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INTERNATIONAL COURT OF JUSTICE JUDGES' DISSENTING OPINIONS AND THE ABUSE OF RIGHT[1]

LAS OPINIONES DISIDENTES DE LOS JUECES DE LA CORTE INTERNACIONAL DE JUSTICIA Y EL ABUSO DE DERECHO

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ABSTRACT: The present work tries to analyze the notion of abuse of law in international law through the ICJ jurisprudence. Is it a right? A dogma? A principle that enters the general principles of international law? These are some of the questions that will be answered through the dissenting opinion of the judges in various cases of the International Court of Justice (ICJ). The doctrine, as we will see, has tried to support or "deny" some of the judges' positions by putting in place new ideas of approach to the subject that is always topical and continuously developing.

KEYWORDS: ICJ - abuse of right - international law - international jurisprudence - good faith -general principle- art. 38 ICJ.

RESUMEN: El presente trabajo trata de analizar la noción de abuso de derecho en derecho internacional a través de la jurisprudencia de la CIJ. ¿Se trata de un derecho? ¿Un dogma? ¿Un principio que entra en los principios generales del derecho internacional? Estas son algunas de las preguntas a las que se dará respuesta a través de la opinión disidente de los jueces en varios casos de la Corte Internacional de Justicia (CIJ). La doctrina, como veremos, ha tratado de apoyar o "negar" algunas de las posiciones de los jueces poniendo en marcha nuevas ideas de aproximación al tema siempre de actualidad y en continua evolución.

PALABRAS CLAVE: CIJ - abuso de derecho - derecho internacional - jurisprudencia internacional - buena fe - principio general - art. 38 CIJ.

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1.Introduction

The concept/existence of the abuse of a right is a legal concept, principle or doctrine, which, as demonstrated by the action of the International Court of Justice (ICJ), concerns the exercise of rights and as a consequence presupposes the existence of a right. Its recognition in a legal order is based on the consideration of the nature and operation of law in the context of recognition of the social operation of rights, which establishes their nature as relative and consequential to their exercise, therefore subject to abuse[2]. It is "allowed" to limit the concept of abuse, not only by the strict limits set by the law[3], but also by the limits set by this social function. The exercise of a right is considered abusive when its use is "anti-social", or when it offends the public's sense of justice, or when the exercise in question is inconsistent with the purpose of the right.

This view is not shared by Civil and Common Law, in whose legal systems the abuse of right has not been incorporated as a principle or doctrine, and at the same time its content and operation are questioned[4]. In this regard, the famous definition formulated by the French civilian Planiol, according to which "le droit cesse là où l'abus commence the droit ceases"[5] remains current. This statement clearly highlights how the issue of abuse is ultimately resolved in defining the substantial content of the subjective situation, and therefore the scope of the faculties recognized to the person who owns it. Evaluating whether the actual exercise of a right is abusive or not means nothing more than delimiting, on a substantive level, the scope of the right itself. The discreet line that characterizes this institution is thus clear: what is defined in terms of freedom or right that can integrate an abusive practice when an action, although positively admitted and recognized, is placed in contrast with the ultimate economic and social aims of the norm, or rather, of the reference system. Abuse and law are two complementary aspects as the first is the boundary of the exercise of the second.

As concerns international law, the abuse of rights indicates restrictions on the rights of States in the international arena, and its acceptance involves further restrictions on state sovereignty as well as an intense debate regarding the acceptance or rejection of abuse of rights as a "doctrine" or "principle of international law"[6], in international field, practice, and particularly in the ICJ[7].

Already in 1961, Reuter mentions that in ICJ jurisprudence it is defined as a warning, when it is not applied, while on the contrary, when it would be possible to apply it, no reference is

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[2]L. JOSSERAND, De l'esprit des droits et de leur relativité. Théorie dite de l' abus des droits, ed. Dalloz, Paris, 2006. V. BOLGÁR, Abuse of rights in France, Germany, and Switzerland: A survey of a recent chapter in legal doctrine, in Louisiana Law Review, 35 (5), 1975, pp. 1015- 1016. M. NOVAKOVIV, Common law and civil law today. Convergence and divergence, Vernon Press, US, 2019, pp. 226ss.

[3]H.C. GUTTERIDGE, Abuse of rights, Cambridge Law Journal, 5 (1), 1933, pp. 22, 27.

[4]L. JOSSERAND, "De l'esprit des droits et de leur relativité. Théorie dite de l'abus des droits, op. cit., pp. 311ss.

[5]M. PLANIOL, Traité Élémentaire de Droit Civil-Tome II, LGDJ, Paris, 1939, par. 871.

[6]J. VOYAUME, B. COTTIER, B. ROCHA, Abuse of rights in comparative law, in Abuse of rights and equivalent concepts: The principle and its present day application, 19th Colloque on European Law, Strasbourg: Council of Europe Publishing and Documentation Service, 1990, pp. 25ss. Contra: J.H. CRABB, The French concept of abuse of rights, in Inter-American Law Review, 6 (1), 1966, pp. 4-5.

[7]P.E. MOYSE, L'abus de droit: l'antenorm, in McGill Law Journal, 57 (4), 2012, pp. 859, 920.

made to it, as a few years later in the International Law Commission (ILC)[8] regarding the international responsibility of States, Special Rapporteur Ago emphasized "(...) its unclear "position" in international law, both at the level of jurisprudence and theory and pointed out, regarding the above position of the Court, that this is understandable, given the dangers involved in both the absolute denial and the general acceptance of it (...)"[9]. According to Ago, in his first report as an internationally illegal act: "(...) is one that objectively conflicts with an international legal obligation of the State (...)"[10]. In his second Report, Ago raised the issue of abuse of rights: "(...) in the context of the international responsibility of States, based on the question of whether it is permissible to change the characteristic feature of international responsibility, as behavior against international obligation, in conduct based on a substantive right. Furthermore, he emphasized its unclear "position" in international law, both in terms of jurisprudence and theory. Regarding the fact of the Court's unclear statement regarding the "doctrine" of the abuse of right, that this is understandable, given the dangers involved in both the absolute denial and the general acceptance of it (...)"[11]. The problem for Ago focuses on whether it is possible to have a rule of international law that prohibits the abusive exercise of state powers. If it really exists, its violation will raise the international responsibility of States but it will again be a violation of an obligation and not a specific exercise of a right. Consequently, the abuse of a right does not have a direct impact on the establishment of international responsibility.

2. International law and recognition of abuse of rights as a general principle

Abuse of a right occurs when a State exercises a right, power or authority in such a way or for a purpose for which the said right, power or authority was not conferred on it and therefore cannot avoid an international obligation or to gain an undue advantage[12].

An opinion which is also evident from the decision on the S.S. "Lotus" case where the ICJ ruled: "(...) that the action of States in the international field-law is legal, unless otherwise expressly provided[13], formulating a case in favor of the extraterritorial jurisdiction of the State and following the absence of a contrary prohibitive rule against international law (...)"[14]. Kiss considered that "(…) the idea that a subject of rights and powers can misuse them seems to be inherent in the legal concept, rooted in all legal systems and leading to the establishment of checks on the use of recognized rights (...)"[15]. The concept of abuse of right includes the refusal of the strict conception of international law, as expressed by the

[8]P. REUTER, Principes de droit international public, in Recueil des Cours de Droit International, ed. Brill, Bruxelles, vol. 103, 1961, pp. 600ss.

[9]State Responsibility, Agenda Item No 4, UN Doc. A/CN.4/222, Second Report by R. Ago, Yearbook of the International Law Commission, 1970, Vol II, 193, par. 47. For further analysis see also: D. LIAKOPOULOS, Complicity of States in the international illicit, ed. Maklu, Antwerp, Portland, 2020. D. LIAKOPOULOS, Complicity in international law, W.B. Sheridan Law Books, ed. Academica Press, Washington, London, 2020.

[10]State Responsibility, First Report by R. Ago (Special Rapporteur), UN Doc. A/CN.4/217 and ADD 1, Yearbook of the International Law Commission, 1969, 139.

[11]State Responsibility, Agenda Item No 4, UN Doc. A/CN.4/222, Second Report by R. Ago, Yearbook of the International Law Commission, 1970, Vol II, 193, παρ. 47.

[12]J. SALMON (ed.), Dictionnaire de droit international public, ed. Bruylant, Brussels, 2001, pp. 3-4.

[13]ICJ, case: S.S. "Lotus", France v. Turkey, [1927], PCIJ Ser. A, No 10, 4, 18. "(...) A'un point de vue général on ne saurait facilement admettre que la cour, dont la fonction est de dire le droit, soit appelle à choisir entre deux ou plusieurs interprétations, dèterminèes d'avance par les parties et dont il se pourrait qu'aucune ne correspondît à l'opinion qu'elle se serait formée (...)".

[14]D. IRELAND-PIPER, Prosecutions of extraterritorial criminal conduct and the abuse of rights doctrine, in Utrecht Law Review, 9 (4), 2013, pp. 70ss.

[15]A. KISS, Abuse of rights, in Max Planck Encyclopedia of Public International Law, 2006.

principle maxim neminem laedit qui suo jure utitur, according to which no one harms another when exercising his rights and is based on the Latin principle sic utere iure tuo ut alterum non laedas, according to which the exercise of individual rights must be done in such a way as not to cause harm to third parties, in third States[16].
Kiss distinguished three cases of abusive exercise of right which cause damage to a third State: "(...) a) when the exercise of the powers of a State constitutes an interference with the legal order of another State, in case of abuse of power; b) when a State exercises, with intention, a right with purposes different from those for which it was granted and in case of arbitrary exercise of state powers (…) the damage caused to a third State is greater than the benefit obtained by the State exercising the right, when the exercise of state powers serves purposes other than those for which the right was granted and when the exercise of state powers is certainly arbitrary so that the social purpose for which the right was granted and the exercise of the right are at odds (...)"[17]. The concept of dimension means an abuse of right that takes place when a State exercises its rights in such a way as to interfere with the rights of another State and this exercise is beyond all reason arbitrary and without taking into account the legitimate expectations of the other State[18]. Cheng stated: "(...) between the balance among rights granted and obligations undertaken by a subject in order to determine whether the exercise of a given right has been abusive (...)"[19]. Even the term "abuse of a right" as the words "abuse" and "right" have been considered as "logically unsupportable" concepts, where among a synthesis of conflicting concepts: a right cannot be legal and illegal at the same time[20].

3.(Follows) Criticisms and parameters for recognizing the concept of abuse at an international level

According to Mitchell the concept of abuse of power: "(...) varies according to the use of objective criteria (result of the exercise of the right) or subjective elements (intent, motive) to assess the factors that establish it (...) depending by identifying the person harmed by such conduct, as it may include, from the very person against whom the conduct is directed, to the broader category of persons to whom a given obligation is due, derived from the international legal order or from the concepts of justice and mercy (...)"[21]. According to Lauterpacht: "(...) there is no legal right, for which it cannot be invoked for its abusive exercise and for this reason the doctrine of abuse of right must be applied carefully and sparingly, as there is a risk of abuse of the very application of the abuse of right (...)"[22].

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[16]A. KISS, Abuse of rights, op. cit., Kiss further clarified that abuse of right and ultra vires should not be confused, since in the latter case there was no right in the first place
[17]A. KISS, L'abus de droit en droit international, ed. LGDJ, Paris, 1953, pp. 184-187.
[18]H. LAUTERPACHT, Oppenheim's international law, 8th ed, Longman's & Green, London, 1955, pp. 263.
[19]I. PETROVA, Stepping on the shoulders of a drowning man: The doctrine of abuse of rights as a tool for reducing damages for lost profits: Troubling lessons from the Patuha and Himpurna arbitrations, in Georgetown Journal of International Law, 35 (2), 2004, pp. 455, 468ss. J. PAULSOON, The unruly notion of abuse of rights, Cambridge University Press, Cambridge, 2019, pp. 67ss.
[20]M. PLANIOL, Traite élémentaire de droit civil, 2nd ed, LGDJ, Paris, 1926, 298-299 and 747.
[21]A.D. MITCHELL, Good faith in WTO dispute settlement, in Melbourne Journal of International Law, 7, 2006, pp. 340, 351ss.
[22]H. LAUTERPACHT, The development of international law by the International Court, Cambridge University Press, Cambridge, 1958, repr. 1982, pp. 164ss.

For other theorists who reject the relativity of rights, the issue of rights abuse has been seen as a concern contained in ethics[23] rather than law[24] and which is a factor of instability in the international system[25].
The abuse of right is a more specific expression of general principles of international law, such as that of good faith, good or "reasonable" administration[26]. In this context, the concept has been characterized as redundant because the criteria of good faith, reasonableness, of good administration are provided by an existing rule, while the abuse of right "adds nothing"[27]. Schwarzenberger was particularly negative regarding the recognition of the abuse of right as a principle of international law, who considered: "(...) that the whole matter was nothing more than a simple business case (...)"[28]. This is a position that is based on the unique case of application of the case of abuse of right and concerns as a "last resort"[29], only the case of arbitrary or beyond reasonable exercise of rights or discretion by the States, within the limits of their exclusive jurisdiction[30]. The above views highlight the reasons why part of the theory maintains that the abuse of rights as a "doctrine" cannot be understood as an established or accepted principle of international law[31], while its very recognition in international law has been considered precarious[32].
A principle as a general one should be accepted in the domestic law of all civilized States[33], and it is not necessary for a principle to have the same form in the main legal systems in particular because the linguistic and cultural differences between the States vary the content of the meaning of each principle[34]. It is doubtful that it should be considered as a general principle of law, rectius to recognize a principle of law that differs from the set of civilized States. It remains doubtful that the absence or rejection of a principle from the domestic law of certain States is sufficient evidence to lead to the conclusion that a principle does not fall

[23]M. OSIEL, The right to do wrong. Morality and the limits of Law, Harvard University Press, Massachusetts, 2015.
[24]G. RIPERT, La règle morale dans les obligations civiles, 3eme ed., Pichon et Durand-Auzias, Paris, 1935, 169 and 195.
[25]J. CRAWFORD, Brownlie's principles of public international law, Oxford University Press, Oxford, 2012, pp. 563ss.
[26]B. CHENG, General principles of law as applied by International Courts and Tribunals, Cambridge University Press, Cambridge, 2006, pp. 122ss.
[27]J. CRAWFORD, Brownlie's principles of public international law, op. cit.
[28]G. SCHWARZENBERGER, Uses and abuses of abuse of rights, in British Institute of International and Comparative Law, Transactions of the Grotius Society, Vol. 42, Problems of Public and Private International Law, Transactions of the Year 1956, pp. 148-149.
[29]G. SCHWARZENBERGER, Uses and abuses of abuse of rights, op. cit.
[30]G. GUTTERIDGE, Abuse of rights, op. cit., pp. 22, 42.
[31]G. FITZMAURICE, The law and procedure of the International Court of Justice: General principles and substantive law, in British Yearbook of International Law, 1, 1950, pp. 12ss.
[32]International Law Association, Report of Johannesburg Conference 2016, Study Group on the Use of Domestic Law Principles in the Development of International Law, 43.
[33]P. GUGGENHEIM, Contribution de l' histoire des sources du droit des gens, in Recueil des Cours, ed. Brill, Bruxelles, vol. 94, 1958, pp. 1-78, see also from the ICJ the case: S. S. "Lotus", (France v. Turkey), [1927], P. C. I. J., Ser. A, No. 10, par. 18, in which the Court held that "the words principles of international law, as usually referred to, can only mean ``international law as applied to all nations belonging to the community of States (…)". W. FRIEDMANN, The uses of "general principles" in the development of international law, in American Journal of International Law, 57 (2), 1963, pp. 279, 284. X. SHAO, What we talk about when we talk about general principles of law, in Chinese Journal of International Law, 20 (2), 2021, pp. 222ss.
[34]B.O. ILLUYOMADE, Scope and content of a complaint of abuse of right in international law, in Harvard International Law Journal, 47, 1975, pp. 54ss.

within the general principles of article 38 of the Statute of the Court[35] as underlined by Cheng: "(...) article 38 (1) (c) refers to principles and not rules, therefore the absence of a rule of law concerning a certain principle does not imply the absence of that principle from a legal order (...)"[36].
Recourse to general principles is discretionary in the hands of judges as well as jurisdictional rules, acting as a "trojan horse" of natural law and morality in the "interstices" of positive law rules.
According to article 38 (1) (c) of the ICJ Statute, but also from the jurisprudence of international judicial bodies on the subject, they are formulated in the first Report of the Special Rapporteur Vázquez-Bermúdez,[37] in April 2019, where the term: "(...) general principles of law" in article 38 (1) (c) of the ICJ Statute refers to concepts that have a "general" and "fundamental" character[38]: the "general" character refers to their content being up to a degree abstract, while "fundamental" in that they contain specific rules or embody important values (...)"[39].
The ICJ applying a general principle of law does not adopt an explicit reference to this fact and when it refers to the general principles of law, as a source of international law, it does not publicize the comparative and proportional mechanism it applied, but ipse dixit simply states that the principle "recognized in all legal systems (...) or widely accepted as incorporated in the list of general principles of law (...)"[40]. The practical application of the general principles is extremely limited and is due to the fact that the Court bases both its jurisdiction and the acceptance of its decisions on the consent of States. The non-use of this "fertile source of the development of international law" is due to the suspicion of States regarding the "(...) indirect "extension" of international law by the Court[41] and because the application of these principles presupposes the possibility of creating rules that which do not depend on the consent of the States, but aim to serve the interests of the international

[35]M. AKEHURST, Equity and general principles of law, in International and Comparative Law Quarterly, 25, 1976, pp. 801, 820. A. PELLET, Article 38, in A. ZIMMERMANN at al. (eds), The Statute of the International Court of Justice: A commentary, Oxford University Press, Oxford, 2012, pp. 731, 834. I. SAUNDERS, General principles as a source of international law: Art. 38 (1) (c) of the International Court of Justice, Hart Publishing, Oxford, Oregon, Portland, 2021. According to Castro: "Les motifs des arrêts (...) sont considérés dicta prudentium et leur force comme source de droit (art. 38 du Statut) dérive non d'un pouvoir hiérarchique (...) mais de la valeur des raisonnements (non ratione imperii, sed rationis imperio)" separate opinion attached to the consultative opinion on Namibia, ICJ Reports 1971, pp. 170ss, parr. 173-174. The judgments of the Court that ascertain violations of erga omnes obligations can substantially extend the considerations expressed towards the advisory opinion on the Wall, defined as a "declarative law destined to all subjects of international law" (Chemillier-Gendreau during the UN Meeting on question of Palestine. See also: UN Meeting on question of Palestine discusses responsibility of Governments in upholding international law, GA/PAL/981, 10 March 2005). P.H.F. BEKKER, The world court's ruling regarding Israel's west bank barrier and the primacy of international law: An insider's perspective, in Cornell International Law Journal, 38 (2), 2005, pp. 553ss. M.V. SÁNCHEZ, Derecho internacional publico, ed. Huygens, Barcelona, 2012. L.A. ALEDO, Le droit international public, Dalloz, Paris, 2021. D. ALLAND, Manuel de droit international public, PUF, Paris, 2021.
[36]B. CHENG, General principles of law as applied by International Courts and Tribunals, op. cit., pp. 24ss.
[37]First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur International Law Commission Seventy-first Session Geneva, 29 April–7 June and 8 July–9 August.
[38] UN A/CN.4/732. First Report on general principles of law by M. Vázquez-Bermúdez, Special rapporteur, 2019.
[39]UN A/CN.4/732.
[40]C.T. KOTUBY, General principles of law, international due process and the modern role of private international law, in Duke Journal of Comparative & International Law, 41 (1), 2013, pp. 441ss.
[41]W. FRIEDMANN, The uses of "general principles" in the development of international law, op. cit., pp. 280ss.

community (...)"[42]. Consequently, the prohibition of abuse of rights is a general principle and constitutes a way of weighing and interpreting legal rights and obligations, as a "yardstick" or "standard", being at the same time a tool in the hands of judicial bodies and contributing to the development of a rebalancing rights and obligations in many areas of international law[43]. Abuse of rights is consistent with other principles of international law, such as necessity, estoppel, reasonableness, due regard and equity, and, in particular, good faith. Good faith is also recognized as a general principle of international law, within the meaning of article 38 (1) (c) of the ICJ Statute[44].

In the Nuclear Tests case, the Court emphasized: "(...) that good faith is one of the basic principles governing the creation and performance of legal obligations, regardless of their source[45] (...) good faith took a place on the foundations of the principle pacta sunt servanda (...)"[46]. The fact that good faith shapes and interprets existing rules does not constitute, according to the ICJ, "an identical and self-sufficient source of legal obligations[47], it is directly applicable in international relations (...)"[48].

According to Cheng, abuse of right is a concept linked to good faith so that it is the other side of the same coin[49]. He argued that the two concepts are distinct: "(...) while good faith generally concerns the fulfillment of obligations, the abuse of rights concerns only the exercise of rights[50]. The abuse of rights is a complementary concept to good faith and not redundant because of it, which at the same time sets a "threshold", after which the lack of good faith entails a violation of international law (...)"[51].

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[42]C. EGGETT, The role of principles and general principles in the "constitutional processes" of international law, in Netherlands International Law Review, 66, 2019, pp. 207ss. In this regard, see recording the jurisprudence of the Court and other international judicial bodies as well as relevant claims of the parties, regarding the general principles as a primary or secondary rule of law.

[43]W. FRIEDMANN, The uses of "general principles" in the development of international law, op. cit., pp. 289ss.

[44]O. DÖRR, K. SCHMALENBACH (eds) Vienna Convention on the Law of Treaties. Springer, Berlin, Heidelberg, 2018, pp. 476ss.

[45]Territorial jurisdiction of the international commission of the river order (Order of 29 August 1929, PCIJ, Series A, n. 23, p. 45) in which it is affirmed that: "(...) The parties must have an equal reciprocal opportunity to discuss their respective contentions (...)". ICJ sustained in the nuclear tests case that: "(...) Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim audi alteram partem, it does not consider that this principle precluded the Court from taking account of statements made subsequently to the course of the proceedings (...)". Nuclear tests (Australia v. France), judgment of 20 December 1974, ICJ, Reports, 1974, p. 469, par. 34. R.C. BRUKE, Losers always whine about their test. American nuclear testing international law and the International Court of Justice, in Georgia Journal of International & Comparative Law, 39, 2011, pp. 344ss.

[46]K. SCHMALENBACH, Article 26, in O. DÖRR, K. SCHMALENBACH (eds), Vienna Convention on the Law of Treaties. Springer, Berlin, Heidelberg, 2018, pp. 473ss. I. PEAT, Comparative reasoning in international courts and tribunals, Cambridge University Press, Cambridge, 2019. L. CHANG-TUNG, T. GARCIA, La Convention de Vienne sur le droit des traitès. Bilan et perspectives 50 ans après son adoption, Pedone, Paris, 2019.

[47]Border and Transborder Armed Actions (Nicaragua v. Honduras), [1988] ICJ Rep 69, 105, par. 94. B. CHENG, General principles of law as applied by International Courts and Tribunals, op. cit.

[48]S. REINHOLD, Good faith in international law, in UCL Journal of Law and Jurisprudence, 2(1), 2013, pp. 40, 47.

[49]In the same spirit see also: J. BAUMGARTNER, Treaty shopping in international investment law, Oxford University Press, Oxford, 2016, pp. 203ss.

[50]B. CHENG, General principles of law as applied by international courts and tribunals, op. cit., pp. 107, 121.

[51]M. BYERS, Abuse of rights: An old principle, a new age, in McGill Law Journal, 47, 2002, pp. 389, 411. M. ANDENAS, M. FITZMAURICE, A. TANZI, J. WOUTERS, General principles and the coherence of international law, ed. Brill, Bruxelles, 2019, pp. 160ss.

Cheng's views were followed by the Court of Appeal of the World Trade Organization in its decision on the Shrimp/Turtle case[52]. The relationship between good faith and abuse of rights at the international level was clarified. The doctrine of abuse of right is understood as the application of the general principle of good faith "(...) while the abusive exercise of an international contractual right is a further simultaneous violation of the rights of other States, parties to an international agreement, and a violation of the obligation of the acting State (...) the consideration of good faith as an exercise of discretion provided by a rule of international law for a certain purpose, leads to the consideration of the abuse of right as the principle that sets limits, restrictions on the exercise of said discretion, in all cases where it goes beyond these purposes and renders the purpose of the international rule ineffective (...)"[53].
The ICJ argued in a case where a State did not act in good faith towards another[54] as a difference that was not based so much on the principle of bad faith but on the application of the logic of the abuse of rights[55]. According to Fitzmaurice: "(...) if it is not an abuse of a right to fail to demonstrate good faith in its exercise, then the legal content of good faith in the exercise of rights is very limited (…)"[56].

4.Abuse of Rights before the ICJ

In the Certain German Interests in Polish Upper Silesia case (German Interests case) the ICJ was called upon to rule on whether article 256 of the Treaty of Versailles prohibited Germany from disposing of its property in the Upper Silesia region between its signature and its entry into force of the treaty in question.
The ICJ pointed out that Germany: "(...) possessed the right to dispose of its property until the transfer of sovereignty over its territories to Upper Silesia, while underlining that only misuse of this right or its exercise in violation of the principle of good faith could give the

[52]WTO, Appellate Body, United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Report of the Appellate Body, AB-1998-4. For further analysis see also: C.C. JOYNER, Z. TYLER, Marine conservation versus international free trade: Reconciling dolphins with tuna and sea turtles with shrimp, in Ocean Development & International Law, 31, 2000, pp. 142ss. J.P. KELLY, The seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the proper role of States in WTO governance, in Cornell International Law Journal, 38, 2005, in which the author intends to demonstrate how a judicial undocumented activity is to the detriment of the weaker States.
[53]U. LINDERFALK, Philip Morris Asia Ltd. v. Australia. Abuse of rights in investor-State arbitration, in Nordic Journal of International Law, 86, 2017, pp. 413ss.
[54]B.O. ILLUYOMADE, Scope and content of a complaint of abuse of right in international law, op. cit., pp. 92ss which exemplifies the oral claims of Ethiopia and Liberia in South West African Cases, 9 I.C.J. Pleadings 37 passim (1963). ICJ has stated on more than one occasion the rule established by art. 31 of the VCLT. See the sentence on the preliminary exceptions in the case of lawfulness of the use of armed force, Yugoslavia v. Belgium, op. cit., par. 10. The provision cited by providing that "a treaty must be interpreted in good faith according to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and its purpose", assigns a priority importance to the objective method, reserving for the subjective method an accessory value only. It follows that recourse to the preparatory work is justified only if the application of the textual method leaves the meaning obscure or results in a manifestly unreasonable result. E. ZOLLER, Bonne foi en droit international public, ed. Pedone, Paris, 1977. R. KOLB, La bonne foi en droit international public, ed. PUF, Paris, 2000.
[55]J.M. PERILLO, Abuse of rights: A pervasive legal concept, in Pacific Law Journal, 27, 1995, pp. 56-57. About good faith see also: G. SCHWARZENBERGER, Uses and abuses of the abuse of rights in international law, op. cit., according to which argumentation of such a nature is undesirable at the level of interstate relations, while the state that engages in it acts against the presumption of bona fide "behavior" of States.
[56]G. FITZMAURICE, The law and procedure of the International Court of Justice: General principles and substantive law, op. cit., pp. 54ss.

acts the character of a violation of the Treaty of Versailles (...)[57], concluding that such misuse had not taken place, as Germany's actions had not exceeded its limits under normal circumstances of public property's administration and were not designed with the purpose of causing an illegal advantage for one party, depriving the other one of a corresponding benefit (...)"[58].
Illyomade has commented that: "(...) as can be deduced from the reasoning of the judgment in question, the Court would not have hesitated to judge, if the facts of the case warranted it, that Germany was liable for abuse of right (...)"[59]. According to Cheng, the Court's decision demonstrates: "(...) the interdependence of the rights and obligations of States, which is based on the principle of good faith. He argued that international courts should consider whether the exercise of a state right had taken place in pursuit of a legitimate interest (…) the exercise of the right was designed to harm the rights of another party (…) the exercise in bad faith of the right will be a violation of the treaty due to the abuse of the right and will become illegal (…)"[60].

5.Explicit reference to abuse of right was made by the Court's predecessor in the Free Zones of Upper Savoy and the District of Gex case (District of Gex case).
The case before the Court concerning the continued impossibility of reaching an agreement between France and Switzerland regarding the interpretation of article 435 par. 2 of the Treaty of Versailles, a term by which the provisions of the treaties of 1815 ceased to have effect (Final Act of Vienna) and its supplementary agreements[61].
During the second phase of the case in 1930, the ICJ made explicit reference to abuse of right. According to the ICJ: "(...) the abuse of a right is possible in a case in which, as a result of taking state measures, a violation of assumed obligations under an international agreement is established (...) despite the fact that the French State could not rely on the internal of legislation in order to limit the scope of its international obligations, it was

[57]Certain German Interests in Polish Upper Silesia (Germany v. Poland) ([1926] PICJ Ser. A, No. 7, 30. Already PCIJ had specified the effects of art. 59 in relation to declarative sentences in the German interests in Polish Upper Silesia case claiming that: "(...) Art. 59 of the Statute (…) does not exclude purely declaratory judgments. The object of this article is simply to prevent legal principles accepted by the Court in a particular case form being binding upon other states or in other disputes" (Certain German interests in polish upper Silesia, merits judgment n. 7, 1926, PCIJ, Series An, n. 7, pp. 18-19). In Factory at Chorzòw case, judgment n. 11, 1927, PCIJ, Series A, n. 13, pp. 18, 20. ICJ has substantially followed the PCIJ jurisprudence both in Northern Cameroon case as regards the declarations and the Nicaragua case as regards the incidental decisions (Case concerning the northern Cameroons (Cameroon v. United Kingdom), preliminary objections, judgment of 2 December 1963, ICJ Reports 1963, p. 37; military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), merits, judgment ICJ Reports 1986, pp. 23-24, par. 27). For further analysis see: A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, C.J. TAMS, M. KASHGAR, D. DIEHL, The statute of the International Court of Justice. A commentary, Oxford University Press, Oxford, 2019, pp. 732ss. J.H.W. VERZIJL, The jurisprudence of the world court, A.W. Sitjhoff, Leyden, 1965, pp. 24ss. D. CIOBANU, Litispendence between the International Court of Justice and the political organs of the United Nations, in L. GROSS, The future of the International Court of Justice, ed. Springer, Dobbs Ferry, 1976, pp. 215ss.
[58]Certain German Interests in Polish Upper Silesia (Germany v. Poland) ([1926] PICJ Ser. A, No. 7, 37-38.
[59]B.O. ILLUYOMADE, Scope and content of a complaint of abuse of right in international law, op. cit., pp. 47-62.
[60]B. CHENG, General principles of law as applied by International Courts and Tribunals, op. cit., pp. 127-128.
[61]A.K. KUHN, The conciliatory powers of the World Court: The case of the free zones of Upper Savoy, in American Journal of International Law, 24 (2), 1930, pp. 350, 352. R. KOLB, The International Court of Justice, Hart Publishing, Oxford & Oregon, Portland, 2013, pp. 762ss. H. THIRLWAY, The International Court of Justice, Oxford University Press, Oxford, 2016, pp. 578ss.

equally certain that French fiscal law was applicable in the territory of the free zones, as in any other French territory, with the express reservation of abuse of right, which could not be established by the Court (...)"[62].
The District of Gex case[63] has been commented as a typical example of a "fictitious exercise of a right", both an action of abusive exercise of a right[64] as well as an impermissible breach of the obligation stemming from an international contractual text and consequently as a violation of law[65].
The ICJ implicitly recognized the abuse of rights at the international level, but ruled that they were not applicable in the present cases.
The issue of abuse of rights was also raised by Belgium in the Electricity Company of Sofia case[66]. Belgium's relevant claim related to the fact that Bulgaria had denounced the treaty between them on compulsory judicial settlement of disputes, because Belgium was going to bring a related claim before the Court under it. Bulgaria's actions constituted an abuse of right. The Court did not address the above claim, however judge Anzillotti, in his separate opinion, opined that: "(…) the "theory" of abuse of right is a particularly sensitive one and I would be extremely hesitant to apply it to cases such as these relating to the compulsory jurisdiction of the Court. The old rule, which is in full harmony with the spirit of international law, qui iure suo utitur neminem laedit, paradoxically appears to be the applicable one. The government of Bulgaria had the right to denounce the Treaty and is the sole judge of the expediency or necessity of this action (...)"[67]

6.(Follows) "Admission Cases"

The prohibition of abuse of power derives from the Admission of a State to the United Nations-UN case (Charter, art. 4), regarding the use of veto by the Member States of the UN Security Council, in terms of preventing the admission of a member to the Organization. The opinion of the Court had been requested by the UN General Assembly, following the rejection of the application of twelve States to join the UN by the Security Council. During the hearing before the Court, the representative of France, Schelle, argued: "(...) that the arbitrary exercise of discretion constitutes an abuse of this right, which also occurs in the

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[62]Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), Judgment, 1930 P.C.I.J. (ser.A/B) No. 46, 12. D. ANZILOTTI, Cours de droit international, Recueil Sirey, Paris, 1929, pp. 372.
[63]A.K. KUHN, The conciliatory powers of the World Court: The case of the free zones of Upper Savoy, op. cit., pp. 353ss. D. LIAKOPOULOS, The role of not party in the trial before the International Court of Justice, ed. Maklu, Antwerp, Portland, 2020, pp. 145ss.
[64]M. PANIZZON, Good faith in the jurisprudence of the WTO: The protection of legitimate expectations, good faith interpretation and fair dispute settlement, Bloomsbury Publishing, New York, 2006, pp. 31ss.
[65]B. CHENG, General principles of law as applied by International Courts and Tribunals, op. cit., pp. 121-122.
[66]Electricity Company of Sofia (Belgium v. Bulgaria) (Preliminary Objection) Judgment, 1939 P.C.I.J. (ser. A/B) No. 77, 65, op. cit., 165-166. The risk that litigation pending and the behaviors of the parties lead to an aggravation or a widening of the dispute that opposes them and that has been submitted to ICJ judgment, could authorize the latter to exercise the power conferred by art. 41. The risk of aggravation was mentioned for the first time in the case of the Sofia electricity company. The reference to the aggravation of the dispute actually serves ICJ to clarify the content of obligations on the parties in a case pending before it and not to describe the specific circumstances of the case. In the continental platform dispute ICJ rejected the request judging the risk of aggravation claimed by Greece to be non-existent and thus avoids ruling on the question whether art. 41 have authorized it to indicate precautionary measures for this purpose.
[67]J.B. ELKIND, Interim protection a functional approach, Martinus Nijhoff Publishers, The Hague, 1981, pp. 97-98.

case of the votes awarded to the members of the Security Council and of the UN General Assembly (...)"[68].
The Court, interpreting article 4 of the UN Charter in 1948, ruled that the conditions for admission to membership in the UN were exhaustive and in the event that they were fulfilled by a candidate State, the Security Council had to issue an opinion so that the General Assembly could decide on of the inclusion of the said State into the UN.
Dissenting justices Basdevant, Winiarski, McNair and Read, in a concurring opinion, affirmed the "overriding" legal obligation of UN members to act in good faith when considering a candidate's application for admission to the Organization. They stated in particular: "(...) that the right in question is not unlimited nor the possibility of its exercise is arbitrary, without however making an explicit reference to the prohibition of abuse of right[69] (...) in good faith in the text of the opinion in question as well as the of the Court's decision has been argued to mean without abusing a right (...)"[70]. Judge Zoriič with dissenting opinion[71] referred to the separate opinion of judge Azevedo, according to which: "(...) the concept of abuse of a right has now been separated from the classic concepts of dolus and culpa: a right must be exercised according to the social function that it was awarded (...)"[72].
Judge Azevedo in a separate opinion[73] argued: "(...) that the role of the UN Security Council concerns the maintenance of peace and security, the exercise of the right of veto for issues that do not pertain to that role, although legal, constitutes an abuse of right. (...) It is an abuse of right to require the fulfillment of additional conditions by a prospective member and, as a consequence, to reject a State's candidacy (...)"[74]. According to judge Alvarez, the inclusion of the abuse of rights is one of the characteristics of the law of social interdependence. The opinions of judges Azevedo and Alvarez have been argued to have "sown the seed" of the debate on the obligations of the Security Council more broadly[75].
In the Competence of Assembly regarding admission to the United Nations case, the issue raised in the Court concerned whether a State can be admitted to the UN, without having received a relevant positive recommendation from the Security Council and in particular whether the lack of a recommendation can be interpreted as a negative recommendation, in order to prevent the consequences of the right of veto of the latter. The Court gave a negative opinion, in the sense that it considered that the exercise of the right of veto cannot be interpreted in this way[76].
Judge Alvarez in his dissenting opinion, made a special reference to the issue of limitations on the rights of States and "(...) that said rights are absolute and derive from an equally absolute conception of the term of sovereignty, allowing absolute freedom of their exercise

[68]Verbatim record 1948, Pleadings, Public Sittings held at the Peace Palace, The Hague, on April 2nd, 23rd and 24th, 1948, the President, M. Guerrero, presiding, M. Schelle (France).
[69]Admission of a State to the United Nations (Charter, Art. 4), Dissenting opinions by judges Basdevant, Winiarski, Sir Arnold McNair and Read, 82, par. 20.
[70]R. JENNINGS, A. WATTS (eds), Oppenheim's international law, 9th ed, Oxford University Press, Oxford, 2008, pp. 408ss.
[71]Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, ICJ Reports 1948, 103.
[72]Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, ICJ Reports 1948, op. cit., par. 80
[73]Individual opinion of judge Azevedo, ICJ Reports 1948, 76.
[74]Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, ICJ Reports 1948, 71.
[75]A.S. KOLB, The UN Security Council Members' responsibility to protect: A legal analysis, ed. Springer, Heidelberg, 2018, pp. 317ss.
[76]Competence of Assembly regarding admission to the United Nations [1950] (Advisory Opinion) ICJ Reports 1950, 4, 10.

and-possibly-and their abuse. (…) The conception of sovereignty has essentially changed, in such a way that the general interest as well as that of international society should constitute the limits of the rights of States and make it possible to determine whether it has taken place an abuse of right[77] (…). The abuse of right is generally accepted as a concept and "urged" the Court to accept it, as an "evolution" of international law (...)"[78]. The General Assembly should be able to determine whether this right has been abused and, in such a case, proceed to accept a candidate for membership without a recommendation from the Security Council[79].

7.The Corfu Channel case

Judge Alvarez's opinion on the "transfer" of the doctrine of abuse of right to international law was stated in his separate opinion in the Corfu Channel case[80].

The Court ruled that the United Kingdom had exercised the right of safe passage through international straits, but ruled that the mine-mining it had carried out was a violation of Albania's sovereignty, as it had taken place without its consent.

The abuse of right was specifically mentioned in judge Alvarez's separate opinion, according to which the "law of social interdependence" leads to the incorporation of the abuse of right into modern international law. According to judge Alvarez: "(...) the unrestricted exercise of rights by States, as a result of the absolute view of state sovereignty, may even lead to disputes that are a danger to international peace (...)"[81]. This "new" conception of law has been positively commented on in theory as it appears that the Court may not have explicitly referred to the concept of abuse of right but rather mentioned and broadly considered principles of law, which concern the rights of humanity and the obligation not to resort to violence[82].

In his dissenting opinion in the above case, judge Krylov stated: "(...) that the passage of British ships through Albanian territorial waters had ceased to have the character of harmless[83], as "misuse" had taken place of the right of passage as a result of the violation of the sovereign rights of Albania (...)"[84]. Judge Azevedo in his dissenting opinion expressed: "(...) the opinion that there is no valid reason to limit the rights of coastal States in the case of warships, but it constitutes an abuse of this right to deny passage without a proper reason, i.e. without the existence of danger, and especially when the refusal stems from the intention of harm or even from whimsy (…)"[85].

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[77]Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion [1950], ICJ Reports 1950, Dissenting opinion of judge Alvarez, 14.

[78]Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion [1950], ICJ Reports 1950, 15.

[79]Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion [1950], ICJ Reports 1950, op. cit., par. 20.

[80]Corfu Channel case, (United Kingdom v. Albania) [1949] ICJ Reports 1949, par. 4. O. CORTEN, P. KLEIN, The limits of complicity as a ground for responsibility. Lessons learned from the Corfu channel case, in K. BANNELIER, T. CHRISTAKIS, S. HEATHCOTE, The ICJ and the evolution of international law. The enduring impact of the Corfu channel case, ed. Routledge, London & New York, 2012, pp. 316ss. M. JACKSON, Complicity in international law, Oxford University Press, Oxford, 2015. A. ZIMMERMANN, C.J. TAMS, K. OELLERS-FRAHM, The statute of the International Court of Justice. A commentary, op. cit.

[81]ICJ, Corfu Channel case, Separate opinion by judge Alvarez, parr. 47-48.

[82]Q. WRIGHT, The Corfu Channel case, in American Journal of International Law, 43 (3), 1949, pp. 494ss.

[83]Q. WRIGHT, The Corfu Channel case, op. cit., pp. 491ss.

[84]ICJ, "Corfu Channel case", Dissenting opinion by judge Krylov, par. 75.

[85]ICJ "Corfu Channel case", Dissenting opinion by judge Azevedo, 99.

Byers referred to the question put to the Court as being not whether Albania intended to damage UK warships, but whether it caused damage to them and by extension to the UK as a State[86]. The specific difference is indicative of the case of "degeneration" of a right into a socially reprehensible abuse of a right, not because of the bad intention of the person exercising the right, but because social changes are not accompanied by corresponding developments in law and as a result the invocation of a right, although based on law, to be considered intolerable on a social level[87].

Jennings and Watts have commented: "(…) that the claim concerned directly the international responsibility of a State, the Court limited itself to referring to the obligation of each State not knowingly to permit the use of its territory for actions against the rights of others of states (...)"[88]. It is evident from the above comments, both by the judges and by the more general doctrine, that several general concepts and guidelines have been produced regarding the abuse of rights, but they remain insufficient to regulate complex issues that are put before them, as confusion is created with further concepts that do not involve the abuse of power[89].

The Corfu Channel case resulted in the application of the "logic" of abuse of rights when considering the exercise of UK mine action[90]. In parallel, this fact is rejected by part of the theory as the result reached by the Court is explained and approached without any reference to the concept of abuse of right[91].

8.The Fisheries case

The Court's decision in the (Anglo-Norwegian) Fisheries case ended the long-running dispute between the UK and Norway, which had started over Norway's drawing of baselines in line with its own system of delimiting fishing zones and territorial waters of coastal States[92].

The Court made a reference to the abuse of right in connection with the incorrect delimitation on the part of the coastal State. Judging at the same time in which cases only a sector of the coast is considered instead of the relationship between the deviation and the general direction of the coast and "clarified" that this can only be done in the case of "manifest abuse"[93], which did not occur in this particular case.

The abuse of right was referred to in the separate opinion of judge Alvarez: "(…) both the Norwegian marking system and the decree implementing it were in accordance with international law, it took a different approach to the rules and principles that should have been applied when judging the case (...) in the absence of contractual or customary rules regulating an issue in international law, the Court must apply, with adaptation to the new conditions of international reality, the general principles of law provided for in article 38 (1)

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[86]M. BYERS, Abuse of rights: An old principle, a new age, op. cit., pp. 389, 416ss.
[87]H. LAUTERPACHT, The function of law in the International community, Oxford University Press, Oxford, 2011, pp. 286-287.
[88]Corfu Channel case, (UK v. Albania) [1949], IC J Reports 1949, 22.
[89]R. JENNINGS, A. WATTS (eds), Oppenheim's international law, op. cit., pp. 409ss
[90]Nuclear Tests case (Australia v. France), [1974], Oral Argument of Mr Ellicot, Counsel for Australia, Vol. I, 186
[91]J. WILLISCH, State responsibility for technological damage in international law, Duncker & Humblot, Berlin, 1987, pp. 154ss.
[92]J. EVENSEN, The anglo-norwegian fisheries case and its legal consequences, in American Journal of International Law, 46 (4), 1952, pp. 609-630.
[93]Fisheries case, (United Kingdom v. Norway), [I951], ICJ Reports 1951, 142.

(c) of its Statute, or to create new ones, in case they do not exist (...)"[94]. Judge Alvarez, in reaching a judgment that Norway's actions were in accordance with international law, did consider their "reasonableness" in light of the abuse of rights as he weighed the rights he acquired through those actions, Norway, with the existing rights of the other States[95].
Lauterpacht commented that it was "a daring piece of judicial legislation"[96], while Waldock: "(...) criticized the aforementioned reasoning of the decision, as the statements of general international law he made Court, were clearly against both State practice and the opinio juris of States, without adequately explaining why they were rejected by the Court or why it considered itself competent to establish its conclusions as rules of international law binding on States (...)"[97]. In our view the judges in this case attempted to mediate the transition from a system based on law as an a priori set of imprinted rules, in which the law is merely jus positum, to a system in which legal claims are appraised of the specific circumstances and particularities of a certain case in rule[98]. In this context, the scope of the "doctrine" of the abuse of rights is omitted.

9.The Anglo-Iranian Oil co. case

In the Anglo-Iranian Oil Company case, the Court decided following an appeal by the United Kingdom against Iran, in the exercise of diplomatic protection in favor of a company of British interests, which in 1933 had entered into an oil concession contract in Iran[99]. The Court concluded that it lacked jurisdiction to hear the case in accordance with the declarations of the parties when accepting the jurisdiction of the Court (article 36 par. 2 ICJ) as well as the nature of the convention as a non-constituent international treaty[100].
Iran, after considering the ICJ incompetent for the dispute, also referred to an abuse of the right to exercise diplomatic protection by the United Kingdom[101] as well as an abusive interpretation of the nature of the 1933[102] Convention, which was exclusively a matter of domain réservé. Judge Alvarez specifically referred to Iran's above claim. The domain réservé, according to Alvarez, is: "(...) a concept that goes back to classical international law and the natural consequence of an individualistic regime based on the absolute sovereignty

[94]Fisheries case (United Kingdom v. Norway) [1951] ICJ Reports 1951, Individual opinion of judge Alvarez, 147-148.
[95]Fisheries case (United Kingdom v. Norway) [1951] ICJ Reports 1951, Individual opinion of judge Alvarez, 153.
[96]D.H.N. WALDOCK, The anglo-norwegian fisheries case, in British Yearbook of International Law, 28, 1951, pp. 114, 169.
[97]D.H.N. WALDOCK, The anglo-norwegian fisheries case, op. cit., pp. 167ss.
[98]N. LIPARI, On abuse of rights and judicial creativity, in Italian Law Journal, 3 (1), 2017, pp. 55, 65.
[99]A.N. SHAW, Strong, united and independent: The British Foreign Office, Anglo–Iranian Oil Company and the internationalization of Iranian politics at the dawn of the Cold War, 1945-1946, Middle Eastern Studies, 52 (3), 2016, pp. 505-524. S. MARSH, Anglo-American crude diplomacy: Multinational oil and the Iranian oil crisis, 1951–1953, in Contemporary British History, 21 (1), 2007, pp. 25–53.
[100]Anglo-Iranian Oil Co. case (jurisdiction) [I952] ICJ Reports I952, 93, 115. G. ARANGIO-RUIZ, The plea of domestic jurisdiction before the International Court of Justice, in V. LOWE, M. FITZMAURICE, Fifty years of the International Court of Justice. Essays in Honour of Sir Rober Jennings, Cambridge University Press, Cambridge, 1996, pp. 440ss, "(…) a study of the said jurisprudence indicates with clarity in our view, that although the court, the parties, the singles judges and commentators continue to refer, explicitly or implicitly to the traditional concept of domestic jurisdiction, that concept does not seem to have played any effective role in determining the acceptance or the rejection of the objections based on domestic jurisdiction (...)".
[101]Observations Préliminaires de l'Iran, 302, Annexe VI, par. 312.
[102]Anglo-Iranian Oil Co. case, Observations Préliminaires de l'Iran, par. 307,

of States, and it covers a very wide range of actions, which the State could act without taking into account the will or interests of other States (…). This individualistic regime began to differentiate, according to him, from the middle of the 19th century, giving way to a new state of interdependence, which led to the "rise" of the law of social interdependence and the "internationalization" of issues that fell under the domain réservé of States (...)"[103].
According to Cheng, the right of the State to dispose of its property as it wishes is an obligation to protect the rights of other States on its territory and in particular the rights that each State claims for its nationals in foreign territory. Where a State has obligations under international treaty or customary law, the issue ceases to be exclusively a matter of domain réservé of States[104]. Judge Alvarez put in this context: "(...) the abuse of rights, as a concept that has begun to be introduced into international law and demonstrates that the domain réservé is differentiated and "reduced" in scope[105], adding that it should be expressly recognition by the Court "at the appropriate time" (...)"[106].

10.The Nottebohm case

Abuse of right was alleged by both parties in the Nottebohm case, in the second phase of the case, in 1955. The case began with an appeal by Liechtenstein, by which that State had sought restitution and compensation from Guatemala on the basis of alleged of the latter's actions against Nottebohm, a citizen of Liechtenstein, contrary to international law.
Guatemala's refusal to allow Nottebohm to return to his place of habitual residence, from which he had been removed in alleged violation of his rights under international law, constituted an arbitrary and illegal expulsion, in abuse of the right possessed by States to regulate the entry of foreigners into their territory[107].
The abuse of rights was among Guatemala's claims, as part of its complaints that international law does not allow for the naturalization of foreigners whose habitual residence is in another State. Guatemala claimed that such naturalization without regard to residence was an abuse of right[108]. Guatemala's argument in question was commented upon by judge Klaestad in his dissenting opinion, as well as the theory as lacking merit[109] as: "(...) the "controversial" doctrine of abuse of right requires the existence of an injury to a state's interests, for the which, there was no evidence (...)"[110].

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[103]Anglo-Iranian Oil Co. case, o.p., Dissenting opinion of judge Alvarez, par. 128.
[104]K. SHAFIEE, Technopolitics of a concessionary contract: How international law was transformed by its encounter with anglo–iranian oil, in International Journal of Middle East Studies, 50, 2018, pp. 637ss.
[105]Anglo-Iranian Oil Co. case, op. cit., Dissenting opinion of judge Alvarez, 128.
[106]Anglo-Iranian Oil Co. case, op. cit., Dissenting opinion of judge Alvarez, 133
[107]Nottebohm case, (Lichtenstein v. Guatemala), 2nd phase, [1955], ICJ Reports 1955, 4, Memorial submitted by the Government of the Principality of Lichtenstein, 14.05.1952, par. 51. M.T., ANDENAS, Jurisdiction procedure and the transformation of international law. From Nottebohm to Diallo in the International Court of Justice, in European Business Law Review, 23 (1), 2012, pp. 130ss. L. NGOBENI, Barcelona Traction and Nottebohm revisited. Nationality as a requirement for diplomatic protection of shareholders in South Africa law: Notes and comments, in Yearbook of International Law, 37, 2012, pp. 172ss. R.B. VON MEHREN, P.N. KOURIDES, International arbitration between states and foreign private parties: the libyan nationalization cases, in American Journal of International Law, 75 (3), 1981, p. 478ss.
[108]Nottebohm case, (Lichtenstein v. Guatemala), 2nd phase, [1955], Reports 1955, 4, Guatemalan Counter-Memorial, pp. 190, par. 17.
[109]Nottebohm case, (Lichtenstein v. Guatemala), 2nd phase, [1955], Reports 1955, Dissenting opinion of judge Klaestad, 31, par. V.
[110]J.M. JONES, The Nottebohm case, in The International and Comparative Law Quarterly, 5 (2), 1956, pp. 287ss

The Court refrained from passing judgment on Liechtenstein's abuse of right of claim. On the contrary, he expanded through his decision, as is known, the doctrine of effective nationality[111].

Judge Read, in his dissenting opinion, recognized the existence of an abuse of right in the international arena[112], holding: "(...) that the question of Nottebohm's motivations for applying for naturalization in Liechtenstein, an issue specifically raised by Guatemala, held that international law, apart from abuse of rights and fraud, does not allow the motivations that led to naturalization to be taken into account as factors that determine its results (…)"[113].

Liechtenstein's appeal was rejected due to the lack of a "genuine link" between the applicant State and the citizen, the issue that arose in this case was that the granting and deprivation of citizenship, a matter that is primarily regulated by the States under their exclusive competence, is a right that the abuse of which may form the basis of an international claim[114].

Schwarzenberger has made reference to this case: "(...) to weigh conflicting rights (balancing process) which belong to the domain réservé of States. The Court did not apply the abuse of right as a balancing mechanism in order to judge the case, but the "effective nationality", nevertheless the weighing of interests leads to the "impregnation" of absolute rights with elements of jus aequum and consequently to the introduction of limitations in strict rules, by the Court (...)"[115]. In the specific case the "doctrine" of the abuse of right favors the achievement of a balance of conflicting interests[116] and functions as a legal engineer designed to facilitate the rigidity of legal relations arising from normative, contractual or judicial rules[117].

11.The "Certain Norwegian Loans" case

The case began after the action of France against Norway and as an exercise of diplomatic protection in favor of French holders of Norwegian bonds which were guaranteed in gold, or in a currency denominated in gold at the time of their issue, but which, since 1914, had been repaid in Norwegian kroner. In a 1957 ruling on Norway's preliminary objections, the Court ruled that it lacked jurisdiction to hear the case[118].

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[111]J.M. JONES, The Nottebohm case, op. cit., pp. 288ss.

[112]Nottebohm case, (Lichtenstein v. Guatemala), 2nd phase, [1955], Reports 1955, Dissenting opinion of judge Read, 37, 40.

[113]Nottebohm case, (Lichtenstein v. Guatemala), 2nd phase, [1955], Reports 1955, Dissenting opinion of judge Read, 42.

[114]R. JENNINGS, A. WATTS (eds), Oppenheim's international law, op. cit., pp. 408

[115]G. SCHWARZENBERGER, Uses and abuses of abuse of rights, op. cit., pp. 176-177

[116]J. BAUMGARTNER, Treaty shopping in international investment law, op. cit.

[117]J. BAUMGARTNER, Treaty shopping in international investment law, op. cit.

[118]Case of Certain Norwegian Loans [1957] (Judgment, Preliminary Objections) ICJ Reports 1957 9, 27. G. FITZMAURICE, The law and procedure of the International Court of Justice: General principles and substantive law, op. cit., pp. 618ss. Judge Lauterpacht questioned in this case the validity of a declaration of acceptance of the compulsory ICJ jurisdiction in which France reserved the possibility of excluding the application of the same with regard to the questions that it itself considered belonging to its own reserved domain. This reserve would have been contrary to the principle established by art. 36, par. 6 of the statute according to which ICJ is the sole judge of its jurisdiction and therefore should have been considered invalid, overturning the validity of the declaration of acceptance. The latter effect was linked to the consideration that the reserve was an essential element of the declaration that the reserve constituted an essential element of the declaration itself. Therefore it could not be separated "from the acceptance as a whole". ICJ actually preferred not to deal with this aspect, with an issue not raised directly by the parties involved. But it is certainly significant that several states, which had formulated reservations similar to the French, subsequently withdrew

Norway claimed that States' reservations to the Court's jurisdiction must be interpreted in good faith, as well as a more general reservation regarding the Court's jurisdiction, and specifically when the case does not concern a matter that falls within the exclusive jurisdiction of the State and constitutes an abuse of right, which cannot exclude the jurisdiction of the Court[119].
Judge Lauterpacht argued that: "(…) according to which the Court has no power to confer jurisdiction on "itself" when it has been expressly excluded by States by way of reservation (…) the Court has no power to find that a question of domain réservé is so excessive or so arbitrary as to constitute state action in bad faith or in abuse of right[120] (...) finding a "legal limit" to the right to submit a reservation "is not easy", since the right is absolute (…). The right of a state to determine when an issue concerns its internal jurisdiction, makes the extent and the very existence of the obligation to accept the competence of the Court dependent on its will and consequently the Court is not competent to judge whether this determination received country in good faith[121] (...) A question of international law is the agreement of national legislation with international law (...)[122]. Iluyomade has argued that the above position of Lauterpacht is perceived: "(...) only as a recognition of the possibility of state responsibility in the event that its legislation is issued with "ultimate purposes", which are not consistent with the issue regulated by the legislation (...)"[123].
Judges Read and Basdevant recognized that the Court has a power of review in this context. Judge Read argued, in his separate opinion: "(…) that in order to find the true meaning of the French reservation, it would first have to be reasonably established in good faith that the matter at hand was a question within the internal jurisdiction of France. The second

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them, probably fearing that the relative declarations of acceptance could subsequently be deemed invalid. However, the question indicated came up again in the context of the case relating to the plane crash of 10 August 1999 (Pakistan v. India). On this occasion ICJ considered starting from the assertion of fully optional acceptance of the declarations of acceptance of its compulsory jurisdiction, that the states enjoy the widest margin of discretion in the formulation of such statements and consequently in the determination of the extension of ICJ jurisdiction, for which it would not make sense to speak of reserves outside the law or not authorized by the statute. It is clear that the question of admissibility of the reservations in question cannot be correctly addressed if the problem of legal nature of the optional clauses is not solved beforehand. See in argument: H. LAUTERPACHT, The British reservations to the optional clause, in E. LAUTERPACHT, International law. Collected papers of Herscht Lauterpacht: Disputes, was and neutrality, Cambridge University Press, Cambridge, 2004, pp. 347ss, which is affirmed that: "(...) The optional clause (...) is the most comprehensive multilateral arbitration convention in existence" argue that the same rules applicable to the admissibility of reservations to multilateral treaties would apply to the reservations included in the acceptance declarations of jurisdiction clauses. From the examination of ICJ jurisprudence it would seem moreover to emerge a greater favor of the latter for the first solution among those outlined: "Les dèclaration d'acceptation de la jurisdiction obligatorie de la cour sont des engaggements facultatifs de caractère unilateral, que les États ont toute libertà de souscrire ou de ne pas sousccrire" (Military and paramilitary activities in Nicaragua, ICJ, Recueil, 1984, pp. 392ss, par., 59.

[119]Case of Certain Norwegian Loans, Preliminary Objections submitted by the Government of the Kingdom of Norway, 131, par. 26.

[120]Case of Certain Norwegian Loans [1957] (Judgment, Preliminary Objections) Separate opinion of judge Sir Lauterpacht, 53.

[121]Separate opinion of judge Sir Lauterpacht, par. 55. The same position was repeated in the dissenting opinion of Lauterpacht in the case: Interhandel, see: Interhandel (Preliminary Objections), ICJ Reports, 1959, 6, Dissenting opinion of judge Sir Lauterpacht, parr. 112-113.

[122]Case of Certain Norwegian Loans [1957] (Judgment, Preliminary Objections) Separate opinion of judge Sir Lauterpacht, par. 37.

[123]B.O. ILLUYOMADE, Scope and content of a complaint of abuse of right in international law, op. cit., pp. 47, 90ss.

condition essentially concerns the abuse of right[124], stating that in practice, it is impossible for an international judicial body to examine a dispute between two sovereign States on the basis of both good faith and abuse of right (...)"[125]. As for the view of judge Basdevant, who saw Norway's claim of invoking the French abuse of rights reservation as an acknowledgment of the Court's power to review States' reservations.
The main issue of the Court's position regarding the French reservation: "(...) was its wording, as excluding from the competence of the Court cases which "essentially" concerned questions of internal jurisdiction of France. In the event that the reservation had it been worded differently, it is argued that the outcome of the judgment on the case would have been different (...)"[126].

12.The South West Africa cases

In South West Africa case, Ethiopia and Liberia filed separate appeals against South Africa before the Court. The cases concerned in particular requests for recognition of the then existence of the League of Nations mandate in South West Africa as well as the alleged violation of the League of Nations mandate in South Africa. In 1961 the Court decided to join the cases. In the decision issued by the Court during the second phase of the case, in 1966, it ruled: "(...) that Ethiopia and Liberia could not be regarded as having a legal right or interest in the subject-matter of the case and the claims they were rejected (...)"[127]. According to the opinion of judge Jessup, who characterized: "(...) the decision in question completely unfounded in law and stated that the Court had no legal basis to avoid a decision on the fundamental question of whether the policy of apartheid was consistent with the "sacred trust" that South Africa had received to govern South West Africa[128]. (…) South Africa had abused the mandate it had been given in relation to South West Africa. South Africa was alleged to have failed in its obligation under the mandate to promote the material and moral welfare and social progress of the people under the mandate. Ethiopia and Liberia alleged in particular an abuse of discretion on the part of South Africa in the exercise of the powers conferred on it by the mandate (...)"[129].

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[124]G.D.S. TAYLOR, The content of the rule against abuse of rights in international law, in British Yearbook of International Law, 46, 1972-1973, pp. 323, 328.
[125]Case of Certain Norwegian Loans [1957] (Judgment, Preliminary Objections) Dissenting opinion of judge Read, 94.
[126]N. ALOUPI, The right to non-intervention and non-interference, in Cambridge Journal of International and Comparative Law, 4 (3), 2015, pp. 568ss. P.M. BUTCHARD, The responsibility to protect and the failure of the United Nations Security Council, Hart Publishing, Oxford, Portland, Oregon, 2020.
[127]South West Africa, (Second Phase, Judgment), I.C.J. Reports 1966, 6, 51. It is noted that there was a tie among the judges and the case was decided based on the vote of the (Australian) President of the Court. For further details see also: I. DE LA RASILLA DEL MORAL, Nihil novum sub soli since the South West Africa cases? On ius standi, the ICJ and community interests, in International Community Law Review, 10, 2008, pp. 172ss. N. KLEIN, N.S. KLEIN, Litigation international law disputes: Weighting the options, Cambridge University Press, Cambridge, 2014, pp. 169ss. C.J. TAMS, The continued relevance of compromissory clauses as a source of ICJ jurisdiction, in T. GIEGERICH, A wiser century? Judicial dispute settlement, disarmament and the laws of war 100 years after the second Hague peace conference, Duncker & Humblot, Berlin, 2009, pp. 461ss, and in human rights matter see: N. OCHOA RUIZ, Las cláusulas compromisorias de las convenciones de derechos humanos de las Naciones Unidas a la jurisdicción de la ICJ Internacional de Justicia: ¿un mecanismo jurisdiccional de protección de los derechos humanos?, in Anuario Español de Derecho International, 19, 2003, pp. 263ss.
[128]South West Africa, op. cit., 6, Dissenting opinion of judge Jessup, 325.
[129]Observations of the Governments of Ethiopia and Liberia, 417, parr. 462, 476.

The above claim strongly raised the issue of international judicial review of the exercise of discretion by States. The text of the mandate (section 2(2)) contained a broad formulation of the quasi-governmental powers granted to South Africa over the territory of South West Africa. Consequently: "(...) the thorny issue of limiting the freedom of States was raised, in relation to the power of the Court to establish it. Any control of the exercise of these powers should be based on the text of the mandate. Given the general nature of the provisions relating to the powers in question in article 2(2) of the mandate, South Africa considered that it was not possible to control the actual exercise of these powers and therefore the Court could not review whether these powers were exercised with improper purposes. (…) The allegations of Ethiopia and Liberia constituted allegations of bad faith on its part, that is, allegations that it knowingly carried out the alleged violations of the mandate (...)"[130].
In 1966, Ethiopia and Liberia alleged abuse of rights by South Africa for amending the terms of the mandate governing South West Africa without the consent of the United Nations[131].
According to Taylor: "(...) the power of judicial review is considered inherent in a Court such as the ICJ, which has the power to rule on the existence of rules of law that limit the powers of States under international law[132]. (…) As the more vague the criteria on the basis of which a power is exercised, the narrower the scope of judicial review, and this as judicial bodies are reluctant to judge that a misuse of that power has taken place, without evidence of bad faith in its exercise. (…) When considering an allegation of abuse of right, there is no reason for judicial review to be limited to finding the element of intent. When the effect of a provision of law or action meets the objective "test" of effect, the abuse of a right may be established (...)"[133].
Four judges[134] raised the issue of the limitation of South Africa's discretion under the mandate in their separate opinions.
In his dissenting opinion, judge Foster stated: "(...) that the discretion conferred on South Africa by the mandate was wide as to the choice of methods of government, it did not follow that that discretion was synonymous with arbitrariness as to its exercise. Methods and actions for purposes other than those set out in the mandate would constitute an abuse of power (détournement de pouvoir). Judicial review of the discretionary power which South Africa possessed by the mandate was also raised by him. He submitted that it was the duty of the Court to record and analyze the totality of the legislation in practice in the mandated territory and then to judge and state whether South Africa's actions were actually designed to further the purposes of article 2(2) of the mandate (...)"[135]. This opinion by judge Foster concerns the second instance of abuse of right under the Kiss "classification" in which the right is intentionally exercised for a purpose other than that for which it was granted, resulting in harm. Judge Jessup developed the analogy of domestic administrative law, as: "(...) rejected South Africa's claim that international review is concerned exclusively with

[130]G.D.S. TAYLOR, The content of the rule against abuse of rights in international law, op. cit.
[131]M. BYERS, Abuse of rights: An old principle, a new age, op. cit., pp. 389ss.
[132]G.D.S. TAYLOR, The content of the rule against abuse of rights in international law, op. cit., pp. 346ss.
[133]G.D.S. TAYLOR, The content of the rule against abuse of rights in international law, op. cit., pp. 323, 338ss.
[134]South West Africa (Ethiopia v. South Africa, Liberia v. South Africa) [1966] (Second Phase, Judgment) ICJ Reports 1966, Dissenting opinion of judge Tanaka, 283-285, Dissenting opinion of judge Jessup, 433-438, Dissenting opinion of judge Padilla Nervo, 466-469.
[135]South West Africa, op. cit., Dissenting opinion of judge Forster, 480-481.

the examination of the fulfillment of the element of bad faith (mala fides), concluding that there is a scope of review of the exercise of state discretion for improper purposes (...)"[136].
The South West Africa case was commented on as a case where the concept of abuse of right was not expressly stated but was considered in practice[137].

13.The Barcelona Traction Light and Power Company Ltd case

The Barcelona Traction Light and Power Company Ltd case was the first in which the abuse of right was an express legal basis of appeal before the Court.
The question of abuse of right was raised in the context of a request for redress by Belgium against Spain, in the context of the exercise of diplomatic protection on behalf of Belgian national shareholders, for alleged acts and omissions of the Spanish authorities against the legal entity of the company Barcelona Traction[138].
In its decision on Spain's preliminary objections (first phase of the case), the Court decided to adjudicate two of Spain's four preliminary objections on merit[139]. Abuse of rights was among the many legal issues raised in the case during its second phase. Belgium in the Memorial it submitted to the Court, under the title "Abuse of Rights, Arbitrary and Discriminatory Attitude of Certain Administrative Authorities", claimed: "(...) that the Spanish authorities demonstrated improper, arbitrary and discriminatory towards the company Barcelona Traction and its shareholders, in order to facilitate the transfer of control of the company's assets into the hands of a Spanish group (…)"[140]. Spain on the other hand claimed: "(...) that there was no violation of an international obligation by the Spanish authorities, due to an abuse of right[141], but on the contrary that the claim for redress on the part of Belgium, constituted an abuse of the right to exercise diplomatic protection (...)"[142].
The Court accepted Spain's third preliminary objection, according to which Belgium: "had no jus standi to intervene in favor of a Canadian company, even if it had Belgian interests"[143] and consequently the question of abuse of right was not decided by the Court[144].
The question of the, direct or indirect, expropriation of the assets of a multinational company, by the State of its seat, is not simply a question of the degree of power available to the State of the seat, but also of the extent and limitations of this power, weighed against the facts of international responsibility of the State[145].
Judge Ammoun, in his separate opinion, stated: "(…) by "categorizing" some of his causes of action against Spain as abuse of right, that "abuse of right constitutes an international tort", which "includes a general principle of law that originates from the legal systems of all nations" (...)"[146]. Judge Tanaka, in his separate opinion, argued: "(...) that a "moral

[136]G.D.S. TAYLOR, The content of the rule against abuse of rights in international law, op. cit., pp. 323ss.
[137]G. TRIGGS, Japanese scientific whaling: An abuse of right or optimum utilisation, in Asia Pacific Journal of Environmental Law, 5 (1), 2000, pp. 38ss.
[138]Barcelona Traction Light and Power Company Ltd, (2nd Phase) Belgium v. Spain, (Barcelona Traction) [1970] ICJ Reports 1970 3, 33 par. 37. M. BYERS, Conceptualising the relationship between jus cogens and erga omnes rules, in Nordic Journal of International Law, 66 (2/3), 1997, pp. 212ss.
[139]Barcelona Traction (Preliminary Objections), Judgment [1964] ICJ Reports 1964-6.
[140]Barcelona Traction Light and Power Company Ltd, (2nd Phase), op. cit., par. 17.
[141]Barcelona Traction op. cit., par. 30.
[142]Barcelona Traction, op. cit., par. 16.
[143]Barcelona Traction, op. cit., par. 16.
[144]Barcelona Traction, op. cit., par. 16.
[145]C.D. WALLACE, The multinational enterprise and legal control: Host state sovereignty in an era of economic globalization, Martinus Nijhoff Publishers, The Hague, 2002, pp. 1067.
[146]Barcelona Traction [1970] ICJ Reports 1970, Separate opinion of judge Ammoun, 325.

consideration", such as the condemnation of bad faith, abuse of power or abuse of right, could be a connecting link between the domestic law of States and international law in relation to negation, thereby raising the issue of international responsibility (...)"[147].

14.Nuclear Tests case

After refugees from Australia and South Zealand in 1973 the Court had to decide on the cessation of atmospheric and nuclear tests carried out by France, on French territory, in the South Pacific Ocean[148]. France did not participate in the proceedings before him. The Court initially issued interim measures by which France had to refrain from carrying out relevant tests that could cause a radioactive cloud on the territory of Australia and New Zealand, pending the final decision of the Court. In 1974, following public declarations by France of its intention to cease nuclear testing, the Court issued two judgments in which it held "that the appeals of Australia and New Zealand had become moot and refrained from passing judgment on them (...)"[149].

Australia based the admissibility of its appeal on the basis of three "categories" of rights which had been violated by France's atmospheric nuclear tests and in particular: "(...) the right possessed by all States to be free from atmospheric nuclear tests of another State, which according to Australia was generally accepted international custom, to Australia's inherent right to be free of radioactive fallout and to decide what actions take place within its territory, invoking, inter alia, the decision of the Court in the Corfu Straits case. Australia invoked France's corresponding obligations of the above rights, the violation of which entailed its international responsibility. Furthermore, and in particular, Australia claimed that, should the Court accept that there was right of France to conduct atmospheric tests, France's international responsibility was based on the principle of abuse of right. Australia's arguments were based on the principles of "classical" international law and concerned the violation of its sovereign rights, and its claims highlighted the environmental nature of the case, since it invoked Principle 21 of the Stockholm Declaration[150], which contained absolute and unconditional obligation to protect the environment (…)"[151].

Judge Ignacio-Pinto in his dissenting opinion on interim measures, argued: "(...) that the case turned on the nature of Australia's right to cease trials, despite the fact that Australia was entitled to invoke sovereignty on its territory and its right to avoid contamination caused by another State, at the same time France's right to carry out nuclear tests on French soil was a sovereign right. The decision on provisional measures against France prompted Ignacio-Pinto to question whether Australia's sovereign rights held some sort of hierarchical position

[147]Barcelona Traction, op. cit., Separate opinion of judge Tanaka, 159.

[148]According to the opinion of the Court, which decided to join the cases due to a similar object. As appears from New Zealand's appeal, it requested the cessation of testing in general and not just atmospheric testing (New Zealand Application, New Zealand v. France, [1974] ICJ 6, para. 10). It is recalled that until the decision was issued, the Partial Test Ban Treaty (PTBT) did not refer to underground tests. The Threshold Test Ban Treaty (TTBT), which established a ban on underground nuclear tests above 150 kilotons, was signed in July 1974.

[149]Nuclear Tests (Australia v. France), (Judgment), ICJ Reports 1974 253, 272, Nuclear Tests (Australia v. France) (Interim Protection), Order ICJ Reports 1973, 99.

[150]"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (…)".

[151]Nuclear Tests (Australia v. France), (Judgment), ICJ Reports 1974 253, 272, Nuclear Tests (Australia v. France) (Interim Protection), Order ICJ Reports 1973, op. cit., par. 100.

superior to France's and whether the Court, in so innovating, exceeded its powers, considering itself legislative supreme judge (...)"[152].
This case raised the issue of the "conflict" of sovereign rights of States contiguous with the territory. The concept of abuse of right was based on the broader question of balancing the sovereign rights of States, namely the exercise of a right by a State and the corresponding right to protect the residents of another State[153].
In 1974 the Court issued two judgments in which it ruled that the appeals of Australia and New Zealand had become moot. The judgment of the Court is an example of the application of the jura novit curia principle[154]. The Court's decision to rule the case moot has been criticized and commented on as an example of judicial avoidance of conflict with (France's) political power[155].
Specifically, judge Ignacio-Pinto in his separate opinion after the judgment was issued in 1974, arguing: "(...) that the Court must respect both the principle enunciated in article 2 paragraph 7 of the UN Charter and the principle of the sovereign equality of States and consequently, France's right to use nuclear weapons was rightly not treated as inferior to the rest of the nuclear powers (...)"[156]. According to Handl and the rise of France's international responsibility due to the abuse of a right, it is: "(...) to argue in favor of international responsibility of a State due to "conduct" attributable to an abuse of a right, automatically raises the question of determining the obligations of States in cases in which the same legal basis is invoked, i.e. rights stemming from the very sovereignty of States (...)"[157].
Judge Castro invoked: "(...) the principle of sic utero tuo ut alienum non leads, as well as the principles mentioned in the Corfu Chennel case and the Trail Smelter arbitration, which are principles closely related to abuse of right and recognized the existence of a customary rule, which prohibits harmful fumes from neighboring lands, which by analogy makes radioactive waste similarly illegal (...)[158].
Elkind regarding the operation of the abuse of rights in international law argued: "(...) that apart from international treaty law, in which the rights of the parties are determined in the text of the treaties, the fact that there is no droit subjectif in international law, makes the abuse of a right inapplicable to customary international law, in which the existence of the right is examined and not its exercise-and consequently-its abuse[159] (...) since France was not a party to the 1963 Nuclear-Test-Ban Treaty, even if the existence of a relevant customary rule had been established, the abuse of right would not have added anything to the examination of the case (…)".
The Nuclear Tests case is jurisprudential recognition that the principle of good faith is a fundamental principle governing the creation and enforcement of legal obligations. Good

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[152]Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June [1973], ICJ Reports 1973, 99, Dissenting opinion of judge Ignacio-Pinto, 131.
[153]See in particular: The legality of nuclear tests: Report of the Committee and background materials, in Asian-African Legal Consultative Committee, Secretariat of the Committee, 1966, pp. 142.
[154]See in argument: H. THIRLWAY, The drafting of ICJ decisions: Some personal recollections and observations, in Chinese Journal of International Law, 5 (1), 2006, pp. 15, 26.
[155]TM. FRANCK, Word made law: The decision of the ICJ in the Nuclear Test Cases, in American Journal of International Law, 69 (3), 1975, pp. 612ss.
[156]Nuclear Tests (Australia v. France), [1974] Judgment, Separate opinion of judge Ignacio-Pinto, 311.
[157]G. HANDL, Territorial sovereignty and the problem of transnational, in American Journal of International Law, 69, 1975, pp. 50, 58.
[158]Nuclear Tests (Australia v. France) [1974], op. cit., Dissenting opinion of judge de Castro, 388-389.
[159]J.B. ELKIND, Footnote to the Nuclear Test Cases: Abuse of right-A blind alley for environmentalists, in Vanderbilt Journal of Transnational Law, 9 (1), 1976, pp. 73ss.

faith was stated: "(...) and applied by the Court in a "unique" manner until then, as the case in question did not concern obligations undertaken in the context of a contractual relationship but a preliminary case of the exercise of France's rights as to the atmospheric tests in good faith, outside the framework of assuming a contractual obligation (and without considering a customary) norm and despite the fact that France had defied the provisional measures issued in 1973 (...)"[160]. The abuse of rights according to Cheng constitutes: "(...) the "threshold", after which the lack of good faith entails a violation in international law[161], the consideration of good faith as in this case, it appears that it does not leave much room for application of abuse of right (…)"[162].

15.Elettronica Sicula S.P.A case

In the Elettronica Sicula S.P.A. (ELSI) case the question of abuse of rights by the USA[163] was raised. The case concerned a dispute between the USA and Italy, following a subpoena of an Italian company, a subsidiary of a group of American interests, which subsequently went bankrupt and was acquired by the Italian government[164]. According to article I of the Supplementary Agreement: "(...) the contracting States were to refrain from subjecting the enterprises of the other State to "arbitrary measures" (...)"[165]. The claims of the USA were based on the measures taken by Italy regarding the seizure of assets of a company of American interests, as being both "arbitrary" and "a product of discrimination", within the meaning of the above texts and in particular article I of the Supplementary Agreement.

The US, in its Memorial, asserted that in international law: "(...) the term "arbitrary" is used to describe acts which are prohibited and which are unreasonable, motivated by improper motives as well as unfair use of a other lawful exercise of governmental power, in the light of relevant international data, such as deportation of aliens, arrest or detention (…) the concept of abuse of right reflects the general use of the term "arbitrary" when it refers to such acts[166], therefore is a manifestation of arbitrariness (…)"[167].

The Court decided: "that arbitrariness does not concern so much behavior that is opposed to a certain, specific rule of law (opposed to a rule of law), as behavior that is opposed to the Rule of Law and surprising the concept of justice[168] since it concluded that Italy had not taken "arbitrary measures" of such a nature (...)".

According to Hamrock: "(…) the ICJ was based on an assumption that a common consciousness of arbitrariness on the part of judges coming from different legal cultures, which does not exist, therefore sets a vague criterion for controlling arbitrary behavior, the

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[160]J.B. ELKIND, Footnote to the Nuclear Test Cases: Abuse of right-A blind alley for environmentalists, op. cit., pp. 61ss.
[161]M. BYERS, Abuse of rights: An old principle, a new age, op. cit., pp. 411ss.
[162]J.B. ELKIND, Footnote to the Nuclear Test Cases: Abuse of right-A blind alley for environmentalists, op. cit.
[163]Elettronica Sicula S.P.A. (ELSI) (USA v. Italy) [1989] Judgment, I.C.J. Reports 1989, 15.
[164]U.S.-Italy Treaty of Friendship, Commerce and Navigation, 1948, U.S.-Italy Agreement Supplementing the Treaty of Friendship, Commerce and Navigation Between the United States of America and the Italian Republic, 1951.
[165]U.S.-Italy Treaty of Friendship, Commerce and Navigation, 1948, U.S.-Italy Agreement Supplementing the Treaty of Friendship, Commerce and Navigation Between the United States of America and the Italian Republic, 1951.
[166]ICJ, ELSI, Memorial of the United States of America, 79.
[167]EICJ, ELSI Memorial of the United States of America, 79, par. 3.
[168]ICJ, ELSI, [1989] Judgment, I.C.J. Reports 1989, 76, with reference to the Court's decision on the case Asylum, ICJ Judgment, Reports 1950, 284.

which is impossible to pay (...)"[169]. According to Murphy: "(...) the meaning attributed to it by the Court, in terms of the requirement to exceed, not only the rule of law but also the State of law, concerns the case in which there is no internal mechanism in the state reception (of an investment), which can remedy the arbitrary act (…). This definition is extremely "narrow" and incompatible with legal reality, both at the state and international level and may influence, towards the wrong direction, the interpretation of the acts of the parties in the context of investment treaties (...)"[170].
The relevance of the Court's decision in the ELSI case to the concept of abuse of right accepts the existence of arbitrary conduct in international law, where the concept of abuse of right is founded. The judgment of the Court was attributed to "arbitrary behavior" and the difficulty of proving and establishing arbitrariness in the international field and the difficulties "encountered" in establishing the abuse of rights.

16.Certain Phosphate Lands in Nauru case

The Certain Phosphate Lands in Nauru case concerned Nauru's action against Australia to resolve a dispute over the reclamation of certain phosphate lands in that country.
Nauru's claims related to lands which until 1967[171] had been mined by the British Phosphate Commissioners (BPC), a board under a trusteeship regime established by the United Nations in 1947[172]. Under the trusteeship regime, Australia, the United Kingdom and New Zealand were the joint governing authority on the territory of Nauru, while the de facto administration was exercised by Australia.
In Nauru's Memorial to the Court, it made six claims: "(…) it requested the Court to recognize that Australia was responsible for breaching, inter alia, its obligation under international law not to exercise administrative powers against in such a way that this exercise constitutes an abuse of right (...)"[173]. Specifically, he referred to the recognition of the principle of abuse of rights by the ICJ in its decisions on the cases concerning Certain German Interests in Polish Upper Silesia and the Free Zones case[174].

[169]K.J. HAMROCK, The ELSI case: Toward an international definition of arbitrary conduct, in Texas International Law Journal, 27 (3), 1992, pp. 849-851.
[170]S. MURPHY, The ELSI case: An investment dispute at the International Court of Justice, in Yale Journal of International Law, 16 (2), 1991, pp. 391, 451.
[171]ICJ, Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), [1992] Judgment, (Preliminary Objections), ICJ Rep. 244, par. 59. J.G. MERRILLS, Interim measures of protection in the recent jurisprudence of the International Court of Justice, in International and Comparative Law Quarterly, 44, 1995, pp. 128ss. B. AJIBOLA, Dispute resolution by the International Court of Justice, in Leiden Journal of International Law, 21, 1998, pp. 124ss, which emphasizes just how the recourse to the ICJ can in some cases act as a catalyst for direct negotiations between the parties in dispute. Regarding the indirect benefits that may derive from the exercise of the jurisdictional functions of ICJ.
[172]A.Y. MELNYK, United Nations trusteeship system, in Max Planck Encyclopedia of Public International Law, 2013, par. 10, 18 and 27.
[173]Case Concerning Certain Phosphate Lands in Nauru [1992] (Nauru v. Australia) (Preliminary Objections), ICJ Rep. 244
[174]Memorial of the Republic of Nauru, Part 1Il, Chapter 5, 163, par. 445 ("Abuse of Rights and Acts of Maladministration").

This case was a claim for restitution[175] by a (formerly) trusteeship State at the expense of the metropolitan State, due to abuse of power during the administration of its territory, while in addition, in this context, the question of sovereignty over natural resources was mentioned as well as the problems which related to international liability due to environmental damage[176].
The Court rejected Australia's preliminary objections and decided: "(...) the examination of the substance of the case (...)"[177]. The question of abuse of rights was not considered, like any other claim by Nauru, by the Court, as in 1993 the parties entered into an agreement out of Court[178].

17.The application of the convention on the prevention and punishment of the crime of genocide case

The case initiated following an action by Bosnia-Herzegovina against the Federal Republic of Yugoslavia concerning alleged violations of the 1948 Treaty on the Prevention and Suppression of the Crime of Genocide and issues related to that Treaty. The Court ruled that Serbia, as the successor State of Yugoslavia: "had breached the obligations arising from the aforementioned Treaty regarding the prevention of genocide (...)"[179].

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[175]Northern Cameroons Case (Cameroon v. UK) [Preliminary Objections] [(1963) ICJ Rep 15. For further analysis see also: F. VOEFFRAY, L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales, Genève, 2004, pp. 63ss. P. OKOWA, Issues of admissibility and the law on international responsibility, in M. EVANS(ed.), International law, Oxford University Press, Oxford, 2010, pp. 472ss. K. MBAYE, L'intèrêt pour agir devant la Cour Internationale de Justice, in Recueil des cours, ed. Brill, Bruxelles, vol. 209, 1988, pp. 289ss, in which the requirement set by art. 62 of the Statute is substantially equated with the interest in acting. For the sake of completeness, it must be remembered that outside the institution of intervention the configurability of the interest to act as an autonomous condition of the action is disputed by a part of the doctrine that considers it absorbed by the requirement of the prior existence of a dispute. Morelli attached to the sentence of 2 December 1963 in the case of northern Cameroon, in ICJ Reports, 1963, par. 3. For this critique of this position see: G. ABI-SAAB, Les exceptions préliminaires dans la procèdure de la Cour international: ètude des notions fundamentals de procédure et des moyens de leur mise en oeuvre, ed. Pedone, Paris, 1967, pp. 134ss. Which notes that when compared with the condition relating to the existence of an interest placed by the French theory of the civil trial to the existence of an interest placed by the French theory of the civil process that requires the interest to be "nè et actuel", "juridique et légitime" and "direct et personnel", the requirement of the existence of an international controversy corresponds only to the first couple of attributes while the other two would remain uncovered. In particular, according to Abi-Saab, the requirement that the interest be "juridique et légitime" presupposes the prior verification by ICJ of the suitability in practice of the decision of merit to affect the legal position of the parties, their rights and obligations to prevent ICJ from being used for purely political purposes, which would be incompatible with its status as a judicial body. Fitzmaurice always in the case of northern Cameroon, in ICJ Reports, 1963, p. 110ss. B. FLEMMING, The case concerning Northern Cameroon. Preliminary objections, in Canadian Yearbook of International Law, 2, 1964, pp. 216ss.
[176]N.J. SCHRIJVER, Certain phosphate lands in Nauru case (Nauru v. Australia), in Max Planck Encyclopedia of Public International Law, 2008, par. 13, 15.
[177]Certain Phosphate Lands in Nauru, Judgment, (Preliminary Objections), op. cit., 268.
[178]M. FITZMAURICE, Environmental law, in C.J. TAMS, J. SLOAN (eds), The development of international law by the International Court of Justice, Oxford University Press, 2013, pp. 361ss.
[179]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) ICJ Rep 2007 43. C. GRAY, Application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) orders of provisional measures of 8 April 1993 and 13 September 1993, in International and Comparative Law Quarterly, 43, 1994, pp. 705ss. See also the dissenting opinion of judge Weeramantry concerning the order of 17 December 1997 in the application of the genocide convention. "(...) In exercising its discretion the Court also needs to bear in mind another aspect touching on the equality of arms of the parties before it. However, great may be the magnitude of its subject-matter the respondent to the counter-claim,

The Federal Republic of Yugoslavia at the pre-trial stage requested the rejection of the provisional measures requested by Bosnia-Herzegovina, as this request constituted, in its view, an abuse of rights[180]. Bosnia-Herzegovina requested from the Court: "the rejection of the preliminary objections, as it claimed that they had been submitted in violation of a right, in accordance with article 36 para. 2 of the Statute of the Court (…)"[181].
The Court rejected in their entirety the Federal Republic of Yugoslavia's pre-trial objections and expressly stated that it did not accept Bosnia-Herzegovina's claim that the raising of pre-trial objections had taken place in violation of a right[182].

18.Immunities and criminal proceedings case

The case invoked an abuse of right regarding immunities and criminal proceedings. In 2016, Equatorial Guinea appealed to the Court against France due to a dispute that had arisen regarding the immunity of the former's Vice President, Teodoro Nguema Obiang Mangue from pending criminal jurisdiction in France, as well as the legal status of the building that it housed the embassy of Equatorial Guinea in Paris.
The Court's jurisdiction, according to Equatorial Guinea: "(...) was based on article 35 of the United Nations Convention against Transnational Organized Crime ("Palermo Convention")[183] and article I of the Additional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes "(Optional Protocol to the Vienna Convention") (...)"[184].

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namely the original applicant, has in general only one opportunity to state its position on the allegations made against itself, whereas the respondent to the original claim has the opportunity not only to file a counter-memorial but also to file a rejoinder. When cases of this magnitude are joined in the fashion requested by the respondent in the present proceedings this aspect of inequality can weigh rather heavily upon its adversary especially in a case such as the present (…) the court has in the present case of this aspect in par. 38 of the order by providing Bosnia and Herzegovina with the right to provide its views a second time in an additional pleading, but this is an aspect that needs to be borne in mind whenever future counter-claims are involved (...)". See also for further analysis: P. AKHAVAN, Balkanizing jurisdiction: Reflections on article IX of the genocide convention in Croatia v. Serbia, in Leiden Journal of International Law, 28 (4), 2015, pp. 894ss.

[180]Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 336. see also the recent case: Qatar v. United Arab Emirates. Application of the international Convention on the elimination of all forms of racila discrimination, 11 June 2018, par. 22. and a request for provisional measures in 2019, the UAE asked: "(...) the ICJ to order Qatar to immediately withdraw its Communication submitted to the CERD Committee (para. 74(i)) (…)". And the ICJ responded that: "(...) this request did not concern the preservation of a right of the UAE under CERD and thus did not meet the criteria for issuing provisional measures (par. 25) (...)".

[181]P. AKHAVAN, Balkanizing jurisdiction: Reflections on article IX of the genocide convention in Croatia v. Serbia, op. cit.

[182]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide case), Preliminary Objections, Judgment, ICJ Reports 1996 595, 622, par. 46.

[183]UN GA Res 55/25, 29 September 2003.

[184]Case Concerning Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, [2018], Judgment, 6 and par. 10: "Equatorial Guinea is a relatively small, poor country, faced by two large and relatively powerful neighbouring African states. If the Court were to determine a Cameroon-Nigeria maritime boundary that would cross over the median line with Equatorial Guinea, this would impair Equatorial Guinea's ability to negotiate a boundary with these two states based on the median line as well as its interests in any adjudication of its maritime boundary with either Cameroon or Nigeria. Furthermore, the general maritime area where the interests of Equatorial Guinea, Cameroon and Nigeria come together is an area of active oil and gas exploration and exploitation. The Court will readily appreciate that, as practical matter, any judgment between Cameroon and Nigeria across the median line with Equatorial Guinea will be relied upon by concessionaires who would likely ignore Equatorial Guinea's protests and proceed to explore and exploit resources to the legal and economic detriment of Equatorial Guinea". In a similar sense, see the

France in the pre-trial stage under the title "The abusive nature of the Application", raised an objection of abusive exercise of the right of appeal to the Court. Equatorial Guinea based its claims: "(...) on contractual provisions which could not be considered a sufficient basis for the establishment of the jurisdiction of the Court, against a manifest abuse of right[185] (…) as a general principle of international law and a general principle of law. He further referred to the fact that the Court has recognized the abuse of right as a necessary consequence of the principle of good faith (...)"[186].
According to France, the abuse of rights was based on the fact that Equatorial Guinea had acted in abuse of the rights provided by international law in order to obstruct the progress of the pending, at the time, criminal proceedings in France against its Vice-President[187]. France claimed: "(...) that Equatorial Guinea's application to the Court constituted an abuse of process, as it was submitted despite the manifest absence of any legal remedy and to the purpose of covering up the abuse of rights that its actions constituted (...)"[188].
The Court ruled: "(...) that the issue was a matter for the substance of the case, as the abuse of a right cannot be the basis of an inadmissible appeal, when the identification of the contested right is a matter of substance[189] (...) carried out a conceptual and " functional" distinction between abuse of right and abuse of power. In particular, it clarified that, despite the fact that the concept of abuse as a constituent element of both is similar, the two concepts are distinct as the consequences of abuse differ from case to case[190] (…) abuse of process, in contrast to abuse of right, concerns in the proceedings before the Court and is therefore considered at the stage of preliminary objections. In this case, it held that the conditions for establishing an abuse of process were not met[191] (…) it rejected France's preliminary objection regarding the abuse of right, considering that it did not relate to the current stage of the procedure, but was a question of substance, while it did not take a different position on France's allegations regarding in that this is a general principle of international law (…)"[192]. The ICJ referred to the decision of Certain German Interests in

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remarks expressed by Judge Schwebel in the dissenting opinion attached to the judgment of 26 June 1992 on the preliminary exceptions in the Phosphorus Lands case in Nauru (Nauru v. Australia) in commentary on the consequences for El Salvador (third state) deriving from the 1986 judgment on military and paramilitary activities in Nicaragua and against Nicaragua (Nicaragua v. United States), in ICJ Reports, 1992, par. 333. As recalled, the United States had tried to justify the use of force by claiming to have acted in legitimate defense to protect El Salvador in the thesis victim in turn supporting Nicaragua's internal insurrection. Judge Schwebel critised that: "if the United States were to comply with the judgment of the Court, it would cease to act in what, with the result that the latter's government, far from having its interests conserved by the force of art. 59, could fall before the onslaught of the insurrection so significantly supported by Nicaragua (...)". For further analysis see also: I. VENZKE, The role of International Courts as interpreters and developers of the law: working out the juris generative practice of interpretation, in Loyola of Los Angeles International & Comparative Law Review, 34, 2011, pp. 100ss.

[185]Case Concerning Immunities and Criminal Proceedings, (Equatorial Guinea v. France), Preliminary Objections, [2018], Judgment, par. 59.

[186]Case Concerning Immunities and Criminal Proceedings, Preliminary Objections of the French Republic, par. 77.

[187]Case Concerning Immunities and Criminal Proceedings, op. cit., par. 87.

[188]Case Concerning Immunities and Criminal Proceedings, op. cit., par. 141

[189]Case Concerning Immunities and Criminal Proceedings, op. cit., par. 151.

[190]Case Concerning Immunities and Criminal Proceedings, op. cit., par. 146.

[191]Case Concerning Immunities and Criminal Proceedings, op. cit., par. 150. See also the Dissenting Opinion of Judge Donoghue, par. 15 and 18.

[192]Case Concerning Immunities and Criminal Proceedings, op. cit., par. 151.

Polish Upper Silesia in order to better connect the above claims to the fact that the rejection of these claims took place due to a lack of sufficient evidence.

19.(Follows) Other cases

In the application of the Convention of 1902 governing the guardianship of infants case[193] judge Spender: "(...) referred to the case of using state legislation to avoid obligations arising from an international treaty. He judged that in this case the Swedish legislation was not incompatible with the Infants Convention 1902, but commented that if in a certain case it is proved that the legislation of a State is being used/invoked in bad faith, "an entirely different view would arise" (...)"[194].

In the Gabčíkovo-Nagymaros Project case, judge Weeramantry: "(...) made an interesting reference to abuse of right in his separate opinion, in the context of his position that sustainable development is part of modern international law. He referred to abuse of rights as one of the "well-established areas of international law"(...)"[195]. In the same case, judge Parra-Aranguren, referring to his dissenting opinion: "(...) on Slovakia's obligation to compensate Hungary, expressed the opinion that the former does not owe compensation, unless an obvious abuse of right has taken place on her part, which is clearly demonstrated (...)"[196].

Implicit recognition for abuse of right has also been referred to in the Court's decision in Rights of United States Nationals in Morocco case, in which the Court referred to the exercise of state powers reasonably and in good faith[197].

20.Concluding remarks

The "doctrine" of the prohibition of abusive exercise of rights is inspired and stems from a purely social conception of the functioning of rights, which subjects them to constant judicial control and implies "(...) the refusal to accept the rigid conception of international law and law in general, as it is attributed by the maxim "neminem laedit qui suo jure utitur"

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[193]Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden) [1958] ICJ Reports 1958 55. B.O. ILLUYOMADE, Scope and content of a complaint of abuse of right in international law, op. cit., pp. 47, 64.

[194]Application of the Convention of 1902 governing the Guardianship of Infants, op. cit., Judgment, 55, Separate Opinion of Judge Spender, 120.

[195]ICJ, GabCikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ Reports 1997, par. 7. See also, in the same direction, the remarks expressed, on the sidelines of the sentence on the Gabćíkovo Nagymaros Project case (Hungary/Slovakia), by Judge Weeramantry. In his separate opinion, (Separate opinion of Vice President Weeramantry, Project Gabčíkovo Nagymaros (Hungary/Slovakia), judgment, 25 September 1997, ICJ Reports 1997, par. 118): "(…) [W]e have entered an era in which international law subserves not only the interests of individual states, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating states, international law will need to look beyond procedural rules fashioned for purely inter partes litigation (...)".

[196]See also in argument: J.M. THOUVENIN, La descente de la cour sur les lieux dans l'affaire relative au projet Gabcikjovo-Nagymaros, in Annuaire Français de Droit International, 43, 1997, pp. 334ss. F. MEADOWS, The first site visit by the International Court of Justice, in Leiden Journal of International Law, 11, 1998, pp. 604ss.

[197]ICJ, Rights of United States Nationals in Morocco (France v. United States of America) ICJ Reports, 1952, 212.

(...)"[198]. The abuse of a right is based on the existence of freedom in the exercise of a right[199].
The doctrine highlights the issue of the vagueness of its content, as the abuse of right can be a particularly useful tool, through which the law penetrates the envelope of legal formalism and meets reality, rectius the deed[200].
The fundamental problem that arises when examining whether an abusive exercise of a right has taken place is that of proof[201]. As the Court pointed out already in 1932, in its decision on the Free Zones of Upper Savoy and the District of Gex case, an abuse of right cannot be assumed by the Court[202].
The abusive exercise of a right by the Court has not taken real "form" in international justice[203]. Despite the "shades" that the reference to it has received in the decisions and opinions of the Court, as reflected in the dicta or in individual judges' opinions[204], the positive statements of the Court: "(...) are either made when they are not critical to the judgment on the cases, whether they are general warnings against the abusive exercise of rights in general, without subjecting the circumstances of the case to this (...)"[205].
The abuse of rights in international law goes to the core of the issue of considering state sovereignty and with the rights derived from sovereignty[206]. The scope of the state's discretion arising from it is defined -and limited- by rules and principles[207].
Abuse of rights is one of the principles for the development of international law with an influence that will fundamentally modify the character of international law, acting as a tool to control the way in which States exercise their competences and present themselves internationally to project their claims. These are authorities which do not derive their normative force from traditional state practice and opinio juris or treaty law and which can exercise such influence. Positive claims before international judicial bodies will contribute to the adoption of specific rules for examining them, which in turn will lead in the long run to the emergence of a relevant customary rule. It has been argued that the abuse of right cannot play such a role as its individual application (on a case by case basis) cannot influence the law[208].
The "position" of the abuse of rights in international law further affects the "legal-productive" role of the Court. Specifically, Lauterpacht claims: "(...) only at an early stage of the development of law does society allow the uncritical exercise of rights, without taking into account the social consequences of this exercise. The "doctrine" of the abuse of right

[198]A. KISS, Abuse of rights, op. cit.
[199]G.D.S. TAYLOR, The content of the rule against abuse of rights in international law, op. cit., pp. 323, 353ss.
[200]N. LIPARI, On abuse of rights and judicial creativity, op. cit.,
[201]G.D.S. TAYLOR, The content of the rule against abuse of rights in international law, op. cit., pp. 31ss.
[202]"an abuse cannot be presumed by the Court", Case of the Free Zones of Upper Savoy and the District of Gex, (France v. Switzerland), Judgment of [1932], PCIJ, Report Series, A/B No. 46, 167. Kiss, Abuse of rights, op. cit.
[203]H. THIRLWAY, The law and procedure of the International Court of Justice: Fifty years of jurisprudence, Oxford University Press, 2013, pp. 24ss.
[204]Corfu Channel case ICJ Reports 1949, 4, Individual Opinion of Judge Alvarez, 48.
[205]B.O. ILLUYOMADE, Scope and content of a complaint of abuse of right in international law, op. cit., pp. 65ss.
[206]Island of Palmas case, (Netherlands, USA) [1928], Reports of International Arbitral Awards 1928 Vol. II, 838-839
[207]Mendis-United Nations/Nippon Foundation Fellow 2006, "Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamuduram Ship Channel Project"
[208]C. FOCARELLI, International law as social construct: The struggle for global justice, Oxford University Press, 2012, pp. 323.

carries extraordinary possibilities and significant power of a legal-productive nature in the hands of judges[209] (…) this power is of particular importance[210] given that there is no central legislative power in international law (…)"[211].
The question that is raised concerns why the States still invoke the abuse of power and the Court has not explicitly ruled on the specific issue. The "tendency" of States to present a relevant claim, when they had done the same in a similar case before another international judicial body, is one of the main justifications for using the argument of abuse of rights, as well as that what the Court is expected to judge is not so much whether a State has abused a given right, as long as the right does not extend to actions committed in its name. States will continue to "persist" in making allegations of abuse of a right, while the Court judges not in the context of examining the exercise of rights but by recognizing or denying the existence of a given right[212]. The jurisprudence presented so far demonstrates that the international judicial bodies, including the Court, have in several cases considered the manner of exercising a right, the existence of which was not disputed. Despite its growing appeals from the party States, the concept of abuse of right, as a general principle, is reflected in particular in the opinions of the judges who decided, while in the Court's own decisions they are "nuggets" of recognition indirectly and as general guidelines, in those cases where there is no clear evidence of its application.
The "proper time" of the Court's application of the abuse of right is clearly seen as referred to in 1952 in the context of the Anglo-Iranian Oil Company case by judge Alvarez: "(...) exhorting its members to recognize and apply the "principle of abuse of right" has not been introduced (…)". In this context, Reuter's opinion is confirmed that: "(...) the decisions of the ICJ refer to the concept of abuse of right when they are not going to apply it in a certain case, while when it would be possible to apply it or in fact they examine the implementation, they avoid mentioning it (…)"[213].

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[209]H. LAUTERPACHT, The development of international law by the International Court, Cambridge University Press, 1982, pp. 164ss.
[210]H. LAUTERPACHT, The development of international law by the International Court, op. cit., pag. 225. "judicial law-making is of special importance(…)"
[211]H. LAUTERPACHT, The development of international law by the International Court, op. cit.
[212]C. FOCARELLI, International law as social construct: The struggle for global justice, op. cit., pp. 323ss.
[213]Anglo-Iranian Oil Co. case, op. cit., Dissenting Opinion of Judge Alvarez, par. 129. P. REUTER, Principes de droit international public, op. cit.

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