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THE CONTENT OF THE RULE AGAINST ABUSE OF RIGHTS IN INTERNATIONAL LAW*

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THAT no person may abuse his rights has long been accepted in theory as a principle of international law. Sir Hersch Lauterpacht was one of the earlier writers to accept it. In *The Function of Law in the International Community*[1] he saw 'abuse of rights' as a general means of bringing every action of State sovereignty under international law, though as a matter of policy he was prepared to see some areas of action left untouched.[2] But for him, abuse of right was more than a general principle of law, it was one of the two prime means of effecting peaceful change in the international community. To say that the abuse of rights was prohibited was not enough. Content must be given to the principle. Those who denied the practical validity of the principle did so because they saw no sufficiently defined content capable of application.

A KEY TO THE CONTENT

If one starts from the premiss that State sovereignty dictates that a State may do what it will, an immediate qualification is necessary. A State cannot act in the territory of another without permission.[3] One may, perhaps, go a stage further and say that a State cannot act in a way which prevents another State from doing what *it* wills. Alternatively, one can refuse to take that step—English municipal law does not in general take it.[4] One can let the burden of a person's action lie where it falls. But State sovereignty does not permit this.[5] At the same time, the proposition that a State cannot act in a way which prevents another State from acting as it will cannot stand without qualification. There must be occasions where a State can lawfully act even though it prevents another State from acting. What, then, are the limits to a State's right to act as it will?

States possess powers to act for which international law does not dictate a manner of use. In *The Lotus*,[6] the Permanent Court of International

* © Dr. G. D. S. Taylor, 1974.

[1] (1933), Chap. 14.

[2] Ibid., pp. 304–6.

[3] *The Lotus*, *P.C.I.J.*, 1927, Ser. A, No. 10.

[4] *Bradford Corporation* v. *Pickles*, [1895] A.C. 587 (H.L.).

[5] See F. de Castro, 'La Nationalité, la Double Nationalité et la Supra-Nationalité', *Recueil des cours*, 102 (1961), p. 515, at pp. 579–80.

[6] *P.C.I.J.*, 1927, Ser. A, No. 10, at p. 19.

Justice described the greatest of such areas—that of domestic jurisdiction—as a 'discretion' (a term used more recently by Sir Humphrey Waldock in the same connection)[1] and as a matter of 'politics'. It is easy to think of such areas of State power as areas of 'no law'; yet they are this only in a sense. The word 'discretion' provides a clue, seen by Judge Azevedo in *Conditions of Admission of a State to the United Nations* (Advisory Opinion):[2]

> Objection to the political aspect of a case is familiar to domestic tribunals in cases arising from the discretionary action of governments, but the Courts always have a sure means of rejecting the *non liquet* and of acting in the penumbra which separates the legal and the political . . . .

In municipal administrative law discretions are limited but the courts do not exercise a complete control over the very action taken. They leave to the person possessing the discretion a margin of appreciation and examine only such questions of law as may be spelled out from the legislation conferring the discretion. International tribunals may be expected to operate in a similar way. They are in an identical position so far as their composition and procedure are concerned: they are experts in law operating by the adversary system, and not experts in government and politics acting by consultation, advice and other informal means.

Today, English administrative law presents the most highly developed law relating to the abuse of discretion—not because English administrative law is a highly developed system. Rather it is a sign of underdevelopment. Where there is a full and adequate review for errors of fact and law there is seldom need to challenge governmental action for incompetence or abuse of discretion. French law on *détournement de pouvoir* is dying,[3] and that of the United States is moribund. Since there is one thing of which no one would accuse the international judicial process—that is of being developed—perhaps the content of abuse of discretion in English administrative law may provide the content of international abuse of rights. Professor de Smith[4] lists six grounds upon which a governmental body will be held to have abused its discretion: acting under another's dictation, acting under an over-riding rule of policy, acting in bad faith, acting for an improper purpose, taking account of irrelevant factors or failing to take account of relevant ones, and acting unreasonably. The first two are rather specialized and do not fit into any general picture, although both appear in international jurisprudence where appropriate.[5] All of them relate to the reasons

[1] 'General Course on Public International Law', *Recueil des cours*, 106 (1962), p. 1, at p. 174

[2] *I.C.J. Reports*, 1948, p. 57, at p. 75.

[3] J. M. Auby and R. Drago, *Traité de contentieux administratif* (1962 and supp. 1970), para. 1198.

[4] *Judicial Review of Administrative Action* (2nd ed., 1968), p. 271.

[5] *Brown's* case, *R.I.A.A.*, 1923, vol. 6, p. 120 (*U.S.* v. *British Arbitral Tribunal*) and *Pouros* v. *Food and Agriculture Organization*, Judgment No. 138, *I.L.O. Official Bulletin*, 53 (1969), p. 150 respectively.

for a decision-maker's reaching a particular conclusion and assume that the conclusion reached is *intra vires*. That is, they are grounds for *détournement de pouvoir*.

Does the practice of international tribunals follow this municipal situation? It seems to be accepted that the International Court of Justice will intervene against abuses of discretion by international organizations, though not those by the General Assembly or the Security Council which can be reviewed only for incompetence.[1] This does not mean that actions of States members of the United Nations acting in their capacity as members cannot be subjected to review for abuse of discretion. Thus, in *Certain Expenses* (Advisory Opinion)[2] the Court excluded from its consideration any issues but those relating to whether the resolutions were ones which could legitimately be passed, while in *Conditions of Admission of a State to the United Nations* (Advisory Opinion)[3] the question canvassed was whether the reason which actuated a State in voting on membership was a legitimate one or not. However, a similar review of State actions is not obviously permissible. This is because of two factors: first, the use of the phrase 'abuse of right' and, secondly, uncertainty as to what form application of the principle will take. The first factor is eliminated by avoiding the word 'right' with its immediate association with Hohfeldian 'rights' and the substitution of 'discretion' which more accurately describes the real nature of the State powers concerned. The second factor is eliminated by reference to municipal administrative law. If the English classification is used as a framework a developed practice in international litigation emerges at once. The analogy supplies the content. The 'abuse of right' which is prohibited emerges not as an international tort,[4] but as an omnibus term to describe certain ways of exercising a power which are legally reprehensible.

This article accordingly uses the English administrative law classification as a framework and as an indication of what to look for in international adjudication. It first examines certain areas where there is no review for abuse of right, showing in the process the background theory governing the extent of review. Then it discusses the administrative law categories in turn. Finally, it uses the *South-West Africa* cases to draw the categories together in a single factual context.

Degrees of Control in Abuse of Right

Every discretionary power, no matter how restricted, contains a degree of margin of appreciation in the person possessing the power. Every

[1] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion), *I.C.J. Reports*, 1971, p. 16.

[2] Ibid., 1962, p. 151.

[3] Ibid., 1948, p. 59.

[4] *Barcelona Traction, Light and Power Co. Ltd.* (Second Phase), ibid., 1970, p. 3, at p. 324.

discretionary power, no matter how wide, 'doit être exercé en accord avec les devoirs du sujet considéré et ne doit jamais être arbitraire'.[1] There may, however, be powers—even narrow ones—which are totally unreviewable for abuse, not as a matter of law, but because there is no body with practical power to review or because there is no person with *jus standi* to bring an application for review.[2] In addition, 'les devoirs du sujet' may be so vague that a Court cannot judge whether the power has been exercised in accordance with them. Between these extremes may be found many different degrees of control. English administrative law jurisprudence shows a rough hierarchy from minimum to maximum review: bad faith, improper purpose, relevant and irrelevant factors, and unreasonableness. The cases show certain factors which bear upon the degree of review which the courts will be willing to undertake in a given case. The operation of these factors may be seen by considering three situations in international law.

Plenary governmental power

Power of this nature is power to act in such a way as is thought to be in the interest of the relevant community. The appropriate international attitude is best expressed in the *Lighthouses* case.[3] In that case the Permanent Court was concerned, *inter alia*, with the question whether the approval of a decree law given by the Ottoman Parliament did or did not comply with the requirement in Ottoman constitutional law that such a law be 'expedient'. The Court said:[4]

> . . . any grant of legislative powers generally implies the grant of a discretionary right to judge how far their exercise may be necessary or urgent; . . . It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation, is alone qualified to undertake. It follows from the foregoing that the Ottoman Government, in the first instance, and, subsequently, the Turkish Parliament, were alone qualified to decide whether a given decree law should, or should not, be issued. The Court is, therefore, not called upon to consider whether the Decree Law [in question] . . . complied with the conditions rendering its issue expedient according to the terms of the Ottoman Constitution.

The Court went on to say that even if it could look at the question of expediency, it could do no more than see whether the subject-matter was an unusual one to be dealt with by decree law having regard to past practice.

This is a straightforward application of principles of justiciability and arrives at a result similar to that found in municipal cases on the grant of

[1] R. L. Bindschedler, 'La delimitation des compétences des Nations Unies', *Recueil des cours* (1963), vol. 108, p. 307, at p. 315.

[2] See *Rights of Minorities in Upper Silesia (Minority Schools)*, *P.C.I.J.*, 1928, Ser. A, No. 15.

[3] Ibid., 1934, Ser. A/B, No. 62.

[4] Ibid., at p. 22.

plenary legislative power to a governmental officer.[1] The general legislative power, unrestricted by international obligations, is too great to be reviewed. Its appearance is similar to that of domestic jurisdiction in its narrowest sense, that is, to those matters '[qui] comprennent tout d'abord celles dont le droit des gens abandonne le règlement à la compétence exclusive des États'.[2] The situation is the same in areas of domestic jurisdiction where a treaty applies but only with respect to certain aspects.[3] Such areas of State action as are left unregulated in these ways will tend to be those which are highly political and important to a State's interests. Courts tend to 'sit out' such disputes, even municipally.[4]

State espousal of nationals' claims

> In the exercise of its discretion [a State] . . . may espouse a claim or decline to do so. It may press a claim before this Commission or not as it sees fit. . . . In exercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammeled discretion in determining when and how a claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. But the private nature of the claim inheres in it and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that it is subject to the absolute control of the nation espousing it.[5]

This does not appear at first sight to be a case of a *legally* unreviewable discretion. Normally there is no person who has standing to complain internationally about his State's handling of his claim.[6] Certainly, an individual has no State to which he can appeal and, for a corporation, the *Barcelona Traction* decision[7] provides a remedy only where the corporation has become defunct and so notionally ceased to be a national of the State concerned.[8]

The reality behind this is the combination of the existence of a rule of procedural law and the absence of a rule of substantive law. The procedural rule is that dual nationality does not give rise to parallel claims to espouse a person's cause of action. Either one of the States will be selected as the one with power to espouse the dual national's claim[9] or the rule which prohibits one State from bringing a claim against the other State will be

[1] e.g., *Reference*, Re *Chemicals Regulations*, [1943] S.C.R. 1.

[2] R. L. Bindschedler, loc. cit. (above, p. 326 n. 1), at p. 393.

[3] See Sir Humphrey Waldock, loc. cit (above, p. 324 n. 1), p. 184.

[4] See L. Henkin, 'Vietnam in the Courts of the United States: "Political Questions" ', *American Journal of International Law*, 63 (1969), p. 284.

[5] *Parker* v. *United Mexican States* (*U.S.* v. *Mexican General Claims Commission*), *R.I.A.A.*, 1926, vol. 35, p. 37.

[6] *Barcelona Traction, Light and Power Co. Ltd.* (Second Phase), *I.C.J. Reports*, 1970, at p. 44 (the Court) and p. 77 (Judge Fitzmaurice).

[7] Full reference to the case as a whole in the preceding note.

[8] *Delagoa Bay Railway Company* (1897), 2 I.A. 1865.

[9] See *Canevaro*'s case, *R.I.A.A.*, 1912, vol. 11, p. 397, and *Mergé's* case, ibid., 1955, vol. 14, p. 236 (*U.S.* v. *Italian Conciliation Commission*) for two solutions.

applied.[1] There is a total absence of substantive law on the subject. Indeed, international tribunals have been careful to keep the law away from this area. The reason for this lies in the general theory of State litigation. Only States have international standing; for a State to have standing it must have sufficient interest in the matter; the injury is to a person who is a member of the State; such an injury affects the body politic in some way; such an injury *is itself* an injury to the State; that is sufficient interest. So long as the first step of this chain is accepted there can be no limit on this State power. The power is not a derived one but an inherent one. It has no object but the good of the State itself. There are no matters which are irrelevant to the State's decision how to deal with a national's claim. There are no reasons which would be legally improper. There can be no review for abuse of right.

Self-judging reservations to the International Court's compulsory jurisdiction

The prototype of such clauses is that of the United States of America which provides that 'this declaration shall not apply to . . . (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'. In 1970 only five States retained this type of clause.[2] Of these Malawi (1966) and the Sudan (1957) use the above formulation, while Liberia (1952) speaks of disputes which the State 'considers' to be domestic, and Mexico uses the phrase 'in the opinion of' Mexico.

The validity of the reservation and the effect which its invalidity may have upon a State's acceptance of the Court's compulsory jurisdiction does not concern us here. The issue is whether invocation of the reservation is susceptible of any degree of judicial review.

Only Judges Read and Basdevant in *Certain Norwegian Loans* case[3] have accepted that the Court has any power of review. Judge Read's analysis took its origin from the word 'understanding' which appeared in the French reservation under consideration. Before there could be an understanding, he said, it must (*a*) be reasonably possible to reach an understanding that the matter was within domestic jurisdiction, and (*b*) have been considered to be within domestic jurisdiction in good faith.[4] The first element relates to competence and the second to abuse of right. Judge Basdevant went no further than to state that Norway's invocation of the reservation could be

[1] *Salem's* case, ibid., 1932, vol. 2, p. 1163; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1949, p. 174, at p. 186.

[2] *I.C.J. Yearbook 1970–71* (1971). D. P. O'Connell, *International Law* (2nd ed., 1970), vol. 2, pp. 1082–3 is in error. He erroneously places Sudan in the list of States with objective clauses, states that Pakistan has a subjective one (it was amended in 1960), and includes South Africa in the list though that State withdrew from the optional clause in 1967.

[3] *I.C.J. Reports*, 1957, p. 9.

[4] Ibid., at p. 94.

reviewed for abuse of right,[1] which is merely what Norway, which was reluctant to use the reservation in the first place, had already conceded.[2] In the course of argument, Norway had illustrated its understanding of abuse of right in this area by reference to the sort of case where the subject-matter was manifestly not within domestic jurisdiction: this is simply Judge Read's first element—*excès de pouvoir*.

In his characteristically scholarly opinion, Judge Lauterpacht analysed the scope for reviewing a State's invocation of the reservation. He gave four reasons for rejecting the possibility of judicial review:[3] the absolute way in which the reservation was formulated; the unjudicial nature of the inquiry; the offensive character of an opinion that a State had acted unreasonably or in bad faith;[4] and the character of domestic jurisdiction as 'elastic, indefinable, and potentially all-comprehensive'. In dealing with the fourth reason he compared a reservation of domestic jurisdiction with one of 'matters arising in the course of hostilities' which he saw as a more precise concept. This lack of precision was increased in its effect by the phrase 'essentially within domestic jurisdiction' rather than 'solely' or 'exclusively' within domestic jurisdiction.[5] He said of his second reason:

> I find it juridically repugnant to acquiesce in the suggestion that in deciding whether a matter is essentially within the domestic jurisdiction of a State the Court must be guided not by the substance of the issue involved in a particular case but by a presumption—by a leaning—in favour of the rightfulness of the determination made by the Government responsible for the automatic reservation. Any such suggestion conveys a maxim of policy, not of law.

Above all, he was impressed by the apparent intention of the reserving State to exclude review—an opinion borne out by the *Aerial Incident* case between Bulgaria and the United States where the latter withdrew its argument on reviewability in the light of its own invocation of the automatic reservation in the *Interhandel* case.[6]

The logical core of these reasons, and the pivot of judicial review in this context, is the word 'essentially'. Had the reservation referred to matters 'solely' within domestic jurisdiction, then judicial review would have been readily available—the subject-matter would not be within the reservation

[1] Ibid., at p. 73.

[2] *I.C.J. Pleadings*, vol. 1, at p. 131.

[3] *Interhandel* case (Preliminary Objections), *I.C.J. Reports*, 1959, p. 6, at pp. 112–13.

[4] This does not seem to square with his attitude expressed in *Voting Procedure on Questions Relating to Reports and Petitions Concerning South West Africa* (Advisory Opinion), *I.C.J.*, 1955, p. 67. See G. G. Fitzmaurice, 'Hersch Lauterpacht—the Scholar as Judge', this *Year Book*, 37 (1961), p. 1, at p. 36, and S. Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', *American Journal of International Law*, 55 (1961), p. 825, at pp. 831–2.

[5] *Certain Norwegian Loans*, *I.C.J.*, 1957, p. 9, at p. 42. Cf. Judge Krylov in *Interpretation of Peace Treaties* (Advisory Opinion), ibid., 1950, p. 65, at p. 112, and L. Gross, 'Bulgaria Invokes the Connally Amendment', *American Journal of International Law*, 56 (1962), p. 357, at p. 378.

[6] See L. Gross, ibid., *passim*.

where there was any rule of international law applicable.[1] 'Essentially', as a matter of degree, changed that. How much is 'essentially'? How is it to be judged? Who is to judge it?

However, judicial review is never eliminated by posing an issue of degree. The subjective phrasing of the reservation indicates no more than that the decision at first instance at least is to be made by the State, though the reserving State no doubt intended more. In this, the International Court is placed in the same position as a municipal court reviewing a ministerial decision that a factual situation does or does not come within a statutory description. The decision is reviewable where the relationship of facts and law is clearly other than that claimed by a minister, or a State, as the case may be. An international tribunal may approach the question with greater restraint than a municipal court, but the analogy remains. Secondly, essentiality indicates substantiality. In general the invocation may be regarded as unlawful where international law regulates every aspect of every issue in the case or where the matters not regulated are few or minor or peripheral. Such an evaluation is not juridically difficult, let alone improper. It is an inquiry as to competence (*excès de pouvoir*)—the first half of Judge Read's review.

Finally, the correct approach may be ascertained also by considering why Judge Lauterpacht thought that a self-judging reservation as to hostilities would be reviewable.[2] Two differences between the two reservations appear. First, an hostilities reservation involves no basic issue which is a matter of degree. Secondly, 'hostilities' may be defined precisely, though there would be dispute as to any particular definition. But these affect only the scope of review and are not in fact decisive of the existence of review. Given that the Court may legitimately exercise powers of judicial review —and Judge Lauterpacht's second reason denies this—both differences are of degree rather than of kind.

On the basis of this theoretical structure, it is possible to outline the logical scope for reviewing an invocation of a self-judging reservation. In the first place, the International Court could overrule such an invocation where it was only a few minor or peripheral issues in the dispute that were not regulated by international law. In such circumstances the invoking State would be acting in *excès de pouvoir*. But there is probably no room for review upon grounds of abuse of right. If a State declares that it is acting for one reason when in fact it is acting for another, there will be an abuse of right only if the undisclosed reason is a legally improper one, for otherwise the 'fraud' is legally irrelevant. The crucial question is, therefore:

[1] *Tunis and Morocco Decrees on the Nationality of British Subjects* (Advisory Opinion), *P.C.I.J.*, 1923, Ser. B, No. 4.

[2] Cf. *Conditions of Admission of a State to the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1948, p. 57, at p. 65.

what reasons would be improper? Obviously, the avoidance of litigation on the dispute is a proper reason, as would be the reason that the dispute related to the State's vital interests. If one assumes that invocation as part of a 'deal' with a third State would be improper, this must be because invocation for reasons unrelated to the dispute concerned would be improper.[1] Such a proposition is at least doubtful, but it—or some other proposition regarding certain reasons as irrelevant—is a necessary basis for review on grounds of abuse of right. In the writer's view it cannot be maintained that a State is restricted as to the reasons which prompt it to raise a legally relevant defence—either to the merits or to the Court's jurisdiction. That being so, neither bad faith nor any other ground of abuse of right is available to overrule a State's invocation of its self-judging reservation. Only the review for *excès de pouvoir* remains.

Conclusion

Thus it may be seen that actions in each of these three areas of law are free from review for abuse of right. They have in common the characteristic of leaving the State free to decide *why* it will act or not act. There is nothing in the context or conditions of the power which makes any reason or factor necessarily relevant or irrelevant, and therefore there *can* be no review.

Evidence of Abuse of Right

Bad faith, improper purpose, taking account of irrelevant factors, and unreasonableness are all errors in the mind of the decision-maker.

Problems of proof in this area revolve around causality. That a person is tempted to act in bad faith or otherwise abuse his rights does not invalidate the action taken. The action is invalid only if the abuse was integral to the action taken and led to it in some way. The *reasons* for the action must be bad. In each of the grounds of abuse of right the impermissible reason operates in a different way. The ways are related but are not identical; they cannot all be reduced to that of bad faith.[2]

The necessary first step is to ascertain the decision-maker's reasons. He may actually state them, or, alternatively, his failure to state them may be an abuse of right.[3] Where the reasons are stated, a court will usually restrict itself to them.[4] Stated reasons which are defective are decisive; the decision-maker cannot later claim that they were not his reasons at all.

[1] For the context of these see below, pp. 333–42.

[2] This was the essence of South Africa's argument in the *South West Africa* cases, *I.C.J. Reports*, 1962, p. 319, and ibid., 1966, p. 4.

[3] *Robinson* v. *United Nations*, (1952) Judgment No. 15; *McIntire* v. *Food and Agriculture Organization*, Judgment No. 13, *I.L.O. Official Bulletin*, 37 (1954), p. 273, at p. 276.

[4] e.g., *Conditions of Admission of a State to the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1948, p. 57.

Where the reasons are not stated they must be inferred from the surrounding facts. Three cases provide good illustrations of the ways in which such 'implied' abuse of right may be established. The first is the *Electricity Company of Sofia and Bulgaria* (Preliminary Objection).[1] The issue in that case was whether a denounced convention for the peaceful settlement of disputes could be invoked to bring the case before the Permanent Court. It was argued, *inter alia*, that Bulgaria had abused its rights in denouncing the treaty at the moment it did. Judge Anzilotti's dissenting opinion dealt with this. There was no evidence of an *ex facie* nature—there had been no announcement that the denunciation was made to avoid litigating the dispute before the Court. Abuse of right could be found only by deduction from the date and the background. Judge Anzilotti relied upon the maxim *qui iure suo utitur neminem laedit*, held that there was no abuse of right, and continued:[2]

> The situation might be somewhat different if the Bulgarian Government . . . had chosen the particular moment at which it had been informed of the Belgian Government's intention to apply to the Court. But that is not the case.

The test at which Judge Anzilotti points is: were the circumstances such that no reasonable State would have renounced the treaty at that moment if it had not had as one of its objects the avoidance of litigating the dispute in question? He used this very approach in ascertaining whether the customs union proposed between Austria and Germany was calculated to alienate Austria's independence.[3]

This process of inferring an abuse of right is seen also in the rather extreme case of *Smith*.[4] Smith's land had been compulsorily acquired by the Cuban government. It was alleged that the government had abused its rights, and this claim was upheld by the arbitral tribunal. The day after a municipal court had issued the 'preliminary' order, 150 men arrived on the property and tore down all the buildings. The authorities promptly handed the land to a local who was on good terms with them for him to use as an amusement park for his own profit. Arbitrator Hale laconically remarked that the facts 'do not present the features of an orderly attempt by officers of the law to carry out a formal order of condemnation'.[5]

Chuinard v. *European Organization for Nuclear Research*[6] illustrates both the finding of the reasons and the examination of whether they caused the action taken. Chuinard was a satisfactory worker but he could not get on with his superiors or subordinates. Over a period parts of his job were

[1] *P.C.I.J.*, 1939, Ser. A/B, No. 77. [2] Ibid., at p. 38.
[3] *Customs Regime between Germany and Austria* (Advisory Opinion), *P.C.I.J.*, 1931, Ser. A/B, No. 41.
[4] *R.I.A.A.*, 1929, vol. 2, p. 913. [5] Ibid., at p. 917.
[6] Judgment No. 139, *I.L.O. Official Bulletin*, 53 (1969), p. 153.

allocated to other employees and finally his post was suppressed. He was offered an alternative though lower position which he refused and was then dismissed. The Tribunal first defined the objects of the power to suppress posts—the permanent reduction of staff and expenses. It pointed out that a post could not be suppressed as a way of dismissing an employee, though the fact that the holder of the suppressed post was unsatisfactory did not automatically render the suppression bad. On the facts it was plain that there had been a permanent reduction of staff, but the gradual taking away of jobs from Chuinard and his constant disputes with others showed a pattern of attempted dismissal. The suppression would not have taken place had the Director not desired to dismiss Chuinard. But was this abuse a causal factor in Chuinard's dismissal? Here the Tribunal found for the Organization. The alternative post offered was an appropriate one which a reasonable employee would have accepted. The chain of causation was broken and dismissal could not be seen as a consequence of the suppression which was an abuse of right.

The natural reluctance of international tribunals to find that a State has acted unreasonably or in bad faith led one tribunal to see this implied abuse of right as the only appropriate inquiry. The object is to find whether the facts indicate a defective reason without attempting to find that the State had that reason actually in mind. Thus, the Tribunal in the *Martini* case said:[1]

> Le Tribunal n'est pas en mesure de se former une opinion sur les motifs qui peuvent avoir inspiré les juges vénézuéliens à l'époque de l'affaire Martini. Si la sentence de la Cour Vénézuélienne est fondée en droit, les motifs psychologiques des juges ne jouent aucun rôle. D'autre part, la défectuosité de la sentence peut être telle qu'il y a lieu de supposer la mauvaise foi des juges, mais également dans ce cas c'est le caractère objectif de la sentence qui est décisif.

Perhaps Judge Lauterpacht's concern not to offend States by holding them to have acted unreasonably stemmed from a belief that the defective reason had to be a real psychological one.[2] It is not so invidious to say that a State has abused its rights where the tribunal is concerned only with the objective correlation of power and effect.

Bad Faith

A State or person acts in bad faith where it abuses its rights—by pursuing an improper purpose, taking account of an irrelevant factor, or acting unreasonably—and does so knowing that it is abusing its rights. It is this last factor which makes bad faith what it is and which leads to the judicial

[1] *R.I.A.A.*, 1930, vol. 2, p. 975, at p. 987.
[2] *Interhandel* case (Preliminary Objections), *I.C.J. Reports*, 1959, pp. 111–13.

reluctance to find that a State or person has so acted. Internationally, good faith is presumed and a State is entitled to rely on the word of another State.[1] Without such a presumption, international intercourse could not continue. The essence of bad faith, then, is the discordance between stated reason and actual reason.[2] It derives from the principle that one cannot be allowed to say one thing at one moment and another at the next,[3] and from the narrower principle that the law can allow no man to 'invoke one reason for exercising his powers when in reality his action is based on another'.[4]

Denial of justice and bad faith

If a municipal court acts in bad faith then there is a denial of justice for international legal purposes. But there is denial of justice also where the court has made a gross error of municipal law. It has often been suggested that this aspect of denial of justice may be summed up by 'bad faith' or, as Presiding Commissioner van Vollenhoven said in *Chattin* v. *United Mexican States*:[5]

> Acts of the *judiciary* . . . are not considered insufficient [in international law] unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiassed man.

But one cannot say that bad faith lies at the heart of this branch of denial of justice unless it is understood to mean bad faith inferred from the circumstances. The applicable test found in the cases may be summed up thus: rendering a decision which no reasonable judge, properly instructed as to the law, could have rendered. Sir Gerald Fitzmaurice has put it this way:[6]

> [Mistake of municipal law does not give rise to an international claim] *provided* that no denial of justice, in the proper acceptation of that term in relation to a judicial decision, is involved—i.e. provided the decision, though *mistaken*, was given honestly and in good faith by a properly constituted and normally competent court. Of course, the nature and degree of the error in question may, on a basis of *res ipsa loquitur*, afford in itself evidence that the court cannot have been acting honestly, or else lacked the standards of competence required of the courts of civilized countries; . . .

But it is neither helpful nor necessary to see this as part of bad faith. The 'reasonable judge' formulation is in itself sufficient.

[1] *Lake Lanoux* case, I.L.R. 24 (1957), p. 101, at p. 126.
[2] C. Chaumont, 'Cours Général de Droit International Public', *Recueil des cours*, 129 (1970), p. 333, at p. 382.
[3] Ibid., at p. 381.
[4] *McIntire* v. *Food and Agriculture Organization*, Judgment No. 13, *I.L.O. Official Bulletin*, 37 (1954), p. 273, at p. 276.
[5] *U.S.* v. *Mexican General Claims Commission*, *R.I.A.A.*, 1927, vol. 4, p. 282, at pp. 286–7.
[6] G. G. Fitzmaurice, loc. cit. (above, p. 329 n. 4), at p. 57.

Unratified treaties and bad faith

Article 18 of the Vienna Convention on the Law of Treaties[1] provides:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty: or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided such entry into force is not unduly delayed.

The draft provision (Article 17) approved by the International Law Commission in 1965 differed from the above in its introductory statement which provided that: 'A State is obliged to refrain from acts calculated to frustrate the object of a proposed treaty when . . .' The final Commission draft article (Article 15) substituted 'tending' for 'calculated' in the 1965 version.

In his discussion of the final Commission draft, W. Morvay thought that the article raised a test of bad faith.[2] The law prior to the treaty was not, however, very clear. What material there is suggests that the law required no more than that a State should refrain from deliberately seeking to subvert the objects of a treaty. This is an obligation to act in good faith. The 1965 draft's use of 'calculated' is very close to this, and shows the influence of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice who had been previous rapporteurs. The changed wording in the final draft and the Convention move away from any requirement which is one of good faith. Both formulations raise objective tests. The change was proposed in the Commission by some of the foremost international lawyers present (MM. Ago, Bartos, Castreń, Rosenne, Reuter and Yaseen) and they saw it as a move away from subjectivity and the test of bad faith.[3] The final change represented another step away. State action is therefore to be judged by the relationship of fact (the action taken) to law (the object of the treaty) without more. It goes without saying that a deliberate frustration of the treaty is prohibited, but the prohibition is wider than this. It is not limited to bad faith.

The Tacna-Arica *question*[4]

Tacna-Arica was a tract of land within Peru but claimed by Chile. By treaty the two States agreed that Chile should administer it for a period at the end of which there should be a plebiscite to determine whether the inhabitants wished to be Peruvian or Chilean. It was alleged that Chile was

[1] (1969), Cmnd. 4140.

[2] 'The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 27 (1967), p. 451, at p. 461.

[3] Ibid., at pp. 456–7.

[4] *R.I.A.A.*, 1925, vol. 2, p. 921.

seeking to frustrate the plebiscite by forcing Peruvians out of the area and inducing an influx of Chileans. The Tribunal found bad faith in only one respect—the discriminatory conscription of Peruvians into the Chilean armed forces.[1] The Tribunal was overtly concerned with ascertaining the intention of the Chilean officials. It examined both their stated intent (*ex facie* bad faith) and the effect of the conscription decisions made (implied bad faith). On the facts it was apparent that conscription of Peruvian youths was initiated as a matter of course in circumstances which forced Peruvians to leave. An inference of bad faith was made from this. On the issue of artificially stimulated immigration the Tribunal could see no measures inconsistent with 'the legitimate and normal development of the provinces'.[2] No inference of bad faith was made, but the structure of the opinion on this issue shows that the investigation was to find bad faith.

Improper Purposes

What purposes are improper?

In municipal law most powers are granted in terms which indicate their ambit and objective. But where no ambit or objective is indicated then a preliminary question arises in filling this blank. Relatively few powers in international law contain such an express 'purpose'.

The process of deducing the 'purpose' of a State power is well shown in the *Right of Passage over Indian Territory* (Merits) case.[3] Having held that Portugal had a right to send civilians over Indian territory between her various colonial enclaves in the West of the Indian sub-continent, and having recognized India's right to regulate that traffic, the International Court had to consider the balance between these conflicting rights. The core of the Portuguese argument is contained in these two quotations:

> La question qui se pose n'est pas, en effet, de savoir si la compétence de l'Inde est exclusive, en ce sens qu'elle seule est qualifiée pour l'exercer. La question est de savoir si cette compétence est discrétionnaire ou si elle est soumise à l'obligation de ne pas faire obstacle au transit nécessaire pour que le Portugal puisse exercer effectivement sa souveraineté sur les enclaves.[4]
>
> Droit de passage, oui, mais droit sans immunité. C'est à l'Union indienne, en tant que Puissance souveraine du territoire par lequel s'effectue le passage, qu'il appartient de réglementer et de contrôler celui-ci à tous les points de vue. Une seule chose lui est juridiquement impossible, son obligation vis-à-vis du Portugal s'y opposant: c'est d'interdire le passage ou de l'empêcher dans la pratique, au moyen de cette réglementation et de ce contrôle; car, le faisant, elle viole cette obligation et en encourt la responsabilité.[5]

[1] *R.I.A.A.*, 1925, vol. 2, p. 921, at p. 941.
[2] Ibid., at p. 936.
[3] *I.C.J. Reports*, 1960, p. 6.
[4] *I.C.J. Pleadings*, 1960, vol. 2, p. 409 (Reply).
[5] Ibid., vol. 4, pp. 294–5 (M. Telles, in argument).

Only Judge Spender discussed the theoretical aspects of Indian regulation of transit. The other Judges dealt with the facts in a way consistent with Judge Spender's theory that:[1]

> If India had in fact purported to regulate and control Portugal's right of passage, it would have been relevant to enquire whether the action taken by India was in reality a regulation or control of the right of passage, or was directed to another and different purpose. It would have been relevant to enquire whether it was in fact directed to the right of passage as such so as to render it nugatory.

Judge Spender found on the facts that there was no purported regulation at all. The theory, however, makes the inquiry whether a particular refusal of transit was made for the reason, *inter alia*, that India disliked any right of passage rather than that the particular transit was unnecessary or undesirable given the special facts relating to it.

In the *Right of Passage* case the presence of two conflicting rights made the derivation of some improper purposes necessary. These purposes were deduced from the natures and incidences of the rights involved. Where there is an empowering provision which deals with the power in any detail, this process is short-circuited. The purposes which are improper are derived by the usual rules of Treaty or Statutory Interpretation.[2]

Proof of an improper purpose

The existence of an improper purpose may appear either *ex facie* (on the 'face' of the action or decision) or impliedly (from the way the action or decision operates). There need be no abuse of right in either word or effect. Of the minority protection provisions in the First World War Peace Treaties, the Permanent Court said: 'There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.'[3] This approach has been used by the European Commission of Human Rights when ascertaining whether a particular extradition is vitiated by abuse of right. The Commission will interfere[4]

> . . . where a person is extradited to a particular country in which, due to the very nature of the régime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed, . . .

Many similar illustrations may be drawn from the jurisprudence of the United Nations and the International Labour Organization Administrative Tribunals.[5]

[1] Ibid., p. 114.

[2] These two processes in administrative law are illustrated respectively by *Roberts* v. *Hopwood*, [1925] A.C. 578 (H.L.) and *Padfield* v. *Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.).

[3] *German Settlers in Territory Ceded to Poland* (Advisory Opinion), *P.C.I.J.*, 1923, Ser. B, No. 6, at p. 24.

[4] *X.* v. *Federal Republic of Germany* (*Req. No. 1802/62*), *Yearbook of the E.C. on Human Rights* (1963), p. 462, at p. 480.

[5] *Chuinard* v. *European Organization for Nuclear Research*, Judgment No. 139, *I.L.O. Official*

The requirement that there be no abuse of right in effect as well as word has not always been adhered to strictly. The case of *Oscar Chinn*[1] is a good example of such a failure. Belgium was required by Treaty to administer the Congo river so as to preserve 'complete commercial equality' among users. The Belgian Government held a majority of the shares in a company which competed with Chinn for transport on the river. When the great depression came, the Belgian Government ordered the reduction of its company's charges to an uneconomical level and promised to reimburse the loss made. Chinn went out of business. The Court held that there had been no violation of the equality provision. It was held that the instruction did not benefit Belgians as such or hinder foreigners as such in its wording. Judge Hurst, in a strong dissent, stated the general principle clearly and correctly:[2]

> ... the basis of the British case must be that the measures taken by the Belgian Government were in themselves unlawful, either by reason of the intention with which they were taken, or by reason of the consequences which they were bound to entail and which should have been foreseen by the Belgian Government. In this latter, the element of intention would be immaterial.

In terms of this dissent, the rationale of the majority's position 'would be that the effect was insufficiently convincing and severe to condemn the action by relation back from its effects'. The majority felt, incorrectly, that they were obliged to make a finding close to one of bad faith so that they required a greater clarity of effect before inferring an improper intent.

This emphasis on *ex facie* improper purpose may be present quite correctly in other contexts. The less justiciable is the question whether the power was properly exercised, and the vaguer are the criteria by which the power was to be exercised, the less scope is there for review for more than incompetence and bad faith. This is because the courts become more reluctant to hold that there has been a misuse of competence without some element of bad faith. That reluctance added strength to South African arguments in the *South-West Africa* cases.[3] But there is no inherent need to see the object of the inquiry as a finding of intent; where the necessary effect of a law or action is inconsistent with international law in the manner discussed in this section, an abuse of right has been established.[4]

Bulletin, 53 (1969), p. 153. *Duberg* v. *U.N.E.S.C.O.*, Judgment No. 17, ibid., 38 (1955), p. 251, at p. 254; *Crawford* v. *United Nations* (1953), Judgment No. 18, para. 7; *Howrani* v. *United Nations* (1951), Judgment No. 5.

[1] *P.C.I.J.* 1934, Ser. A/B, No. 63.
[2] Ibid., at p. 54.
[3] *I.C.J. Reports*, 1962, p. 319 and ibid., 1966, p. 4.
[4] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion), ibid., 1971, p. 16, at p. 57.

Improper purposes for expropriation

International law makes the vague and ethereal demand of States that they expropriate aliens' property only for 'reasons of public utility'. It would be attractive to derive from that the general proposition that the only proper purpose for expropriation is to benefit the public. Professor O'Connell appears to take this view.[1] He derives it from *Czechoslovakian Posts and Telegraphs Administrator* v. *Radio Corporation of America*.[2]

The parties in that case had entered into an agreement whereby R.C.A. was given exclusive rights to telegraph traffic between the United States of America and Czechoslovakia. Czechoslovakia claimed that R.C.A. was breaking the agreement by failing to 'secure the successful and remunerative working of the line' because Czech-bound traffic was very much less than United States bound traffic. The State, therefore, entered into an agreement with another corporation to run a service parallel to that of R.C.A. The case was arbitrated at R.C.A.'s instance. It was held that the contract was a private law one so that it was irrelevant that one of the parties was a State. However, as *obiter dictum*, the tribunal stated the law upon the assumption that it was a public law agreement. If so, then, it was said, Czechoslovakia could only repudiate the agreement if otherwise 'public interests of vital importance would suffer'.[3] This does not support the general proposition that any expropriation must be for reasons of 'public interest'. Professor O'Connell goes further, however, and states that the proposition just quoted was given content by the later statement that:[4]

> When a public institution enters into an agreement with a private person or a private company, it must be assumed that the institution has intended by this agreement to benefit its citizens. But that this expectation sometimes proves to fail in not giving the country as large a profit as was expected, cannot be considered sufficient reason for releasing that public institution from its obligations as signatory of said agreement.

Both statements deal with public benefit, but the two propositions have nothing else in common. The second was made with reference to an argument that the agreement created a 'company of mutual profit' under the Czech Civil Code because a State, it was argued, is 'exclusively directed by the considerations of commercial advantages for its citizens'.[4] The quotation set out was inserted by the Tribunal as part of a refutation of that argument.

Administrative law, too, has been faced with the task of restricting powers which are to be exercised for the 'public interest'. They have been unable

[1] D. P. O'Connell, op. cit. (above, p. 328 n. 2), p. 778.
[2] *American Journal of International Law*, 30 (1932), p. 523.
[3] Ibid., p. 531.
[4] Ibid., p. 534.

to prescribe any general limitation of object. Instead, the courts have worked from the other end: it is an abuse of discretion to act for the purpose of lining private pockets[1] or to attack an individual or group of individuals[2] where this is intended almost to the exclusion of 'public' purposes. These two restrictions are to be found also in international expropriation cases. *Smith*[3] exemplifies the former and *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*[4] is an apt example of the latter.

This, it is submitted, is the correct approach. The right to expropriate is discretionary. General international law does not confine that power in the way in which a municipal statute might do so. The only possible limit is that spelled out from the general nature of government—that expropriation must be for the public interest. This is too vague to be defined other than negatively. The highest point at which a readily justiciable issue can be stated is that the expropriation must not be for private benefit or be discriminatory to the almost complete exclusion of reasons relating to the needs of the community.

Discrimination

Something rather exceptional must be proved before an action will be held to be wrongfully discriminatory. An action is not wrongful merely because it helps some considerably and acts to the detriment of others. Most State actions are unequal in their operation, and every State or international organization possesses a discretion in assessing whether the action serves the community despite this inequality. Thus, in *El Triunfo* case[5] the tribunal was willing to find that the expropriation there involved was discriminatory because (*a*) the only property taken was that of a United States national and (*b*) relations with the United States at the time indicated that that property had been taken *because* it belonged to a person of that nationality. This is a high standard of proof. It may be that the majority in *Oscar Chinn*[6] took the view they did because the benefit of keeping at least one river transport service in operation was sufficient to lay on the credit side against the discriminatory effect of the subsidy.

In the jurisprudence of the European Commission and Court of Human Rights there is no discrimination where the benefiting of some and harming of others is explicable to some extent by a proper reason. In *Church of Scientology* v. *United Kingdom* (*Req. No. 3798/68*)[7] the Commission noted that:

[1] e.g. *United Buildings Corp. Ltd.* v. *Vancouver Corp.*, [1915] A.C. 345 (J.C.) at pp. 353–4.

[2] The French case of *Ribotti* 1956 C.E. 609 (political and religious discrimination) provides a very apt example here.

[3] *R.I.A.A.*, 1929, vol. 2, p. 913.

[4] Ibid., 1926, vol. 2, p. 777, at p. 794.

[5] [1902] U.S. For. Rel. 838.

[6] *P.C.I.J.*, 1934, Ser. A/B, No. 63.

[7] *Yearbook of the E.C. on Human Rights* (1969), p. 306, at p. 322.

. . . in deciding whether to recognise an institution as an educational establishment, [the State] is entitled to have regard to certain minimum educational standards, . . . therefore, any governmental measures which are taken to differentiate between institutions on such a basis do not constitute discrimination . . .

The point is clearer in the Court's decision in *Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits).[1] Complete equality as a Conventional requirement was rejected at the outset:[2]

The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.

The key was stated to be the existence of an 'objective and reasonable justification' for the distinction:[3]

The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: . . . [the Convention] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Only one of the measures attacked was held to be discriminatory, and that because it was 'not imposed in the interest of schools, for administrative and financial reasons: it proceeds solely . . . from considerations relating to language'.[4] This is a classical exposition of the role of review for improper purpose in international adjudication.

Conclusions

Does international law contain a general prohibition wider than that of discrimination or private gain? Dr. A. C. Kiss, in his most thorough investigation of abuse of right,[5] arrived at three headings of abuses of right. First, use of a State power which interferes with another State's use of a power which it possesses;[6] secondly, use of a power for a reason which was not one for which the power was conferred ('un but autre que celui en vue duquel les compétences étaient attribuées aux autorités étatiques');[7] thirdly, use of a power in an unjustifiable ('injustifié et injustifiable') or arbitrary ('l'exercise arbitraire des pouvoirs discrétionnaires') manner.[8]

The first heading represents the ultimate basis of abuse of right.[9] In practice it appears as bad faith. The third heading emerges from general international law. Both 'injustifiable' and 'arbitraire' point to discrimination and the absence of connection with matters which should be relevant to a

[1] Ibid. (1968), p. 832. [2] Ibid., p. 864. [3] Ibid., p. 866.
[4] Ibid., p. 942. [5] *L'Abus de droit en droit international* (1953).
[6] Ibid., p. 184. [7] Ibid., p. 186. [8] Ibid., p. 187.
[9] See the first section of this article.

State's decision upon an international matter, for instance, the private gain object. It is the second heading which reaches furthest and possesses the greatest scope for growth, but it has no general field of operation in State action. For it to operate there must be a conferred power set out with some measure of precision. Few State powers are conferred. Even the powers of international organizations are expressed with too great a generality for review for improper purpose to bite. At a lower level there is such scope, and the jurisprudence of the United Nations and the International Labour Organization Administrative Tribunals show considerable development in this area. There is, however, little reason to expect State powers or those of international organizations to follow suit.

Taking Account of Irrelevant Considerations and Failing to Take Account of Relevant Ones

English and Commonwealth courts have always found this ground of abuse of discretion more manageable than that of improper purposes. It presents none of the justiciability-oriented difficulties found in the case of improper purpose. Here the empowering provision contains a list of the matters which must be considered in arriving at a decision. This leaves the courts with the relatively easy task of ascertaining whether those reasons have been considered or omitted and whether any other reasons have been drawn upon. If one of the listed matters has not been considered, there has been an abuse of discretion (abuse of right). If a matter other than those listed has been considered then (*a*) if the list is exclusive, there has been an abuse of discretion, but (*b*) if the list is not exclusive, the State decision-maker has a discretion as to the other matters he will consider and there is an abuse of discretion only if the matter is unauthorized in the sense of being an 'improper purpose'. When one speaks of a decision-maker's taking account of an irrelevant consideration one means that the decision-maker has considered a matter which bears such a relationship to the listed ones that a reasonable decision-maker could not have interpreted a listed matter to include it. When one speaks of a decision-maker's failing to take account of a relevant consideration one does not mean that the decision-maker misconstrued the list so that he looked at the wrong thing, but that he did not direct his mind to the listed matter at all.[1] That, at any rate, is the correct analysis of the administrative law cases.

International adjudication contains few examples of this ground, but then the enumeration of matters to be considered by a State organ is rare. One example of this ground of abuse of right is the *Martini* case.[2] There

[1] See, especially, *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.) at 174 (Lord Reid), 201 (Lord Pearce), and 214 (Lord Wilberforce).

[2] *R.I.A.A.*, 1930, vol. 2, p. 975, at p. 995.

the tribunal held that the Venezuelan court had made a reviewable error when it took account of a head of damages which was not one listed in the arbitral award that gave rise to the municipal court's jurisdiction. Further, the administrative tribunals use it in respect of the Secretary-General's powers over employment.[1] However, there is one case where this ground of review was the appropriate one, was the one used, and was used in a manner identical to the municipal law approach.

In *Conditions of Admission of a State to the United Nations* (Advisory Opinion)[2] the International Court was called upon to decide whether the conditions listed in Article 4 (1) of the Charter of the United Nations were exhaustive and whether a certain matter was a relevant one for States to take into account. Article 4 (1) provided that:

> Membership of the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

The allegedly improper matter was that if State *A* would vote for the admission of State *B*'s protégé, *X*, then State *B* would vote for State *A*'s protégé, *Y*.

Article 4 (1) enumerated four reasons to which all voters had to advert. Analysis with respect to them was that of relevant and irrelevant considerations. No Judge dissented from this proposition. The issues were whether there was a residual discretion into which the matter in issue could fall and, if not, whether the enumerated matters could encompass the one in issue.

The majority held that the enumeration was exhaustive. Passing on to consider whether the matter came within those enumerated, the Court noted:[3]

> Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions, . . .

This indicated the view that a considerable margin of appreciation had been left to the voting States. The allegedly irrelevant matter was then considered and held to be bad:[4]

> . . . [it] clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category . . . since it makes admission dependent . . . on an extraneous consideration concerning States other than the applicant State.

This makes two points. First, that the matter was incapable of being subsumed to one of those stated—it was an irrelevant consideration. Secondly,

[1] *Julhiard* v. *United Nations* (1955) Judgment No. 62; *Giuffrida Food and Agriculture Organization* (1960) Judgment No. 47, *I.L.O. Official Bulletin*, 43 (1960), p. 479.

[2] *I.C.J. Reports*, 1948, p. 57. [3] Ibid., p. 63. [4] Ibid., p. 65.

it implies that the matter was foreign to the general tenor and aim of Article 4 (1)—it was an improper purpose.

The dissentients held that there was a residual discretion in States to consider matters other than those enumerated. Their approach was therefore one of improper purposes. First, they looked for the aims and objects of the Article but could find only a reference to the aims and objects of the Organization itself. Hence, they differed from the majority and were led to the conclusion that:[1]

> In the exercise of this power the Member is legally bound to have regard to the principle of good faith, to give effect to the Purposes and Principles of the United Nations and to act in such a manner as not to involve any breach of the Charter.

This is a correct conclusion given their proposition that the aim and object of the Article could be found only in the aim and object of the Organization. But the control is in fact no control, for the Organization's aims and objects are so vague and general that precise evaluation of any given matter is impossible.

Unreasonableness

There is a real danger of losing oneself among the shifting meanings of unreasonableness. If to act unreasonably means to act in a way in which a reasonable man would not act, then virtually every ground of judicial review is encompassed in 'unreasonableness'. Administrative law cases show four distinct meanings of unreasonableness: (*a*) lack of a sufficient connection between a factual situation and a legal proposition,[2] (*b*) an absurd, irrational, or arbitrary action,[3] (*c*) an action which is thoroughly bad and should certainly not have been done,[4] (*d*) an action which seriously violates the basic principles behind a body.[5] It is therefore essential to isolate the usage of the word in each case.

A study of administrative law shows that most of the times an action is described as 'unreasonable' the judge is using the word to describe an error which comes under another ground for review. Perhaps the most frequent use of 'unreasonableness' is to describe the lack of connection between a factual situation and a legal proposition. This is certainly true of its use in international adjudication. For instance, in *Lawless* v. *Ireland* (Merits)[6] the test of 'reasonableness' (reasonable connection) was used to determine whether a particular emergency was capable of being regarded as one

[1] *I.C.J. Reports*, 1948, p. 92, *per* Judges Basdevant, Winiarski, McNair and Read.
[2] e.g. *Edwards* v. *Bairstow*, [1956] A.C. 14 (H.L.).
[3] e.g. *Kruse* v. *Johnson*, [1898] 2 Q.B. 91 (D.C.).
[4] e.g. *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.).
[5] e.g. *Roberts* v. *Hopwood*, [1925] A.C. 578 (H.L.).
[6] *Yearbook of the E.C. on Human Rights* (1961), p. 438, at pp. 474–80 (the Court).

threatening the life of the State. The use in *Hochbaum*[1] was similar. Again, in *Interhandel* (Preliminary Objections)[2] Judge Lauterpacht,[3] and in *Application of the Convention of 1902 Governing the Guardianship of Infants*[4] the Dutch argument,[5] used reasonableness in this way to determine whether a matter came within a treaty description. Finally, the European Court of Human Rights has adopted reasonableness in this sense as the appropriate description of the scope of their inquiry into the propriety of pre-trial detention.[6]

In what sense is unreasonableness a unique concept? Two cases from administrative law provide two illustrations. In *Kruse* v. *Johnson*[7] Lord Russell C.J. said bylaws would be unreasonable if they were:[8]

> . . . partial and unequal in their operation as between different classes; if they were manifestly unjust; . . . if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, . . .

The second case is *Roberts* v. *Hopwood*.[9] There five Law Lords gave fifteen different reasons for their decision. A synthesis, in so far as one can be drawn from the opinions, is that an action is unreasonable if it lacks logic either by being faulty in its logical processes or by the invalidity of one of its premisses—in the opinion of the judges.

The reluctance of courts to find that a body has acted unreasonably is fully understandable. True unreasonableness is one of the few areas of judicial review where the court must substitute its own ideas of what is right without leaving a margin of appreciation to the decision-maker. True unreasonableness is a residual power of review. It has not appeared in interstate adjudications; it would be surprising to find it used. However, it is to be found in the jurisprudence of the Administrative Tribunals.[10]

Review for Abuse of Right, and its Abuse: the South-West Africa Cases

These claims[11] raised in a very fundamental way the problems of international judicial review of discretionary State action. The way the case was argued and the way in which the Judges dealt with the submissions on the

[1] *Annual Digest* (*1933–34*), Case No. 134 (Upper Silesian Arbitral Tribunal).
[2] *I.C.J. Reports*, 1959, p. 6. [3] Ibid., p. 111. [4] Ibid., 1958, p. 55.
[5] *I.C.J. Pleadings* (1958), pp. 101–5 (Reply) and pp. 149–55 (Professor Kisch, in argument).
[6] See *Wemhoff* v. *Federal Republic of Germany*, *Yearbook of the E.C. on Human Rights* (1968), p. 796, and *Stögmüller* v. *Austria*, ibid. (1969), p. 364, at p. 394.
[7] [1898] 2 Q.B. 91 (D.C.).
[8] Ibid., at pp. 99–100.
[9] [1925] A.C. 578 (H.L.).
[10] e.g. *Howrani* v. *United Nations* (1951), Judgment No. 4.
[11] (Preliminary Objections), *I.C.J. Reports*, 1962, p. 319; (Second Phase), ibid. (1966), p. 4.

merits indicate that neither counsel nor Judges really understood the role which they were required to play.

The facts

It was alleged that South Africa had violated its Mandate to govern South-West Africa by misusing its governmental competence. South Africa had allegedly failed in its obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory under Article 2 (2) of the Mandate. There were other allegations of breach, for instance, in militarizing the territory. While Ethiopia and Liberia commenced by alleging abuse of discretion, a very able (though misconceived) argument by Mr. de Villiers for South Africa drove them back to abandoning this in favour of deducing abuse by the legal fiction that racial discrimination could never be for the well-being of the inhabitants. In the event the Court did not find it necessary to adjudicate upon the argument about abuse of discretion. Few judges did so and only Judge *ad hoc* van Wyk did so in depth.

The issues

Does the International Court of Justice have a power of judicial review? South Africa did not concede this, and the discussion of judicial review arose only as an alternative submission.[1] It was not until South Africa's rejoinder that the argument on this matter was joined in earnest.[2] It is believed that the power of judicial review is inherent in a court such as the World Court. If there are rules of law limiting the power of a State in any respect then a court to which the parties are subject has power to determine whether those rules have been breached. The *South-West Africa* cases were instances of just this.

The keystone to the question was the wide phrasing of Article 2 (2) of the Mandate, made all the wider by the narrow phrasing of its Articles 3 to 5.[3] This had two consequences. First, there was inevitably a wide discretion conferred by Article 2 (2), and this discretion had necessarily to be wider than those under the other provisions. Article 2 (2) contained only one criterion—the requirement that South Africa promote the well-being of the inhabitants to the 'utmost'. It was at one stage of the proceedings argued that without the norm of non-discrimination there could be no review at all.[4] This would have been an accurate observation only if the criterion did not give rise to anything capable of objective evaluation. This was not so. Article 2 (2) conferred a near-governmental power—a plenary power—but it remained a conferred power and showed on its face a purpose

[1] *I.C.J. Pleadings* (1966), vol. 5, p. 157.
[2] Ibid., vol. 9, pp. 491 et seq.
[3] Ibid., vol. 8, p. 629.
[4] Ibid., vol. 5, p. 164 (Rejoinder).

for conferral. Therefore, it had to be used positively for that purpose. This distinguishes the power from those which give rise only to negative restrictions.

The judicial opinions

The judges who did discuss abuse of discretion recognized that they were acting as a review authority of sorts. But what sort? Judge Forster, for instance, spoke of the power to review for *détournement de pouvoir*[1] but did not expand on this. Judge *ad hoc* van Wyk mentioned, as grounds for review, all those discussed in this article, though he gave no clear indication that he saw them as separate grounds.[2] Judge Tanaka first took the position that the only ground was bad faith[3] though he subsequently stated that:[4]

> If any legal norm exists which is applicable to the exercise of the discretionary power of the Mandatory, then it will present itself as a limitation of this power, and the possible violation of this norm would result in a breach of the Mandate and hence the justiciability of this matter.

This statement was made apropos of the applicants' submission that the norm of non-discrimination imposed a limit upon South Africa's exercise of power but it also implies a thorough-going review for abuse of discretion. Indeed, Judge Tanaka later referred to 'the general rules which prohibit the Mandatory from abusing its power and *mala fides* in performing its obligations'.[5] Judge Jessup alone developed the obvious analogy of municipal administrative law which was, in fact, given some discussion in the course of the argument.[6] He rejected South Africa's final submission that all review is in essence based on the finding of bad faith.[7] He concluded that there was scope for review for improper purposes.[8] These were the only judges who discussed the place of international judicial review.

South Africa's arguments

South Africa's argument developed as follows. First, it was propounded that State actions are restricted only by positive provisions of international law—*The Lotus*[9] theorem—so that in order to base the Court's review those positive restrictions had to be found in the Mandate.[10] The only restriction in Article 2 (2) was that South Africa must act for the moral and material well-being of the inhabitants. Finding that there was no more specific direction as to how South Africa was to administer the territory, South Africa concluded that there could be no control over the actual exercise of

[1] *I.C.J. Reports*, 1966, p. 481. [2] Ibid., pp. 150–3. [3] Ibid., p. 283.
[4] Ibid., p. 284. [5] Ibid., p. 301.
[6] *I.C.J. Pleadings* (1966), vol. 2, p. 392 (Counter-Memorial); vol. 8, pp. 158 et seq. (Rejoinder); ibid., pp. 275–6 (Mr. de Villiers, in argument).
[7] *I.C.J. Reports*, 1966, pp. 434–5. [8] Ibid., pp. 435–8.
[9] *P.C.I.J.*, 1927, Ser. A, No. 10.
[10] *I.C.J. Pleadings* (1966), vol. 5, pp. 157–60 (Rejoinder).

the power to administer.[1] It was deduced from this that the Court could concern itself only with errors of procedure,[2] competence,[3] essential prerequisites for acting in a particular way,[4] and bad faith.

South Africa's alternative contention was that, even if the Court could review for improper purposes, the argument necessarily failed. In the first place, it was said, the applicants had made their case in terms of bad faith —that South Africa knew it was doing wrong.[5] Secondly, in South Africa's view it was extremely unlikely that a State could pursue an improper purpose in relation to Article 2 (2) without doing so knowingly,[6] that is, without bad faith. All possible grounds for misuse were the same—bad faith. Improper purpose differed from bad faith only in knowledge, and unreasonableness came down to bad faith because the proper test was that the action taken was so bad that it must have been in bad faith.[7] These propositions were stated repeatedly[8] and only weakly rebutted.[9]

While Judge *ad hoc* van Wyk agreed that an improper purpose could be either *ex facie* or implied,[10] Mr. de Villiers made the requirement for evidence of implied improper purpose so strict as to negative its existence. First he argued that the Court must look to all the evidence, both that showing *ex facie* improper purpose and that showing implied improper purpose. But, he continued, it was the *ex facie* side—the evidence which showed the decision-maker's subjective intent—which was the heart of the matter. Should there be no evidence of subjective intent, he propounded, then the evidence of implied improper purpose must be overwhelming—such that there remained no room for 'honest difference of opinion'—and to the effect that the decision-maker must have intended to achieve an unauthorized purpose.[11] In support of this Mr. de Villiers made use of administrative law material, but took the dicta one step further than was warranted. The courts do not *have* to infer bad faith from the operation of the action and the background facts before holding it to be an abuse of discretion.

The correct analysis

The essential starting-point for discussion of judicial review of the Mandate is Article 2 (2) itself. This Article requires that South Africa's

[1] *I.C.J. Pleadings*, vol. 8, p. 619; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, pp. 150–1.
[2] *I.C.J. Pleadings* (1966), vol. 8, p. 621; vol. 9, p. 494; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, p. 151.
[3] *I.C.J. Pleadings* (1966), vol. 8, p. 621; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, p. 151.
[4] *I.C.J. Pleadings* (1966), vol. 9, p. 500.
[5] *I.C.J. Reports*, 1966, pp. 153–4.
[6] Ibid., p. 152; *I.C.J. Pleadings* (1966), vol. 9, pp. 503–4.
[7] Ibid., p. 500.
[8] Ibid., vol. 2, p. 392 (Counter-Memorial); vol. 5, pp. 161 and 171 (Rejoinder); vol. 8, pp. 275 and 621 (Mr. de Villiers, in argument).
[9] Ibid., pp. 244–5; vol. 9, pp. 38–41.
[10] *I.C.J. Reports*, 1966, p. 152.
[11] *I.C.J. Pleadings* (1966), vol. 5, pp. 158–9 and 172 (Rejoinder); vol. 8, pp. 690–2.

power of administration be exercised so as to promote the well-being of the inhabitants of the territory. This sets up a positive criterion of State action, albeit a vague one. Coupled with this is the direction that such promotion be to the 'utmost'. Therefore, there may be situations where South Africa's actions promote well-being but not to the utmost. For instance, if an increasing proportion of African children are being educated then the well-being of the inhabitants is being promoted. But if only ten per cent of the education budget for South-West Africa is being spent upon the education of African children then it could not be said that the well-being of the inhabitants was being promoted to the 'utmost'. This does not involve any allegation of bad faith.

The situation may usefully be compared with that under the self-judging reservations to the compulsory jurisdiction of the International Court. In both cases there is a very vague concept—domestic jurisdiction and well-being—coupled with a requirement which is a matter of degree—essentiality and utmost. The difference is that essentiality is descriptive of an area which is less than total, while the direction to promote well-being to the utmost is a hundred per cent proposition. Before the Court can say that a matter is not essentially within domestic jurisdiction there must be little or no element of domestic jurisdiction. This is not true of promotion to the utmost. Thus, while the self-judging reservation does not leave scope for judicial review for misuse of competence beyond the minimum of good faith, Article 2 (2) does.

The mere fact that the Court in *South-West Africa* was not concerned with an inherent State power but with a conferred power takes the matter beyond the first and third classes of abuse of right found by Dr. Kiss.[1] Hence, reasons which South Africa may use in deciding whether to take a particular action in South-West Africa may be impugned, not for irrelevant considerations (for there is no enumeration), but for improper purposes and unreasonableness. The latter (lack of a valid logical reason for the action) need be considered no further. It did not arise in the cases and is largely self-explanatory. The structure of the Mandate and especially of Article 2 (2) point to two categories of reasons which are outside the Mandate and are therefore improper. These are reasons which discriminate positively against the interests of the inhabitants and reasons which prefer the interests of non-natives to those of the natives. The first class relates to non-promotion of the well-being of the inhabitants while the second refers to the 'utmost' directive. In particular, reasons directed towards the factual annexation of the territory by South Africa will be improper.

These improper reasons may appear either *ex facie* or by implication. In the case of the latter there is no need to infer that South Africa has been

[1] Op. cit. (above, p. 341 n. 5), pp. 184–8.

acting in bad faith. It is sufficient to look at the action taken and to look at the background—which will include facts about South Africa and the international community as well as about the territory—and ask whether the action would have been taken unless one of those improper reasons had been in the mind of the decision-maker. For instance, in the example of ten per cent of the education budget's being spent upon native education, it could reasonably be said that the percentage would have been much higher had not South Africa been concerned as a priority to keep European education at a standard of international excellence. It may be that the native educational standards are higher than anywhere else in Africa. That is irrelevant. It may be that South Africa is very concerned to raise native standards to those of the Europeans in the territory. That is irrelevant. The inquiry is simply to assess the action taken in the light of the Mandate and Article 2 (2). The concern with European education is outside the scope of the Mandate. It is a legally improper reason or purpose. It has had a determinative effect upon the action taken. It would arguably constitute an abuse of right by South Africa which breaches the Mandate.

Conclusions

The view of abuse of rights which appears from this study is different from that adopted by some. Certainly, it is not what Sir Hersch Lauterpacht described. It is, however, a systematization and extrapolation of the common concept of abuse of rights.

Any rule against the abuse of rights is based upon, and cannot exist apart from, the existence of a discretion in some person. The English law of nuisance provides some prohibition akin to the abuse of rights when it prohibits *A* from using his land in such a way as unreasonably to deprive *B* of the enjoyment of his (*B*'s) land.[1] *A*'s discretion as to how he uses the land is limited to this extent. English law, however, stops short of a general concept limiting the land-owner's discretion.[2] The law in the Occupier's Liability Act 1957 remains a category and not merely part of a general principle of occupiers' responsibility. Both deal with the effect of an act with no relation back to the reasons for acting.

English administrative law represents a considerable advance in this context, but it is an advance which flows from the nature of a discretion in law. It subjects a discretion to review for abuse if and only if the discretion itself, its context and conditions, can be found to contain some limitation of the reasons for which it is to be used. Not every discretion displays such

[1] An example showing the relation of intention here is *Hollywood Silver Fox Farm Ltd.* v. *Emmett*, [1936] 2 K.B. 468.

[2] *Bradford Corporation* v. *Pickles*, [1895] A.C. 587.

a limitation. Three such discretions in international law have been discussed above. Once a limitation of the reasons for which a discretion is to be used has been established, further analysis presents a number of distinct ways in which the discretion can be abused. But, while they are distinct ways, they maintain a strong inner coherence. No apology is made for reproducing the following long passage from the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*:[1]

When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case .... When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles, the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there are to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters .... I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty—those of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short* v. *Poole Corporation*, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

[1] [1948] 1 K.B. 223 at 228–9.

In outline, this structure parallels that of *abus de droit* in French private law. It is not every 'right' which is reviewable for abuse but only those which are susceptible of limitation by reference to the reason for exercising them.[1] Whether one adopts the wide approach of Josserand[2] and judges the propriety of the actor's reasons by *le but social des droits*, or uses Mazeaud's own test of *l'individu avisé*,[3] the orientation is unmistakably related to Lord Greene's formulation.

Upon translation into international adjudication, the jurisprudence shows sufficient coherence to posit a general principle prohibiting abuse of right in international law. English administrative law categories provide a content from which a general principle may be arrived at inductively: no person may, under international law, exercise a power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international law contemplates the power will be used. The *Trail Smelter* case[4] is, therefore, not an instance of abuse of right but of a 'tort' similar to the English law of nuisance: it is based on the effect of an action and does not refer back to the actor's reasons for acting. Prohibition of abuse of right may now be seen as a precise concept of definite content and common application. It may not be a prime instrument of peaceful change in the way Sir Hersch Lauterpacht envisaged it, but it is a potent rule of international law none the less.

[1] H. L. and J. Mazeaud, *Leçons de droit civil* (4th ed., by M. de Juglart, 1969), vol. 2, paras. 455–61.

[2] L. Josserand, *De l'esprit des droits et de leur relativité* (2nd ed., 1939).

[3] Mazeaud, op. cit. (above, n. 1 on this page), para. 458.

[4] *R.I.A.A.* 3 (1938 and 1941), p. 1905.