

BOOK REVIEW

The Unruly Notion of Abuse of Rights, by Paulsson Jan. Published by Cambridge University Press (2020, pp xiii, 144)

Books written by leading practitioners occasionally tend to avoid taking clear positions on issues of real-life importance in the settlement of international disputes, particularly when published after 30 September 2013.¹ Jan Paulsson is not one of these authors, and *The Unruly Notion of Abuse of Rights* is not one of these books: the issue addressed is important and the position is clear. The ‘tool for digging, paring, or cutting ground, turf, etc., now usually consisting of a flattish rectangular iron blade socketed on a wooden handle which has a grip or cross-piece at the upper end, the whole being adapted for grasping with both hands while the blade is pressed into the ground with the foot’ is called by its proper name in the second page of the foreword²:

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 (p x) (emphasis in the original).

The thesis is developed in 8 brisk chapters over 144 pages. Paulsson first introduces the concepts, terminology (‘Matters of Nomenclature’), and pedigree, with a particularly close eye to (misreading of) Bin Cheng (‘An Idealistic but Troublesome Impulse’), and categorizes the great variety of ways in which abuse of rights has been

- 1 *CC/Devas (Mauritius) Ltd and Ors v India*, PCA Case no 2013-09, Decision on the Respondent’s Challenge to the Hon Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator, 30 September 2013 [60]–[65]. All URLs accessed on 1 February 2021.
- 2 ‘Spade, *n.*’ 1.a, Oxford English Dictionary.

expressed ('A Cacophony of Criteria'). He then considers the role that abuse of rights plays in domestic (civil) law ('A "Principle" with no Rules?') and international law ('The Challenge of Establishing Universal Principles'), squarely addressing the strongest academic argument in its favour in the latter setting ('The Politis/Lauterpacht Quest to Elevate Abuse of Right') as well as its unpromising reception in the international legal process ('Rejection and Retrenchment'). Paulsson concludes ('The Vanishing Prospect') by restating the main claim: abuse of rights is a concept familiar to civil lawyers but not accepted in public international law—nor should it, due to unpredictability costs and the danger of pushing international adjudicators (too far) into law-making and associated perceptions of arbitrariness and bias (pp 132–33). In short, as per the last two sentences of the book, 'the ever-denser international environment, characterised by concurrent, overlapping, and in and of themselves perfectly legitimate claims of rights that need to be reconciled on a solid, predictable basis' needs more law-making by the international law-makers, less a tapestry of adjudicatory musings on vague moral intuitions' (p 134).

There is little that I disagree with in the broader thrust of Paulsson's argument. It is indeed troubling to see some authorities waive aside public international law's sophisticated framework of sources, interpretation, and procedural safeguards as unhelpful with resolving what they perceive as utterly unique challenges, relying instead on common-sense platitudes from half-remembered undergraduate textbooks. Paulsson is right to be unimpressed, and his impatience for muddled thinking and sloppy drafting, even by the greatest of the great and good, makes the dissection of particular examples of faulty reasoning an enjoyable read. Take the devastating dismissal of *lex mercatoria*: '[a]lthough the debate was exhilarating and thought-provoking, it cannot be said that it won the day, or that many parties were prepared to stipulate to the applicability of *lex mercatoria* to their contracts—let alone that many arbitrators applied it on their own initiative' (p 110).³ Still, precisely because I am sympathetic to Paulsson's methodology, it is worth recalling that sometimes a purely formalist approach to the inquiry into whether moral and humanitarian ideals are clothed in legal form⁴ can miss the broader of systemic shifts in the international legal process, with catastrophic consequences for the adjudicators.⁵ In the remainder of the review I will therefore focus on four key aspects of Paulsson's argument, considering, first, methodological aspects of inquiry into general principles; secondly, an

3 The other great one-sentence destroyer of *lex mercatoria* is, of course, Judge Crawford: J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Hague Recueil* 19, 143 ('It is a law of and for professors, a *Buchrecht* reduced to a single book, based on the assumption that comparative law techniques can distil a true or real underlying common law — a sort of natural law without the benefit of divinity').

4 *South West Africa (Ethiopia v South Africa, Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6 [51] ('in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. . . . In each case the legal rights and obligations are those, and only those, provided for by the relevant texts, whatever these may be.').

5 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* CR 2019/20 (12 December 2019) 30 [3] ('That Judgment caused a scandal, it cast the [International] Court [of Justice] into a wilderness for nearly two decades') (Sands on behalf of the Gambia).

alternative way of posing the question; thirdly, the way how he deals with unfavourable dispute settlement practice; and fourthly, whether his argument is in line with the recent cases of the International Court of Justice (ICJ).

General principles of law are, of course, not the only source of international law capable of raising vexing questions. Still, debates on treaties will mostly be solved by reference to the classic 1969 Vienna Convention on the Law of Treaties (VCLT) and (its near echo in) the customary law of treaties, and customary law queries will be significantly assisted by the International Law Commission's (ILC) 2018 Conclusions on identification of customary international law, more recent but overall well-received by States.⁶ General principles of law, in contrast, as a topic are still in the early stages of consideration by the ILC,⁷ with debates within and without the Commission identifying areas of consensus but also significant uncertainties,⁸ so I am mindful of the need for caution in critiquing methodological approaches on the point—and in any event I am largely in agreement with the way how Paulsson approaches the topic. Still, two points could have been framed differently. The first relates to principles and time. Paulsson is, as always, upfront about where he stands: 'Examples from national legal systems are used as illustrations, without worrying whether they are consonant with current jurisprudence or legislation' (pp xii–xiii). I have some qualms about such an approach, mostly relating to, as it were, supply-side: even fundamental norms of domestic legal orders are not immanent but subject to political change, which such a-temporal arguments may miss. Consider, for example, a Lauterpachtian argument drawing upon similarities of approaches of mostly European domestic legal orders to formulate a general principle, which surely will be influenced by whether it draws upon, say, Russia and Germany of 1928 or 1908, 1938, 1948, or, indeed, 2018.⁹ The more general concern is that reliance upon principles shared since time immemorial will unduly prioritize the approaches of those States that have travelled through the last centuries with the fewest constitutional and political ruptures, and minimize the contribution of polities historically subject to foreign domination, particularly in the decolonized world.

My second caveat to Paulsson's argument relates to messiness. It may seem an odd reproach to have regarding his very clear claim but my concern is precisely that Paulsson is understating how messy the development of general principles usually is. Consider, as examples for the complexities of the international legal process, the making of estoppel and *res judicata*. Estoppel is a general principle of law that 'stems from the general requirement that States act in their mutual relations in good faith', builds upon but also departs in important respects from 'at least some forms of estoppel in municipal law', and 'its frequent invocation in international proceedings

6 GA Res 72/203 'Identification of customary international law' (20 December 2018) UN Doc A/RES/73/203, particularly materials at [3], fn 5; also *Resolute Forest Products Inc v Canada*, PCA Case no 2016-03, Second Submission of the US, 20 April 2020, nn 15–18.

7 See M Vázquez-Bermúdez, 'Second Report on General Principles of Law' (9 April 2020) UN Doc A/CN.4/741; Memorandum by the Secretariat, 'General principles of law' (12 May 2020) UN Doc A/CN.4/742.

8 M Paparinskis, 'Conclusions: General Principles and the Other Sources of International Law' in M Andenas, M Fitzmaurice, A Tanzi, and J Wouters (eds), *General Principles and the Coherence of International Law* (Brill 2019), 117–19.

9 H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1928).

has added definition to the scope of principle'.¹⁰ *Res judicata* 'has its origins in the general principles of law' but is now firmly established in the jurisprudence of international tribunals and therefore no longer framed by 'the not inconsiderable differences that exist between different national legal systems'.¹¹ Timing of transmutation is also contestable: *res judicata*, for example, was considered a general principle in 1927 and 1953 and a rule of international law in 1905 and 1941.¹² In short, such general principles work in mysterious ways. It is probably unhelpful to be overly prescriptive regarding the required ingredients for transmuting broader structural assumptions, domestic similarities, and unpredictable vagaries of invocation in particular disputes into a rule of international law. Before considering the limited judicial practice, it may be better to step back and ask a broader question: if abuse of rights were a rule of international law, in what settings over the last century would one expect to find it?

It seems to me that abuse of rights is not the type of rule that would easily lend itself to being generated by means of inter-State contestation but could be plausibly discussed in a multilateral setting. In the Vienna Conference on the Law of Treaties, a number of delegations did refer to abuse of rights in general terms, eg Nepal as an example of a general principle not peculiar to international law¹³ and Mexico regarding coercion in concluding a treaty.¹⁴ But the only specific suggestion was made by Spain regarding the provision eventually adopted as Article 60 of the VCLT (Termination or suspension of the operation of a treaty as a consequence of its breach), suggesting abuse of rights as an alternative ground:

it [is] essential to transfer to the international plane the idea of abuse of rights. That idea was inseparable from the notion of good faith, which had already prevented so many abuses in internal law. The *Tacna-Arica Arbitration* exemplified the view reproduced in paragraph (4) of the [1996 ILC] commentary [to the Draft articles on the law treaties] that the abuse of a right created a situation which frustrated the operation of the treaty. . . . The Spanish amendment took account of the fact that one of the purposes of treaties was to help maintain international peace; if an abuse of a right created by a treaty was so serious as to justify its being held unlawful, it must be regarded as a material breach of the treaty.¹⁵

Interest in Spain's proposal was modest. Cuba supported the amendment, adding that '[t]he doctrine of the abuse of a right was universally accepted'; the Philippines

10 *Chagos Marine Protected Area (Mauritius v UK)* (Award) (2015) 31 RIAA 365 [435]–[437].

11 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 100, Separate Opinion of Judge Greenwood 177 [2]–[4].

12 *ibid*; *Mobil Investments Canada Inc v Canada*, ICSID Case no ARB/15/16, Decision on Jurisdiction and Admissibility, 13 July 2018 [187]–[193].

13 United Nations Conference on the Law of Treaties (Second Session, Vienna, 9 April–22 May 1969) Official Records UN Doc A/CNF.39/11/Add.1 65 [56] ('It was obvious that international law applied many principles of internal law, such as those of good faith and abuse of rights').

14 *ibid* 86 [22] ('it would be contrary to the general principle of law prohibiting what French legal doctrine referred to as "abuse of rights"').

15 United Nations Conference on the Law of Treaties (First Session, Vienna, 26 March–24 May 1968) Official Records UN Doc A/CNF.39/11 354 [4]. The reference is to ILC, 'Draft articles on the law of treaties with commentaries' in *Yearbook of the ILC, 1966*, Vol II 187 art 57 Commentary 4.

thought that introducing abuse of rights (on the pedigree of which it said nothing) as a ground for termination could be either too wide or superfluous in light of the already existing rules on material breach; Humphrey Waldock was concerned that results could be too far-reaching; and in the end the amendment was overwhelmingly rejected.¹⁶

Within the ILC, abuse of rights was most thoroughly addressed in recent years in the Secretariat's 2006 Memorandum on Expulsion of aliens. It noted that '[t]here are different views regarding the extent to which notions of abuse of rights is recognized as a matter of international law' and concluded, with a nod to Guy Goodwin-Gill, that nevertheless 'the notion of abuse of rights may provide useful guidance in determining the limitations on expulsion even if it is not an established principle of international law'.¹⁷ In short, if abuse of rights were (being made into) a rule of international law, one would have expected to see it treated quite differently. Rather, these examples are in line with Paulsson's point about the *notion* of abuse of rights in international law (p 132), expressing what one might colloquially call (in my words) a general disapproval in the international legal order of naughtiness by States. The notion inspires and informs particular primary rules, like expulsion of aliens, and rules on law of treaties, like material breach, and probably quite a few other general rules articulated at the level of law of treaties on termination and suspension of treaties and State responsibility on circumstances precluding wrongfulness. But there is very little that suggests that abuse of rights plays a particularly legal role beyond loosely inspiring rules at various levels of legal reasoning, a perspective reflected in Waldock's intervention noted above and Roberto Ago's statement at the ILC regarding breach of international obligations:

if there were situations in international law in which the exercise of a right was subject to limits, that was because there was a rule which imposed the obligation not to exceed those limits. In other words, the abusive exercise of a right then constituted failure to fulfil an obligation. Hence the statement of the principle that an internationally wrongful act was considered to be the violation of an obligation was enough to cover the case of abuse of a right.¹⁸

That the phrase 'abuse of rights' does not appear once in Judge Crawford's reports on State responsibility or the 2001 ILC Articles on responsibility of States for internationally wrongful acts confirm its limited relevance in foundational debates. In short, the multilateral detour endorses Paulsson's argument.

The ultimate test for a putative rule like abuse of rights is its treatment international dispute settlement. I will consider in turn three (lines of) decisions that explicitly rely on abuse of rights that may be problematic for Paulsson's position. First, how is the claim about meagre reception of abuse rights in the international realm reconcilable with the *US-Shrimp* report of the World Trade Organization's Appellate

16 *ibid* respectively 356 [31], 355 [18], 359 [74], 359 (63 votes to 6, with 20 abstentions).

17 ILC, 'Expulsion of aliens: Memorandum by the Secretariat' (10 July 2006) UN Doc A/CN.4/565 [203], [208].

18 *ibid* [205].

Body, which relied on abuse of rights to interpret and apply the provision on exceptions?¹⁹ The response, for Paulsson, is to emphasize the limited effects that the mere nod to ‘doctrine’ had in legal reasoning (p 97), which is a narrow but plausible reading in line with some of the trade law scholarship.²⁰ Secondly, what about *Himpurna v Indonesia*, an award that diminished the amount of compensation by reference to the ‘universal . . . principle of abuse of rights’? Paulsson is unimpressed, noting the misreading of passages and footnotes of Bin Cheng relied upon as the key authority, the extent to which the reasoning may have been shaped by the presentation of the case as well as the compromises on articulation of legal rationale characteristic of arbitral decision-making, and the lack of endorsement of this aspect of its reasoning in subsequent practice (pp xii, 61–67). Whether ‘being more defensive of *Himpurna* than Paulsson’ will become a common phrase in arbitration—Paulsson himself, of course, was the President of the Tribunal—is too early to say but for the present purpose the key passage from the award is this:

To seek to apply the ESC [Energy Sales Contract] so as to permit the claimant to reap pure profit by reference to hypothetical *future initiatives* in pursuit of an agreement which has become an instrument of oppression would be like stepping on the shoulders of a drowning man. The Arbitral Tribunal finds that it would be insufferable, and therefore an abuse of right.²¹

Is it possible to reach the conclusion of denial of lost profits without invoking abuse of rights? For Paulsson, the safest rationale is the broad applicable law clause (‘the Tribunal need not be bound by strict rules of law’) (p 67). In any event, if a case analogous to *Himpurna* were to arise in investment treaty setting, these concerns could perhaps be addressed by focus on the character and scope of breach, causality between injury and loss, and the rich practice on valuation of future profits, while the particular point of ‘stepping on the shoulders of the drowning man’ could raise, for some, the question about permissibility of crippling compensation.²² The harder challenge is the third, relating to a broader group of cases in investment arbitration often discussed under the rubric of ‘abuse of process’. One issue addressed under this rubric is parallel claims, which Paulsson views as admissible in the absence of treaty stipulations to the contrary (p 94)—a plausible reading of the traditional position albeit not one followed in all of recent arbitral practice.²³ The second issue

19 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, W T/ DSS8/AB/R (adopted 6 November 1998) [158].

20 See the somewhat similar treatment, also with an eye to misreading of Bin Cheng, in L Bartels, ‘The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction’ (2015) 109 AJIL 95, 101–04.

21 *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara, Final Award, 4 May 1999* Yearbook Commercial Arbitration 2000 - Volume XXV (Van den Berg (ed); Jan 2000) [343] (emphasis in the original).

22 M Paparinskis, ‘The Case against Crippling Compensation in International Law of State Responsibility’ (2020) 83 MLR 1246.

23 *Ampal-American Israel Corp and Ors v Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction, 1 February 2016 [328]–[339]; *Orascom TMT Investments Sàrl v Algeria*, ICSID Case No ARB/12/35, Final Award, 31 May 2017 [539]–[548]. The annulment committee in the latter case rejected the challenge on

is corporate restructuring, an objection that has rapidly gained wide acceptance, including by tribunals using ‘abuse of rights’ language.²⁴ These decisions do not necessarily undermine Paulsson’s claim—it may be that they fall under ‘abuse of process’ in the technical sense of ‘misuse of an institution’ which he views as distinct (pp 40, 65, 73, 97), or reflect the normal process of purposive interpretation of specialized rules in a particular field, even if expressed in flowery terms—but they do seem to stand in some tension with its broader implications.

With excellent timing, a few months after the publication of the book under review, the International Court of Justice rendered what was expected to be its leading judgment on abuse of rights. The *Immunities and Criminal Proceedings* was brought by Equatorial Guinea against France regarding alleged breaches of obligations on State and diplomatic immunity in criminal proceedings in relation to a high-ranking official, and one of France’s preliminary objections was presented in terms of abuse of process and abuse of rights. The Court dealt with the issue in the 2018 preliminary objections judgment in the following terms:

146. In the case law of the Court and its predecessor, a distinction has been drawn between abuse of rights and abuse of process. Although the basic concept of an abuse may be the same, the consequences of an abuse of rights or an abuse of process may be different.

...

150. An abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings. In this case, the Court does not consider that Equatorial Guinea, having established a valid title of jurisdiction, should be barred at the threshold without clear evidence that its conduct could amount to an abuse of process. Such evidence has not been presented to the Court. It is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. The Court does not consider the present case to be one of those circumstances.

151. As to the abuse of rights invoked by France, it will be for each Party to establish both the facts and the law on which it seeks to rely at the merits phase of the case. The Court considers that abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits. Any argument in relation to abuse of rights will be considered at the stage of the merits of this case.²⁵

Two Judges wrote further on abuse of rights. For Judge Owada, France’s ‘abuse of rights’ objection, drawing upon the investment arbitration cases on corporate restructuring, was ‘an issue that touches the very basis of claims advanced’ and therefore could not be disposed of on a preliminary basis under the procedural rules of the

24 *Phoenix Actions, Ltd v Czechia*, ICSID Case no ARB/06/5, Award, 15 April 2009 [143]; *Transglobal Green Energy, LLC and Or v Panama*, ICSID Case No ARB/13/28, Award, 2 June 2016 [103].

25 *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) [2018] ICJ Rep 292 [146], [150]–[151].

Court.²⁶ Judge Donoghue found the narrow and isolated reading of abuse of process and abuse of rights problematic, and would have accepted the objection to admissibility because ‘the conduct in which the Applicant engaged as a predicate for the assertion of certain rights [was] of such a character that the Court should not exercise its jurisdiction to determine whether the Applicant has those rights.’²⁷ The 2020 Judgment on the merits disappointed those who read the last sentence of paragraph 151 as a promise of landmark pronouncements—abuse of rights plays no explicit role in the Court’s reasoning,²⁸ although the separate opinions are again more helpful. For Judge Gaja, Equatorial Guinea’s conduct ‘cannot be viewed as abuse of rights’ because it did not have the effect that France challenged in the first place.²⁹ For Judge Robinson, the allegedly abusive conduct should have been addressed by using the remedies provided under the regime in question.³⁰ Judge Sebutinde addressed the issue in the greatest detail, in substance echoing the focus on substantive obligations and remedies provided under the regime in question, and concluding with the policy point that ‘[i]n the long run, a finding by this Court of abuse of rights against the Applicant may not be useful and may only serve to further undermine the strained relations between the two States.’³¹

Where does the *Immunities and Criminal Proceedings* case leave the modern law of abuse of rights? Let me summarize the position, as I see it, in five points, and suggest that Paulsson and the ICJ are mostly of one mind on abuse of rights. First, abuse of rights does have a distinct legal role in international law and dispute settlement.³² Secondly, abuse of rights is properly a matter of the merits, unlike abuse of process that is an admissibility objection that goes to the procedure before a court of tribunal.³³ Thirdly (and by inference), abuse of rights is properly a matter of interpretation and application of primary obligations, and not a free-standing rule under law of treaties and secondary rules of State responsibility. Fourthly, the line between abuse of rights and process will be contested. In other settings of international dispute settlement, tribunals will have to reflect on whether the authoritative definition of terms offered by the Court³⁴ provides a generally helpful taxonomy,³⁵ and in particular

26 *ibid* Declaration of Judge Owada 364 [18]–[20].

27 *ibid* Dissenting Opinion of Judge Donoghue 381 [5]–[6].

28 *Immunities and Criminal Proceedings (Equatorial Guinea v France)* [2020] ICJ Judgment of 11 December 2020 <<https://www.icj-cij.org/public/files/case-related/163/163-20201211-JUD-01-00-EN.pdf>>. The argument of abuse of rights may have played a subtler and less obvious influence in how particular arguments were approached on the merits, which may explain the otherwise perhaps slightly unusual silence of Judge Donoghue at this stage.

29 *ibid* Declaration of Judge Gaja <<https://www.icj-cij.org/public/files/case-related/163/163-20201211-JUD-01-03-EN.pdf>> [13].

30 *ibid* Dissenting Opinion of Judge Robinson <<https://www.icj-cij.org/public/files/case-related/163/163-20201211-JUD-01-06-EN.pdf>> [72]–[75].

31 *ibid* Separate Opinion of Judge Sebutinde <<https://www.icj-cij.org/public/files/case-related/163/163-20201211-JUD-01-04-EN.pdf>> [39], generally [32]–[39].

33 *Immunities and Criminal Proceedings* (Preliminary Objections) (n 25) [150]–[151].

34 *ibid* Donoghue (n 27) [3].

35 Eg in investment arbitration, where the terms are often used interchangeably, *Philip Morris Asia Limited v Australia*, PCA Case no 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 [554] (‘the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature)’). Note the reference to the *Immunities and Criminal*

whether applicable procedural rules influence where the line between categories is drawn.³⁶ Finally (and speculatively), abuse of rights will play a negligible if any role in the practice of dispute settlement. It is a trite point that parties can significantly shape the legal issues that adjudicators decide upon by choosing to present particular arguments in a particular manner, and there may be an incentive to characterize their arguments as *not* relating to abuse of rights.³⁷ Within international tribunals, the combination of arguments about rules and remedies peculiar to particular disputes with flexibility inherent in judicial reasoning and policy suspicion about the contribution of the ‘abuse of rights’ language to peaceful settlement of disputes provide the systemic grain for further marginalizing its role.³⁸ This seems to me to be very much in line with the substance of Paulsson’s argument and policy concerns about predictability of law and apparent impartiality of adjudicators (pp 131–34)—the difference for the practice of dispute settlement between a proposition not having formal validity and having formal validity but rarely if ever applying is slight. Indeed, even the seeming tension with some aspects of investment arbitration practice I noted above is perhaps best explained by the contestation of the boundary between abuse of rights and process currently in the early stages of unfolding across the field of international dispute settlement.

It is customary for the concluding observations of a book review to be prefaced with a nod to a footnote error, for the inability to find which I blame the careful work of the copy-editing team at Cambridge University Press. Nevertheless, I strongly recommend this book, supremely sharp on technical reasoning and sensitive to challenges and limitations of the reality of international dispute settlement that the author knows so well. Whether the reader finds themselves largely persuaded by Paulsson’s argument, as I was, they will certainly be intellectually enriched from reading the treatment of an important topic by one of the great figures of modern international dispute settlement. The essentially simultaneous publication in autumn 2020 of *The Unruly Notion of Abuse of Rights* and the merits judgment of the ICJ in *Immunities and Criminal Proceedings* puts the book under review in the rare category of perfectly timed scholarship that independently captures the substance of the leading judgment, explains the intellectual backstory of a key concept, and is likely to significantly shape future developments in the field.

Martins Paparinskis

Reader in Public International Law, University College London
m.paparinskis@ucl.ac.uk

36 *Immunities and Criminal Proceedings* (Preliminary Objections) Owada (n 26) [18].

37 In *Certain Iranian Assets*, the USA ‘acknowledges that it used the term “abuse of right” in its written submissions, but states that the clarification provided by the Court on the nature of abuse of right and abuse of process in the case concerning *Immunities and Criminal Proceedings* (*Equatorial Guinea v. France*) made it more appropriate to characterize the objection it raised as one based on an abuse of process’, (n 32) [101].

38 There may well be very rare cases that do turn on abuse of rights. Consider espionage as a ground for invalidity of treaties, which some could characterise as an issue addressed by international law in some way but not falling under or analogizable with other grounds for invalidity and not flowing from either the general principle of good faith, commonalities of domestic approaches or widespread State practice; abuse of rights could plausibly provide the intellectual framework. But the key point is that such cases would be the odd exceptions and not the mainstream material of international law and dispute settlement.