

Abuse of Rights

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Subject(s): [Sources, foundations and principles of international law](#)

This article was last updated December 2006

A. Notion

1. General Concept

- 1 In international law, abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State (see also → [State Responsibility](#)).
- 2 The concept of abuse of rights implies the negation of a rigid conception of international law, and of law in general, summarized by the maxim *neminem laedit qui suo jure utitur*, meaning that nobody harms another when he exercises his own rights. *Summum ius*, the maximum of law, may thus become *summa iniuria*, a maximum of injustice. The principle of Roman law, *sic utere iure tuo ut alterum non laedas*, prescribing the exercise of individual rights in such a way that others would suffer no injury, is therefore the very fundament of the concept of abuse of right, since in such a case the State which acted had no right at all. There should thus be no confusion between abuse of right and situations where a State acts *ultra vires*, since in the latter case it has exceeded the limits of its rights, ie it has no right at all.
- 3 The concept also implies a distinction between the existence of an individual right and the exercise of such a right. Some authors consider such a distinction artificial (Elkind 71). In reality, the distinction seems to be generally adopted in practice not only in international law, but also in municipal law systems, and in civil as well as in administrative law. (see also → [International Law and Domestic \(Municipal\) Law](#)) The distinction is illustrated by control exercised on the way individuals or authorities make use of their rights or competences, such as property rights or decisions of administrative organs.

2. Specific Situations

- 4 A closer inquiry shows that in inter-State relations the concept of abuse of rights may arise in three distinct legal situations. In the first case, a State exercises its rights in such a way that another State is hindered in the exercise of its own rights and, as a consequence, suffers injury. Such a situation can result, for example, from the inconsiderate use of a shared natural resource, or a migratory species, or the radio-electronic spectrum. Here the States sharing the same resource suffer a reduction in their enjoyment of the resource to which they are entitled. In reality, however, the existing rights and the legitimate interests of the States concerned have to be balanced in such cases. It can be considered that an abuse of right exists only

when the injury suffered by the aggrieved State exceeds the benefit resulting for another State from the enjoyment of its own right.

- 5 In the second case, a right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused. This is the concept of *détournement de pouvoir*, well known in administrative practice within States. It has been identified in general inter-State practice, and it plays a growing role inside international organizations (→ ***International Organizations or Institutions, General Aspects***), since the competences conferred upon Member States, the organs of the institutions themselves or beneficiaries of rights may be exercised in a way very different from that originally intended (see also → ***International Law Development through International Organizations, Policies and Practice***).
- 6 In the third case, the arbitrary exercise of its rights by a State, causing injury to other States but without clearly violating their rights, can also amount to an abuse of right. In contrast to the preceding situation, bad faith or an intention to cause harm are not necessary to constitute this form. Broader objectives concerning the social function of the right which has been exercised are at stake here, eg in the case of unjustified if not illegal measures imposed upon → ***aliens***, including arbitrary expulsion (→ ***Aliens, Expulsion and Deportation***) or expropriation (→ ***Property, Right to, International Protection***).

B. Prohibition of Abuse of Rights

- 7 On the whole, it may be considered that international law prohibits the abuse of rights. However, such prohibition does not seem to be unanimously accepted in general international law (→ ***General International Law [Principles, Rules and Standards]***), while it is not contested in the law of international institutions. Hence the two aspects have to be examined separately.

1. General International Law

- 8 As far as international law doctrine (→ ***Doctrines***) is concerned, many publicists, including practically all the earlier ones, do not even mention prohibition of the abuse of rights. The principle prohibiting abuse of rights seems to have been formulated for the first time at an inter-State level by the Committee of Jurists preparing the Draft Statute of the → ***Permanent Court of International Justice (PCIJ)*** in 1920. In the attempt to define the → ***general principles of law*** which would form the legal basis for the PCIJ's decisions, a member of the Committee of Jurists referred to the prohibition of abuse of rights as an example, together with the principle of → ***res iudicata*** (***A Ricci-Busatti in Permanent Court of Justice: Advisory Committee of Jurists (ed) Procès Verbaux of the Proceedings of the Committee (Van Langenhuisen Brothers The Hague 1920) 314–15***).
- 9 Following this reasoning, several writers have reviewed different municipal law systems in order to find out whether such a prohibition could be considered as general, ie whether it was to be considered as relevant to **Art. 38 (1) Statute of the PCIJ**. The wording (which is the same as that of **Art. 38 (1) (c) Statute of the → *International Court of Justice (ICJ)*** [ICJ Statute']) lists among the → ***sources of international***

law the 'general principles of law recognized by civilized nations'. Most of the authors came to the conclusion that in civil law countries, whether European or not, as well as in socialist countries, the abuse of rights was, along with *détournement de pouvoir*, prohibited. As far as common law countries are concerned, it was submitted that, although a decision in a given case may be based upon principles of the law of torts, when a court looks into the motives of an actor the legal theory applicable is indistinguishable from that of abuse of rights. This, it was held, supports the contention that the theory is accepted in the private law of common law countries. In addition, the existence of controls over the discretionary powers of public authorities should be taken into account, though there are many variants on the means or methods of such controls. Some have concluded, therefore, that since the concept of abuse of rights is known in many countries it may be said to be a general principle of law.

- 10 However, even among writers who accept the principle of the prohibition of the abuse of rights, there is no agreement on the analysis of its significance and theoretical basis. This divergence of opinion results at least partly from the different forms in which the exercise of an existing right can cause injury to another State, amounting to a *summa iniuria*. Some distinguished authors question the importance of the principle in international relations, or object to its lack of precision for practical use. Others consider it to be lacking in value as an independent rule, asserting that it consists essentially of an application of other uncontested concepts such as → **good faith (bona fide)**, reasonableness, good neighbourliness, or even equity. (→ **Equity in International Law**).
- 11 In inter-State practice, abuse of rights has often been alleged by → **governments**. Diplomatic discussions and opinions of legal advisers in various ministries of foreign affairs show that the prohibition of the abuse of rights has been used not only as an argument against other States, but also to impose upon the State concerned the duty to avoid acts which would amount to a violation of this principle. The most complete collection of arguments based on this principle can be found in memorials submitted to international tribunals as well as in oral statements made before such tribunals. Abuse of rights was expressly made the basis of a claim before the ICJ in the *Case concerning the Barcelona Traction, Light and Power Co, Ltd (New Application: 1962) (Belgium v Spain)* (at 17; → **Barcelona Traction Case**). It has also been submitted that the British claim against Belgium in the → **Oscar Chinn Case** was essentially an allegation of abuse of right (at 70).
- 12 The principle has been mentioned in several cases as a possible basis for a condemnation for violation of international law, but without having been actually used for that purpose. In the **Case concerning Certain German Interests in Polish Upper Silesia (Merits)** ('*Certain German Interests Case*'; → **German Interests in Polish Upper Silesia, Cases concerning the**) the PCIJ concluded that a misuse had not taken place (at 30 and 37–38). In the **Case of the Free Zones of Upper Savoy and the District of Gex** ('*Free Zones of Upper Savoy and Gex Case*'; → **Free Zones of Upper Savoy and Gex Case**) the PCIJ stressed that a reservation had to be made regarding the case of abuse of rights, but it added that an abuse could not be presumed by the court (at 167).
- 13 Still, a series of decisions and awards can be mentioned where the court or arbitral tribunal (→ **Arbitration**) examined the way in which a State exercised a right, the existence of which was not contested. Authors refer in this regard in particular to the *Case concerning Rights of Nationals of the United States of America*

in Morocco (*France v United States of America*) (at 212; → *United States Nationals in Morocco Case*) in the practice of the ICJ as well as to arbitral awards in the *Trail Smelter Arbitration (US v Canada) (1941)* ('*Trail Smelter Arbitration*'), the → *Delagoa Bay Arbitration*, the *El Triunfo Case (United States v El Salvador)* and to some of the Venezuelan arbitrations (9 RIAA 111–553, 10 RIAA; *The Venezuelan Preferential Case* 9 RIAA 99–110). Dissenting opinions of judges at the PCIJ and at the ICJ have also frequently adverted to the principle, but some of them expressed hesitation before applying it, without ever rejecting outright its place in international law.

- 14 Interestingly, the clearest jurisdictional formulation of the norm prohibiting abuse of rights is due to the Appellate Body of the → *World Trade Organization (WTO)* in 1998 in the *United States—Import Prohibition of Certain Shrimp and Shrimp Products* case. It answered the US claim that its efforts to change foreign fishing practices fell within **Art. XX(g) General Agreement on Tariffs and Trade** (→ *General Agreement on Tariffs and Trade [1947 and 1994]*) relating to the conservation of exhaustible natural resources (→ *Conservation of Natural Resources*):

The chapeau of **Article XX** is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably'. An abusive exercise by a member of its own treaty right results in a breach of the treaty rights of the other members and, as well, a violation of the treaty obligation of the Member so acting (at para. 158).

- 15 The provisions of certain → *treaties* enunciate the principle prohibiting the abuse of rights in inter-State relations. States sharing a natural resource often entered into bilateral and multilateral conventions for the purpose of utilizing it to mutual advantage. In a sense, treaty clauses providing for the application and implementation of measures agreed in good faith may be considered as involving the prohibition of any abuse of the rights which those treaties confer upon the contracting parties. In this context, it should be noted that **Art. 26 Vienna Convention on the Law of Treaties (1969)** ('VCLT') declares that every treaty in force must be performed in good faith by the parties.

- 16 More specific prohibitions have also been provided for. One may consider as such the obligation not to defeat the object and purpose of a treaty prior to its entry into force (→ *Treaties, Conclusion and Entry into Force*), set out in **Art. 18 VCLT**. It may also be recalled that **Art. 2 Convention on the High Seas ([adopted 29 April 1958, entered into force 30 September 1962] 450 UNTS 82)** adds to the definition of the various aspects of freedom of the → *high seas* that these freedoms, and others which are recognized by the general principles of international law, are to be exercised by all States with reasonable regard to the interests of other States (→ *Law of the Sea*). The most explicit recognition of the prohibition of any abuse of rights is to be found in **Art. 300 United Nations Convention on the Law of the Sea** ([opened for signature 10 December 1982, entered into force 16 November 1994] 1833 UNTS 397) (→ *Conferences on the Law of the Sea*):

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

- 17 Having been proclaimed in a global convention of fundamental importance, the principle progressively appeared in an increasing number of international treaties. **Art. 34 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks** ([adopted 4 August 1995, entered into force 11 December 2001] (1995) 34 ILM 1542) (→ *Straddling and Highly Migratory Fish Stocks*; → *Fisheries Agreements*) is similar, except that it omits the words 'jurisdictions and freedoms'. **Art. 33 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean** ([adopted 5 September 2000, entered into force 19 June 2004] (2001) 40 ILM 278) also declares that the obligations assumed under it shall be fulfilled in good faith and the rights which it recognizes shall be exercised in a manner which would not constitute an abuse of rights.
- 18 The problem of the use of common freshwater resources is also often faced by States which share them (→ *Water, International Regulation of the Use of*). Several treaties approach the problem, however, under the much more general aspect of equitable use. According to **Art. 2 (2) (c) Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes** ([adopted 17 March 1992, entered into force 6 October 1996] 1936 UNTS 269) the parties shall take all appropriate measures 'to ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact'.
- 19 **Art. 5 Convention on the Law of the Non-Navigational Uses of International Watercourses** ([adopted 21 May 1997, not yet entered into force] (1997) 36 ILM 703), drafted by the → *International Law Commission (ILC)* of the → *United Nations (UN)*, uses the same terms: 'Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner'. They also 'shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner'. **Art. 6 Convention on the Law of the Non-Navigational Uses of International Watercourses** lists the factors relevant to equitable and reasonable utilization: geographic, hydrographic, climatic, ecological and other factors of a natural character, but also social and economic needs of the population dependent on the watercourse in each State and the effects of the use of the watercourse on other watercourse States.
- 20 A more recent instrument, the **Framework Agreement on the Sava River Basin** ([adopted 3 December 2002, entered into force 29 December 2004]), also proclaims in its **Art. 7** the principle of reasonable and equitable share of the beneficial uses of the Sava River Basin water resources (→ *Framework Agreements*). It adds that this 'is to be determined in any particular case in light of the relevant factors according to international law'.
- 21 Inter-State practice and international judicial proceedings show that the main fields where abuse of rights has been alleged are the law of the sea, international rivers and lakes, transfrontier pollution (→ *Air Pollution, Transboundary Aspects*) and international trade.

2. International Institutions

- 22 Within international institutions, competences and discretions are granted to the Member States and to specified organs (→ ***International Organizations or Institutions, Decision-Making Bodies***). The abuse of rights is a danger to be avoided. A general tendency is therefore found to prohibit such abuse in two of its principal forms: arbitrary use of rights and *détournement de pouvoir*. Here again, it may be recalled that the general obligation to fulfil in good faith the rights and obligations resulting from membership (→ ***International Organizations or Institutions, Membership***) or from institutional competences is the overall basis for the prohibition of the abuse of rights (see **Art. 2 (2)**→ ***United Nations Charter***).
- 23 The prohibition of abuse of rights was emphasized as far as the rights of UN Member States are concerned, in dissenting opinions by five judges in the Advisory Opinions on *Conditions of Admission of a State to Membership in the United Nations* (at 91–92) and on the *Competence of the General Assembly for the Admission of a State to the United Nations* (at 15 and 20; → ***Admission of a State to Membership in the United (Advisory Opinions)***; → ***Advisory Opinions***) and in the *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) Second Phase* by Judge Forster (at 480–1; → ***South West Africa/Namibia [Advisory Opinions and Judgments]***). **Art. 10 Treaty Establishing the European Coal and Steel Community** ([adopted 18 April 1951, entered into force 24 July 1952] 261 UNTS 140); ‘ECSC Treaty’) ; → ***European Coal and Steel Community [ECSC]***) explicitly authorized the Court of Justice of the European Communities to declare null and void abusive vetoes by Member States in the designation of the members of the High Authority (→ ***Veto***).
- 24 Other institutional frameworks prohibit certain abuses of rights which can be enjoyed by others than Member States. **Art. 86 Treaty Establishing the European Economic Community** ([adopted 25 March 1957, entered into force 1 January 1958] 298 UNTS 11; ‘EEC Treaty’; → ***European [Economic] Community***) prohibits any States’ abuse of a dominant position within the Common Market.
- 25 The principle prohibiting the abuse of rights within international organizations is quite frequently applied in order to control the exercise of powers by international organs (see also → ***International Organizations or Institutions, Legal Remedies against Acts of Organs***; → ***International Organizations or Institutions, Supervision and Sanctions***). **Art. 33 ECSC Treaty** provides for jurisdiction of the ECJ over appeals by a Member State or by the Council for the annulment of decisions and recommendations of the High Authority, on the grounds of abuse of power. The same principle appears in **Art. 173 EEC Treaty** and in **Art. 146 Treaty Establishing the European Atomic Energy Community** ([adopted 25 March 1957, entered into force 1 January 1958] 298 UNTS 167 ; → ***European Atomic Energy Community [Euratom]***). **Art. 296 (1) (a) Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts** [adopted 2 October 1997, entered into force 1 May 1999] (1998) 37 ILM 56; ‘Treaty of Amsterdam’ ; → ***European Union, Historical Evolution***) provides that no Member State is obliged to disclose information which it considers contrary to the essential interests of its security. Still, according to **Art. 298 Treaty of Amsterdam**, the Commission or any Member State may bring the matter directly before the ECJ if it considers that another Member State is making improper use of the powers so provided.
- 26 The **Charter of Fundamental Rights of the European Union** ([adopted 7 December 2000] (2001) 40

ILM 266; 'Charter of Fundamental Rights'), included in the **Draft Treaty Establishing a Constitution for Europe ([adopted 29 October 2004, not entered into force] [2004] OJ C310/401)**, as adopted by the representatives of the governments of the Member States, also prohibits abuse of rights. **Art. II-54 Charter of Fundamental Rights** declares that nothing in the Charter of Fundamental Rights shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in the Charter of Fundamental Rights or at their limitation to a greater extent than is provided for therein (→ **Interpretation in International Law**).

- 27 A similar rule already figured in Art. 17 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1959, entered into force 3 September 1953] 213 UNTS 222); → **European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)**:

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Nothing in this Convention may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

- 28 **Art. 3 1966 Optional Protocol to the International Covenant on Civil and Political Rights (1966) ([adopted 16 December 1966, entered into force 23 March 1976] 999 UNTS 302)** also states that the → **Human Rights Committee shall** declare inadmissible any communication which it considers to be an abuse of the right of submission of such communications. The absence of a satisfactory explanation of the communication after an unjustified delay should be considered as an abuse of the right of submission.

- 29 In reality, most cases where international organs are found to have abused their rights concern the exercise of their competences and discretions in relation to members of their staff. In a number of decisions of the United Nations Administrative Tribunal, of the Administrative Tribunal for the → **International Labour Organization (ILO)** and of the ECJ, it has been held that the prejudice suffered by the plaintiffs resulted from a *détournement de pouvoir*.

- 30 Such evolution shows the extension of the prohibition of the abuse of rights from inter-State relations to relations between international bodies and persons other than States (see also → **Individuals in International Law**).

C. Implementation of the Prohibition

- 31 It seems that the fact of injury resulting from an abuse of rights is a fundamental element in the implementation of that principle. The arbitrators of the *Trail Smelter Arbitration* stressed that the abuse should be 'of serious consequence' and the injury 'established by clear and convincing evidence' (at 1965). When an injury is alleged, an international body or States, through diplomatic inquiry, may examine the circumstances in which the relevant rights have been exercised. Such a procedure of verification appears in several cases submitted to the ICJ, including the Nottebohm → **Case (Liechtenstein v Guatemala) Second Phase** (at 21-4) and the *United States Nationals in Morocco Case* (at 212).

- 32 Abuse of rights provides a ground for international responsibility (→ ***International Organizations or Institutions, Responsibility and Liability***). There can be no defence that a State or an international organization which has exceeded its powers could not have committed an illegal act, having simply exercised its proper rights, once it is admitted that a general principle exists in international law prohibiting abuse of rights, a principle which is thus superior to specific rules recognizing individual rights. It does not seem, however, that intention to harm other States is required: an injurious or arbitrary use of rights, competences or discretions can be considered sufficient in this regard. The extension of the concept of abuse of rights to the domain of the international protection of human rights opens a new perspective in this regard.
- 33 The problem of the proof of the existence of an abuse of right is a fundamental one. In both cases where the PCIJ referred to the possibility of an abuse of right, in the *Certain German Interests Case* (at 30) and the *Free Zones of Upper Savoy and Gex Case* (at 167), it was stressed that such an abuse cannot be presumed by the PCIJ. In the *Certain German Interests Case*, the PCIJ added that the burden of proof rested with the party alleging an abuse of right. When arbitrary use of powers or a *détournement de pouvoir* is alleged, proof should also be brought that the right has been used in disregard of the purpose for which it was originally intended.

D. Conclusion

- 34 The idea that a subject of rights and competences can misuse them seems to be inherent to legal thinking and to have roots in all legal systems and leads to the establishment of controls on the use of recognized rights. The prohibition of abuse of rights in international law is, however, problematic because of differences in the content of the concept itself: it may include, indeed, a conflict of sovereign rights, an arbitrary exercise of competences or discretions or a *détournement de pouvoir*. Nevertheless these last two forms seem to play a growing role within the framework of the law of international institutions, especially as far as the exercise of rights conferred upon individuals by international conventions is concerned.
- 35 The evolutive role of the concept of prohibition of abuse of right has been stressed by several authors. Conflicts where an abuse of rights is alleged or is likely to exist can lead the States involved to adopt specific rules which are designed to solve the problem for the future. At a general level, the concern to avoid such conflicts can result in the long term in the emergence of new customary rules, eg (→ ***Customary International Law***), in the case of the development of international law concerning transfrontier pollution, the overexploitation of living marine resources (→ ***Marine Living Resources, International Protection***), or the inequitable use of other shared natural resources. Art. 38 (1) (c) ICJ Statute declaring that the general principles of law recognized by civilized nations can be applied by the ICJ opens the door for such a possibility.

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