THE UNRULY NOTION OF ABUSE OF RIGHTS

Everyone condemns what they perceive as 'abuse of rights', and some would elevate it to a general principle of law. But the notion seldom suffices to be applied as a rule of decision. When adjudicators purport to do so, they expose themselves to charges of unpredictability, if not arbitrariness. After examining the dissimilar origins and justification of the notion in national and international doctrine, and the difficulty of its application in both comparative and international law, this book concludes that except when given context as part of a *lex specialis*, it is too nebulous to serve as a general principle of international law.

JAN PAULSSON is Emeritus Professor at the School of Law of the University of Miami and a former Centennial Professor at the London School of Economics. He has served as President of the London Court of International Arbitration, the International Council for Commercial Arbitration, and the World Bank Administrative Tribunal; and as a Vice-President of the ICC International Court of Arbitration. He is a Member of the Permanent Court of Arbitration in The Hague. He is the author of *The Idea of Arbitration* (2013) and *Denial of Justice in International Law* (2005).

THE UNRULY NOTION OF ABUSE OF RIGHTS

JAN PAULSSON
Three Crowns LLP

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108840699
DOI: 10.1017/9781108887229

First published 2020

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-84069-9 Hardback

For Marike and Samuel – two miracles in a single lifetime . . .

CONTENTS

FOREWORD: THE THESIS AND A CONFESSION

Anyone who has read Jean-Daniel Roulet's *Le caractère artificel de la théorie de l'abus de droit en droit international public* will wonder how the notion of the prohibition of abuse of right as a general principle survived its publication in 1958, five years after the appearance of Bin Cheng's famous *General Principles*. Cheng's book contained a chapter on good faith, which he indeed posited as a general principle. Its subtitle, appearing within parentheses, extended the discussion to what the author referred to modestly as the *theory* of abuse of right. Yet this is perhaps the single most important basis for the common belief that the notion is, in fact, a general principle. Roulet, a Swiss scholar who had pursued his graduate studies under Cheng in London, reached an emphatically negative conclusion: 'By reason of the primitive and often imprecise character of the rules of international law, the theory of abuse of right, itself characterised by considerable elasticitiy and imprecision, loses all utility in the context of international law.'

It is noteworthy that Cheng was invited to write the preface to Roulet's work, and even more important to note that Cheng was laudatory and indeed, in so many words, declined to take a position as to 'the place of the *theory* of abuse of right in international law'. (A more detailed discussion of the two authors' analysis of the subject appears in the part of Chapter 2 entitled 'Reading Bin Cheng Properly'.)

Yet Cheng continues to be cited as an authority for the proposition that abuse of right is a general principle, while *Le caractère artificiel* is largely forgotten. One reason is that Roulet abandoned the path of scholarship for a long and successful career at the World Bank, and did not spend time developing and defending his thesis. Another is simply that he wrote in French. In any event, countless lawyers have continued to invoke the notion of abuse of right in their pleadings. But when judges and arbitrators address the topic, it seems most often to explain why a particular fact pattern does *not* constitute an abuse of right, and so its existence tends to be posited in dicta rather than given effect by a holding.

But far more disturbing is the fact that it is also enlisted as a convenient way to justify an outcome that fails to find a basis in anything that resembles pre-existing criteria which can be considered as rules of decision. Thus the impetus of this book – to insist that the pretense of using a nebulous abstraction as the sole justification for a decision is the path to arbitrariness and disaffection for international law.

It is, of course, easy to agree that conduct amounting to the abuse of a right is wrong. But this does not help us decide anything, given the endless variety of opinions as to what constitutes abusive conduct. Is malice necessary, or is it enough to find disproportionality between the right asserted and the harm caused? Indeed, what is 'harm'? Could it not include the enforcement of ordinary contractual rights that have turned out to be disadvantageous to the respondent? What is one to make of a claim that a right is not being used for its intended purpose, if 'purpose' is inevitably left to the eye of the beholder? As we shall see (in Chapter 3), it takes no great effort to identify more than thirty competing formulations of abuse of right. If we are to know where we stand, it seems that abuse of right must be generated by a *lex specialis*, be it a statute or treaty, which defines abuse of the rights it creates by reference to identified criteria or explicitly accords adjudicatory discretion where it seems contextually indispensable.

Conceivably, in some ideal system, 'abuse of right' could operate as a free-standing rule of decision established by a rigorous and stable *jurisprudence constante*, needing no statute or treaty, but there seems to be no chance that this will occur at the international level. In truth, the judicial hesitations and contradictions within individual national legal systems hardly show much promise there either.

The thesis of this book is that the notion of abuse of right, whatever sympathy one may have for the idealistic impulses of its proponents, cannot be the foundation for a general principle of law or an acceptable rule of decision on the international plane. As an *analytical matter*, the conclusion that there has been an abuse of right is either redundant because the claimed right is in any event rejected by reference to other rules of decision, or else necessarily dealt with according to the personal preferences of the decision-maker. As *a matter of policy*, which is of particularly acute concern in the field of international law, decisions that amount to case-by-case rule-making by adjudicatory bodies may engender hostile reactions and weaken general adherence to the law.

The only place for the notion of abuse of right is therefore when a lawmaker determines that a certain type of right may generate temptations

that are difficult to foresee and define, therefore justifying an explicit *legislated* grant of adjudicatory discretion to decide based on either broad considerations or specific criteria. But when such discretion is granted, the general expression *abuse of right* adds nothing; anyone assigned authority to assess the contested exercise of a right on a discretionary basis will not need to be told to reject abuse.

Yet I must confess to having practiced and taught law for many years without questioning the status of abuse of right as a general principle of law. Nor, I must further admit and will now explain, was it my first-discovered blind spot.

More than two decades had passed since the end of my formal law studies (in the United States and France) when I began grappling with the notion of *denial of justice* as a member of the arbitral tribunal in a case usually referred to as *Azinian* v. *Mexico*.[1] It was not the only issue in the case; the legal authorities put before the tribunal were not exhaustive; the submissions by the parties exposed many difficulties. I was sufficiently familiar with the concept to know that non-lawyers, who frequently and with great fervour employ the term *denial of justice* when they comment on public affairs, generally misuse it as a synonym for *injustice* – to be freely enlisted as a criticism of any court decisions with which they strongly disagree. But when I was confronted with this concrete case, I came to see complexities that had never occurred to me before, which continued to puzzle me even after we had unanimously resolved the matter before us.

This experience motivated me to write a book called *Denial of Justice in International Law*. The present volume has a similar genesis.

Abuse of right turns out to be a more elusive subject. Indeed, it could be dismissed – and has been dismissed – as useless nonsense; only lawyers, it might be said, could find it a struggle to understand the idea that if you go beyond what you are allowed to do, you are not allowed to do it. To understand whether a right has evaporated by the transgression of its boundaries, it is surely better to be able to invoke autonomous rules that define the abusive conduct one wishes to discourage – like those that pertain to neighbourhood nuisance. Why would we need to say that people who play deafening music through the night in a residential area are 'abusing their rights' as homeowners?

[1] *Robert Azinian et al.* v. *The United Mexican States*, ICSID Case No. ARB(AF)/97/2, award, 1 November 1999, 5 *ICSID Reports* 269.

Here, too, my interest in the subject was piqued by a case that I was involved with as an arbitrator, often referred to as *Himpurna* v. *Indonesia*.[2] One of my colleagues on that tribunal joined me in concluding that the damages sought were excessive (1) insomuch as they related exclusively to lost profits to be gained under an infrastructural investment project yet to be commenced, given moreover the facts that (2) the arbitrators agreed unanimously to grant significant lost profits with respect to the investments actually made by the claimants and that (3) a worldwide economic crisis had created a situation in which further performance would have caused immense and certain losses to the respondent, as well as ever-greater hardship to the people of Indonesia. We wrote that 'abuse of right' was a general principle of law (Indonesian law was applicable, and my colleague in the majority was a retired judge of the Supreme Court of Indonesia) and that to seek the full enforcement of contractual rights under these circumstances would be abusive. The dissenter succinctly expressed his failure to understand how reliance on a perfectly lawful contract could be abusive. (Some further observations about *Himpurna* may be found in Chapter 4.)

In the two following decades, I have suffered no qualms about the outcome in that case. A significant feature of the contracts in question was a provision to the effect that 'the Tribunal need not be bound by strict rules of law' and the arbitrators were authorised to use their discretion as to the 'correct and just enforcement of this agreement'. Yet I am now of a different mind as to the soundness of our unnecessary invocation of the notion of abuse of right. I may perhaps say in mitigation that arbitrators operate under the constraints of the record before them and of the need (in most cases) for the agreement of at least two members of the tribunal. At any rate, I developed an abiding curiosity about the concept of abuse of right and began taking notes for what has become this volume. I have come to recant my assumption in *Himpurna* that the notion can claim a place as a general principle of law – as opposed to a pithy abstraction enlisted to justify an outcome.

This book makes no pretence of being a systematic exposition of comparative law (a field in which I am but a modest amateur). It is concerned with broader concepts. Examples from national legal systems are used as illustrations, without worrying whether they are consonant

[2] *Himpurna California Energy Ltd.* v. *Republic of Indonesia*, interim award, 26 September 1999; final award, 16 October 1999; extracts in 25 *ICCA Yearbook Commercial Arbitration* (2000), 109, 186.

with current jurisprudence or legislation. Yet these illustrations are not fictional, and that is important because 'general principles of law', in order to be recognised as a source of international law, must be derived from *common* norms established by national legal systems. The notion of abuse of right fails in this respect as a result of its heterogeneity and indeterminateness – powerful evidence that it does not merit recognition as an autonomous category of breach of international law.