be contemplated, while the rights of both parties within their territorial limits were respected.[198]

The most important of these provisions was article 11, which contemplated that a State Party proposing to construct works or grant new concessions which "might change the regime or the volume of a watercourse whose lower or opposite part is being used by riparians of the other country"[199] would give prior notice to authorities of the other State so that they could object.

Article 12 further provided that the lower riparian State was entitled to secure from the upper riparian "the waters which flow naturally from it together with what they carry, without the hand of man having contributed thereto."[200]

Lake Lanoux is located wholly in France and drains into Carol River, which in turn flows into Spain.[201] In 1950, a French Company received approval from the French Government to raise the capacity of the lake for the purpose of generating electricity. After some review the French Government agreed with the Company that the total volume of the water abstracted should be returned to the River Carol. The French Government then informed the Spanish Government that this scheme would not entail any change in the regime of the water on the Spanish side of the border and that the matter was wholly within the competence of France. The Spanish Government objected, claiming that the project altered

196. 12 U.N.R.I.A.A. 281 [1957], Transl. 53 AM. J. INT'L L. 156 (1959).
197. 12 U.N.R.I.A.A. at 288, 53 AM. J. INT'L L. at 156.
198. *Id.*
199. *Id.* at 289, 53 AM. J. INT'L L. at 156.
200. *Id.*
201. *Id.* at 287-88; 53 AM. J. INT'L L. at 157.

the regime of the watercourse and was therefore subject to article 11.[202]

The Tribunal noted that at no point was it argued by the Spanish Government that the French project would have an adverse effect on waters flowing into Spanish territory.

> It could have argued that the works would bring about a definitive pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain could then have claimed that her rights had been impaired in violation of the additional Act. Neither the dossier nor the debates of the case carry any trace of any such allegation.[203]

If the Spanish Government had made that argument, they would not have had to base their claim on *empietement d'immissio* since article 11 of the Act would have been directly applicable. But it is worth noting that there was no argument that *empietement d'immissio* had occurred.

Nor was there any finding of abuse of right. The Tribunal found no evidence of bad faith on the part of France[204] and said:

> In the case of Lake Lanoux, France has maintained to the end the solution which consists in diverting the waters of the Carol . . . with full restitution. By making this choice France is only *making use of a right*; the development works of Lake Lanoux are on French territory, the financing of and responsibility for the enterprise fall upon France, and France alone is the judge of works of public utility which are to be executed on her own territory . . . (Emphasis added)[205]

Rejecting the argument of Spain that there is a rule of international law that states must negotiate before undertaking projects on waters wholly within their own territorial limits merely because such waters also flow into the territory of neighboring states, the Tribunal held:

> . . . the rule according to which States may utilize the hydraulic force of international watercourses only on condition of *prior* agreement between the interested States cannot be established either as a custom, or even less as a general principle of law.[206]

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202. *Id.* at 292-93; 53 AM. J. INT'L L. at 158-59.

203. *Id.* at 303; 53 AM. J. INT'L L. at 161.

204. *Id.* at 305; 53 AM. J. INT'L L. at 162; *see* note 32 *supra* and accompanying text.

205. *Id.* at 316; 53 AM. J. INT'L L. at 170.

206. *Id.* at 308; 53 AM. J. INT'L L. at 165.

Thus, the Tribunal concluded that the French project did not contravene any rule of international law.[207]

Hence, when we compare the decisions in *Trail Smelter* and *Lake Lanoux* with the principle of neighborship as formulated above[208] we see that the principle works the same way in international law even though it is unformulated.

C. *Acceptance by Socialist States*

The foregoing does not entirely overcome objections to the assertion that general principles of law recognized by civilized nations incorporate concepts derived from the law of private property. The objection may, however, be overcome by the functional approach developed here. Legal principles developed from the property law are only valid for international law insofar as these principles serve the same function for the institution of territorial sovereignty that they do for the institution of property, with which the analogy has been drawn. We have now demonstrated that this is the case.

With certain exceptions which are not relevant here, both the People's Republic of China[209] and the Union of Soviet Socialist Republics[210] strongly adhere to the institution of territorial sovereignty. To quote one Soviet writer:

> In universalizing sovereignty, international law prescribes the concrete content of state sovereignty in international relations, that is, it establishes the limits of a state's freedom of action with due respect for the sovereignty of other states.[211]

Thus, notwithstanding that the doctrine of neighborship is derived by analogy from property law, its acceptance by Socialist States would seem to be inherent in their acceptance of the institution of territorial sovereignty.

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207. *Id.* at 317; 53 AM. J. INT'L L. at 171. It is also worth noting that, even though this was an arbitration between France and Spain, the tribunal cited a United States Supreme Court case to support a conclusion of law (not relevant here) relating to the use of inter-State watercourses. Wyoming v. Colorado, 259 U.S. 419 (1922); cited *id.* at 304; 53 AM. J. INT'L L. at 162.

208. *See* note 179 *supra* and accompanying text.

209. COHEN, CONTEMPORARY CHINESE LAW 284-85 (1970). The Chinese Government, like the French Government, would no doubt contend that atmospheric nuclear testing is a reasonable activity.

210. Ushakov, in CONTEMPORARY INTERNATIONAL LAW, 97 (Turkin ed., I. Munjiev transl. 1969).

211. *Id.* at 110.

> The establishment in present-day general international law of the principle of peaceful coexistence with its basic requirement of *good-neighborliness* as the *juridical minimum* of the demands made by the States upon one another and by international intercourse in general upon each state, is the result of the influence exerted on international law by the socialist and other forces of peace and progress.[212]

VIII. CONCLUSION

The judgment of December 20, 1974 is but one more example of the extremes of judicial innovation to which the International Court of Justice will resort to extricate itself from a difficult political situation. In this case the dexterity of the Court can only be admired. Both sides were able to claim a moral victory.[213] But the Court is a judicial, not a political institution, and when such a result is achieved at the cost of a decision which is so clearly questionable as a matter of law one may legitimately inquire whether the Court is any longer performing a judicial function. On the other hand, it might be argued that the judgment of December 20, 1974, is nothing other than a realistic assessment by the Court that it has political limitations born perhaps of its inability to persuade France to comply with its Interim Order of protection and that there are unwritten political limits to the Court's competence, a sort of jurisdiction *ratione-politika*.[214]

The Court's authority is not completely dead. Recent Resolutions by the United States Senate[215] demonstrate that there are some disputes which that body at least considers suitable for submission to the Court because they "affect neither the national security nor the vital interests of the parties concerned. . . ."[216]

One thing is certain however, the Court cannot expect that it will be called upon in the future to adjudicate anything of significance. By the judgment of December 20, 1974, the Court avoided involving itself in an area of international law that promises to be of increasing significance, *i.e.* international environmental law. In this article we have attempted to address ourselves to one of the

212. BOLROW, CONTEMPORARY INTERNATIONAL LAW, 43 (Turkin ed., I. Munjiev transl. 1969).

213. *See* New Zealand Herald, Dec. 23, 1974, at 4, col. d-g.

214. *See* Judgment of Dec. 20, 1974, [1974] I.C.J. 487.

215. S. Res. 74-78, 93d Cong., 2d Sess., 120 CONG. REC. S-8430-3 (1974) in 69 AM. J. INT'L L. 246-48. *See also* Editorial Comments, at 92-96.

216. S. Res. 74, *Id.* at 246.

issues with which the Court might have dealt had it reached the merits of the *Nuclear Tests Cases*, that issue being the international responsibility of a State for activities conducted on its own territory which have harmful or destructive effect on the territory of another State.

Generally, the problem has been considered to fall within an international law principle of abuse of right. But as we have demonstrated, this principle is not entirely appropriate. Nor is it clear that abuse of right is such an international principle, since it is not accepted by the English common law, unless we can somehow cram this broad principle into the tight, ill-fitting English boot of nuisance law.

But, there is a more appropriate principle which is common to systems of law based on private property. This doctrine is applicable *de lege lata* to international law because it operates to protect territorial sovereignty in the same way that it operates to protect private property in municipal legal systems. We have seen it applied in the *Trail Smelter* and *Lake Lanoux* arbitrations.

We have chosen to call this principle the principle of neighborship. It is clear, once we formulate it, that the principle does impose limitations on a State's right to adversely affect the territorial sovereignty of its neighbors by acts carried out on its own territory. This principle should be of considerable help not only in dealing with atmospheric tests and more conventional problems of transnational air and water pollution[217] but also in dealing with problems caused by testing of chemical and biological weapons as well as weather modification having transnational effects.

217. *See e.g.*, Brownell & Eaton, *The Colorado River Salinity Problem With Mexico*, 69 AM. J. INT'L L. 255 (1975).