The Kaplan Lecture 2020 - Omnipotence Fantasies

By Professor Jan Paulsson

One of the best-known American humorists was James Thurber, and the best-known of his short-stories, published in 1939, was "The Secret Life of Walter Mitty". The protagonist was an inconsequential man living an uneventful life, for which he compensated by daydreaming about imaginary exploits, as a famous surgeon who succeeds with miraculous operations, a fighter pilot of unmatched daring and success, an intrepid spy who saves his country -- and so forth.

I expect that many of us are from time to time gripped by omnipotence fantasies. They are probably quite revealing. I'd like to know about yours. But I suppose you'll only reveal them if I tell you my own, and … that will never happen.

This is a lecture about how arbitrators decide international disputes. Can we take as a starting point that arbitrators are expected, unless explicitly given greater authority, to operate within the constraints of applicable law. They are not omnipotent. The expression "Palm tree justice" is pejorative. One dictionary definition of palm tree justice speaks of it as "an approach to justice that is entirely discretionary and transcends legal rights or precedent". It will not do in our ecosystem. Too bad for the Walter Mitty who might be lurking in the dreams of international arbitrators. But I have a strong suspicion that those who dispensed justice in this fashion in ancient times were in fact obeyed more often because they had power, not because they were wise, and when praises were sung to them on account of their wisdom this was less often because of sincere trust than because it seemed advisable to flatter them.

I will not today engage in a general disquisition on omnipotence fantasies, but rather a reflection on a specific manifestation of this disorder – namely the use of catch phrases like "legitimate expectations" and "proportionality" as though they are rules of decision -- and thus sufficient to establish whether a claim of legal entitlement is or is not well founded.

They are not sufficient. In 1905, the immortal Justice Oliver Wendell Holmes wrote this in his famous dissent in a case called *Lochner v New York:* "general principles do not decide concrete cases."

I have often thought of that observation, and was therefore riveted when I came upon a quotation from one of Holmes's letters to his friend Harold Laski, the London School of Economics professor and one-time chairman of the English Labour Party. In this letter, written 15 years after *Lochner v New York*, Holmes wrote that in deliberations with his fellow Supreme Court Justices, he would declare that "no case can be settled by general propositions … I will admit any general proposition you like and decide the case either way."

So if we remain at this level of generality, we may as well sit under the palm tree. And since parties to international arbitration do not accept absolute arbitral power, decisions that pretend to be commanded by the invocation of such general propositions will be castigated as arbitrary.

I have selected a single general proposition to make my demonstration, namely the prohibition of "abuse of right". Just as everyone favours respect for legitimate expectations and proportionality, so everyone favours the condemnation of abuse of rights. But this does not get us anywhere. The words themselves presume a conclusion, and that is useless; it simply cannot provide

a rule of decision. Who is in favour of abuse? No one. Who is in favour of unkindness? No one. But is there a legal rule that we must be kind? When a court or tribunal is faced with a claim under a contract which has been affected by the increased cost of raw materials, is it OK to declare that the plaintiff is unkind, or is abusing his right, because he is seeking the benefit of a contract under which the other party will lose money? Are we not back under the palm tree?

I have thought for years about the concept of abuse of rights and collected cases and commentary which I have come across here and there. Finally I put pen to paper and wrote a little book which has just come out. Its title is *The Unruly Notion of Abuse of Rights*. You would be absolutely right if the adjective "unruly" strikes you as an echo of the hoary case of *Richardson v Melish* where an English judge in 1824 unforgettably observed that public policy is like an unruly horse which, if you decide to jump on it, might head off in unimaginable and unwanted directions, and thus lead you, in his words, away "from sound law".

International arbitrators of course frequently apply national law, and some national laws more or less authoritatively recognize a principle which they refer to as abuse of right or misuse of the law. It may therefore become necessary to come to a more granular understanding of what is meant by the corresponding words under the specific national law. Good luck with that; my book will not help you. In fact to the contrary. Chapter 3 is called "A Cacophony of Criteria" and it distills no less than 34 formulations that try to give specificity to the notion. Their inconsistencies cannot be reconciled into a single coherent rule. It makes me think of a massive pileup of automobiles, drunken drivers at the wheel having speeded recklessly on a crowded highway which has just been covered by black ice.

One category of formulations focusses on detriment to the defendant. It is said that conduct constitutes an abuse of right if:-

- its sole purpose is to cause harm (a subjective criterion)

- or its 'sole possible effect is causing injury to another' (an objective criterion), or yet again if

- its 'only effect is to cause harm to another, without benefit to the owner', or if

- it is done maliciously so as to injure others (without reference to
other purposes), or if

- its preponderant purpose is to cause harm (a subjective criterion), or if

- it causes more harm to others than benefit to one's self (an objective criterion), or if

- its sole purpose is to cause harm (a subjective criterion), or if

- its 'sole possible effect is causing injury to another' (an objective criterion), or

- its 'only effect is to cause harm to another, without benefit to the owner'

- it is done maliciously so as to injure others (without reference to
other purposes),

- an injury to another which cannot be justified by a legitimate consideration of its own advantage'

- its preponderant purpose is to cause harm (a subjective criterion),

- it causes more harm to others than benefit to one's self (an objective criterion),

Another strand of formulations focusses on disregard of the "proposed" purposes of a right. Thus, one abuses a right if one exercises it for another purpose than for which it is granted. This notion is also expressed in a variety of irreconcilable ways.

What I did try to do is to appraise the notion that "abuse of rights" should be accepted at the *international level* as a general principle of law. Given the heterogeneity of national laws, one can of course hardly begin with a presumption in its favour.

Article 38(1) of the Statute of the ICJ defines four sources of international law. In third place, we find "general principles of law recognized by civilized nations". Obviously there is no place for principles of law found randomly under some national laws. The pedigree of such principles needs to be established by something far more serious than the familiarity of stray expressions. States tend to resist claims that they, notwithstanding their sovereignty, must obey rules made without their consent. This may explain why "general principles" is very much a poor cousin as a source of international law; defendant states tend to say "show me a treaty we have signed" – and judges applying international law prefer to base their decisions precisely on treaties lest their legitimacy be questioned politically.

The French scholar Alain Pellet, who has probably appeared before the ICJ more than anyone else as an advocate and knows what he is talking about, reached the following interesting conclusion in the 116-page essay he devoted to Article 38 in the compendious Oxford Commentary on the ICJ Statute:

> The Court itself has referred to Art. 38, para. 1(c) with an extreme parsimony. If the present author is not mistaken, this provision has been expressly mentioned only four times in the entire case law of the Court since 1922 and each time it has been ruled out for one reason or another.

Pellet went on to write that 'the principles of Art. 38, para(1)(c) . . . provide general guidelines." Guidelines are hardly rules of decision. This explains the extreme parsimony, showed once more not long ago when the ICJ in the *Bolivia v. Chile* case declined to apply the notion of legitimate expectations as a foundation for its decision.

Bin Cheng's famous book *General Principles of Law as Applied by International Courts and Tribunals*, published in 1953, was apparently extraordinarily well timed and has remained continuously in print. It is not in essence an analytical work, but rather a distillation of cases in which the author sought to identify a number of 'general principles' applied by international adjudicatory bodies.

'Abuse of rights' is indeed there, but only as a subtitle of chapter 4, which is actually called 'Good Faith in the Exercise of Rights'. The two notions overlap but are neither synonyms nor mirror images. The good faith performance of contracts is known, it seems, to all systems of law, although under a great variety of terms; the Germans require conduct *nach Treu und Glaube* and the English speak of "implied terms". The famous Article 1134 of the

Napoleonic Civil Code, copied all over Latin America and Francophone Africa, requires that contracts *doivent être exécutés de bonne foi* (should be performed in good faith).

This means, notably, as Article 1135 makes clear, that contracts require not only the performance of explicitly defined obligations, but also what is called for 'by equity, usage, or law'. *Abus de droit* is nowhere to be seen. When the French speak of 'abusive clauses' in reference to Article 1135, they condemn things like unusual (if not illegal) limitation of liability clauses. In other words, the point is to secure enforcement of contractual duties, not to define claims of contractual rights as abusive. Abuse of rights is often referred to by non-French lawyers in French, as *abus de droit*, as though the concept has been embraced in French law. To the contrary, one of the great expositors of the Civil Code, Marcel Planiol, famously wrote in his massive treatise this: "… right ends where the abuse commences, and there can be no 'abusive use' of any right, since the same act cannot at once be in conformity with and contrary to the law." That was in his 1902 edition. He added in his 1907 edition that "if I use my right, my act is licit; and when it is illicit it is because I exceed my right and act without right." Of course this did not stop French lawyers from clamoring about abuse. But the attempt to include the prohibition of abus de droit in the *Code* Civil failed at the turn of the century 120 years ago, and failed again in the middle of the 20th.

We are still at a level of considerable generality. But we can readily see that the good faith performance of agreements is a requirement of positive obligation, whereas the notion of 'abuse of rights' is one of a restriction of rights. It is well worth noting that the subtitle of Cheng's chapter 4 is in fact this: '(The Theory of Abuse of Rights)'; its parenthetical appearance confirms its tentative status.

The little section devoted to abuse of right is disappointing. One cannot fault the author for failing to describe things he has not seen (i.e., outcomes explicable only by recognition of abuse of right as a

rule of decision). One might regret his failure to develop concrete criteria to help lawyers evaluate whether fact patterns may be said to reveal the abuse of rights. Indeed, the qualification contained in its very title suggests a failure to achieve the self-assigned task assigned of the author 'as Applied by International Tribunals'.

In sum, the status of the 'theory' or 'doctrine' of abuse of right as a general principle seems dubious at the outset. Established general principles have solid foundations in the major national legal systems of law. How otherwise could they be deemed of general applicability in the international community? Abuse of right, on the other hand, is wholly unfamiliar to common lawyers, who have difficulty understanding how a right can be abused. Either a party has a right or not. If it engages in abusive conduct, it should be unable to establish the right. To reach this sensible result, alternative expressions such as 'unclean hands', 'bad faith', 'waiver', or 'unconscionable bargains' may as well be used. In the context of agreements such as contracts or treaties, an even more prevalent and straightforward way of reaching the same result is to interpret the text so that any right it creates does not extend to such circumstances. I am unaware of any clamours for the common law to fill a supposed void by adopting the concept of 'abuse of right'.

When a continental (Swiss) scholar, Jean-David Roulet, writing in French in 1958, as it were on the heels of Cheng and fully familiar with his book, published an entire monograph on 'la théorie' of abuse of right in international law, his very title indicated considerable skepticism – *Le caractère artificiel de la théorie de l'abus de droit en droit international public*. His conclusion was a clear rejection of abuse of right as a principle of international law. These are, in my translation, the final passages of his monograph:

> By reason of the primitive and often imprecise character of the rules of international law, the theory of abuse of right, which is already

> characterized by considerable elasticity and imprecision, loses all utility in the context of international law. To remedy imprecision by a new imprecision cannot lead to positive results. Another task, admittedly more demanding, is presented to international lawyers: conscious of the imperfections of the system, practitioners and theoreticians should make efforts to develop the existing regulations, and to render it more precise. But the principle of abuse of right would not be of any use to them, and, in the end, I remain persuaded that without the unfortunate and ambiguous expression abuse of right, this notion, which even today enjoys excessive and undeserved popularity, would never have seen the light of day.

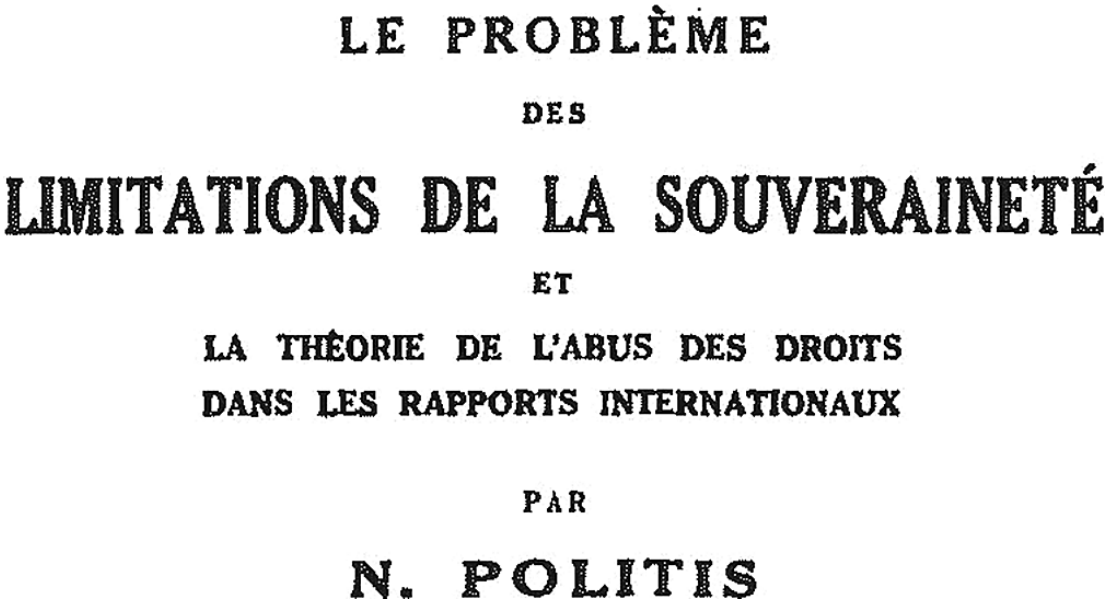
It is important to observe that Cheng did not reject Roulet's thesis. To the contrary, he wrote an admiring foreword to the book in which he explicitly declined to take a position as to 'the place of the theory of abuse of rights in international law.'

So what about international law? If the French Parliament was unimpressed by the entreaties to incorporate abus de droit in the Civil Code, what about the early attempts to make it come alive in *international* law proper. If no foundation can be laid for it as the expression of a grand consensus of national law, how about its sui generis blossoming on the international stage.

The starting point for the quest to assimilate the notion of abuse of right into international law is widely recognised, namely the famous Politis Lectures, published in 1925 under the title *Le problème des limitations de la souverainité et la théorie de l'abus de droit dans les rapports*

internationaux. They became an enduring lodestar for the invocation of abuse of right with the goal of neutralising what Politis perceived as the excesses of state sovereignty.

Nicolas Politis had studied in France and held law professorships at the Universities of Aix-en-Provence and Paris. He became Greece's Foreign Minister in 1916 as a member of the Venizélos government, and represented Greece in the Paris Peace Conference in 1919. Profoundly marked not only by the obscene carnage of World War I, but also by the
devastating consequences of the Greco-Turkish war (1919–20), Politis was instrumental in the creation of the Hague Academy of International Law. The title of his famous Lectures, published in 1925, displays a subtitle in much smaller letters.. It is worth reproducing it here (as a photocopy of the front cover):


LE PROBLÈME

DES

LIMITATIONS DE LA SOUVERAINETÉ

ET

LA THÉORIE DE L'ABUS DES DROITS
DANS LES RAPPORTS INTERNATIONAUX

PAR

N. POLITIS

THE PROBLEM OF THELIMITATIONS OF SOVEREIGNTY AND

THE THEORY OF ABUS DE DROIT IN INTERNATIONAL RELATIONS BY

N. POLITIS

Make no mistake: Politis was not seeking to establish the existence of a legal proposition, but to promote the political objective of neutralising the excesses of state sovereignty. He suggested that 'the theory' of abus de droit might be used as a means to that end. Lest there be any doubt, these were his radical words on pages 18–19: La souveraineté doit être réservée au droit et, pour plus tard, à la communauté internationale. Elle ne peut plus appartenir aux Etats. ('Sovereignty should be reserved for the law and, in due course, for the international community. It can no longer belong to States.')

Looking back three decades later, in the aftermath of another world war, Georg Schwarzenberger addressed the Grotius Society in London on the topic 'Uses and Abuses of the "Abuse of Rights" in International Law'. His first words were to refer to Politis's 'famous course of lectures'. This was Schwarzenberger's second sentence: 'It did not take long before what Politis had modestly termed a theory – and what, until confirmed by the necessary evidence, it might be still more preferable to call a hypothesis – was described in a somewhat bewildering tempo, first as a doctrine and, then, a principle of international law.'

As an example of this 'bewildering tempo', Schwarzenberger cited the changing description, in successive editions of Oppenheimer's International Law, of a particular issue: the rule against diversion of traversing rivers. In the second edition (1912), the duty of noninterference - 'is treated as based on a rule of international law to this effect'. This remained so until the fifth edition (1937), without seeking to link it to the 'still controversial doctrine' of abuse of right, but from the sixth edition (1947) onward, the duty was said

to be based on the 'principle of abuse of rights', even though that concept was described as a 'still controversial doctrine'.

Hersch Lauterpacht, like Schwarzenberger a permanent exile in England (the former from East Galicia, in what is now Ukraine; the latter arriving a decade later in 1933 from Germany), in the meantime had become the editor of the Oppenheim treatise. He is frequently associated with Politis as the second prominent proponent of bestowing normative effect on the concept of abuse of right (and having the advantage of writing in English). A giant in the field of international law, Lauterpacht rose to great distinction as an academic at the London School of Economics and the University of Cambridge, and later still as a Judge and President of the International Court of Justice (1955–60). One of his early works, The Function of International Law in the International Community (1933), contains a twenty-page chapter 14, entitled 'The Doctrine of Abuse of Rights as an Instrument of Change', which commences with this sentence: 'Although as yet unknown in text-books of international law, the doctrine of abuse of right has recently attracted the attention of international lawyers.' This passage ends with a footnote in which Politis is the dominant reference.

Like Politis, Lauterpacht was not seeking to elucidate the concept of abuse of right, but to enlist the theory, as the very title of his chapter revealed, as an 'instrument of change'. There is an abuse of right, he wrote in the first paragraph, 'each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right'.

The audaciousness of the claim that 'legally recognized' rights should be displaced whenever they consist of a 'less important ... individual right' of single states that might harm 'the general interest

of the community' becomes clear when one considers who should make that determination, as to which Lauterpacht's answer was clear: judges.

Moreover, like Politis, Lauterpacht perceived that the right whose abuse is in question was nothing less than sovereignty itself. He quoted Hyde with approval to the effect that 'the society of nations may at any time conclude that acts which an individual State was previously deemed to possess to commit without external interference, are so injurious to the world at large as to justify the imposition of fresh restrictions'.

There can be no doubt that his book, begun when he had just reached the age of thirty, was one of towering ambition, and has influenced successive generations until today. It constituted a broad attack on the conventional notion that international law was inapt to deal with 'non- justiciable' issues with respect to which state sovereignty could not be questioned.

This is how Lauterpacht saw the potential role of the prohibition of abuse of right:

> 'in international society, in which there is no authoritative legislative machinery adapting the law to changed conditions, there may be both frequent occasion and imperative necessity for the judicial creation of new torts through the express or implied recognition of a principle postulating the prohibition of abuse of rights'.

His goal, as announced in the beginning of the chapter, may have been lofty, but Lauterpacht's attempt in the remaining pages to find

support in positive law for abuse of right as such an 'instrument of change' was unimpressive.

He began with the 'practice of international tribunals', where he was able to do little more than to observe their acknowledgment of the notion that rights are lost if invoked to make extreme claims. He quoted caveats to that effect expressed by the Permanent Court of International Justice in cases where, in fact, there was no finding of abuse of right. He also referred to cases involving the sovereign rights of states to expel aliens from their territory, which some international tribunals had said could trigger responsibility under international law in the event the foreigner had been allowed entry and no justification was given for the expulsion. Why this must be viewed as an abuse of right is unclear, since the more straightforward proposition is that the act of admission of aliens may be associated with some obligations as to their treatment. The same observation may be made with respect to the right to close ports to foreign commerce, which were viewed as associated with the duty under international law 'to give notice to those regularly admitted'.

At any rate, Lauterpacht was transparent about his embrace of concepts of what he deemed to be natural law as 'a lever of progress'. He later wrote: 'The law of nature has been rightly exposed to the charge of vagueness and arbitrariness. But the uncertainty of the "higher law" is preferable to the arbitrariness and insolence of naked force.'

This was plainly not an attempt to state the law but a call to arms to change it. It can hardly be said, as we shall see, that the international community of states showed much eagerness to accept the suggested expansion of adjudicatory authority.

The attempt to elevate the notion of abuse of right to the status of an internationally recognised general principle of law faltered in two stages. First came the simple recognition that the project could not generate a consensus in its favour. Realists thereafter retreated to a more modest strategy – namely, to promote the objective of curtailing excessive claims of right as a policy objective by promoting specific treaty commitments having that effect, which was a very different objective than seeking acceptance of a general commanding principle.

Responding to Lauterpacht's thesis that the indeterminateness of 'higher law' is preferable to 'the arbitrariness of the insolence of naked power', Georg Schwarzenberger – Lauterpacht's academic adversary in more ways than one – was harsh and hostile. In a Harvard Law Review article (1946) where he criticised the approach taken by Lauterpacht in Oppenheim's International Law, he had railed against those who "appear to pick and choose from natural and positive law exactly as they think fit . . . [deciding] with an air of infallibility what God and Reason ordain, and state practice is usually more honored by neglect than by systematic study". Mutual quotation clubs and what Bentham called 'ipse-dixitism' became rampant in the treatment of international law.

Specifically with respect to the notion of abuse of rights, no less a figure
than Gerald Fitzmaurice affirmed that 'the doctrine cannot be regarded
as definitively established, or as constituting an accepted principle of international law'. J. L. Brierly's classic textbook The Law of Nations, the 6th edition of which was edited by Humphrey Waldock in 1963, did not mention the expression.

As for Schwarzenberger (who naturally agreed with Fitzmaurice), his sustained attack on the 'hypothesis' of abuse of rights in his aforementioned Grotius Society speech was sarcastic:

> Why engage in painstaking research work if the desired result can be attained by way of asserting that the prohibition of abuse of rights is a general principle of law recognized by civilized nations? . . . The apparent shortcut of attempting to prove that the prohibition of abuse of rights is a general principle . . . proves to be full of snares. . . . Yet, be it assumed that, in a particular system of municipal law, the notion of the prohibition of abuse of rights has exercised a formative influence on the creation of actual rules of law. This would hardly constitute evidence that such an evolutionary principle behind the law was a regulative principle de lege lata, and an overriding principle in the bargain.

This is not the place for an account of Schwarzenberger's lengthy demonstration; the point is only to underline the controversial nature of the proposition that the notion of abuse of right could generate an acknowledged rule of decision. A few passages, among dozens, should suffice:

> Once it is examined critically within what confines it is really necessary to pray in aid the hypothesis of abuse of rights as a regulative factor, a surprising number of fields emerge in which this appears redundant or outright misleading. . . .

> [W]hen the operation of rules underlying the principle of sovereignty is excluded or limited by other rules of international law, this hypothesis [of abuse of right] is redundant. . . . Although the prohibition of abuse of rights is not the real reason of the illegality of the act in question, the illustration serves its appointed purpose of turning another piece of 'incontrovertible' evidence of the doctrine. ... Especially when alleged rights are exercised surreptitiously or deceitfully, the typical reason is that one of the facts which constituted one of the conditions of the exercise of a right does not actually exist. It, therefore, must be manufactured in order to take the act out of the operative field of another rule of international law. Again, it is redundant first to imagine the existence of a right and then to devise, like a deus ex machina, its abuse and the prohibition thereto. All that is required is to ignore the pretence and to deal with the case on its true facts. Then, the misrepresentation and the bad faith implicit in it are merely relevant in order to provide conclusive evidence that the case in question falls under the rule which it was the purpose of the façade erected to evade.

Bin Cheng himself, as must be emphasised at every turn to ensure that the wrong conclusion is not drawn from the fact that the passages relating to abuse of right appear in a book entitled General Principles, never endorsed the notion even as a principle, let alone as a rule of decision; there is to the contrary every reason to believe

that he shared Schwarzenberger's doubts (if not his vehemence). Cheng referred to abuse of right as a 'theory'. In so doing, he was faithful not only to Politis, but also to Schwarzenberger, who as seen remarked on Politis's prudence in this regard. In his Grotius Society speech, Schwarzenberger had complained that the reasoning of actual decisions of international courts and tribunals 'hardly bears out the hypothesis of a prohibition of abuse of rights, and that any true answer will depend on more painstaking forms of inductive research'.

Schwarzenberger's earlier Harvard article in 1947 was precisely entitled 'The Inductive Approach to International Law'. In that substantial essay, he excoriated what he called the 'eclectic approach to international law', whose practitioners 'appear to pick and choose from natural and positive law exactly as they think fit' and was unsparing of Lauterpacht's work in the Oppenheim treatise. He sought to 'call away from the dreamland of deductive speculation to the reality of hard work on raw material waiting for the workman' prepared to 'grapple seriously with the systematic presentation of the practice of individual states'. Schwarzenberger was, in fact, Cheng's mentor; he had suggested the subject of General Principles, supervised the study, and written the foreword. The second sentence of Cheng's introduction, on page one of the book, begins with the declaration 'The present work is an attempt to apply the inductive method', referring to Schwarzenberger's Harvard article. The nail in the coffin is this: Cheng's elogious preface to Roulet's book-length dismissal of abuse of right as a general principle was explicitly agnostic as to 'the place of the theory of abuse of rights in international law'.

Above all, the international community of states has never embraced the radical instrumentalist vision of abuse of rights advanced by Politis and Lauterpacht. The fact that idealistic scholarly writings are pleasing to other scholars does not count for

much when contradicted by the reality of state practice. There is little authority in the exhortations of what Schwarzenberger called 'mutual quotation clubs'.

The international community of states was not eager to accept the expansion of adjudicatory authority desired by Politis and Lauterpacht. As seen, both Politis and Lauterpacht were prudent in the characterisation of the concept of abuse of right and did not declare its prohibition to be a principle. This was left to their followers. But by the 1950s, faced with failure to secure this status, more realistic voices came to the fore.

Having encountered the persistence of serious doctrinal resistance, and even more adamant obduracy on the part of states, the realists saw that there was no way the concept could generate consensus in its favour and thereafter lowered their aim: to promote the notion of abuse of right as a consideration that might inspire even exclusively self-interested states to make voluntary accommodations, in particular by treaty. Unfortunately these realists have created considerable confusion because of their continued use of the expression abuse of right, even though they were not proposing an autonomous rule of decision, but rather a way of describing the effect of the kinds of international agreements they sought to encourage.

This realists' move crystallised in a book written by Alexandre Kiss – and in five words written by Suzanne Bastid in 1953. Kiss had emigrated from Hungary to France in 1947 at the age of twenty-two, and six years later published L'abus de droit en droit international, one of the most important studies of the subject, read and cited by all scholars who have paid sustained attention to the topic. This was Kiss's doctoral thesis, recognised immediately as a work of exceptional merit and published by the French Centre national de la recherche scientifique. Bastid, a formidable presence

among French scholars (and later to become the first woman to sit on the International Court of Justice, as an ad hoc judge in Libya v. Tunisia), had taken the young scholar under her wings and supervised his thesis.

In her glowing preface to his book, Bastid could not resist pointing out that the attempt to incorporate the notion of abus de droit into the international context revealed that the expression should not be 'taken literally', given that in this environment the search for principles have a different aim – namely to restrict the exercise of state authority (which she referred to as competences). This is what she wrote:

> Although the expression abus de droit is frequently used in a number of decisions applying international law, it should not be taken literally. Mr Kiss demonstrates very well that the subject in fact pertains to the conditions under which international law acknowledges the exercise of State authority; all authority implies duties to act as well as freedom of action.

Bastid praised Kiss for his meticulous identification of three forms of abuse of right, each being abuses of authority: acts of a state to interfere in the internal legal order of another state, détournement de pouvoir (misuse of power), and arbitrary acts of authority. She also acknowledged that the importance of a state's authority 'for maintaining its cohesion as an entity' and 'the absence of organized systematic control' provide explanations for 'the complexities and the contradictions of international practice'. She might as well have said that 'we are a long way from Politis's dream'.

Kiss himself harboured no illusions, using terms that Schwarzenberger would have applauded: 'until now the literature of international law has concerned itself more with deduction than demonstration, and the number of cases examined from this point of view is highly limited; in truth the point of view de lege ferenda has so far taken precedence over the study of precedents.' He referred to a' difficulty which we shall face at every step; is the position taken by a government contrary to a rule of international law, or is it rejected only because we deem it to be an excès de pouvoir or an abuse of right?'

What then to do? Kiss's answer was to explain how states might see the advantage of avoiding 'abusive' conduct by other states and therefore find it tolerable to accept limitations on their own authority. For this, of course, one needs no notion of 'abuse of rights' as an autonomous general principle, since the idea is to achieve the goal by negotiating treaties, at the highest level of the normative hierarchy of Article 38 of the Statute of the International Court of Justice. It would require no principle even if one existed – and that is why Bastid said, 'Do not take it literally.'

She was impressed enough by one of Kiss's examples of how this might work that she referred to it in her preface – namely, the authority given by the States who had formed the new European Coal and Steel Community to its Court of Justice, vesting power to sanction abuse of power and conduct (or failure to act) causing 'fundamental and persistent harm' to the economy of another state, and noted that even private enterprises would have standing to seize the court if affected by harmful state conduct. Kiss himself gave detailed and fascinating accounts of how the 'sovereign States' of the United States and the 'sovereign Cantons' of the Swiss Confederation could be ordered to conduct themselves as riparians so as not to harm their 'sovereign' neighbours.

But, of course, this presupposes prior agreement, in the particular instances just cited taking the solid form of constitutions of a permanent and existential nature that give plenary authority to a federal supreme court. From the perspective of the 1950s, the 'sovereign relations' among such confederated states, or among West European states, were immensely different from the relations among the sovereign states of the First, Second, and Third Worlds. And our present world community still does not resemble Switzerland.

The world community of states is, in sum, a different universe than that of private citizens of single, comprehensive legal systems testing the limits of rights bestowed upon them by sovereigns. We are considering the self-imposed restrictions on sovereigns when they act pursuant to self-declared authority. Such restrictions – now advancing, now retreating – may not evolve fast enough to satisfy us, in a fragmented international environment where the community and system are only aspirational. But it is what we have, and it works only in this modest and painstaking way.