
Abuse of Rights: An Old Principle, A New Age

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One of several meanings of the term “abuse of rights” provides that there is an abuse of right when the exploitation of an individual right injuriously affects the interests of the community. The concept of abuse of rights derives from national legal systems notwithstanding that its content may vary among states. Abuse of rights has influenced international law in areas where it is widely considered to be a part of international law, whether as a general principle of law or as part of customary international law.

In examining these origins and the historical applications and contemporary limitations of abuse of rights, the author contends that although it may not be relevant to a number of areas of international law, abuse of rights retains an important role with respect to various international legal issues. These issues include the resolution of certain types of normative conflicts, the protection of “common spaces” and “matters of common concern”, and the promotion of normative change. Abuse of rights, the author demonstrates, may be a deft instrument, and one not to be forgotten, in dealing with issues such as transboundary pollution, declining fishstocks and whale populations, and the protection of areas such as the Antarctic and space.

Une des significations de l’expression «abus de droit» prévoit qu’il y a abus de droit si l’exploitation d’un droit individuel a pour conséquence d’entraîner un préjudice à une communauté. Bien que son contenu puisse être différent selon les états, le concept d’abus de droit provient de systèmes juridiques nationaux. L’abus de droit a influencé le droit international dans des régions où le concept est compris comme faisant partie du droit international, soit comme un principe général de droit, soit comme faisant partie du droit international coutumier.

En examinant les origines, les applications historiques et les limitations contemporaines de la notion d’abus de droit, l’auteur soutient que, alors que le concept n’est peut-être pas applicable à tous les domaines du droit international, il conserve un rôle important en ce qui concerne plusieurs questions juridiques internationales. Ces questions comprennent la résolution de certains conflits normatifs, la protection des «espaces communs» et des «questions d’intérêt général» et la promotion des changements normatifs. L’auteur nous démontre que l’abus de droit peut être un instrument ingénieux, qu’il ne faut pas oublier, particulièrement lorsque l’on doit traiter des questions telles que la pollution transnationale, le déclin de la population des poissons et des baleines et la protection de l’Antarctique et de l’espace.

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Introduction**I. Abuse of Rights in National Legal Systems***A. Civil Law Systems**B. Common Law Systems***II. Abuse of Rights as Applied in International Law****III. Abuse of Rights and Its Academic Supporters****IV. The Contemporary Relevance of Abuse of Rights****V. Abuse of Rights and Normative Conflicts****VI. Abuse of Rights, Common Spaces, and Matters of Common Concern****VII. Abuse of Rights and the Promotion of Normative Change****Conclusion**

*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 ...*¹

Introduction

International lawyers trained in the common law tradition will have heard of, but probably paid little attention to, the principle of abuse of rights (*abus de droit*).² In an age of limited sovereignty, abuse of rights seems a dated concept which is of little contemporary interest or value. The principle retains little scope for application in most areas of international law, areas that in recent decades have developed considerably in both depth and specificity. Yet abuse of rights continues to play an important role in those few areas where the rights of states are still conceived of as general or primordial, by mediating between or otherwise limiting the exercise of rights. This article examines the origins, historical applications, and contemporary limitations of abuse of rights before demonstrating how the principle remains relevant in resolving certain kinds of normative conflicts, protecting “common spaces” and “matters of common concern”, and promoting normative change.

I. Abuse of Rights in National Legal Systems

The historical influence of abuse of rights in international law derives substantially from the principle's existence in a large number of national legal systems.³ It has

¹ A. Kiss, “Abuse of Rights” in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 1 (Amsterdam: North-Holland, 1992) at 4 [hereinafter Kiss, “Abuse of Rights”].

² See H. Lauterpacht, *The Function of Law in the International Community* (Hamden, Conn.: Archon Books, 1966) at 286 [hereinafter Lauterpacht, *Function of Law*]: “The essence of the doctrine is that, as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right.” A Council of Europe study defined abuse of rights as a “legal mechanism designed to ease the inflexibility of the legal relationships derived from statutory, judicial or treaty rules.” See J. Voyame, B. Cottier & B. Rocha, “Abuse of Right in Comparative Law” in *Abuse of Rights and Equivalent Concepts: The Principle and Its Present Day Application (Proceedings of the 19th Colloquy on European Law, Luxembourg, 6-9 November 1989)* (Strasbourg: Council of Europe, 1990) 23 at 23 [hereinafter *Abuse of Rights and Equivalent Concepts*].

³ The origins of the principle would, however, seem to lie in Roman law. See Kiss, “Abuse of Rights”, *supra* note 1 at 5; J. Willisch, *State Responsibility for Technological Damage in International Law* (Berlin: Duncker & Humblot, 1987) at 180-81. See also A. Rodger, *Owners and Neighbours in*

long been accepted that general principles common to most national legal systems constitute a primary source of international law, albeit one that provides considerably fewer rules than treaties or customary international law.⁴ However, the content and application of the principle of abuse of rights vary significantly among national legal systems, making it difficult to identify a common principle except in the most general of terms.

A. Civil Law Systems

In some systems, abuse of rights is given a wide compass. For example, article 2 of the *Titre préliminaire* to the Swiss Civil Code states: “Chacun est tenu d’exercer ses droits et d’exécuter ses obligations selon les règles de la bonne foi. L’abus manifeste d’un droit n’est pas protégé par la loi.” And in France, the courts have interpreted articles 1382 and 1383 of the *Code civil*, which fix responsibility on the author of any harm, so as to limit the abusive exercise of rights or powers in property law, labour law, contractual obligations, and legal proceedings.⁶

Roman Law (Oxford: Clarendon Press, 1972); D. Johnston, *Roman Law in Context* (Cambridge: Cambridge University Press, 1999) at 71-76; P.G. Stein, “‘Equitable’ Remedies for the Protection of Property” in P. Birks, ed., *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Oxford: Clarendon Press, 1989) 185.

⁴ See *Statute of the International Court of Justice*, art. 38(1)(c), online: International Court of Justice <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>> (date accessed: 6 May 2002), which reads: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... (c) the general principles of law recognized by civilized nations”; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953); A. Pellet, *Recherches sur les principes généraux de droit en droit international* (Thesis, Université de Paris, 1974); G. Battaghi, “Il riconoscimento internazionale dei principi generali del diritto” in *Le droit international à l’heure de sa codification: études en l’honneur de Roberto Ago*, vol. 1 (Milan: Giuffrè, 1987) 97.

⁵ G. Scyboz & P.-R. Gilliéron, *Code civil suisse et Code des obligations annotés* (Lausanne: Éditions Payot, 1999). When Turkey adopted the main provisions of the Swiss Civil Code in 1926, this included article 2, although the Turkish version emphasizes that there is an abuse of rights only “if the abuse harms another person.” See M. Zwahlen, “Les écarts législatifs entre le droit civil turc et le droit civil suisse” [1973] *Revue de droit suisse* 141.

⁶ Art. 1382 C. civ. reads: “Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.” Art. 1383 C. civ. reads: “Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.” See L. Josserand, *De l’abus des droits* (Paris: Rousseau, 1905); L. Josserand, *De l’esprit des droits et de leur relativité*, 2d ed. (Paris: Dalloz, 1939); H.C. Gutteridge, “Abuse of Rights” (1935) 5 *Cambridge L.J.* 22 at 31-35; P. Catala & J.A. Weir, “Delict and Torts: A Study in Parallel, Part II” (1964) 38 *Tul. L. Rev.* 221 at 221-36; V. Bolgár, “Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine” (1975) 35 *La. L. Rev.* 1015 at 1015-23. A well-known application of abuse of rights in France is the *Affaire Clément-Bayard*, where the Cour de

Some national legal systems, while giving the principle of abuse of rights broad effect, have linked it to social or economic interests. For example, the Soviet Code of 1923 was prefaced by the following clause paramount: "Civil rights are protected by the law except in those cases in which they are exercised in a sense contrary to their economic and social purpose."⁷ Similarly, article 7 of the Czechoslovak Civil Code of 1964 stated that no one was allowed to misuse his or her rights against the interests of society.⁸ And in the 1972 case of *Mitamura v. Suzuki*, the Japanese Supreme Court articulated a reasonableness element to abuse of rights, with reasonableness being cast in terms of social interests:

In all cases a right must be exercised in such a fashion that the result of the exercise remains within a scope judged reasonable in the light of the prevailing social conscience. When a conduct by one who purports to have a right to do so fails to show reasonableness and when the consequential damages to others exceed the limit which is generally supposed to be borne in the social life, we must say that the exercise of the right is no longer within its permissible scope. Thus, the person who exercises his right in such a fashion shall be held liable because his conduct constitutes *an abuse of right*.⁹

In other national legal systems the principle of abuse of rights is narrowly conceived. For example, article 226 (the famous *Schikaneverbot*) of the German Civil Code states: "The exercise of a right is unlawful, if its purpose can only be to cause damage to another."¹⁰ An element of intent is also part of the principle as it appears in article 833 of the Italian Civil Code, which forbids the exercise of property rights

Cassation enjoined the construction of a large wooden structure topped with spikes that had been designed to prevent the use of a nearby airport, despite the landowner's right under Art. 552 C. civ. to plant or build whatever he wished on his property. See Cass. Req., 3 August 1915, D.P. 1917.I.79. See also Trib. civ. Compiègne, 19 February 1913, D.P. 1913.II.177 at 181 for the Tribunal's decision (to similar effect) in the same case.

⁷ See V.E. Greaves, "The Social-Economic Purpose of Private Rights: Section 1 of the Soviet Civil Code. A Comparative Study of Soviet and Non-communist Law" (1934) 12 N.Y.U. L. Rev. 165; Gutteridge, *ibid.* at 41-42. Article 5 of the 1964 Civil Code of the Russian Federation was to similar effect. See V. Paul, "The Abuse of Rights and Bona Fides in International Law" (1977) 28 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 107 at 119.

⁸ See Paul, *ibid.* at 119.

⁹ 26 Saiko Saibansho minji hanreishu. 1067 (Sup. Ct., 27 June 1972), translated in K. Sono & Y. Fujioka, "The Role of the Abuse of Right Doctrine in Japan" (1975) 35 *La. L. Rev.* 1037 at 1037 [emphasis in original].

¹⁰ *The German Civil Code*, trans. S. Goren (Littleton, Colo.: Fred B. Rothman, 1994). Although the *Bürgerliches Gesetzbuch* never uses the term *Rechtsmißbrauch*, the principle of abuse of rights is an important part of German law. See generally Gutteridge, *supra* note 6 at 36-39; G. Eörsi, "Rechtsmißbrauch und funktionsmäßige Rechtsausübung im Westen und Osten" (1965) 6 *Zeitschrift für Rechtsvergleichung* 30; Bolgár, *supra* note 6 at 1023-30; G.P. Fletcher, "The Right and the Reasonable" (1985) 98 *Harv. L. Rev.* 949.

purely for the purpose of harming others,¹¹ and in article 1295(2) of the Austrian Civil Code, which is framed in similar terms.¹²

In other jurisdictions, the element of intent has explicitly been rejected. For example, in *Morse v. J. Ray McDermott & Co.*, the Supreme Court of Louisiana held: "The exercise of a right [...] without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of right which courts should not countenance."¹³

Some national legal systems have combined several of these different elements. For example, article 7 of the Spanish Civil Code provides that an abuse of right may result from a deliberate intention, the aim pursued, or the circumstances of the harm caused.¹⁴ Similarly, article 13(2) of the 1992 Civil Code of the Netherlands reads:

¹¹ "The owner cannot perform acts that have no other purpose than that of harming or causing annoyance to others." *The Italian Civil Code*, trans. M. Beltramo, G.E. Longo & J.H. Merryman (Dobbs Ferry, N.Y.: Oceana Publications, 1991). Italian courts, however, have held that article 833 is inoperative if the property owner derives any advantage from the exercise of a right. See e.g. Cass. civ., 7 March 1986, No. 1509, in *Giust. civ.*, 1986, I, 434; Cass. civ., 29 July 1963, No. 2139 in *Giust. civ.*, 1963, II; Cass. civ., 23 February 1963, No. 448 in *Giust. civ.*, 1963, I, 1053. See generally A. di Francia, "L'abuso di diritto nella legislazione, nella dottrina e nella giurisprudenza italiana" in M. Rotondi, ed., *L'abus de droit* (Padua: CEDAM, 1979) 115.

¹² "A person who intentionally injures another in a manner in violation of public morals is liable therefor; however, if the injury was caused in the exercise of legal rights, the person causing it shall be liable therefor only when the exercise of this right obviously has the purpose to cause damage to the other." *The General Civil Code of Austria*, trans. P.L. Baeck (Dobbs Ferry, N.Y.: Oceana Publications, 1972). See also T. Mayer-Maly & H. Böhm, "Die Behandlung des Rechtsmissbrauchs im Osterreichischen Privatrecht," in Rotondi, ed., *ibid.* at 221.

¹³ 344 So.2d 1353 at 1369 (La. 1977) (on rehearing). See also *Hero Lands Co. v. Texaco, Inc.*, 310 So.2d 93 at 99 (La. 1975). On abuse of rights in Louisiana, see generally A.N. Yiannopoulos, "Civil Liability for Abuse of Right: Something Old, Something New..." (1994) 54 La. L. Rev. 1173; A.N. Yiannopoulos, "Abuse of Right in Louisiana Civil Law" in A.M. Rabello, ed., *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem: Harry & Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, 1997) 690.

¹⁴ The article reads:

7.1 Rights must be exercised in accordance with the requirements of good faith.

.2 The law does not protect abuse of rights or the antisocial exercise of rights. Every act or omission that, by virtue of the intention of the actor, the object thereof, or the circumstances in which it is undertaken manifestly surpasses the normal limits of exercise of a right, causing damage to a third party, shall give rise to liability in damages and to the adoption of judicial or administrative measures that will prevent persistence in the abuse.

Civil Code of Spain, trans. J. Romanach, Jr. (Baton Rouge, La.: Lawrence, 1994). See also F.F. de Villavicencio, "El abuso del derecho en la doctrina y en la jurisprudencia españolas" in Rotondi, ed., *supra* note 11 at 75. See also article 6(1) of the 1987 Civil Code of Luxembourg: "Any deliberate act

Instances of abuse of right are the exercise of a right with the sole intention of harming another or for a purpose other than that for which it was granted; or the exercise of a right where its holder could not reasonably have decided to exercise it, given the disproportion between the interest to exercise the right and the harm caused thereby.¹⁵

As this brief review makes clear, even if abuse of rights means somewhat different things in different civil law systems, it remains an enduring element of the civil law.¹⁶

B. Common Law Systems

The principle of abuse of rights is not so readily apparent in common law systems, yet some authors argue that it is the basis upon which tort law developed. Joseph Perillo has claimed that abuse of rights exists in United States law, where it is “employed under such labels as nuisance, duress, good faith, economic waste, public policy, misuse of copyright and patent rights, lack of business purpose in tax law, extortion, and others.”¹⁷ In Australia, John Fleming holds the view that the tort of abuse

which manifestly exceeds, by its purpose or by the circumstances in which it is carried out, the normal exercise of a right, shall not be protected by the law, shall incur the liability of the person responsible and may constitute grounds for action to restrain him from persisting in the said abuse.” Translated in G. Margue, “Abuse of Rights and Luxembourg Law” in *Abuse of Rights and Equivalent Concepts*, *supra* note 2, 56.

¹⁵ *New Netherlands Civil Code: Patrimonial Law (Property, Obligations and Special Contracts)*, trans. P.P.C. Haanappel & E. MacKaay (Deventer: Kluwer Law and Taxation, 1990) [hereinafter *New Netherlands Civil Code*]. Prior to the adoption of the new code in 1992, the Dutch courts had long applied abuse of rights. See C.J.H. Brunner, “Abuse of Rights in Dutch Law” (1977) 37 *La. L. Rev.* 729. See also *Civil Code of Québec*, art. 7: “No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.” Prior to 1994, the principle of abuse of rights had long been applied in Quebec. See P.B. Mignault, “L’abus des droits” (1939-40) 3 *U.T.L.J.* 360 at 365. For the similarly multifaceted provisions of the Mexican Civil Code, see *Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal* (Mexico City: Ediciones Delma, 1995) arts. 840, 1912.

¹⁶ As Joseph Voyame, Bertil Cottier, and Bolivar Rocha write at the conclusion of a Council of Europe study in 1990: “Abuse of rights is an institution which can be expected to endure. Its origin lies in the Roman rules forbidding acts of nuisance, but it has developed over the centuries into a cardinal principle of private law. Moreover, in those European countries which place this institution at the centre of their legal system, voices are no longer raised to demand its abolition, or even simply to cast doubt on its necessity. On the contrary, the great majority of commentators agree on the usefulness of the remedial function of the rules forbidding abuse of rights. Indeed, the legislator is no more infallible today than he was in the past. While the rules he promulgates are becoming increasingly precise and detailed, he cannot foresee every eventuality. Only the proscription of abuse of rights makes it possible to establish the connection between the justice ostensibly guaranteed by positive law and genuine justice.” Voyame, Cottier & Rocha, *supra* note 2 at 48.

¹⁷ J.M. Perillo, “Abuse of Rights: A Pervasive Legal Concept” (1995) 27 *Pac. L.J.* 37 at 40.

of process is "probably the clearest illustration in our law of what civilians call an 'abuse of right'."¹⁸ But note that, from this perspective, the principle of abuse of rights as such is not directly employed; it instead serves as a matrix from which more specific legal principles grow.

Some common law cases call even this limited role into question. For example, in the 1895 case of *Mayor of Bradford v. Pickles*, Lord Halsbury famously stated: "If it was a lawful act, however ill the motive, he had a right to do it."¹⁹ However, as Pierre Catala and Tony Weir have explained:

A doctrine of abuse of rights is necessary only if the rights are proclaimed in generous terms; if they are initially hedged with qualifications, it may not be required at all. The former is the French legislative method; the latter is peculiar to the common-law tradition of England, which affects the style of legislation as well as its construction. If a right arises at common law, the authority for it will be a judicial decision in typically narrow terms, *obiter* and unauthoritative in so far as it goes beyond the facts under review; English statutes also make every effort to avoid appearing to grant a broadly stated right, and even when a right is indubitably conferred, the judges are there to state that the legislature has at the same time impliedly restricted it.²⁰

Indeed, a closer examination of the decision reveals that the motive for the defendant's actions was, in fact, monetary gain, which has enabled Catala and Weir and others to distinguish the case from the typical abuse of rights situation.²¹

Other common law nuisance cases provide some support for an underlying principle of abuse of rights. For example, in *Hollywood Silver Fox Farm v. Emmett*, another English court considered the utility of the defendant's conduct before holding that the firing of guns on his property with the sole aim of frightening his neighbour's foxes constituted a tort.²² Similarly, William Prosser wrote of American law that "[i]n all but a few jurisdictions, it is now settled that where the defendant acts out of pure malice or spite, as by erecting a fence for the sole purpose of shutting off the plaintiff's view, or drilling a well to cut off the plaintiff's underground water [...] such conduct is indefensible from a social point of view, and there is liability for nuisance."²³

Regardless of the label used, it appears that the same general principle is at work. As Hersch Lauterpacht explained: "The law of torts as crystallized in various systems

¹⁸ J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney: The Law Book Company, 1992) at 623.

¹⁹ [1895] A.C. 587 at 594 (H.L.), aff'g [1895] 1 Ch. 145 (C.A.). See also *Allen v. Flood*, [1898] A.C. 1 (H.L.).

²⁰ *Supra* note 6 at 237-38.

²¹ See *ibid.* at 247; W. Friedmann, "Social Security and Some Recent Developments in the Common Law" (1943) 21 Can. Bar Rev. 369 at 372-73.

²² [1936] 2 K.B. 468. See also *Christie v. Davey*, [1893] 1 Ch. 316.

²³ W.L. Prosser, *Law of Torts*, 3d ed. (St. Paul, Minn.: West, 1964) at 618-19.

of law in judicial decisions or legislative enactment is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights.”²⁴ Yet this general principle is impossible to define in precise terms such that it would encompass all of its various manifestations. A definition such as “The excessive or abusive exercise of rights as limited by the rights and interests of others” is about the best that one can do. Moreover, the above review suggests that abuse of rights is of limited utility in those legal systems and those areas of law in which the rights themselves have been framed in precise or qualified terms.

II. Abuse of Rights as Applied in International Law

As a result, due largely to its widespread existence in national legal systems, many states, judges, arbiters, and authors have considered abuse of rights to be part of international law, whether as a general principle of law or as part of customary international law.²⁵

A number of states have argued for the applicability of abuse of rights in state-to-state litigation and arbitration, including the United Kingdom in the *Fisheries Jurisdiction Cases*,²⁶ Liechtenstein in the *Nottebohm Case*,²⁷ Norway in the *Norwegian Loans Case*,²⁸ Liberia and Ethiopia in the *South West Africa Cases*,²⁹ Belgium in the *Barcelona Traction Case*,³⁰ and Australia in the *Nuclear Tests Case*.³¹ Greece made an

²⁴ Lauterpacht, *Function of Law*, *supra* note 2 at 297.

²⁵ See generally M. Whiteman, *Digest of International Law*, vol. 5 (Washington, D.C.: Government Printing Office, 1965) at 224-30; Kiss, “Abuse of Rights”, *supra* note 1 at 4-8.

²⁶ (*United Kingdom v. Iceland*), “Memorial of the Merits of the Dispute Submitted by the Government of the United Kingdom” (14 April 1972), [1975] I.C.J. Pleadings (Vol. 1) 265 at paras. 153-54. The UK argued that the right to delimit exclusive fisheries zones is balanced by the duty to respect the rights of other states. To ground the point, the memorial quoted Alvarez J.’s separate opinion in the *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 116 at 150-51 [hereinafter *Fisheries Case*], where he wrote, *inter alia*, that states demarcating their territorial seas must do so in a way that does not constitute an abuse of rights.

²⁷ (*Liechtenstein v. Guatemala*), “Memorial Submitted by the Government of the Principality of Liechtenstein” (26 January 1952), [1955] I.C.J. Pleadings (Vol. 1) 21 at para. 51 [hereinafter *Nottebohm Case*]. See below, text accompanying note 144.

²⁸ *Case of Certain Norwegian Loans (France v. Norway)*, [1957] I.C.J. Rep. 9 at 73, Basdevant J. [hereinafter *Norwegian Loans Case*]. Norway argued that the Court should assert jurisdiction whenever claims as to the applicability of a domestic jurisdiction reservation constitute an abuse of rights.

²⁹ (*Ethiopia v. South Africa; Liberia v. South Africa (Second Phase)*), [1966] I.C.J. Rep. 6 at 10, 480-83. Liberia and Ethiopia argued that South Africa had, without obtaining the consent of the United Nations, “substantially modified the terms” of the agreement to manage the territory that would later become Namibia, and that this constituted an abuse of rights.

³⁰ *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)*, [1970] I.C.J. Rep. (Vol. 1) 3 at 17 [hereinafter *Barcelona Traction Case*]. Under the

abuse of rights argument in *The Ambatielos Claim*,³² as did Nauru in the *Nauru Case*³³ and the Federal Republic of Yugoslavia in the *Genocide Case*.³⁴

Some treaties contain provisions that expressly relate to abuse of rights. For example, article 300 of the 1982 *United Nations Convention on the Law of the Sea* reads:

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.³⁵

heading "Abuse of Rights, Arbitrary and Discriminatory Attitude of Certain Administrative Authorities," Belgium argued that Spain had frustrated the implementation of an agreement and "made improper use of an international enquiry."

³¹ *Nuclear Tests Case (Australia v. France)*, [1974] I.C.J. Rep. 253 at 362. Australia argued that, in the event that France was determined to have a right to conduct atmospheric nuclear tests, its exercise of that right would have constituted an abuse of rights.

³² (*Greece, United Kingdom of Great Britain and Northern Ireland*) (1956), 12 R.I.A.A. 83 at 94 (Commission of Arbitration, Arbitrators: R.J. Alfaro *et al.*). Greece argued that the withholding of evidence by the British government in national court proceedings in England constituted "an abuse of right which amounted to a denial of justice."

³³ Memorial of the Republic of Nauru, Part III, Chapter 5, 163 ("Abuse of Rights and Acts of Maladministration"), online: International Court of Justice <<http://www.icj-cij.org/icjwww/cases/inaus/inausframe.htm>> (date accessed: 6 May 2002); *Case Concerning Certain Phosphate Lands in Nauru (Preliminary Objections)*, [1992] I.C.J. Rep. 240 at 244. Nauru argued that Australia exercised its powers of administration over that island nation, particularly with regard to the extraction of phosphates, in a manner that amounted to an abuse of rights.

³⁴ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures)*, Order of 13 September 1993, [1993] I.C.J. Rep. 325 at para. 19. The Federal Republic of Yugoslavia argued that Bosnia-Herzegovina's request for provisional measures constituted an abuse of rights.

³⁵ *United Nations Convention on the Law of the Sea*, 10 December 1982, UN Doc. A/CONF.62/122, 21 I.L.M. 1261, online: United Nations <http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm> (date accessed: 6 May 2002) [hereinafter *UNCLOS* cited to I.L.M.]. When President Clinton transmitted *UNCLOS* to the United States Senate in 1995 for its advice and consent to ratification, he explained, "This article restates existing customary law." See *United States: President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI to the U.S. Senate with Commentary*, 7 October 1994, 34 I.L.M. 1393 at 1446. Art. 34 of the *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: 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*, 4 December 1995, UN GA, 6th Sess., UN Doc. A/CONF.164/37 (1995), 34 I.L.M. 1542, reads: "States Parties shall fulfil in good faith the obligations assumed under this Agreement and shall exercise the rights recognized in this Agreement in a manner which would not constitute an abuse of right." Additionally, subsequent to the coming into force of the amending *Protocol No. 11* in 1998, art. 17 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222, Eur. T.S. 5, now carries the heading

The principle also appears in the case law of the International Court of Justice (“ICJ”) and the Permanent Court of International Justice (“PCIJ”). In the *Case concerning certain German interests in Polish Upper Silesia (The Merits)*, the PCIJ held:

Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.³⁶

In the *Case of the Free Zones of Upper Savoy and the District of Gex*, the same court suggested that if a state attempted to avoid its contractual obligations by resorting to measures having the same effect as the specifically prohibited acts, an abuse of rights would result.³⁷ And the ICJ, when dealing with the right to draw straight baselines in a territorial sea delimitation in the *Anglo-Norwegian Fisheries Case*, wrote:

The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, *except in a case of manifest abuse*; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone.³⁸

“Prohibition of abuse of rights.” Art. 17 itself reads: “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.” Art. 35(3) on “Admissibility Criteria” states: “The Court shall declare inadmissible any individual application submitted under Art. 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.” For other treaty provisions on abuse of rights, see *Convention on Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19 at art. 3 (“Montevideo Convention”); *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 11, 13 U.S.T. 2312 at art. 2.

³⁶ (*Germany v. Poland*) (1926), P.C.I.J. (Ser. A) No. 7 at 30. The decision concerned Germany’s powers in Upper Silesia during the period between the coming into force of the Treaty of Versailles and the transfer of sovereignty to Poland.

³⁷ (*France v. Switzerland*) (1932), P.C.I.J. (Ser. A/B) No. 46 at 167. The court wrote: “A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court.” See also the Order of 6 December 1930 in the same case: (1930), P.C.I.J. (Ser. A) No. 24 at 12.

³⁸ *Fisheries Case*, *supra* note 26 at 141–42 [second emphasis added].

The principle has also received support in separate and dissenting opinions. For example, in *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, Judge Hersch Lauterpacht wrote:

[A]n Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization [*i.e.* the United Nations], in particular in proportion as that judgement approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.³⁹

More recently, Judge Weeramantry referred to abuse of rights as a “well-established area of international law” when discussing sustainable development in the *Gabcikovo-Nagymaros Case*, where Slovakia’s treaty rights were pitted against Hungary’s environmental concerns.⁴⁰ Judge Parra-Aranguren, in the same case, held that “Slovakia shall not compensate Hungary ... unless a manifest abuse of rights on its part is clearly evidenced.”⁴¹ And, although the ICJ itself has never endorsed the principle unequivocally, neither it, nor any of its members, has ever rejected the place of abuse of rights in international law.

Some additional support for the principle may be found in international arbitral decisions. For instance, the tribunal in the 1986 *La Bretagne Arbitration* held that treaty rights could not be exercised in an abusive manner:

³⁹ Advisory Opinion, [1955] I.C.J. Rep. 67 at 120 (separate opinion).

⁴⁰ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 at para. 22 [hereinafter *Gabcikovo-Nagymaros Case*]. Weeramantry J. also refers to abuse of rights in the *Case concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Rep. 38 at para. 110, where he cites with approval Schachter’s analysis on the five uses of equity. Schachter identifies one use as offering “certain specific principles of legal reasoning associated with fairness and reasonableness, to wit, estoppel, unjust enrichment and abuse of rights.” See O. Schachter, “International Law in Theory and Practice: General Course in Public International Law” (1982) 178 *Rec. des Cours* 1 at 82, reprinted as *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991) at 56 [hereinafter Schachter, *International Law*].

⁴¹ *Gabcikovo-Nagymaros Case*, *ibid.* 227 at para. 22. See also *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, [1948] I.C.J. Rep. 73 at 80, 93 [hereinafter *Admission Case*]; *The Corfu Channel Case (United Kingdom v. Albania) (Merits)*, [1949] I.C.J. Rep. 4 at 47-48, 75, 129 [hereinafter *Corfu Channel Case*]; *Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] I.C.J. Rep. 4 at 15; *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, [1952] I.C.J. Rep. 93 at 133 [hereinafter *Anglo-Iranian Oil Case*]; *Fisheries Case*, *supra* note 26 at 150, 152, 153; *The Electricity Company of Sofia and Bulgaria (Preliminary Objections) (Belgium v. Bulgaria)* (1939), P.C.I.J. (Ser. A/B) No. 77 at 88; *Nottebohm Case*, *supra* note 27 at 37; *Norwegian Loans Case*, *supra* note 28; *South West Africa Cases*, *supra* note 29 at 480-83.

[A] *voisinage* arrangement of the type set forth in Article 4 of the Agreement involves, for the benefit of the Contracting Parties, recognition of rights that may be exercised concurrently in the same geographical sector, and by virtue of that fact, requires restraint and moderation from the holders of these rights in exercising them and in co-operating in the settlement of any disputes arising out of their exercise.⁴²

Most recently, the Appellate Body of the World Trade Organization (“WTO”) relied on abuse of rights in the 1998 *Shrimp-Turtle Case*.⁴³ In applying article XX of the *General Agreement on Tariffs and Trade*⁴⁴ (“GATT”) to the United States’ claim that its efforts to change foreign fishing practices fell within the article XX(g) exception “relating to the conservation of exhaustible natural resources,” it wrote:

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 thus 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.⁴⁵

Abuse of rights also found some support when, in 1920, the Advisory Committee of Jurists was crafting article 38 of the *Statute of the Permanent Court of Interna-*

⁴² (*Canada v. France*) (1986), 82 I.L.R. 590 at para. 28 (Arbitral Tribunal, Arbitrators: De Visscher, Pharand, Quéneudec). The tribunal was referring to the Agreement of 27 March 1972 between Canada and France on their mutual fishing relations. For the full text of the agreement, see 82 I.L.R. 590 at 600. For other arbitral decisions concerning abuse of rights, see *North American Dredging Co. of Texas Case*, opinion rendered 31 March 1926, General Claims Commission (U.S.-Mexico), *Opinion of Commissioners 1927*, 21 at 23; *Trail Smelter Case (United States v. Canada)* (1938-41), 3 R.I.A.A. 1905 (Arbitrators: C. Warren, R.A.E. Greenshields, J.F. Hostie) [hereinafter *Trail Smelter Case*]; *Boffolo Case*, in J. Ralston, ed., *Venezuelan Arbitrations of 1903* (Washington, D.C.: Government Printing Office, 1904) 696 at 705; *In the Claim of Walter Fletcher Smith v. The Compañía Urbanizadora del Parque y Playa de Marianao (Cuba v. United States)* (1929), 2 R.I.A.A. 915. In addition, a German national court has held that the principle of proportionality exists in international law as part of the general principle of abuse of rights. See *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1972), 11 C.M.L.R. 177 at 186.

⁴³ *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by the United States)* (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1998> (date accessed: 6 May 2002) [footnote omitted, hereinafter *Shrimp-Turtle Case*].

⁴⁴ 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27.

⁴⁵ *Supra* note 43 at para. 158. The Appellate Body was quoting from Cheng, *supra* note 4 at 125. For a further discussion of this case, see below, Part V.

tional Justice, which identifies sources of international law and which later became article 38 of the *Statute of the International Court of Justice*.⁴⁶ Arturo Ricci-Busatti, the Italian member of the Committee, referred to the principle "which forbids the abuse of rights" as one of the "general principles of law".⁴⁷ He gave as an example disputes concerning the right of a coastal state to fix the breadth of its territorial sea. Assuming that there was, at that time, no international rule defining the outer limit of the territorial sea, he suggested that the court be permitted to admit the rules of each state in this respect as "equally legitimate in so far as they do not encroach on other principles, such for instance, as that of the freedom of the seas."⁴⁸

Within the work of the United Nations International Law Commission ("ILC"), one of the more detailed references to abuse of rights is found in the 1953 Report to the United Nations General Assembly. The report includes the following comment on the Draft Articles on the International Regulation of Fisheries:

The Commission, in adopting the articles, was influenced by the view that the prohibition of abuse of rights is supported by judicial and other authority and is germane to the situation covered by the articles. A State which arbitrarily and without good reason, in rigid reliance upon the principle of the freedom of the seas, declines to play its part in measures reasonably necessary for the preservation of valuable, or often essential, resources from waste and exploitation, abuses a right conferred upon it by international law. The prohibition of abuse of rights, in so far as it constitutes a general principle of law recognized by civilized States, provides to a considerable extent a satisfactory legal basis for the general rule as formulated in article 3.⁴⁹

In 1960, Francisco García-Amador wrote in his fifth report as Special Rapporteur on State Responsibility:

Relatively few authors have troubled to study the applicability of the doctrine of "abuse of rights" in international relations. The majority of those who have done so, however, have not only reached the conclusion that the doctrine can and should be applied in order to solve particular problems, but also contend that its applicability has already been adequately demonstrated in practice.

...

⁴⁶ *Supra* note 4.

⁴⁷ *Procès-verbaux des séances du comité* (The Hague: Van Langenhuisen Brothers, 1920) at 314-15, see also 335.

⁴⁸ *Ibid.* at 315.

⁴⁹ "Report of the International Law Commission Covering the Work of Its Fifth Session" (UN Doc. A/2456) in *Yearbook of the International Law Commission 1953*, vol. 2 (New York: United Nations, 1959) 200 at 218-19. Article 3 provides for the acceptance by states of a system of regulations for protecting the fishing resources of specific areas against waste or extermination.

A survey of international practice, particularly in the jurisprudence of the courts and claims commissions, clearly shows that at least the basic principle of the prohibition of abuse of rights is applicable in international relations.⁵⁰

García-Amador went on to explain that the principle's purpose was one of "limiting the exercise of rights which are not always well-defined and precise rules in general international law or in the particular instruments which recognize them."⁵¹

In 1970 Roberto Ago, García-Amador's successor as Special Rapporteur, posited that states were required "not to exercise a right beyond the limits of what was reasonable."⁵² Endre Ustor expressed a view held by many members of the ILC "that the question of abuse of rights warranted further study and should not be excluded from the Commission's codification work."⁵³ A.J.P. Tammes' comments during the same session are especially interesting:

[I]n certain legal situations there was no clearly defined interaction of rights and obligations and the rights remained undivided in law. Disputes in such cases could only be decided on the basis of a reasonable balance between the interests of the parties. State responsibility did not then arise from the violation of a primary rule of international law, but was determined, in the absence of such a rule, by the parties themselves or by an impartial authority on the basis of general rules providing for the settlement of disputes with "due regard for" or "reasonable regard for" the mutual interests of the parties concerned. International instruments dealing with such matters as freedom of the seas, lunar exploration and activities which could threaten mankind or its environment were cases in point.⁵⁴

Tammes thus made two points that will be analyzed at greater length below: first, that abuse of rights is most needed in those areas of international law where rights remain undivided, that is, where the limits of those rights have not yet been defined; and second, that abuse of rights, while only a general principle of law, can itself give rise to state responsibility.⁵⁵

In its work on state responsibility since the early 1970s, the ILC has focused on secondary obligations, more particularly, those general rules that define the param-

⁵⁰ F.V. García-Amador, "International responsibility", 5th report (UN Doc. A/CN.4/125) in *Yearbook of the International Law Commission 1960*, vol. 2 (New York: United Nations, 1961) 41 at paras. 70, 73.

⁵¹ *Ibid.* at para. 75.

⁵² "1081st Meeting" (2 July 1970) in *Yearbook of the International Law Commission 1970*, vol. 1 (New York: United Nations, 1971) 222 at para. 31.

⁵³ "1079th Meeting" (29 June 1970) in *Yearbook of the International Law Commission 1970*, vol. 1 (New York: United Nations, 1971) 181 at para. 29.

⁵⁴ "1975th Meeting" (23 June 1970) in *Yearbook of the International Law Commission 1970*, vol. 1 (New York: United Nations, 1971) 209 at para. 40.

⁵⁵ See below, note 133 and accompanying text.

ters and procedures of state responsibility but do not themselves give rise to it. This explains why the *Draft Articles on State Responsibility* make no reference to abuse of rights.⁵⁶ And while one might expect the principle to appear in the *Draft Articles on Injurious Consequences*, those articles focus entirely on harm caused across international borders, where the more specific neighbour principle of *sic utere tuo ut alienum non laedas* prohibits states from using their territory or allowing it to be used in a manner that causes injury to other states.⁵⁷ The principle of abuse of rights has not yet been studied and codified by the ILC; its content and scope of application remain unresolved.

III. Abuse of Rights and Its Academic Supporters

Numerous authors have argued that abuse of rights is part of international law. Nicolas-Socrate Politis, writing in 1925, defined abuse of rights as follows: “[I]l y a abus si l’intérêt général est lésé par le sacrifice d’un intérêt individuel très fort à un autre intérêt individuel plus faible.”⁵⁸ Noting that the Advisory Committee of Jurists

⁵⁶ *Draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001), online: ILC <[http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf)> (date accessed: 6 May 2002), extracted from International Law Commission, *Report of the International Law Commission on the work of its Fifty-third session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (November 2001), c. IV.E.1, online: ILC <<http://www.un.org/law/ilc/reports/2001/2001report.htm>> (date accessed: 6 May 2002) [hereinafter *Draft Articles on State Responsibility*].

⁵⁷ ILC, “Text of the Draft Articles on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage for Hazardous Activities) Provisionally Adopted by the Commission on First Reading” in *Report of the International Law Commission on the work of its fiftieth session*, UN GAOR, 53d Sess., Supp. No. 10, UN Doc. A/53/10 (1998), online: United Nations <<http://www.un.org/law/ilc/reports/1998/98repfra.htm>> (date accessed: 6 May 2002) [hereinafter *Draft Articles on Injurious Consequences*]. This restrictive focus was not envisaged when the topic of injurious consequences was included on the ILC’s agenda in 1978; see *Yearbook of the International Law Commission 1978*, vol. 2, part 2 (New York: United Nations, 1979) at 149ff. For a concise review of how the topic was progressively narrowed, see A.E. Boyle, “State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?” (1990) 39 I.C.L.Q. 1 at 1-8 [hereinafter Boyle, “State Responsibility”]. On the neighbour principle, see *Trail Smelter Case*, *supra* note 42 at 1965; *Corfu Channel Case*, *supra* note 41 at 22; Principle 21 of the *Stockholm Declaration on the Human Environment*, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1, 11 I.L.M. 1416 [hereinafter *Stockholm Declaration*]; Principle 2 of the *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/CONF.151/5/Rev. 1, 31 I.L.M. 874 [hereinafter *Rio Declaration*]; J. Ballenegger, *La Pollution en droit international* (Geneva: Librairie Droz, 1975) at 66; P. Birnie & A.E. Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992) at 89ff.

⁵⁸ N.-S. Politis, “Le problème des limitations de la souveraineté et la théorie de l’abus des droits dans les rapports internationaux” (1925) 1 Rec. des Cours 1 at 81 [footnote omitted].

had recently identified abuse of rights as a general principle of law,⁵⁹ he argued that the principle is well-suited to situations where a right is exercised in an anti-social manner giving rise to an unjust injury.⁶⁰ Such situations would include certain closures of international ports⁶¹ and expulsions of foreign nationals.⁶² In a work devoted to analyzing the concept of sovereignty, Politis concluded that “les libertés non réglementées doivent en subir le contrôle grâce à la théorie de l’abus du droit.”⁶³

Hans-Jürgen Schlochauer, writing in 1933, engaged in a review of the literature and practice concerning abuse of rights before concluding that, although the principle had achieved far less scope of application in international law than in civil law systems, its future was closely linked to the increasing interdependence of states:

Ultimately the pre-judicial prohibition on arbitrariness, in its most comprehensive meaning, simultaneously found a place and recognition in the international legal system in the norm of “pacta sunt servanda”. Its specific development in the sense of the emergence of norms characterized as abuse of rights has, however, in international law only hesitantly been achieved and is in fact only a concomitant to recent developments. The tighter their multi-meshed international relations are tied, the less free and unchecked are States in exercising their “rights” according to subjective discretion. It is a necessary consequence of the move from the “indépendance des états” to “interdépendance”, to the construction of the “communauté internationale”, that the originally purely individualistic character of the international legal order changes to a social character and that international law, which is above all trade and commercial law, constructs its norms from the point of view of social goals. This leads to a progressive widening of state responsibility, whereby it deals above all with the imposition of restrictions on the degree to which a subject of international law has a claim vis-à-vis another, without the powers of the first state being extended, in other words with certain restrictions on the free discretions of states.⁶⁴

⁵⁹ *Ibid.* at 91. See also *Procès-verbaux des séances du comité, supra* note 47 at 314-16, 335.

⁶⁰ Politis, *ibid.* at 92.

⁶¹ See *ibid.* at 94-101, and specifically *Affaire de Portendick (France v. United Kingdom)* (1843), 1 Recueil des arbitrages internationaux 512. Compare *Affaire de la fermeture de Buenos-Ayres (Argentina v. United Kingdom)* (1870), 2 Recueil des arbitrages internationaux 637, and the discussion in Politis, *ibid.* at 98-101.

⁶² Politis, *ibid.* at 101-09.

⁶³ *Ibid.* at 116.

⁶⁴ H.-J. Schlochauer, “Die Theorie des abus de droit im Völkerrecht” (1933) 17 *Zeitschrift für Völkerrecht* 373 at 378-79 [footnotes omitted, translated by author]:

In der letzten Endes dem präjuridischen Willkürverbot entstammenden Norm des “pacta sunt servanda” hat gleichzeitig dieses in seiner umfassendsten Bedeutung Stellung und Anerkenntnis im Völkerrechtssysteme gefunden. Seine spezielle Ausbildung im Sinne der eingangs als Rechtsmißbrauchverbot charakterisierten Normen aber ist im Völkerrecht nur zögernd erfolgt und ei-

F.A. Mann approached abuse of rights in the context of international currency law. He argued that "exchange control is abusive if in substance it is an instrument of economic warfare or a measure preparatory to war or 'an instrument of oppression and discrimination'."⁶⁵ He also recognized that abuse of rights, like other international law principles, rests upon the requirement of good faith by which every state is bound. A state that acts in good faith is unlikely to abuse its rights:

It is the lack of fair and equitable treatment, or of good faith, that is the real and fundamental and, at the same time, the most comprehensive cause of action of which all other aspects of State responsibility [...] are mere illustrations. The difficulties lie in the application rather than the existence of a doctrine the substance of which it is hard to deny.⁶⁶

The best known proponent of abuse of rights has been Hersch Lauterpacht, who argued for a broad interpretation and application of the principle. He asserted that only the most primitive of societies could allow the unchecked exercise of rights without regard to their societal consequences, and that the determination of when the exercise of a right becomes abusive must depend on the specific facts of each case, rather than the application of an abstract legislative standard. Lauterpacht's abuse of rights occurs "when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage."⁶⁷ Lauterpacht thus regarded abuse of rights as the

gentlich erst Begleiterscheinung der neueren Entwicklung. Je enger sich die vielmaschigen internationalen Beziehungen knüpfen, desto weniger frei und ungehemmt werden die Staaten ihre "Rechte" nach subjektivem Ermessen ausüben können. Es ist eine notwendige Folge der Entwicklung von der "indépendance des états" zur "interdépendence", zum Ausbau der "communauté internationale", daß sich der ursprünglich rein individualistische Charakter der Völkerrechtsordnung zu einem sozialen wandelt und auch das Völkerrecht, das ja in erster Linie Verkehrs- und Wirtschaftsrecht ist, seine Normen unter dem Gesichtspunkt sozialer Zielsetzung ausbildet. Es führt dies zu einer fortschreitenden Erweiterung der staatlichen Verantwortlichkeit, wobei es sich in erster Linie um Aufrichtung von Schranken handelt, auf deren Innehaltung ein Völkerrechtssubjekt gegenüber einem anderen Anspruch hat, ohne daß dadurch gleichzeitig die Kompetenz des ersteren erweitert würde, mit anderen Worten also um gewisse Einschränkungen des freien Ermessens der Staaten.

⁶⁵ F.A. Mann, "Money in Public International Law" (1959) 96 Rec. des Cours 1 at 98, citing *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323 at 352.

⁶⁶ F.A. Mann, *The Legal Aspects of Money*, 5th ed. (Oxford: Clarendon Press, 1992) at 476.

⁶⁷ L. Oppenheim, *International Law: A Treatise*, 8th ed., ed. by H. Lauterpacht (London: Longmans, Green & Co., 1955) at 345.

source of the duty not to interfere with the flow of a river to the detriment of other riparian states, and of the neighbour principle.⁶⁸

Lauterpacht acknowledged that his was a relatively ambiguous definition that would, if put to the test before international courts and tribunals, result in a great deal of discretionary power being granted to judges and arbiters. He therefore promoted caution in applying the principle:

There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint.⁶⁹

At the same time, however, he argued that the ability of judges to develop the law is “particularly important in the international society in which the legislative process by regular organs is practically non-existent.”⁷⁰

Paul Guggenheim, commenting on abuse of rights, wrote:

En principe, le droit international, comme tout droit primitif, est un droit simple, rigide. Dans son application, on se contente généralement d'examiner si le sujet de droit a agi dans les limites objectives de la règle de droit. Lorsque celui-ci est un entité collective, un Etat, une organisation internationale, un belligérant, on ne tient pas compte de sa volonté subjective, bien qu'une théorie opposée, confirmée par quelques décisions arbitrales isolées, prétende le contraire. Toutefois, dans l'application de certaines règles d'un caractère très général et abstrait, on étudie de plus près la manière dont ces normes ont été exécutées et on admet une application plus souple, plus nuancée. Une règle comme celle qui confère la souveraineté à l'Etat indépendant donne lieu à un abus lorsqu'elle est appliquée dans le but de nuire à autrui ou dans un autre but que celui pour lequel le droit international a établi cette règle. L'exercice du pouvoir discrétionnaire qu'implique l'application du droit à la souveraineté n'a alors que l'apparence de la légalité, de la conformité au droit.⁷¹

Guggenheim gave two examples of abuse of rights: first, where a state exercises in bad faith its right to designate the members of a diplomatic mission, for example, by designating an individual wanted on criminal charges in the host state; and second,

⁶⁸ *Ibid.* at 346-47. On the neighbour principle, see *infra* note 86. On the relationship between the neighbour principle and abuse of rights, see the discussion below, Part V.

⁶⁹ H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) at 164 [hereinafter Lauterpacht, *Development*]; see also H. Lauterpacht, “Droit de la paix” (1937) 62 *Rec. des Cours* 95 at 342.

⁷⁰ Lauterpacht, *Development*, *ibid.* at 162.

⁷¹ P. Guggenheim, “La validité et la nullité des actes juridiques internationaux” (1949) 74 *Rec. des Cours* 195 at 250 [footnotes omitted].

where a state engages in the economic exploitation of an international river in a manner harmful to a down-river state. The two acts would, however, be dealt with in different ways. The receiving state would have no obligation to recognize the designation of the member of the diplomatic mission, for the act would simply be void. In contrast, some of the economic exploitation of the river would already have occurred, with damage being caused, giving it the character of an illegal act and thus engaging the normal rules of state responsibility.⁷²

Gerald Fitzmaurice referred to abuse of rights when commenting on a passage in the *United States Nationals in Morocco Case*, where the ICJ held: "The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith."⁷³ He wrote:

There is little legal content in the obligation to exercise a right in good faith unless failure to do so would, in general, constitute an abuse of rights. Here therefore the Court may be said to have taken a step towards the recognition of the doctrine propounded in earlier cases by Judge Alvarez.⁷⁴

The most rigorous study of abuse of rights is that produced by Alexandre Kiss in 1952.⁷⁵ Drawing upon an extensive compilation of judicial and arbitral decisions,⁷⁶ as well as state practice,⁷⁷ Kiss concluded that the principle was an important part of international law and could be an important factor in the ongoing evolution of the international legal system. Thirty-seven years later, Kiss' view had not changed:

⁷² Guggenheim, *ibid.* at 250-54. Today, the latter situation would be governed by the more specific—and more recently developed—principle of equitable utilization. See generally *Convention on the Law of the Non-navigational Uses of International Watercourses*, 21 May 1997, UN Doc. A/51/869, online: ILC <<http://www.un.org/law/ilc/texts/nnavfra.htm>> (date accessed: 6 May 2002); X. Fuentes, "The Criteria for the Equitable Utilization of International Rivers" (1996) 67 *Brit. Y.B. Int'l L.* 337.

⁷³ *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. 176 at 212 [hereinafter *United States Nationals in Morocco Case*].

⁷⁴ G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law" (1953) 30 *Brit. Y.B. Int'l L.* 1 at 53. See also G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law" (1950) 27 *Brit. Y.B. Int'l L.* 1 at 12ff. For the relevant separate and dissenting opinions by Alvarez J., see *Admission Case*, *supra* note 41; *Anglo-Iranian Oil Case*, *supra* note 41; *Fisheries Case*, *supra* note 26.

⁷⁵ A.-C. Kiss, *L'abus de droit en droit international* (Paris: Librairie générale de droit et de jurisprudence, 1952).

⁷⁶ See especially Kiss' discussion of *The Great Lakes Diversion Case (Canada v. United States)*, *ibid.* at 32-33, and *State of New Jersey v. New York City*, *ibid.* at 35.

⁷⁷ See especially Kiss' discussion of the *Boundary Waters Protection Treaty (Canada & United States)* (1909), *ibid.* at 32-36.

L'abus peut être l'exercice arbitraire du droit, c'est-à-dire l'absence de motivation acceptable, alors que cet exercice porte préjudice à un autre Etat. Il peut aussi résulter d'actes dont les bénéfices pour l'Etat territorial sont négligeables lorsqu'ils sont comparés aux conséquences produites sur le territoire de l'autre Etat.⁷⁸

Kiss saw great possibilities for the principle with respect to transboundary pollution, both in and of itself and as a general principle of law which “peut donner naissance à une nouvelle règle spécifique du droit international interdisant directement de telles pollutions, sans recourir encore au support de la théorie de l'abus de droit.”⁷⁹

In 1972, Michael Akehurst argued “that legislative jurisdiction ... can give rise to genuine examples of abuse of rights—the State has a right to legislate and acts illegally only because it abuses that right.”⁸⁰ This would occur “if the legislation is designed to produce mischief in another country without advancing any legitimate interest of the legislating State,” or “if legislation is aimed at advancing the interests of the legislating State illegitimately at the expense of other States.”⁸¹ Akehurst provided the following example of the latter scenario:

[D]uring the 1920s proposals were made in the United States Congress to alter United States law in order to give foreign seamen (serving on foreign ships) a contractual right to demand half their wages when the ship arrived in a United States port, even though the law of the flag State postponed the time for payment; in calculating the wages due to the seamen, advances paid in foreign countries were to be disregarded (i.e. the employer would have to pay again). Wages on United States ships were higher than wages on foreign ships, and the purpose of the proposed legislation (which was never passed) was to encourage foreign seamen to desert from foreign ships and to take up work on United States ships, thereby reducing labour costs and rectifying a shortage of labour on United States ships and increasing labour costs and causing general inconvenience on foreign ships. It is not surprising that foreign States protested that the proposed legislation was contrary to international law.⁸²

More recent references in the literature include a call “to apply the international law principles of good faith and abuse of rights in determining the legality of dis-

⁷⁸ A. Kiss, *Droit international de l'environnement* (Paris: Pedone, 1989) at 72 [hereinafter Kiss, *Droit international de l'environnement*]. See also Kiss, “Abuse of Rights,” *supra* note 1 at 4-8.

⁷⁹ Kiss, *Droit international de l'environnement*, *ibid.* at 72.

⁸⁰ M. Akehurst, “Jurisdiction in International Law” (1974) 46 *Brit. Y.B. Int'l L.* 145 at 189, n. 3.

⁸¹ *Ibid.* at 189.

⁸² *Ibid.* at 189-90, citing “The British Embassy to the Department of State: Memorandum” in *Papers Relating to the Foreign Relations of the United States 1931*, vol. 1 (Washington, D.C.: United States Government Printing Office, 1946) at 811-14. See also H. Briggs, *The Law of Nations*, 2d ed. (New York: Appleton-Century-Crofts, 1952) at 353.

crimination in the matter of expropriation of alien property”⁸³ and a suggestion that the principle be used to encourage the resolution of trade disputes concerning the protection of marine living resources under the dispute settlement system established by the 1982 *UNCLOS* rather than that of the WTO.⁸⁴ Abuse of rights has also been mentioned in the context of the law governing the transboundary movement of hazardous waste from developed to developing countries.⁸⁵

IV. The Contemporary Relevance of Abuse of Rights

Although abuse of rights finds a significant degree of support in state practice, the judgments of international courts and tribunals, and academic writing, some authors contest whether it still has a useful role to play.

Some argue that abuse of rights and the neighbour principle are one and the same thing, with the neighbour principle being a specific development of abuse of rights for situations involving the territories of two or more states.⁸⁶ This argument has significant implications because until recently at least, most situations where one state’s rights were infringed by the exercise of another state’s rights involved the territories of two or more states. Even when states ventured beyond their borders, they did so carrying attributes of territorial sovereignty, for instance, through the flagging of vessels and aircraft.⁸⁷ Now that more specific principles have evolved for these transboundary situations, abuse of rights, it is argued, can be placed on the back shelf of international law, not because the principle has become invalid, but because it is redundant. Yet while this argument is compelling to a certain extent, there remain a few

⁸³ A.F.M. Maniruzzaman, “Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview” (1998) 8 *J. Transnat’l L. Pol’y* 57 at 68 [footnotes omitted].

⁸⁴ R.J. McLaughlin, “Settling Trade-Related Disputes over the Protection of Marine Living Resources: *UNCLOS* or the WTO?” (1997) 10 *Geo. Int’l Envtl. L. Rev.* 29 at 66-69.

⁸⁵ R. Park, “An Examination of International Environmental Racism Through the Lens of Transboundary Movement of Hazardous Wastes” (1998) 5 *Indiana J. Global Leg. Stud.* 659 at 680, citing A. Kiss & D. Shelton, *International Environmental Law* (New York: Transnational, 1991).

⁸⁶ Gunther Handl explains that the neighbour principle is “but the factual background against which the exercise of territorial rights must be seen. It does not constitute an independently existing body of specific legal rules imposing restraints on the exercise of territorial rights but merely represents an expression of the principle of abuse of rights.” G. Handl, “Territorial Sovereignty and the Problem of Transnational Pollution” (1975) 69 *A.J.I.L.* 50 at 56. See also Birnie & Boyle, *supra* note 57 at 126; R. Jennings & A. Watts, eds., *Oppenheim’s International Law*, 9th ed., vol. 1 (London: Longman, 1992) at 408. For discussion of the *Draft Articles on Injurious Consequences*, see below, Part VI.

⁸⁷ See e.g. *UNCLOS*, *supra* note 35 at 1287, arts. 90-94; *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, I.C.A.O. Doc. 8364, 2 *I.L.M.* 1042, arts. 3, 16; *The Case of the S.S. “Lotus” (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No. 9 [hereinafter *Lotus Case*]. See also discussion of the *Draft Articles on Injurious Consequences*, below, Part VI.

areas and issues where the territorial model is inapplicable and specific principles have yet to evolve. And, as discussed below in Part VI, the number and importance of these areas and issues may in fact be growing.

It is also possible to argue that abuse of rights is redundant because it is itself only a more specific expression of a broader principle, namely that of good faith.⁸⁸ For example, Patricia Birnie and Alan Boyle argue that abuse of rights is merely a method of interpreting rules concerning matters such as the duty to negotiate and consult in good faith, or another way of formulating a doctrine of reasonableness or a balancing of interests, and neither approach, they conclude, “adds anything useful.”⁸⁹ Bin Cheng similarly writes: “The theory of abuse of rights ... is merely an application of this principle [of good faith] to the exercise of rights.”⁹⁰ But Cheng goes on to elaborate in considerable detail the history and content of abuse of rights at the international level, concluding:

Good faith in the exercise of rights ... means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law. The exact line dividing the right from the obligation, or, in other words, the line delimiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved. This becomes the limit between the right and the obligation, and constitutes, in effect, the limit between the respective rights of the parties. The protection of the law extends as far as this limit, which is the more often undefined save by the principle of good faith. Any violation of this limit constitutes an abuse of right and a breach of the obligation—an unlawful act.⁹¹

From this perspective, the principle of abuse of rights is not redundant. Instead it is, in one small but important respect, supplemental to the principle of good faith: it provides the threshold at which a lack of good faith gives rise to a violation of international law, with all the attendant consequences.

⁸⁸ On good faith, see generally R. Kolb, *La bonne foi en droit international public* (Paris: Presses Universitaires de France, 2000); A. D'Amato, “Good Faith” in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 2 (Amsterdam: North-Holland, 1995) at 599; Cheng, *supra* note 4 at 105-60.

⁸⁹ Birnie & Boyle, *supra* note 57 at 126. See similarly quotation from Mann, *supra* note 66; D'Amato, *ibid.* at 600: “Good faith may be said to cover the somewhat narrower doctrine of ‘abuse of rights’ [...]; there is no need for an independent, even if subsidiary, concept of abuse of rights.”

⁹⁰ Cheng, *supra* note 4 at 121.

⁹¹ *Ibid.* at 131-32 [emphasis added].

Abuse of rights may also provide an advantage over the principle of good faith in that, at least in international law, one need not imply malice in order to establish that an abuse has occurred.⁹² International courts and tribunals have to presume that states act in good faith. To do otherwise would call the honour of states into question, risk introducing political and diplomatic factors into the judicial process, impede international relations, and increase the danger of escalation.⁹³ Moreover, as Lauterpacht explained:

In many cases the use of a right degenerates into a socially reprehensible abuse of right, not because of the sinister intention of the person exercising the right, but owing to the fact that, as the result of social changes unaccompanied by corresponding developments in the law, an assertion of a right grounded in the existing law becomes mischievous and intolerable.⁹⁴

Other authors deny that the principle has any validity in international law because of its imprecise character. Georg Schwarzenberger and E.D. Brown wrote that "it is difficult to establish what is supposed to amount to an abuse, as distinct from a harsh but justified use, of a right under international law."⁹⁵ Jean-David Roulet considered that such a flexible and imprecise principle could not hope to remedy the primitive and imprecise character of international law.⁹⁶ Gutteridge went so far as to suggest that the principle "may get out of hand and result in serious inroads on individual rights,

⁹² See Part II above for more on this issue. Compare Akehurst, *supra* note 80. G.D.S. Taylor comments: "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." G.D.S. Taylor, "The Content of the Rule Against Abuse of Rights in International Law" (1972-73) 46 *Brit. Y.B. Int'l L.* 323 at 352 [footnotes omitted].

⁹³ See *Lake Lanoux Arbitration (France v. Spain)* (1957), 24 *I.L.R.* 101 at 126 (Arbitral Tribunal, Arbitrators: Petré, Bolla, De Luna, Reuter, De Visscher); Taylor, *ibid.* at 334 writes: "Without such a presumption, international intercourse could not continue."

⁹⁴ Lauterpacht, *Function of Law*, *supra* note 2 at 286-87. There are at least two approaches that do not involve implying malice that could be taken to establish that an abuse of rights has occurred. Gutteridge, *supra* note 6 at 32, suggested that an intent to harm be ascertained objectively, so that the test became "whether the defendant in the action has exercised a right in a prudent and reasonable manner." Alternatively, or additionally, one could look to effect rather than intent. The neighbour principle involves this sort of consideration. In the *Corfu Channel Case*, *supra* note 41, for example, the question was not whether Albania intended to harm the United Kingdom, but whether it did cause harm to that country.

⁹⁵ G. Schwarzenberger & E.D. Brown, *A Manual of International Law*, 6th ed. (Milton, U.K.: Professional Books, 1976) at 84. They acknowledge, however, that the principle is useful in areas of international law that are regulated by treaties, particularly within the context of international organizations (*ibid.* at 85).

⁹⁶ J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Neuchâtel: Editions de la Baconnière, 1958) at 150.

thus becoming an instrument of dangerous potency in the hands of the demagogue and the revolutionary.”⁹⁷

To some degree, one’s response to this argument depends on the view one takes of the judicial function in international law. Lauterpacht, while advocating caution,⁹⁸ made his own view clear: “The power to apply some such principle as that embodied in the prohibition of abuse of rights must exist in the background in any system of administration of justice in which courts are not purely mechanical agencies.”⁹⁹ Or, as George Fletcher explained with respect to reasonableness in the common law:

[N]o set of rules can determine what is reasonable in all situations. Nor does reasonableness lend itself to definitive specification on the basis of custom or of market practices. We do not always know what the reasonable requires, but working with this open-ended concept at the core of our legal system saves us from the constricting effects of positivism. Whatever philosophers may argue, we know that the rule of law means more than the law of rules.¹⁰⁰

Judicial discretion and innovation play an important role in the still relatively under-developed system that is international law. Without judicial innovation, international organizations might not have functional international legal personality,¹⁰¹ obligations *erga omnes* might not exist,¹⁰² and treaty texts might never be open to change as the result of subsequent practice amongst their parties.¹⁰³ Although one might not approve of these developments, that they have occurred demonstrates that judicial innovation constitutes one way in which international law is made and changed. Judges some-

⁹⁷ *Supra* note 6 at 43-44. Gutteridge claimed that this situation exists in Swiss law, writing that the effect of the adoption of the principle in the Swiss Civil Code “is to make the judge the master of the situation, and the selection of a criterion of abuse rests entirely in his hands ... The difference between unconditional and other rights disappears altogether, and there is no right which is not susceptible of abuse in the eye of the Swiss law” (*ibid.* at 40). In response to this concern Taylor argues that an abuse of rights should be considered as an abuse of discretion and subjected to the Wednesbury principles of English administrative law, with the effect that “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.” *Supra* note 92 at 352.

⁹⁸ See Lauterpacht, *Development*, *supra* note 69 at 164.

⁹⁹ *Ibid.* at 165.

¹⁰⁰ Fletcher, *supra* note 10 at 980 [footnotes omitted].

¹⁰¹ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174.

¹⁰² See *Barcelona Traction Case*, *supra* note 30 at paras. 33-35.

¹⁰³ See *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Merits)*, [1962] I.C.J. Rep. 6 at 33-34; *Air Transport Services Agreement Arbitration (United States v. France)* (1969), 38 I.L.R. 182 at 245-46; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. Rep. 16 at para. 22. See also M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999) at 172-80.

times need to exercise discretion and innovate, in part because of the relative slowness with which treaties and rules of customary international law usually change, and in part because of the longstanding principle of *non liquet* whereby courts and tribunals cannot refuse to render a decision on the basis that there is no law.¹⁰⁴ And judicial innovation could become more prevalent in international law, given the rapid and profound changes occurring as a result of what is colloquially referred to as “globalization”, a process that generates gaps between established law and contemporary problems.

Jerome Elkind has advanced a different critique, that abuse of rights is ill-suited to both the common law and international law, where lengthy codes setting out general principles do not exist. According to Elkind, the question posed in common law cases is not whether a right has been abused, but whether there was a right at all. Even in cases involving statutes,

if a right purportedly granted by a statute is used for purposes other than those for which the right was granted, common-law courts will not say that there has been an abuse of the right. Rather they will seek, through statutory interpretation, to establish whether or not the conduct in question actually falls within the ambit of the right created by the statute. They may decide either that the conduct does not fall within the statute, or they might conclude, albeit reluctantly, that applicable canons of interpretation do not justify its exclusion. In the latter case, the conduct will be permitted whatever the motive although the statute might be acknowledged to be defective. The only remedy would be to amend the statute at that point, for we would have what is called, in common parlance, a loophole.¹⁰⁵

The same situation, Elkind argues, prevails with regard to treaties and customary international law, making it “seem appropriate to argue that a right does not exist rather than that it has been abused.”¹⁰⁶

Elkind’s critique falls short in several respects. First, he ignores (or fails to predict) developments in some common law systems that mirror abuse of rights in inter-

¹⁰⁴ See article 12, “Draft on Arbitral Procedure” (UN Doc. A/CN.4/113) in *Yearbook of the International Law Commission 1958*, vol. 2 (New York: United Nations, 1958) at 8: “the tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied.” See also *Desgranges v. International Labour Organization* (1953), 20 I.L.R. 523 at 530 (Administrative Tribunal of the International Labour Organization); H. Lauterpacht, “Some Observations on the Prohibition of ‘*Non Liquet*’ and the Completeness of the Law” in F.M. Van Asbeck *et al.*, eds., *Symbolæ Verzijl* (The Hague: Martinus Nijhoff, 1958) 196; J. Stone, “*Non liquet* and the Function of Law in the International Community” (1959) 35 Brit. Y.B. Int’l L. 124; P. Weil, “‘The Court Cannot Conclude Definitively ...’ *Non Liquet* Revisited” (1997) 36 Colum. J. Transnat’l L. 109.

¹⁰⁵ J.B. Elkind, “Footnote to the Nuclear Test Cases: Abuse of Right—A Blind Alley for Environmentalists” (1976) 9 Vand. J. Transnat’l L. 57 at 71.

¹⁰⁶ *Ibid.* at 73.

national law.¹⁰⁷ As Kiss explains, the distinction between the existence of an individual right and the exercise of that right “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.”¹⁰⁸ More importantly, Elkind mistakenly assumes that the only important difference between civil and common law systems is the presence or absence of codes, and that international law is therefore more like the common law with regard to the treatment of rights. However, international law is actually more like the civil law when it comes to rights, in that both systems tend to characterize some rights as general and primordial.

Rights in civil law systems have traditionally been framed in a general and abstract manner, whereas rights in common law systems are more often based on narrowly focused judicial decisions, sometimes hedged with open-ended modifiers such as “reasonable” or “substantial”, or on relatively precise statutory provisions laced with exceptions and qualifications.¹⁰⁹ As Fletcher has explained, the civil law relies upon a “structured” legal discourse involving two stages: “first, an absolute norm is asserted; and second, qualifications enter to restrict the scope of the supposedly dispositive norm.”¹¹⁰ In other words, the civil law initially sets out expansive abstract principles which are then, and only then, subject to limitations and exceptions. The common law, in contrast, is based upon a “flat” legal discourse, whereby all of the criteria relevant to the resolution of a dispute are dealt with at a single stage.¹¹¹

Fletcher illustrates the distinction between civil and common law rights with reference to the right to use force to prevent one’s other rights from being encroached upon, and the need to impose limits upon that right:

German law approaches this problem in the style of structured legal discourse. According to the criminal code of 1975 ... everyone who suffers an unjustified invasion of her rights has an absolute privilege to use whatever force is necessary to thwart the invasion. If the only way to stop a fleeing thief, even a child stealing fruit, is to shoot the thief, the courts and the scholars have supported the property owner’s right to use deadly force. Countering this trend, some post-war commentators and courts have invoked the principle of “abuse of

¹⁰⁷ See discussion above, Part I.B.

¹⁰⁸ Kiss, “Abuse of Rights”, *supra* note 1 at 5.

¹⁰⁹ See Catala & Weir, *supra* note 6, as quoted in text accompanying note 20. It is noteworthy in this context that the distinctions between civil and common law approaches are gradually becoming less clear. For instance, modern codes, such as the *Civil Code of Québec* and the *New Netherlands Civil Code*, *supra* note 15, are relatively detailed and contain their own open-ended modifiers. It is also noteworthy that the situation is somewhat reversed in the area of constitutional (as opposed to private) rights. Constitutions in civil law countries often set out numerous exceptions and qualifications to individual rights whereas written constitutions in common law countries do not.

¹¹⁰ *Supra* note 10 at 951.

¹¹¹ *Ibid.* at 951-53.

rights” to limit this right at a second stage of analysis. At the first level, there remains an absolute right to use deadly force when necessary; at the second level, the exercise of that right comes under scrutiny. If the right is exercised at excessive cost, it is thought to be “abused” and therefore inoperative. Nothing in the criminal code supports this restriction. Nonetheless, the method of structured legal thought permits an additional level of argument, a level where extra-statutory considerations can limit the explicit provisions of the code.¹¹²

International law has traditionally characterized the rights of states as general and primordial, as integral to state sovereignty and subject to restriction only by way of state consent. As the PCIJ stated in the 1927 *Lotus Case*:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.¹¹³

States have traditionally begun most treaty-making exercises from a posture of unlimited sovereignty, to which they then negotiate consensual restrictions and exceptions. Article 2(7) of the *Charter of the United Nations* is a particularly clear expression of this approach, which is usually couched in less explicit terms:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement un-

¹¹² *Ibid.* at 951-52 [footnotes omitted]. Fletcher goes on to analyze the distinction between “flat” and “structured” discourse in terms of how the criminal law of civil law systems distinguishes between justification and excuse and how the criminal law of common law systems does not (*ibid.* at 971-78). See also G.P. Fletcher, “Two Modes of Legal Thought” (1981) 90 *Yale L.J.* 970; G.P. Fletcher, “Comparative Law as a Subversive Discipline” (1998) 46 *Am. J. Comp. L.* 683 at 698. It is noteworthy that the similarity between private-law rights in civil law systems and state rights in international law has led to the adoption of a multi-staged analysis in the law of state responsibility, whereby the breach of an international obligation, attributable to the state, must be established prior to the consideration of “circumstances precluding wrongfulness”. See *Draft Articles on State Responsibility*, *supra* note 56, part 1 of which is divided into five chapters: “General principles”, “Attribution of conduct to a State”, “Breach of an international obligation”, “Responsibility of a State in connection of the act of another State”, and “Circumstances precluding wrongfulness”.

¹¹³ *Supra* note 87 at 18. See also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) (Merits)*, [1986] *I.C.J. Rep.* 14 at 135 where the ICJ noted: “[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise.” See also the quotation from A.J.P. Tammes, above in text accompanying note 51.

der the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹¹⁴

The same approach also colours traditional conceptions of customary international law and general principles of law, though these forms of law-making tend to occur much more gradually, with a greater emphasis on “system-consent” rather than specific consent to individual rules.¹¹⁵

Yet the traditional centrality of sovereign consent is but one explanation for why international law has tended to characterize the rights of states as general and primordial; another concerns the difficulty of applying the concept of reasonableness at the international level. Constructing a hypothetical “man on the Clapham omnibus” requires a greater degree of cultural and situational commonality than has traditionally been present among many of the states that make up international society.¹¹⁶ Although in recent decades a significant degree of commonality has developed in some areas, a limited degree of commonality remains characteristic in others. And, in addition to making it difficult to apply a concept of reasonableness, a lack of commonality makes it unlikely that specific rules will have evolved in the latter areas to limit rights that have traditionally been cast in general and primordial terms. Thus, abuse of rights, as a mediator between otherwise undivided rights, still has a role to play there. As Robert Jennings and Arthur Watts explain:

If a right is formulated in absolute terms (“a State may expel aliens”), arbitrary and precipitate action may involve an abuse of that right; if the right is formulated in qualified terms (“a State may take reasonable measures to expel aliens”), such action would be wrongful not so much as an abuse of right but as being outside the scope of the right claimed. ... The inclusion in a rule of a qualification requiring reasonableness, or something similar, in its application, serves much of the purpose of the doctrine of “abuse of rights”. That doctrine is a useful safeguard in relatively undeveloped or over-inflexible parts of a legal system pending the development of precise and detailed rules.¹¹⁷

Moreover, it may be impossible to develop specific rules for every situation in which excessive or abusive exercises of rights might require limitation. Reasons similar to

¹¹⁴ 26 June 1945, Can. T.S. 1945 No. 7, online: United Nations <<http://www.un.org/aboutun/charter/index.html>> (date accessed: 6 May 2002).

¹¹⁵ For further discussion of system consent and customary international law, see V. Lowe, “Do General Rules of International Law Exist?” (1983) 9 *Rev. Int’l Stud.* 207; J. Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990) at 123-29; P. Allott, *Eunomia: New Order for a New World* (New York: Oxford University Press, 1990) at 145-77; S. Sur, *La coutume internationale* (Paris: Librairie Techniques, 1990) at 5, 10.

¹¹⁶ For the origins of the Clapham omnibus phrase, see *McQuire v. Western Morning News*, [1903] 2 K.B. 100 at 109 (C.A.), *Collins M.R.*; *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205 at 224 (C.A.), *Greer L.J.*; E. Kahn, “A Trimestrial Potpourri” (1985) 102 *S. African L.J.* 184 at 186-87.

¹¹⁷ Jennings & Watts, *supra* note 86 at 407, n. 1.

these explain why national legal systems have developed concepts such as judicial review, reasonableness, nuisance, legitimate expectation, and abuse of rights. Although not a substitute for constitutionally-entrenched rights and other higher-order rules, such concepts fulfill a unique and sometimes necessary role.

International lawyers have looked to the concepts of *jus cogens*, *erga omnes*, and the related concept of international crimes to impose some limits on otherwise unrestricted state rights. However, the existence, content, and applicability of *jus cogens* not only remain contentious, but the invocation of such rules results in an all-or-nothing approach to normative conflict, there being no possibility for balancing rights and obligations if a peremptory rule will always trump a non-peremptory rule.¹¹⁸ Rules of an *erga omnes* character have their own limitations, the most important being that their *erga omnes* character does not override other rules, but only gives all states the right to make claims in the event of a violation.¹¹⁹ The concept of international crimes, for its part, has recently been dropped from the ILC's *Draft Articles on State Responsibility*, in part out of a concern to avoid complicating the rules governing counter-measures.¹²⁰

In any event, these various concepts are inadequate to deal with certain developments that are amenable to the principle of abuse of rights. These developments include the greatly increased number of treaty obligations and dispute settlement mechanisms in international law, which gives rise to a much increased probability of normative and jurisdictional conflicts. They also include the decline of territory as a defining feature of international law, particularly with regard to some forms of pollution, common spaces, and the digital world. Although abuse of rights is no longer of

¹¹⁸ For further discussion of *jus cogens*, see generally arts. 53 and 64, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter *Vienna Convention* cited to I.L.M.]; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical, Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing, 1988); S. Kadelbach, *Zwingendes Völkerrecht* (Berlin: Duncker & Humblot, 1992); M. Byers, "Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules" (1997) 66 *Nordic J. Int'l L.* 211.

¹¹⁹ See generally *Barcelona Traction Case*, *supra* note 30 at paras. 33-35; Schachter, *International Law*, *supra* note 40 at 208-13; J. Frowein, "Reactions by Not Directly Affected States to Breaches of Public International Law" (1994) 248 *Rec. des Cours* 345 at 405-22.

¹²⁰ See J. Crawford, Special Rapporteur, *First Report on State Responsibility (Addendum)*, UN ILC, 50th Sess., UN Doc. A/CN.4/490/Add.1 (1 May 1998) 2, online: ILC <<http://www.un.org/law/ilc/sessions/50/english/n9811945.pdf>> (date accessed: 6 May 2002). For commentary on this decision, see G. Abi-Saab, "The Uses of Article 19" (1999) 10 *Eur. J. Int'l L.* 339; A. Pellet, "Can a State Commit a Crime? Definitely, Yes!" (1999) 10 *Eur. J. Int'l L.* 425. On international crimes, see generally article 19 of the *Draft Articles on State Responsibility* as adopted by the Commission on first reading: ILC, *Report on the Forty-Eighth Session*, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996), online: ILC <<http://www.un.org/law/ilc/reports/1996/96repfra.htm>> (date accessed: 6 May 2002); J. Weiler *et al.*, eds., *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin: Walter de Gruyter, 1989).

general application in an increasingly sophisticated and detailed international legal system, it retains considerable relevance in these particular areas.

V. Abuse of Rights and Normative Conflicts

The *Shrimp-Turtle Case* illustrates that abuse of rights can sometimes play an important role in the resolution of normative conflicts.¹²¹ There, the WTO Appellate Body held that a United States import ban on shrimp harvested without approved “turtle excluder devices” fell within the scope of the article XX(g) exception to the GATT as a measure “relating to the conservation of exhaustible natural resources.”¹²² It then turned to the chapeau of article XX, which reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ...¹²³

The Appellate Body held that these clauses had to be interpreted and applied against the backdrop of abuse of rights:

To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members.¹²⁴

The Appellate Body then engaged in what it referred to as the “delicate” task “of locating and marking out a line of equilibrium between the right of a Member to invoke

¹²¹ *Supra* note 43. In support of its invocation of abuse of rights, the Appellate Body cited Cheng, *supra* note 4 at 125; Jennings & Watts, *supra* note 86 at 407-10; *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, [1988] I.C.J. Rep. 69 at 105; *United States Nationals in Morocco Case*, *supra* note 73; *Fisheries Case*, *supra* note 26 at 142. It is possible that the Appellate Body’s first reference to abuse of rights was in fact in *United States—Standards for Reformulated and Conventional Gasoline (Complaint by the United States)* (1996), WTO Doc. WT/DS2/AB/R (Appellate Body Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996> (date accessed: 6 May 2002). But there the reference was to “abuse or illegitimate use of the exceptions to substantive rules available in Article XX” (*ibid.* at para. 27). The term “abuse of rights” or “*abus de droit*” was not specifically invoked. See J. Waincymer, “Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?” (1996) 18 *Mich. J. Int’l L.* 141.

¹²² *Shrimp-Turtle Case*, *supra* note 43 at paras. 125-45.

¹²³ The chapeau serves as an introductory clause to article XX, see *ibid.* at para. 113.

¹²⁴ *Ibid.* at para. 156.

an exception ... and the rights of the other Members under varying substantive provisions."¹²⁵

At least two subsequent WTO panels have also invoked the principle of abuse of rights more particularly in situations involving a prohibition on asbestos imports and a failure to implement the recommendations of a WTO panel and the Appellate Body within a reasonable period of time.¹²⁶ Abuse of rights is thus helping to resolve not only the tensions that currently exist between international trade principles and environmental, health, and similar concerns,¹²⁷ but also tensions between different ambiguously defined rights within the WTO dispute settlement process.

Normative conflicts of this kind would appear to be increasing in number, for "[a]s a society becomes more integrated more obligations are laid upon its members and the rights of each subject of law become also more restricted."¹²⁸ Some authors have already recognized that rules of a conflicts of law character are required in international law, just as they have long been needed in national legal systems.¹²⁹ From the

¹²⁵ *Ibid.* at para. 159. The Appellate Body also noted that the location of this line "moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ." In this instance, it found that the State Department, without taking into consideration conditions within other WTO members, required them to adopt essentially the same regulatory program as the U.S., and that it had failed to engage in serious negotiations for the protection of sea turtles. Instead, it opted for negotiations with regard to some members and a unilateral import ban, imposed through non-transparent, *ex parte* processes, with regard to others. This constituted unjustifiable as well as arbitrary discrimination, and therefore violated article XX.

¹²⁶ See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2000), WTO Doc. WT/DS135/R at para. 8.259 (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2000> (date accessed: 6 May 2002) [hereinafter *Asbestos Case*]; *United States—Import Measures on Certain Products from the European Communities (Complaint by the European Communities)* (2000), WTO Doc. WT/DS165/R at para. 6.112 (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2000> (date accessed: 6 May 2002).

¹²⁷ For further discussion on this tension, see generally "Symposium: The *United States—Import Prohibition of Certain Shrimp and Shrimp Products Case*" (1998) 9 Y.B. Int'l Env. L. 3; D. Ahn, "Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case" (1999) 20 Mich. J. Int'l L. 819; H. Nordström & S. Vaughan, *Trade and Environment* (Geneva: World Trade Organization, 1999).

¹²⁸ Cheng, *supra* note 4 at 131.

¹²⁹ See e.g. W. Czaplinski & G. Danilenko, "Conflicts of Norms in International Law" (1990) 21 Netherl. Y.B. Int'l L. 3; A.E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction" (1997) 46 I.C.L.Q. 37; J.B. Mus, "Conflicts Between Treaties in International Law" (1998) 45 Netherl. Int'l L. Rev. 208; J. Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 Rec. des Cours 101; "Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle" (1999) 31 N.Y.U. J. Int'l L. & Pol. 679.

common law tradition, the principles of *res judicata* and *lis peudens* are needed to resolve conflicts between the differing jurisdictions and decisions of an increasing number of international courts and tribunals. The principles of *lex posteriori* and *lex specialis* are already being used to resolve conflicts between differing treaty obligations,¹³⁰ while the concept of *ordre public*, in the form of *jus cogens*, is sometimes invoked by courts and tribunals struggling to deal with conflicting rights, obligations, and interests.¹³¹ But as has already been explained, *jus cogens* rules provide only a partial answer to conflicts of law situations in international law, much as concepts of *ordre public* provide only a partial answer to conflicts in and between national legal systems.¹³² It is in this context of an increasingly dense and complex international legal system, brimming with potential conflicts of law, that the principle of abuse of rights continues to find application.

When abuse of rights was discussed by the ILC during the 1960s and 1970s, A.J.P. Tammes argued that the principle was a special source of state responsibility in situations where “there was no clearly defined interaction of rights and obligations and the rights remained undivided in law.”¹³³ Francisco García-Amador, acting then as the commission’s first Special Rapporteur on State Responsibility, took a similar approach,¹³⁴ while his successor, Roberto Ago, altered the language somewhat by proposing a “primary rule” to the effect “that States were under an international obligation not to exercise their rights beyond a certain limit.”¹³⁵ Terminological differences aside, these members of the ILC recognized that abuse of rights may be particularly

¹³⁰ On *lex posteriori*, see *Vienna Convention*, *supra* note 118, art. 30(3) at 691. On *lex specialis*, see A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 219-20; G. Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Points” (1957) 33 Brit. Y.B. Int’l L. 203 at 236-38. For a discussion of earlier applications of both principles, see *Mavrommatis Palestine Concessions (Jurisdiction) Case* (1924), P.C.I.J. (Ser. A) No. 2 at 32; *European Commission of the Danube (Advisory Opinion)* (1927), P.C.I.J. (Ser. B) No. 14 at 23.

¹³¹ On *jus cogens*, see generally *supra* note 118.

¹³² See discussion above, Part IV. That said, where such peremptory rules do exist, they will supersede the principle of abuse of rights in their application. See *e.g.* article 26 of the *Draft Articles on State Responsibility*, *supra* note 56: “Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”

¹³³ “1075th Meeting” in *Yearbook of the International Law Commission 1970*, vol. 1 (New York: United Nations, 1971) 181 at para. 40.

¹³⁴ *Supra* note 50 at 57-58. For further discussion see Part II above.

¹³⁵ R. Ago, “The Internationally Wrongful Act of the State, Source of International Responsibility” 3rd report on State responsibility (UN Doc. A/CN.4/246 and Add. 1-3) in *Yearbook of the International Law Commission 1971*, vol. 2, part 1 (New York: United Nations, 1973) 199 at para. 68 (CN.4/SER.A/1971/Add.1 (Part 1)). Ago proposed this change so that the constituent element of the wrongful act would “still be represented by the violation of an obligation and not by the exercise of a right” (*ibid.* at para. 68).

useful when there is a lack of clarity as to the limits needed to resolve or prevent normative conflicts. That said, the principle should not be regarded as a substitute for other criteria such as good faith, reasonableness, or normal administration, if those are already clearly set out as part of an existing rule.¹³⁶

Along similar lines, Vaughan Lowe proposes that concepts such as sustainable development and abuse of rights are best regarded as “interstitial norms”.¹³⁷ Such norms do not have any “independent normative charge of their own” but instead “direct the manner in which competing or conflicting norms that do have their own normativity should interact in practice.”¹³⁸ As Lowe explains:

These interstitial or modifying norms are simply concepts. If the tribunal chooses to adopt the concept, the very *idea* of sustainable development is enough to point the tribunal towards a coherent approach to a decision in cases where development and environment conflict. There is absolutely no need for the concept to have been embodied in State practice coupled with the associated *opinio juris*. Its employment does not depend upon it having normative force of the kind held by primary norms of international law. Tribunals employ interstitial norms not because those norms are obligatory as a matter of law, but because they are necessary in order that legal reasoning should proceed. All that is needed to enable the norms to perform this role is that they be clearly and coherently articulated. ...

These interstitial norms can exercise a very great influence on the system. For instance, the importance of sustainable development in reconciling the conflicting demands of development and the environment can scarcely be overstated.¹³⁹

Lowe considers abuse of rights to be an interstitial norm of growing importance:

The effect of interstitial norms is to set the tone of the approach of international law to contemporary problems, bringing subtlety and depth to the relatively crude, black-and-white quality of primary norms. I have used one example; but I expect there to be many others in the coming decades, during a phase in the development of international law analogous to the development of equity in English law ... The concept of *abus de droit*, already established in the approach of civil lawyers to international law, is likely to achieve much greater prominence as a check upon exercises of legal power by States.¹⁴⁰

¹³⁶ See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 448.

¹³⁷ V. Lowe, “The Politics of Law-making: Are the Method and Character of Norm Creation Changing?” in M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 207 at 212-21.

¹³⁸ *Ibid.* at 216.

¹³⁹ *Ibid.* at 217 [emphasis in original].

¹⁴⁰ *Ibid.* at 218.

Whether as a general principle of law or as an “interstitial norm”, the principle of abuse of rights still has an important role to play. Moreover, that role might extend beyond situations of normative conflict into situations where the problem is the absence of a countervailing right rather than the problem of mediating between different rights.

VI. Abuse of Rights, Common Spaces, and Matters of Common Concern

The principle of abuse of rights may be particularly useful in those situations where rights have traditionally been the least restricted, for example, with regard to activities by states within their own territory. As Francisco García-Amador explained: “[I]t is necessarily true that the doctrine of the abuse of rights finds its widest application in the context of ‘unregulated matters’, that is, matters which ‘are essentially within the domestic jurisdiction’ of States.”¹⁴¹ One example of such a matter involves nationality, where there is a lack of agreement as to whether the revocation of nationality causing statelessness is prohibited by customary international law.¹⁴² In response, a number of scholars have suggested that unnecessary and extreme but otherwise legal actions taken by a state against its own population, including mass revocations of nationality so as to cause statelessness, could be regarded as abuses of rights.¹⁴³

A second, related example concerns the right of states to expel aliens from their territory. Although in most instances this right is not limited by customary international law, Liechtenstein argued in the *Nottebohm Case* that Guatemala’s refusal to readmit Nottebohm, who had attained permanent resident status there, was an abuse of

¹⁴¹ *Supra* note 50 at 60.

¹⁴² See J.M. Chan, “The Right to Nationality as a Human Right: The Current Trend Towards Recognition” (1991) 12 H.R.L.J. 1 at 13-14; R. Plender, “The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced” (1994) 6 Int’l. J. Refugee L. 345 at 356 (arguing that there is no such right); J.L. Blackman, “State Succession and Statelessness: The Emerging Right to an Effective Nationality Under International Law” (1998) 19 Mich. J. Int’l L. 1141 at 1191; T.L. Lee, “Refugees from Bhutan: Nationality, Statelessness and the Right to Return” (1998) 10 Int’l J. Refugee L. 118 at 139 (arguing that such a right exists); “Draft articles on nationality of natural persons in relation to the succession of States” in ILC, *Report of the International Law Commission on the work of its fifty-first session*, UN GAOR, 54th Sess., Supp. No. 10, UN Doc. A/54/10 (1999), c. IVE.1 at art. 15, online: ILC <<http://www.un.org/law/ilc/reports/1999/english/99repfra.htm>> (date accessed: 6 May 2002).

¹⁴³ See Lauterpacht, *Function of Law*, *supra* note 2 at 300-01; Jennings & Watts, *supra* note 86 at 408; Plender, *ibid.* at 356. Compare P. Weis, *Nationality and Statelessness in International Law* (London: Stevens, 1956) at 116-17, 129.

its right to regulate the admission of aliens because the refusal of re-admission was without just cause and equivalent to an illegal expulsion.¹⁴⁴

Another area where abuse of rights finds application is with regard to activities that occur outside the territory of any state, in "common spaces" such as the high seas, or in multiple states without any particular territorial nexus, as is the case with the Internet and some sources of pollution. Territory is becoming a less salient feature of the international legal landscape as contemporary problems increasingly reach across and beyond state borders, blurring traditional concepts of sovereignty and responsibility.

The *UNCLOS* and other instruments demonstrate that many states are now willing to surrender some of their freedom to act in common spaces in favour of an environmental common interest, with concepts such as the "common heritage of mankind" having become an accepted part of international law.¹⁴⁵ However, there is still no specific, widely accepted body of law governing the pollution of common spaces. Treaty law, either with regard to the high seas,¹⁴⁶ the Antarctic¹⁴⁷ or space,¹⁴⁸ suffers from both a lack of precision and a limited number of ratifications. For example, in article VII(3) of the "Agreed Measures for the Conservation of Antarctic Fauna and Flora" the contracting parties affirm with regard to marine pollution: "Each Participating Government shall take all reasonable steps towards the alleviation of pollution of the waters adjacent to the coast and ice shelves."¹⁴⁹ Similarly, the pollution provisions of the *UNCLOS* focus on the obligations of individual states to "adopt laws and regulations to prevent, reduce and control pollution."¹⁵⁰ As Alan Boyle points out with

¹⁴⁴ *Nottebohm Case*, *supra* note 27. See also *Boffolo Case*, *supra* note 42; Politis, *supra* note 58 at 101-09. See generally G. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford: Clarendon Press, 1978) at 201-310.

¹⁴⁵ See art. 136 *UNCLOS*, *supra* note 35 at 1293; K. Baslar, *The Concept of the Common Heritage of Mankind in International Law* (The Hague: Martinus Nijhoff, 1998); R.St.J. Macdonald, "The Common Heritage of Mankind" in U. Beyerlin *et al.*, eds., *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (Berlin: Springer-Verlag, 1995) 153. On international environmental law generally, see Birnie & Boyle, *supra* note 57.

¹⁴⁶ See *UNCLOS*, *ibid.*; *United Nations Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 11.

¹⁴⁷ *Antarctic Treaty*, 1 December 1959, 402 U.N.T.S. 71, 12 U.S.T. 794; *Conference on the Conservation of Antarctic Marine Living Resources*, 20 May 1980, 19 I.L.M. 837.

¹⁴⁸ See *United Nations: Draft Convention on Liability for Damage Caused by Objects Launched into Outer Space, Report of the Legal Sub-Committee of its Tenth Session*, UN Legal Sub-Committee, 1971, UN Doc. A/A.C.105/94, 10 I.L.M. 965.

¹⁴⁹ Appendix to *Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty*, Recommendations of Third Antarctic Treaty Consultative Meeting, 2-13 June 1964, 17 U.S.T. 991 at 999 (TIAS 6058).

¹⁵⁰ *UNCLOS*, *supra* note 35, art. 207 (pollution from land-based sources). See also *UNCLOS* arts. 208 (pollution from sea-bed activities subject to national jurisdiction), 210 (pollution by dumping), 211 (pollution from vessels), 212 (pollution from or through the atmosphere).

regard to the latter treaty, “To say that states have a duty to regulate pollution is to beg the question what regulations they must adopt, a question the Convention does not satisfactorily answer.”¹⁵¹ Boyle goes on to write that “there is an insidious uncertainty about too much of the phraseology and a danger it may be used to undermine the Convention’s effectiveness.”¹⁵²

The existence of detailed customary international law with regard to pollution in these areas is doubtful,¹⁵³ in part because state practice indicates that many governments feel that they can, with impunity, permit pollution to occur.¹⁵⁴ Similar problems exist with regard to high seas fishing and whaling.¹⁵⁵

Moreover, almost all the instruments that address pollution in common spaces deal with the issue of liability in terms of damage to natural or juridical persons,¹⁵⁶ with some only providing the possibility of compensation for injuries caused within state territory.¹⁵⁷ The 1988 *Convention on the Regulation of Antarctic Mineral Re-*

¹⁵¹ A. Boyle, “Marine Pollution under the Law of the Sea Convention” (1985) 79 A.J.I.L. 347 at 357.

¹⁵² *Ibid.* at 357. See also J.P.A. Bernhardt, “A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference” (1979) 20 Va. J. Int’l L. 265.

¹⁵³ See Boyle, *ibid.* at 366.

¹⁵⁴ Greenpeace estimates that 568,000 tons of oil are dumped or spilled into the oceans each year by the shipping industry. Oil platforms account for additional spills but Greenpeace makes no estimates on that figure. See Greenpeace Research Laboratories, “Report on the World’s Oceans” (1998), online: Greenpeace <<http://www.greenpeace.org/~oceans/>> (date accessed: 6 May 2002). An industry group, the International Tanker Owners Pollution Federation Limited, estimates that in the 1990s anywhere from 9,000 tons (in 1995) to 435,000 tons (in 1991) of oil were spilled by tankers. The group reports that annual spill rates vary dramatically year by year, but in the aggregate there has been a downward trend in spills from oil tankers. See “ITOPF Historical Data: Statistics,” online: International Tanker Owners Pollution Federation <<http://www.itopf.com/stats.html>> (date accessed: 6 May 2002).

¹⁵⁵ For further discussion on high seas fishing, see W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Oxford: Clarendon Press, 1994); R. Rayfuse, “Enforcement of High Seas Fisheries Agreements: Observation and Inspection under the Convention on the Conservation of Antarctic Marine Living Resources” (1998) 13 Int’l J. Marine & Coastal L. 579 at 585; N. Nelson, “International Concern for the Sustainability of the World’s Fisheries: United Nations Efforts to Combat Over-Fishing and International Debate Over State Fishing Subsidies” (1999) Colo. J. Int’l Env’tl. L. & Pol’y 157. On whaling, see H.S. Schiffman, “The Protection of Whales in International Law: A Perspective for the Next Century” (1996) 22 Brooklyn J. Int’l L. 303; J.D. Lindemann, “The Dilemma of the International Whaling Commission: The Loophole Provisions of the Commission vs. the World Conscience” (1998) 7 Detroit J. Int’l L. & Pract. 491.

¹⁵⁶ See Principle 22 of the 1972 *Stockholm Declaration*, *supra* note 57 and Principle 13 of the 1992 *Rio Declaration*, *supra* note 57; *UNCLOS*, *supra* note 35. See generally M. Arsanjani & W.M. Reisman, “The Quest for an International Liability Regime for the Protection of the Global Commons” in K. Wellens, ed., *International Law: Theory and Practice. Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff, 1998) 469.

¹⁵⁷ See e.g. *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 U.N.T.S. 3, art. 2.

source Activities was a striking exception to the general pattern in that it provided the possibility of compensation for harm caused to the Antarctic environment independent of that harm's consequences for individual persons.¹⁵⁸ However, the Convention never entered into force and it was superseded by the 1991 *Madrid Protocol on Environmental Protection to the Antarctic Treaty*.¹⁵⁹ And while the *Madrid Protocol* put in place a moratorium on Antarctic mining, it does not, as yet, contain a liability regime.¹⁶⁰

As was explained above, the ILC has avoided the issue of common spaces when preparing its *Draft Articles on Injurious Consequences*.¹⁶¹ The commission attempted to pre-empt criticism of its decision not to deal with liability for injurious consequences except in transboundary situations by defining "transnational harm" in an extremely broad manner, as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border."¹⁶² In its commentary to the draft articles, however, the commission specified that transnational harm includes, *inter alia*, "injurious impacts on ships or platforms of other States on the high seas."¹⁶³ The focus throughout is on harm caused to individual states rather than harm caused to common spaces such as the high seas, Antarctica, or space.

The decision not to include harm caused to common spaces was criticized by several states in their responses to a version of the *Draft Articles on Injurious Consequences* circulated in 1998. For example: "The Netherlands deplores the absence of a provision on the obligation to prevent damage to common areas, i.e., areas beyond the limits of national jurisdiction."¹⁶⁴ Italy not only disagreed with the decision, it also

¹⁵⁸ 25 November 1988, 27 I.L.M. 859. Art. 8(2)(a) reads: "An Operator shall be strictly liable for ... damage to the Antarctic environment or dependent or associated ecosystems arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the *status quo ante*." See generally R. Wolfrum, *The Convention on the Regulation of Antarctic Mineral Resource Activities* (Berlin: Springer-Verlag, 1991); A. Watts, *International Law and the Antarctic Treaty System* (Cambridge: Grotius, 1992) at 165-204; C.C. Joyner, *Governing the Frozen Commons* (Columbia: University of South Carolina Press, 1998) at 149, 169-73.

¹⁵⁹ 3 October 1992, 30 I.L.M. 1455, online: Antarctica Online <<http://www.antdiv.gov.au/information/treaty/protocol.asp>> (date accessed: 6 May 2002) [hereinafter *Madrid Protocol*]. See generally L. Pineschi, "The Madrid Protocol on the Protection of the Antarctic Environment and Its Effectiveness" in F. Francioni & T. Scovazzi, eds., *International Law for Antarctica* (The Hague: Kluwer Law International, 1996) 261.

¹⁶⁰ See *Madrid Protocol*, *ibid.*, art. 16, which simply postpones negotiations on rules and procedures concerning liability. See generally F. Francioni, "Liability for Damage to the Antarctic Environment" in Francioni & Scovazzi, eds., *ibid.* 581.

¹⁶¹ *Supra* note 57. See discussion above, notes 56-57 and accompanying text.

¹⁶² *Ibid.*, art. 2(c).

¹⁶³ *Ibid.*

¹⁶⁴ ILC, Report of the Secretary-General, *International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Haz-*

pointed out that the ICJ, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, “had referred to prevention specifically in relation to regions over which no State had sovereignty.”¹⁶⁵

In contrast, the *Draft Articles on State Responsibility* would extend to common spaces, for instance, through the application of article 48(1): “Any State other than an injured State is entitled to invoke the responsibility of another State ... if ... (b) The obligation breached is owed to the international community as a whole.”¹⁶⁶ However, the *Draft Articles on State Responsibility* are premised on the existence of an “internationally wrongful act of a State”, in other words, “a breach of an international obligation of the State.”¹⁶⁷ In addition, they are inapplicable where clear legal rules do not yet limit the exercise of states’ rights in common spaces, at least since the ILC created a distinction between wrongful and lawful activities within the law of state responsibility, broadly speaking.¹⁶⁸ And with “international liability for injurious consequences of acts not prohibited by international law” being the new paradigm for dealing with environmental harm in transboundary situations, the more traditional approach of developing new obligations to limit old rights could become all the more difficult with regard to other kinds of environmental harm.

That said, as the problem of extraterritorial pollution becomes increasingly serious, and fish stocks and whale populations suffer further declines, treaties and rules of customary international law will undoubtedly be developed to provide more precise rules for common spaces. This will take time, with progress requiring the co-operation of the vast majority of states, many of which face contradictory and often pervasive pressures, such as feeding, employing, and housing their people. It is also clear that pollution, over-fishing, and whaling disputes arising in common spaces will increasingly be taken to international courts and tribunals, even before any specific law evolves. Early examples of this trend include the *Fisheries Jurisdiction Case*,¹⁶⁹ where

ardous Activities), UN GA ILC, 52d Sess., UN Doc. A/CN.4/509 at 5 (17 April 2000), online: ILC <<http://www.un.org/law/ilc/sessions/52/english/acn4509e.pdf>> (date accessed: 6 May 2002).

¹⁶⁵ ILC, *Report on the fiftieth session*, UN GAOR, 53d Sess., UN Doc. A/C.6/53/SR.15 at para. 65. For a contrary view, see China’s comments, UN Doc. A/C.6/53/SR.14 at para. 40.

¹⁶⁶ *Supra* note 56.

¹⁶⁷ *Ibid.*, art. 2(b).

¹⁶⁸ The distinction has been described as “fundamentally misconceived”. See I. Brownlie, *State Responsibility* (Oxford: Clarendon Press, 1983) at 50. See similarly M.B. Akehurst, “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law” (1985) 16 *Netherl. Y.B. Int’l L.* 3 at 8. For a lengthy analysis of the distinction, see Boyle, “State Responsibility”, *supra* note 57.

¹⁶⁹ (*Spain v. Canada*), [1998] I.C.J. Rep. 4. The dispute concerned the adoption of national legislation enabling the seizure of foreign fishing vessels on the high seas, and the subsequent arrest of a Spanish trawler pursuant to that legislation. The court concluded that it did not have jurisdiction because of a reservation concerning fisheries conservation measures, entered into by Canada in 1994, in respect of its acceptance of compulsory jurisdiction.

Spain sought to take Canada to the ICJ over unilateral efforts to protect straddling fish stocks, and the *Southern Bluefin Tuna Cases*, where Australia and New Zealand sought to take Japan to arbitration under Annex VII of the *UNCLOS*.¹⁷⁰

In the absence of more specific rules and principles, international courts and tribunals faced with these issues could, and probably should, look to abuse of rights as a general principle of law whose violation in itself constitutes a wrong giving rise to state responsibility. Applying the principle to common spaces, a state's right to pollute or extract resources would be weighed against international society's interest in a clean, sustainable environment.¹⁷¹ Initially, state rights might be accorded considerable weight. But though it remains uncertain at what point international courts and tribunals would accept and apply the broad powers offered by abuse of rights with regard to these issues, as the global environment becomes increasingly threatened, the balance will eventually shift in favour of community interests. When and how it does so will depend on how important the interest in a clean environment is considered to be, and the ambient perception of how much degradation can be tolerated.

In this context, it should be noted that rights may be abused either immediately or prospectively. The interest in clean oceans would be injured in an immediate manner if, by some catastrophic accident, the biota of an entire ocean were eliminated by the discharge of some horrendously poisonous substance. Yet the same interest would also be injured by any small spill of a destructive substance, although that spill might not itself cause widespread damage. In itself, a small spill will not amount to an abuse of rights. However, if the exercise of the right to discharge a small quantity denies the interest in a clean ocean *in concert with* similar exercises of that right by others, then

¹⁷⁰ The dispute concerned the conservation and management of southern bluefin tuna under the *Convention for the Conservation of Southern Bluefin Tuna*, 10 May 1993, A.T.S. 1994 No. 16, online: Australian Legal Information Institute <<http://www.austlii.edu.au/au/other/dfat/treaties/1994/16.html>> (date accessed: 6 May 2002). Provisional measures were granted by the International Tribunal for the Law of the Sea. See *New Zealand v. Japan, Australia v. Japan (Provisional Measures)* (1999), Cases Nos. 3 and 4, online: International Tribunal for the Law of the Sea <http://www.itlos.org/start2_en.html> (date accessed: 6 May 2002). The arbitral tribunal that was subsequently constituted to hear the case, however, held that article 16 of the 1993 Convention requires the consent of all parties for adjudication or arbitration under the *UNCLOS*, and that Japan had not consented. See *Australia and New Zealand v. Japan* (2000), (Arbitral Tribunal, Arbitrators: Schwebel, Feliciano, Keith, Tresselt, Yamada), online: International Centre for Settlement of Investment Disputes <<http://www.worldbank.org/icsid/bluefintuna/main.htm>> (date accessed: 6 May 2002).

¹⁷¹ The development of substantive rules on the protection of common spaces does not, of course, in itself provide standing for the enforcement of such rules. Although the issue of standing is not addressed here, the development of enforcement mechanisms usually follows, rather than predates, the creation of substantive rules. For a useful overview of the standing issue, see J. Charney, "Third State Remedies for Environmental Damage to the World's Common Spaces" in F. Francioni & T. Scovazzi, eds., *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991) 149.

any of the contributing acts might be regarded as abusive. Lauterpacht hinted at this balance when he wrote that there is an abuse of rights “each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right.”¹⁷²

It is also noteworthy that developments in international environmental law are beginning to extend beyond the usual situations of transboundary pollution and efforts to protect common spaces into “matters of common concern” that fit neither of these more traditional paradigms.¹⁷³ As with the nationality and expulsion of aliens examples referred to above, how states behave within their territories can sometimes cause disproportionate harm to the particular or common interests of other states, even if those states are not neighbours. When such instances are not already governed by more specific principles, abuse of rights could, and perhaps already does, apply.

VII. Abuse of Rights and the Promotion of Normative Change

Abuse of rights may also play a role in promoting legal change. As Lowe suggests, abuse of rights may encourage the development of more precise principles limiting the exercise of rights, or at least greater specificity in the drafting of treaties, as part of a general move towards the greater inclusion of equitable concepts in international law.¹⁷⁴ For example, the meaning of the chapeau to article XX of the GATT might well be clarified by way of a further agreement among the member states of the WTO as a result, in part, of the Appellate Body’s decision in the *Shrimp-Turtle Case*.¹⁷⁵ A more likely development, however, is that repeated applications of abuse of rights to the chapeau will result in greater specificity through the resulting body of

¹⁷² Lauterpacht, *Function of Law*, *supra* note 2 at 286.

¹⁷³ See F. Kirgis, “Standing to Challenge Human Endeavors that Could Change the Climate” (1990) 84 A.J.I.L. 525 at 527; J. Brunnée & S. Toope, “Environmental Security and Freshwater Resources: A Case for International Ecosystem Law” (1994) 5 Y.B. Int’l Env. L. 41 at 73-74; the Preamble to the 1992 *United Nations Conference on Environment and Development: Convention on Biological Diversity*, 4 June 1993, Can. T.S. 1993 No. 24, 31 I.L.M. 818, online: [Convention on Biological Diversity <http://www.biodiv.org/convention/articles.asp>](http://www.biodiv.org/convention/articles.asp) (date accessed: 6 May 2002), which states that “the conservation of biological diversity is a common concern of humankind”; the Preamble to the 1992 *United Nations Conference on Environment and Development: Framework Convention on Climate Change*, 19 June 1993, Can. T.S. 1994 No. 7, 31 I.L.M. 849, online: [United Nations Framework Convention on Climate Change <http://unfccc.int/resource/conv/index.html>](http://unfccc.int/resource/conv/index.html) (date accessed: 6 May 2002), which states that “change in the Earth’s climate and [the] adverse effects [of rapid climate change] are a common concern of humankind.”

¹⁷⁴ Lowe, *supra* note 137 at 208. See discussion above, Part V.

¹⁷⁵ *Supra* notes 121-22 and accompanying text. See discussion above, Part V.

case law, which might eventually make the express articulation of abuse of rights no longer required.¹⁷⁶

As Wolfgang Friedmann explained with regard to the expropriation of foreign-owned property:

In the present greatly diversified family of nations—which comprises states of starkly differing stages of economic development, as well as of conflicting political and social ideologies—the notions, for example, of “equity,” “reasonableness” or “abuse of rights” ... do, and are bound to, differ widely. What to the one party is an abuse is to the other the reassertion of a long withheld “natural” right. It is therefore in the individualizing application of such guideposts by impartial arbiters to concrete and unique situations that such principles as equity or abuse of rights can contribute to the evolution of a new balance of rights and duties in many fields of international law.¹⁷⁷

In some contexts, this process may lead to the development of sub-principles, such as the neighbour principle, that render the more general principle of abuse of rights redundant there.¹⁷⁸ And as Lowe explains, abuse of rights could play this and other roles even if it were not itself a positive rule of international law.¹⁷⁹ One such way is by reaffirming, through its very invocation and application, that the rights of states are no longer general and primordial. With time, this reaffirmation could contribute to changing how people, both within the discipline of international law and without, think about states, their rights, and perhaps even the very character of international law.¹⁸⁰ The end result could well be new positive rules of international law directed at the very same goals.

¹⁷⁶ See Kiss, *Droit international de l'environnement*, *supra* note 78. For the beginnings of greater specificity, see especially the *Asbestos Case*, *supra* note 126 at paras. 8.160ff.

¹⁷⁷ W. Friedmann, “The Uses of ‘General Principles’ in the Development of International Law” (1963) 57 A.J.I.L. 279 at 289-90 [footnotes omitted]. See also Handl, *supra* note 86 at 57.

¹⁷⁸ See discussion above, Part IV.

¹⁷⁹ See Part V above. Ian Brownlie writes, “[I]t may be said that the doctrine is a useful agent in the progressive development of the law, but that, as a general principle, it does not exist in positive law.” *Supra* note 136 at 448. See also B.D. Smith, *State Responsibility and the Marine Environment* (Oxford: Clarendon Press, 1988) at 85: “When international law defines conduct as wrongful it is by reference to rules, such as the obligation to prevent environmental harm, which may reflect the logic of abuse of rights; it is not, however, by recourse to the abstraction of abuse of rights itself.”

¹⁸⁰ Recent international relations literature on “constructivism” is of some relevance here. See e.g. J.G. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998); A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); J. Brunnée & S. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 Colum. J. Transnat'l L. 19.

Conclusion

This article argues that abuse of rights is a long-standing general principle of law that continues to play an important role in certain limited contexts by imposing restrictions on, or mediating between, state rights otherwise characterized as general or primordial. Within national legal systems, each actor's rights are necessarily limited by the rights and interests of others. Thanks in part to the principle of abuse of rights, the same holds true in international law.

The principle also plays a role in the promotion of legal change. In an international society that itself continues to experience rapid and far-reaching change, long-standing general principles of law such as abuse of rights help to extend legal controls to previously unregulated areas, and to fill new gaps as they appear. As international lawyers rush forward to meet the challenges of the twenty-first century, they would be wise not to leave abuse of rights, one of their most basic tools, behind.
