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Exercising Discretion Against the General Interest:
Unearthing the Doctrine of Abuse of Rights in Public International Law

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'Exercising Discretion *Against the General Interest*: Unearthing the Doctrine of Abuse of Rights in Public International Law'

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Abstract:
This contribution explores the application/applicability of the abuse of rights doctrine in public international law, against the background of the surge of claims alleging "pretexts", "bad faith" and "malicious" acts in international judicial practice. While the doctrine finds its natural application in the context of rights, its operation in relation to legal obligations appears underexplored. Charting this path, the paper sets forth a two-pronged argument. First, it contends that the doctrine of abuse of rights is key to assess claims relating to breaches of international legal obligations which entail a margin of discretion for states performing those obligations (in good faith). Second, resurrecting the doctrine of abuse of rights offers new ground to give effect to the *public* dimension of public international law, against poignant individualistic patterns and structures. Under this trajectory, the paper overviews existing international jurisprudence on points of abuse of rights as well as bad faith, including the recent *Allegations of Genocide (Ukraine v. Russia: 32 states intervening)* before the International Court of Justice, to analyze the limits of states' discretionary powers associated with the performance of broadly designed legal obligations. The paper invites a closer engagement with the doctrine of abuse of rights as one capable to sanction manifest anti-social conduct and to balance individual rights against the common good of the society.

Keywords: good faith; bad faith; abuse of rights; pretext; false allegations; discretion; community interests; social; sociability; treaty interpretation; state responsibility; *Ukraine v. Russia*.

1. Introduction

Good faith is experiencing global resurgence in international law, although under a different cloth. Indeed, claims alleging "pretexts", "bad faith" and "malicious" acts are becoming increasingly more visible in international judicial practice as compared to the past. For instance, arguments of intentional misuse of treaty norms were mobilized in a number of recent disputes before the International Court of Justice ("the Court", ICJ). In *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, among others, the applicant argued that Russia resorted to the purported threat of religious extremism to subject the wider Crimean Tatar community to arbitrary searches and detentions, as a "*pretext* for discrimination", in violation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention).[1] In response, Russia argued that Ukraine's allegations "were made in *bad faith* and actually concerned peaceful campaigns of humanitarian assistance to the civilian population in eastern Ukraine."[2]

Similarly, during the oral pleadings in *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, the League of Arab States

[1] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment of 31 January 2024, para 230 (emphasis added). See also para 233.
[2] Ibid, para 90 (emphasis added).

and the Organization for Islamic Cooperation, among others, pointed to Israel's "pretexts" aimed at hindering peace with Palestine, enduring its territorial occupation, delaying Palestinians' self-determination, and realising Israel's colonial project of annexation of Palestine.[3] Bolivia too, referred to Israel using "its prolonged occupation as a *pretext* to pursue its illegal objective of annexing the occupied Palestinian territories, in violation of the Charter of the United Nations",[4] while Indonesia argued that "Israel has even been circumventing negotiations through numerous strategic *pretexts*".[5] In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, too, the Applicant claimed that the large-scale assault against the Nagorno-Karabakh region was launched 'under the *pretext* of conducting an "anti-terrorist" operation',[6] pointing again at a malicious misuse of the law for the sake of advancing self-interest.

As such, in the context of various proceedings before the ICJ, States have framed their arguments in terms of pretextual conduct and malicious circumvention of the law, seemingly centralising bad faith and abuse of rights under international law. Most recently, the argument was mobilised in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, in which Israel deemed the South Africa's allegations of genocide against the Palestinian people "malicious", considering the "extensive record of Israeli efforts in the humanitarian sphere to alleviate the suffering of the civilian population in general and to address the challenge of food insecurity in particular".[7] Arguments from "bad faith" can be also traced back to the *1955 Treaty of Amity case* in 2021[8] as well as to *Arbitral Award of 3 October 1899 case* in 2022,[9] among others.

Absence of good faith however does not necessarily equate to bad faith. Arguably, to claim bad faith one would need to show that the state not only failed to perform a norm in good faith,[10] but that it actually did so with a malicious intent to harm a counterpart. This is particularly evident if one considers good faith in connection to the abuse of rights doctrine. This doctrine articulates itself around the idea that a subject is provided with a range of discretion as to the measures it may adopt to achieve a certain state of affairs –for instance, to realise the object and purpose of a convention. The convention may thus fall short of enumerating each single measure and instead leave the ways in which the parties may fulfil the convention open. Yet this range of choice has limits. One limit

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[3] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion,* Verbatim Record 2024/13 of 26 February 2024, in particular pp 24-30, paras 6 and 31, and p 43, para 26.
[4] Ibid, Verbatim Record 2024/06 of 20 February 2024, p 29, para 26.
[5] Ibid, Verbatim Record 2024/11 of 23 February 2024, p 47, para 23.
[6] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Armenia's Request to indicate provisional measures, 28 September 2023, para 17.
[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* Observations of the State of Israel on South Africa's Request for the indication of provisional measures and modification of the Court's prior provisional measures decisions, 15 March 2024, para 37.
[8] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 9, para 86: "The United States contends that, while the notion of abuse of process may be tied to the principle of good faith, an analysis of whether a State has acted or is acting in good or bad faith is not necessarily required."
[9] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Verbatim Record of 17 November 2022, 2022/21, p. 49, para 27.
[10] Based on the wording of the Vienna Convention on the Law of Treaties (see in particular Art 26), good faith is relevant for the performance of a treaty tout court, not solely to the performance of legal obligations. By the same token, it is reasonable to assume that the principle would apply to obligations as well as to rights, powers and freedoms derivable from a convention as well as from customary international law.

rests with the way this choice is *exercised*, that is, in good faith or not abusively. Should a state adopt measures with the intention to harm another party, the state would arguably not only fail to act in good faith but would actually act in bad faith.

A quite sophisticated argument on the abusive misuse of state discretionary powers was articulated by Ukraine in the recent *Allegations of Genocide (Ukraine v. Russia Federation: 32 states intervening)*, unfolding in the context of Russia's war of aggression against Ukraine. According to the applicant, Russia abused the Genocide Convention by fabricating false allegations of genocide committed by Ukraine against Russian minorities in Eastern Ukraine in order to use force against Ukraine for the stated purposes of preventing and punishing those acts of genocide.[11] Since a "false claim of genocide is incompatible with the Genocide Convention and violates Ukraine's rights",[12] Russia's responsibility would thus be engaged for "a full-scale invasion against Ukraine, based on *false and pretextual* allegations of genocide in Ukraine's Luhansk and Donetsk oblasts".[13] Ukraine notably remarked that Russia "[had turned] the Genocide Convention on its head",[14] implicitly referring to the concept of misuse of powers (*détournement de pouvoirs*) that we will consider more closely later on.

Notwithstanding the increasing resort to arguments hinging on abuse of rights, bad faith, and alleged pretexts forming the backbone of disputes between states, the ICJ has to date failed to address them satisfactorily. In *Allegations of Genocide* mentioned above, good faith and abuse of rights in relation to states' obligations under the Genocide Convention were at the very heart of Ukraine's allegations against the Russian Federation.[15] Still, the Court declined jurisdiction with respect to the alleged abuse of the Genocide Convention because of the lack of jurisdictional basis – hence, of consent – to entertain claims of good faith. No doubt, this was a missed opportunity for the Court to contribute its own authoritative understanding of the doctrine of abuse of rights in a way that would have certainly enriched the discourse on good faith in international law. On the contrary, a body of jurisprudence on abuse of rights and bad faith has been consolidating at the European Court of Human Rights (ECtHR) since 1974 and 2004, respectively,[16] while the International Tribunal on the Law of the Sea (ITLOS) has elaborated on the relationship between abuse of rights and primary rules under the UN Convention of the Law of the Sea (UNCLOS)[17] in the seminal *M/V "Louisa" case*.[18]

Drawing from relevant caselaw, this contribution argues that claims of bad faith cannot be assessed *in abstracto* but require resort to the doctrine of abuse of rights as a theoretical framework. As such, the paper considers that doctrines provide a lens through which principles, and the law more broadly, can be interpreted. While the doctrine finds its natural application in the context of rights, its operation in relation to legal obligations appears overlooked. Exploring this avenue, the paper sets forth a two-pronged argument. First, it contends that the doctrine of abuse of rights is key to assess claims relating to breaches of international legal obligations which entail a margin of discretion for states performing those obligations in good faith. Second, resurrecting the doctrine of abuse of rights

[11] *Allegations of Genocide*, Memorial submitted by Ukraine, 1 July 2022, paras 3, 4, 15.
[12] *Allegations of Genocide*, Application instituting proceedings, para 29.
[13] Ibid, para 16. See also para 22: "(…) The Russian Federation's claimed objective to "de-nazify" Ukraine is a transparent pretext for an unprovoked war of aggression."
[14] Ibid, para 22.
[15] *Allegations of Genocide*, Application of 27 February 2022, para 27; Memorial submitted by Ukraine on 1 July 2022.
[16] Çali B (2022) Proving Bad Faith in International Law – Lesson From the Article 18 Case Law of the European Courts on Human Rights. In: Kajtár G, Çali B and Milanovic M (eds) Secondary Rules of Primary Importance in International Law. Oxford University Press, pp 183-201, at 183.
[17] 1833 UNTS 397, entered into force 16 November 1994.
[18] *M/V "Louisa" case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Merits, Judgment of 28 May 2013.

offers new ground to give effect to the *public* dimension of public international law, against poignant individualistic patterns and structures. Under this trajectory, the paper invites a closer engagement with the doctrine of abuse of rights as one capable of limiting states' discretionary powers ensuing from broadly defined legal obligations, as well as of sanctioning manifest anti-social conduct to balance individual rights against the general interest of the society.

The paper proceeds in four steps. Section 2 situates the prohibition of abuse of rights in relation to the principle of good faith in international law. In doing so, on the one hand, it accounts for the multi-faceted character of good faith not only as a general principle of law, but also as a subjective/psychological legal fact as well as an objectivising legal standard; on the other hand, it emphazes that the doctrine/theory of abuse of rights applies to the *exercise* of rights, and has nothing to do with the *existence* of rights. By resorting to the recent proceedings in *Allegations of Genocide*, Section 3 shows how the theory of abuse of rights may extend to the performance of legal obligations. This is especially the case of legal obligations that are broadly or vaguely defined and therefore afford a wide margin of discretion as to the measures states can take to implement them. The proceedings in *Allegations of Genocide* are revisited to assess the flaws of the recent Court's order on preliminary objections. Section 4 delves into the potential of the doctrine of abuse of rights to give expression to the *public* dimension of international law. If abuse of rights sits at the intersection between the exercise of sovereign rights and the protection of the common good of the society from malicious abuses, then resurrecting this doctrine appears all the more needed in the increasing mobilization of community interests in international judicial proceedings. Section 5 concludes with a few pressing remarks on the judicial function to sanction states' anti-social conduct concretising itself in manifest abuses of the law at the expense of the general interest.

2. Good Faith: More than a General Principle of Law

Good faith is uncontroversially regarded as a bedrock principle of public international law. Along with other principles such as *pacta sunt servanda*, it provides the axiological infrastructure of the international legal order, that is, the very foundation of states' social environment.[19] As such, even in the absence of an expressed reference to the principle of good faith, e.g. in an international treaty, an obligation to perform a treaty in good faith can nevertheless be presumed. Likewise, beyond the realm of international treaties, good faith has been used as the legal basis to claim the binding nature of promises (unilateral declarations) in inter-state relations, in that they create legitimate expectations that the promising state ought to abide by.[20] In fact, if it was otherwise, hardly would any oral or written utterances of state representatives carry any value vis-à-vis counterparts. This dimension of the principle of good faith as a source of obligation has been elaborated by the ICJ in the *Nuclear Tests case*:[21]

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus

[19] Kolb R (2017) Good Faith in International Law. Hart Publishing, pp 4-5.
[20] Kolb Robert (2006) Principles as Sources of International Law (with Special Reference to Good Faith). Netherlands International Law Review 53:1-36, at 10.
[21] *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253.

> interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[22]

Aside from the difficulty of pinpointing or individualising legal rights and obligations ensuing from general principles of law, good faith is still capable of being elastic and of extending to different classes of cases. In other words, this generality enables for a certain flexibility in 'serving as a ground in a dynamic interpretation and in substantive development of the law'[23] as well as to 'deduce' legal solutions. Importantly, the assumption that good faith sits as a normative premise to the international legal order enables states to entertain social relations that would otherwise be hindered by distrust, suspicion and normative uncertainty. This capability to engage in social relations is commonly termed *sociability*.[24]

Good faith is however a multi-faceted concept. Other than as a general principle of law, it can also be used as a subjective/psychological legal fact and as an objectivising legal standard.[25] As to the former, Kolb posits that the presumption of good faith typically assumed in international law refers to good faith as a psychological fact.[26] This meaning of the concept makes reference to 'the knowledge of the fact which breaches the operation of a legal norm'.[27] As such, acting with bad faith points to 'hidden motives, fraud, injurious or arbitrary conduct, non-respect for the law, intentions to harm, undisclosed motives, and the like.'[28] The doctrine of abuse of rights presents itself as a useful lens to assess claims of bad faith and provide grip to otherwise vanishing norms. It is though worth underscoring that while good faith as a general principle of law could be used as a source of legal obligation, the doctrine of abuse of rights would have nothing to do with ascertaining the *existence* of a legal right or obligation. Its application would rather hinge on the *performance* of rights as well as of obligations previously ascertained.

2.1. Abuse of Rights in International Law

While the principle of good faith is ubiquitous to international law, the concepts of abuse of rights and bad faith have received far more limited attention in international legal scholarship.[29] From a scholarly viewpoint, the golden age of abuse of rights can be traced back to the 1920s and 1930s.[30] During this time, the Permanent Court of International Justice (PCIJ) rendered decisions which, more

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[22] Ibid, paragraph 46.
[23] Kolb, Principles as Sources (note 20), 9.
[24] On the point, see e.g. Straumann B (2021) Sociability. In: Lesaffer R and Nijman J (eds), The Cambridge Companion to Hugo Grotius. Cambridge University Press, pp 157-177.
[25] Kolb, Good Faith (note 19), p. 15 and ff.
[26] Ibid, p. 20.
[27] Ibid.
[28] Ibid.
[29] Kolb R (2000) La bonne foi en droit international public: contribution à l'étude des principes généraux de droit. PUF, pp 442-445; Byers M (2002) Abuse of Rights: An Old Principle, A New Age. McGill Law Journal 47:389-431; Çali (note 16); Kolb, Good Faith (note 19), pp. 133 ff; Paulsson J (2020) The Unruly Notion of Abuse of Rights. Cambridge University Press.
[30] Among pioneering voices on the concept of abuse of rights in international law, see Politis N-S (1925) Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux. 6 Recueil de Cours 1; Kiss A (1952) L'abus de droit en droit international. Librairie Générale de droit et de jurisprudence; Oppenheim L, edited by Hersch Lauterpacht (1955) International Law: A Treatise, 8th ed., Vol. 1. Longmans; Cheng B (1953) General Principles of Law as Applied by International Courts and Tribunals. Cambridge University Press; Lauterpacht H (2011) The Function of Law in the International Community. Oxford University Press, devoting a whole part to 'The Doctrine of Abuse of Rights as an Instrument of Change'.

or less expressly, engaged with the concept of abuse of rights.[31] Also, at the time where the codification of public international law was not as extensive as today, doctrines such as abuse of rights would assist to fill lacunae and orient judicial reasoning.

As noted by Byers, although the ICJ "has never endorsed the principle [of abuse of rights] unequivocally", it has also never rejected its place in international law.[32] The doctrine appears in the *Anglo-Norwegian Fisheries*,[33] in *Conditions of Admission to Membership in the United Nations*,[34] and *Rights of Nationals of the United States of America in Morocco*,[35] and resurfaces in several separate and dissenting opinions of ICJ judges. One example is offered by Judge Lauterpacht's separate opinion in *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa.*[36] Lauterpacht observes that

> an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the [UN]…may find itself that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, *between the exercise of the legal right to disregard the recommendation and the abuse of that right*….[37]

Similarly, in *Corfu Channel*, Judge Ečer considered that the passage of the four British vessels "involved an element of intimidation and of misuse of a right from the objective standpoint".[38] Several other references to the doctrine of abuse of rights can be found in the separate and dissenting opinions of Judge Alvarez in the *Admission case*,[39] *Anglo-Iranian Oil*,[40] and *Fisheries case*.[41] A cursory overview of inter-state practice and international judicial proceedings exhibits that "the main field where abuse of rights has been alleged are the law of the sea, international rivers and lakes, trans-frontier pollution and international trade."[42] Notably, within these areas, the tension between state sovereignty and the common good of the society is particularly susceptible.

From a conceptual viewpoint, the doctrine of abuse of rights finds application in at least three types of situations in international relations. First, when a state exercises its right in a way that hinders the exercise of a right by another state, which thus suffers an injury, as in the case of "the inconsiderate use of a shared natural resource".[43] This situation is better described as a conflict between sovereign rights. Secondly, in situations of *détournement de pouvoirs* – literally, misuse of powers – when "a

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[31] *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)*, (1926), P.C.I.J. (Ser. A) No. 7, at 30; *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)* (1032), P.C.I.J. (Ser. A/B) No. 46 at 167: "A reservation must be made as regards the case of abuses of rights, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court." On the point, see also Lauterpacht H (1958) The Development of International Law by the International Court. Stevens and Sons Limited, pp. 162 ff; Byers, (note 29), p. 399.

[32] Byers, ibid, p. 400. Tanaka Y (2014) A Note on the M/V "Louisa" Case. Ocean Development & International Law 45:205-220, at 212, citing Thirlway on the same point.

[33] ICJ Reports 1951, p. 142.

[34] ICJ Reports 1948, p. 63.

[35] ICJ Reports 1952, p. 212.

[36] Separate opinion of Judge Lauterpacht to *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, Advisory Opinion ICJ Reports 1955, p. 67.

[37] Ibid, 120 (emphasis added).

[38] *Corfu Channel (UK v. Albania)* ICJ Reports 1949, p. 4, Dissenting Opinion of Judge Ečer, at 130.

[39] *Competence of Assembly regarding admission to the United Nations*, Advisory Opinion, ICJ Reports 1950, p. 4.

[40] *Anglo-Iranian Oil Co. case* (jurisdiction), ICJ Reports 1952, p. 93.

[41] *Fisheries case*, ICJ Report 1951, p. 116.

[42] Kiss A (2006) Abuse of Rights. Max Planck Encyclopedia of Public International Law [MPEPIL], para 21. See also Byers (note 2929), pp. 401-404.

[43] Kiss, ibid, para 4.

right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused."[44] Thirdly, when a state exercises its rights arbitrarily, causing injury to another state, 'but without clearly violating their rights.'[45] This situation ensues from an arbitrary exercise of discretionary powers afforded to states by international conventions or other legal sources. Kiss observes that, unlike the situation of *détournement de pouvoirs,* "bad faith or an intention to cause harm are not necessary to constitute this form of abuse of rights. Broader objectives concerning the social function of the right which has been exercised are at stake here."[46]

Worth of notice is the element of *exercise* of rights or powers common to all these situations. In other words, all these three situations do not take issues with whether or not a certain right exists but with how this right is *exercised* by a state, that is, whether their performance was carried out injuriously or against the common good or the public need. This makes the doctrine of abuse of rights non-autonomous, but dependent on the existence of primary norm applicable to the situation. Such an interpretive stance is confirmed by the case law of both ITLOS and the ECtHR. A common trait between UNCLOS and the ECHR lies in the expressed codification of the prohibition of abuse of rights as an aspect of the performance of the convention in good faith. Indeed, Article 300 UNCLOS provides that "State Parties shall fulfil in *good faith* the obligations assumed under the Convention and shall exercise the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an *abuse of rights*."[47] It is evident from this codification that the prohibition of abuse of rights is intimately connected to the operation of the principle of good faith. This understanding finds support in international legal practice. For instance, in the *US-Shrimps case*,[48] the Appellate Body of the World Trade Organization considered:[49] "The chapeau of Article XX [of GATT] *is…but one expression of the principle of good faith*. (…) *One application of this general principle, …widely known as the doctrine of* abus de droit*, prohibits the abusive exercise of a state's rights* (…)'.[50] Similarly, Article 18 ECHR sets forth that "restrictions permitted under the Convention to said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

As said, the non-autonomous character of the prohibition of abuse of rights is corroborated by the jurisprudence of both ITLOS and the ECtHR. In the *M/V Louisa* case of 2013,[51] ITLOS declined jurisdiction because the applicant failed to indicate a provision contained in UNCLOS to which the prohibition of abuse of rights set out in Article 300 of the Convention could apply.[52] The Tribunal found that "article 300 of the Convention cannot serve as a basis for the claims submitted by Saint Vincent and the Grenadines."[53] In doing so, it upheld the respondent's position that "an abuse of rights may be invoked *only* in respect of the manner of the *exercise* of the *rights, jurisdiction and freedoms* "recognized" in the Convention, and that it is only when such rights, jurisdiction and

[44] Ibid, para 5.
[45] Ibid, para 6.
[46] Ibid.
[47] Emphasis added.
[48] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ('*US-Shrimp*'), WT/DS58/AB/R, 12 October 1998, para 158.
[49] The chapeau of Art. XX GATT reads as follows: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (…)
[50] *US-Shrimp*, para 158 (emphasis added).
[51] *M/V "Louisa" case*, Judgment (note 18).
[52] On the point, see also Tanaka (note 32), p. 215.
[53] *M/V "Louisa" case*, Judgment, para 150.

freedoms are abused that article 300 may be applicable".[54] The non-autonomous character of the abuse of rights has also been reaffirmed by the ECtHR in a number of cases, starting from *Kamma v. Netherlands* in 1974.[55] The Commission stated plainly that Article 18 ECHR could only be raised in conjunction with other articles of the Convention concerned with restriction of rights.[56] This shall raise no surprise. The very doctrine of abuse of rights presupposes the application of a primary norm, the performance of which ought to be assessed against the doctrine of abuse of rights.

2.2. Proving Abuse of Rights

The difficulty of building cases that may successfully lead to findings of abuse of rights has been remarked by the Court in prior occasions. For instance, in *Certain Iranian Assets (Iran v. USA)*, the Court traced back the origins of the doctrine to the PCIJ, but also acknowledged the evidentiary hurdles that led to the rejection of abuse of rights allegations at the merits stage.[57]

> As early as 1926, the Permanent Court of International Justice held that an abuse of rights or a violation of the principle of good faith "cannot be presumed, and it rests with the party who states that there has been such [an abuse or violation] to prove his statement" *(Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J.,* Series A, No. 7, p. 30). As the Court noted in its 2018 Judgment in the case concerning *Immunities and Criminal Proceedings*, "[o]n several occasions before the Permanent Court of International Justice, abuse of rights was pleaded and rejected at the merits phase for want of sufficient proof" *(Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018* (I), pp. 335-336, para. 147).
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> The Court could only accept the abuse of rights defence in this instance if it were demonstrated by the Respondent, on the basis of compelling evidence, that the Applicant seeks to exercise rights conferred on it by the Treaty of Amity for purposes other than those for which the rights at issue were established, and that it was doing so to the detriment of the Respondent.[58]

To date, proving bad faith has been an almost insurmountable stumbling block in judicial proceedings before the ICJ. To provide a few illustrations, in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, the Court noted that

> …the stated purpose of certain measures appears to have served as a *pretext* for targeting persons who, because of their religious or political affiliation, the Russian Federation deems to be a threat to its national security. However, the Court is of the view that Ukraine has not presented *convincing evidence* to establish that persons of Crimean Tatar origin were subjected to such law enforcement measures based on their ethnic origin. Therefore, the Court does not

[54] Ibid, para 134.
[55] *Kamma v. Netherlands*, Application no 4771/71 (Commission, 14 July 1974), para 9; *Gusinskiy v. Russia*, Application no 70276/01, (ECtHR, 19 May 2004), para 151. For a comprehensive overview of ECtHR case law on the point, see Çali (note 16), pp. 187 ff.
[56] Ibid.
[57] *Certain Iranian Assets (Iran v. USA)*, Judgment 30 March 2020, paras 92-93.
[58] Ibid.

> consider that these measures are based on the prohibited grounds contained in Article 1, paragraph 1, of CERD.[59]

Similarly, in *Allegations of Genocide (Ukraine v. Russian Federation: 32 states intervening)*, the Court concluded that

> while such an *abusive* invocation will result in the dismissal of the arguments based thereon, it does not follow that, by itself, it constitutes a breach of the treaty. In the present case, even if it were shown that the Russian Federation had invoked the Convention *abusively* (which is not established at this stage), it would not follow that it had violated its obligations under the Convention, and in particular that it had disregarded the obligations of prevention and punishment under Articles I and IV.[60]

Plainly, addressing claims of bad faith against a state is not a comfortable task for a Court that operates along the thin line between state consent and serving its function as the primary judicial organ of the UN. This might even expose the Court to engage in political rather than decision-making.[61] However, there are examples to the contrary. In the context of claims concerning Article 18 ECHR, the ECtHR has started developing a jurisprudence with has been termed "bad faith case law".[62] While initially focusing on the arbitrariness of legal, judicial or executive practices having to do with the limitation of rights and liberties under the ECHR, from 2004 onwards that the ECtHR started to engage with bad faith in the form of illegitimate motives laying behind rights restrictions[63] and amounting, depending on the case, to detention in bad faith, illegitimate detention interfering with the individual right of assembly for purposes other than those allowed by the Convention, and the like.[64] Importantly, in a number of these cases, the Court considered circumstantial evidence in connection to the detention of individuals, in lieu of direct evidence, sufficient to prove hidden motives and bad faith. For instance, businessmen were detained until they sold their companies to the state; political opponents were imprisoned on false charges with the purpose of excluding them from political elections; etc.[65] In *Merabishvili v. Georgia*,[66] the Grand Chamber admitted that bad faith could be invoked both in cases where illegitimate motives were present from the start of a certain conduct, as well as in cases in which illegitimate motives materialised subsequently. This approach opens up to a wider range of evidence to be accepted as relevant during the proceedings.[67]

3. Abuse of *Rights* and the Performance of Legal *Obligations*: the *Allegations of Genocide* case

[59] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment of 31 January 2024, para 241 (emphasis added). See also para 256.
[60] *Allegations of Genocide*, Judgment on Preliminary Objections, para 143.
[61] Çali (note 16), p. 186.
[62] Başak Çali, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35 *Wisconsin International Law Journal* 237.
[63] Çali (note 16), p. 190.
[64] See e.g. *Navalny v. Russia* [Grand Chamber], Application nos 29580/12, 36847/12, 11252/13, 12317/13, and 43746/14 (ECtHR, 15 November 2018).
[65] See e.g. *Mammadov v. Azerbaijan*, Application no 15172/13 (ECtHR, 22 May 2014), para 137. On the point see also Çali (note 16), pp. 192-194.
[66] *Merabishvili v. Georgia* [Gran Chamber], Application no 72508/13 (ECtHR, 28 November 2017).
[67] Çali, (note 16), p. 196.

A discussion on bad faith and abuse of rights in international law cannot fail to examine the arguments of the parties and the reasoning of the ICJ and individual judges in *Allegations of Genocide*. As mentioned earlier, good faith and abuse of rights occupy a central stage in Ukraine's legal claims[68] in that it argues that the allegations of genocide used by Russia to wage a war of aggression against Ukraine were deliberately and maliciously fabricated as a pretext to resort to their unilateral use of force and proceed with a full invasion of Ukraine In invoking the Convention, it had also adopted measures that go beyond the limits permitted by international law.[69] As such, Russia's acts would constitute violations of obligations under the Convention, in particular of Articles I and IV of the Convention, and would thus confer jurisdiction *ratione materiae* to the Court under the terms of Article IX of the Convention.[70]

> …the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called "Donetsk People's Republic" and "Luhansk People's Republic," and then declared and implemented a "special military operation" against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact. On the basis of this false allegation, Russia is now engaged in a military invasion of Ukraine involving grave and widespread violations of the human rights of the Ukrainian people.[71]

Besides denying the existence of a dispute relating to genocide at the time of Ukraine's application, Russia claims that there is no basis to allege any abuse of rights under the Genocide Convention as this instrument sets out *obligations*, *not rights*.[72] From a legal standpoint it is interesting to examine how abuse of rights has been brought into relation to the obligation to prevent and punish genocide under the Genocide Convention. This question bears directly on the material jurisdiction of the Court under the compromissory clause under Article IX of the Convention. From the material available, three main approaches can be distilled: a *systemic/contextualist* approach; a *legalist/textualist* approach; and a *logical/rationalised* approach to material jurisdiction.

3.1. Systemic/contextualist approach

This approach considers the prohibition of abuse of rights as an aspect of good faith as a legal principle. As such, it aims to bring the obligation to perform obligations pursuant to the Convention under the material jurisdiction of the Court as a legal obligation operating by default. In this vein,

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[68] *Allegations of Genocide*, Application instituting proceedings, 26 February 2022, para 27: 'The duty to prevent and punish genocide enshrined in Article I of the Convention necessarily implies that this duty must be performed in good faith and not abused, and that one Contracting Party may not subject another Contracting Party to unlawful action, including armed attack, especially when it is based on a wholly unsubstantiated claim of preventing and punishing genocide.' See also Ukraine's Oral submission, Verbatim Record, 19 September 2023, page 35, paragraph 6: 'Russia accused Ukraine of committing genocide. It launched a full-scale invasion for the stated purpose of stopping genocide. In other words, Russia abused and violated the Genocide Convention, by using allegations of genocide as a pretext for a full-scale invasion. But Russia is not above the law. It must be held accountable.' Similarly, ibid, page 42, paragraph 12: 'When Russia invaded Ukraine last February for the pretextual reason of stopping a genocide, it failed to perform in good faith — in fact, it abused – the Convention.' See also the section of Ukraine's oral pleadings titled '*La violation de l'obligation d'exécuter de bonne foi et de ne pas abuser de la convention, en particulier de ses articles premier et IV, est un grief qui entre dans les prévisions de la convention*' on pages 75-80 of the Verbatim Record, which elaborates on the argument on the abuse of rights under international law.

[69] *Allegations of Genocide, Judgment on Preliminary Objections*, 2 February 2024, para 137.

[70] Ibid, paras 137-141.

[71] *Allegations of Genocide under the Convention on the Prevention and Punishment of Genocide (Ukraine v. Russian Federation: 32 States intervening),* Application instituting proceedings, 27 February 2022, para 2.

[72] The Court seems to take issues with the concept, too. See ibid, para. 143.

Counsel for Ukraine Harold Koh builds the argument on good faith and abuse of right in relation to the provisions of the Genocide Convention, in particular Articles IX and I. With regard to Article IX, Koh argues that, in adding the term 'fulfilment' to the classical formula of jurisdictional clauses concerning 'any disputes relating to the interpretation and application' of the Convention, the scope of this provision was designed to be wider than other similar compromissory clauses. The argument repeats the position advanced e.g. by Latvia and Lithuania in their respective Declarations as parties intervening in the case, citing the ICJ in the *Bosnian Genocide case*.[73] Good faith is thus an *obligation* originating in the context of the *fulfilment* of the Convention, that is, amid the Convention's primary obligations. Ukraine has in fact reasserted the discretionary powers that the Convention affords to the contracting parties to take reasonable measures to prevent and punish genocide even outside its territory (see also the *Institut de droit international* (IDI) resolution of 2005, Krakow, art 1, cited as supportive authority).

Counsel for Ukraine Professor Jean-Marc Thouvenin adds a supplementary limb to the construction of the obligation to perform in good faith, by reference to the rules of the Vienna Convention of the Law of Treaties (VCLT), as an obligation that is inherent in any treaty under international law. Unlike Koh's argument, where the link between good faith and the primary obligations under the Convention is straightforward in the sense that good faith is encompassed by the concept of 'fulfill', this second one contains some elements of risk. First, the VCLT rules governing treaty interpretation are secondary in character.[74] As such, their application depends on the existence of a primary norm to be interpreted, applied or fulfilled. If the contrary held, then a case could oddly be built around the failure to perform secondary rules rather than primary ones. Second, analyses about the Court's jurisdiction *ratione materiae* concern primary rules. Even when the obligation of the contracting parties to perform a convention in good faith has been codified, courts have considered these provisions not autonomous but *dependent* on the joint application of a primary rule under the convention. As it has been shown earlier, fitting examples are offered by Article 300 UNCLOS and Article 18 of the ECHR recalled above.

The systemic/contextualist approach is also embraced by Judges Sebutinde and Robison in their Dissenting Opinion to the ICJ order on preliminary objections,[75] who construct the obligations under the Convention as incorporating the obligation to perform the treaty in good faith.[76] By 'incorporation', the general rule becomes "an integral part" of a treaty.[77]

3.2. Legalist/textualist approach

The legalist/textualist approach is centred on the idea that any obligation relevant for assessing the alleged responsibility of the respondent in a case shall be one for which consent to the jurisdiction of the Court is not controversial. This would also include the obligation to perform a treaty in good faith. Based on this, in its order on provisional measures, the Court considered that "even if it were shown that the Russian Federation had invoked the Convention abusively (which is not established at this stage), it would not follow that it had violated its obligations under the Convention, and in particular that it had disregarded the obligations of prevention and punishment under Articles I and

[73] Latvia's Written Submissions, 5 July 2023, paras 7-8; Lithuania's Written Submissions, 5 July 2023, paras 3-5.
[74] Azaria D (2020) 'Codification by Interpretation': The International Law Commission as an Interpreter of International Law. European Journal of International Law 31:171-200, 194.
[75] *Allegations of Genocide, Judgment on Preliminary Objections*, 2 February 2024.
[76] Ibid, Dissenting Opinion of Judges Sebutinde and Robinson, para 13.
[77] Ibid, para 19.

IV."[78] The main hurdle for the Court was the impossibility to ground violations complained of by the Applicant on the Genocide Convention, in a way not to frustrate the consent of the respondent to the jurisdiction of the Court, which was expressed via the compromissory clause under Article IX of the Convention, but that would otherwise be lacking for violations of the principle of good faith under customary international law or treaty law. This is the sense in which the Court's passage should be read.

> It is indisputable that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (Article 26 of the Vienna Convention on the Law of Treaties, reflecting customary international law). More generally, the Court has recalled on a number of occasions that the principle of good faith is "a well-established principle of international law" and "one of the basic principles governing the creation and *performance* of legal obligations".[79]

However, the Court has also stated that the principle of good faith "is not in itself a source of obligation where none would otherwise exist" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94). What matters, for the purpose of establishing the Court's jurisdiction *ratione materiae* when it is seised of an application alleging the respondent's violation of an obligation under a treaty, is whether the respondent State could have violated a specific obligation incumbent upon it and whether the alleged violation falls within the scope of the Court's jurisdiction.

3.3. Logical/rationalised approach

It would be not the first time for the Court to resort to theories or doctrines that lay behind the very idea of an international public order for the sake of interpreting relevant applicable law. In *Belgium v. Senegal* or *Reparations for Injuries* for instance the Court has constructed standing on the basis of common interests, or ascertained the UN legal personality based on the functions it has been entrusted by the UN Charter. Theories and doctrines are lenses to interpret the law; which theory or doctrine is best suited to do so falls within the discretion of the Court.

According to this approach, rather than as law, abuse of rights would be used as a *doctrine* to which the Court could resort, amid others, to interpret Article I of the Convention. The doctrine of abuse of rights would be a particularly valuable one in assessing the performance of legal obligations that entail discretionary powers. Indeed, pursuant to Article I of the Genocide Convention the contracting parties are duty-bound to prevent the crime of genocide.[80] The Convention does not specify, though, how states shall implement this obligation but leaves them free to individually decide the means to employ to give effect to that obligation. This interpretation finds support in the ICJ order on provisional measures in *Bosnian Genocide*,[81] in which the Court observed:

> Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation. However, the Contracting Parties must implement this obligation in good faith, taking into account other parts of the Convention (…).[82]

[78] Ibid, para 143.
[79] Ibid, para 142 (references omitted, emphasis added).
[80] Article I reads as follows: 'The Contracting Parties confirm that genocide…is a crime under international law that they undertake to prevent and to punish.'
[81] *Bosnian Genocide case*, Provisional Measures Order of 16 March 2022.
[82] Ibid, para 56.

As such, the obligation to prevent the crime of genocide comes with a range of discretion that each contracting state may legitimately exercise to implement the Convention. This discretion is though not without restraint, albeit conceptions of state sovereignty projecting ideas of all-mighty states may suggest the contrary.[83] A first limit stems from good faith.[84] What is more, this discretion may be approached as a power afforded to states by the international community by reason of the established cooperation to liberate humankind from the 'odious scourge' of genocide.[85] In this light, one could imagine states to take measures that would potentially frustrate other existing obligations (e.g. a trade agreement for the export of lethal weapons), provided that they would do so with purpose of preventing (and punish) the crime of genocide. As such, while being free to decide how to give effect to the obligation to prevent genocide, they are also restrained in how they may *exercise* their range of choice in order for it not to be abusive. This is in line with the ICJ's reasoning in *Bosnian Genocide*, in which the Court considered that a state acting pursuant to the obligation to prevent genocide shall employ '*all means reasonably available…within the limits permitted by international law*.'[86] In a similar vein, in its order on provisional measures in the same case, the Court observed that '[t]he acts undertaken by the Contracting Parties 'to prevent and to punish' genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter.'[87]

3.4. The *Doctrine* of Abuse of rights and the Material Jurisdiction of the Court

Assuming a the logical/rationalised approach, the Court's reasoning on preliminary objections in *Allegations of Genocide* appears flawed in several respects. *First*, one thing is to ascertain the existence of a valid legal obligation granting the Court jurisdiction over a dispute, and quite another is to assess how that obligation was performed for the purposes of ascertaining state responsibility. Particularly when the obligation entails a range of discretionary choice as to the measures that a state could adopt to implement that obligation (such as Article I of the Genocide Convention), the exercise of this discretion becomes crucial for the settlement of the dispute. In this respect, it is totally adequate to talk about abuse of *rights*,[88] since the point of contention is the scope of discretionary choice (e.g. providing the right to resort to arms embargos, the right to resort to armed force against the territorial integrity of another state, or the like) associated with the performance of that obligation. In this sense, resort to abuse of rights and good faith is necessary 'to add precision to the scope of application of a conventional or customary rule'.[89] In this sense, it would be beyond question whether the principle – not as a *legal* principle but rather as a *doctrinal* one – falls under the Court's

[83] To some extent, these ideas have found support in judicial decisions. See for instance *S.S. Lotus (France v. Turkey),* 1927 PCIJ (ser. A) No. 10 (Sept. 7), in which the Permanent Court of International Justice found that in the absence of a prohibitive rule to the contrary, states are free to act as they please (see paras 44-46). For *contra* views, see e.g. the Dissenting opinion of Judge Nyholm, para 225.

[84] Lo Giacco L (2022) Judicial Decisions in International Law Argumentation – Between Entrapment and Creativity. Hart, p. 33. See more generally, pp. 28-36.

[85] Preamble to the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Judgment, 26 February 2007, ICJ Reports 2007, p. 113, para 430 (emphasis added).

[87] *Bosnian Genocide case*, Provisional Measures Order of 16 March 2022, para. 58. On the same point, see also Separate Opinion of Judge Robinson to the Order, para. 27.

[88] This is worth stressing since Russia contended that since the dispute concerned the obligations to prevent and to punish, there was no relevant 'right' to which the concept of abuse of rights could in principle apply.

[89] Kolb, Good Faith (note 19), p. 8. In a similar vein, Çali remarks that "if an international legal *right or a duty* is not well defined, it is often thought that findings of an abuse of an abuse of that right or duty may help develop the primary law on the matter. Çali (note 16), p. 185.

jurisdiction. As long as the Court can affirm jurisdiction over a dispute concerning the application and interpretation of the Genocide Convention (say Article I), abuse of rights and good faith could come into play in the interpretation of how the broadly designed obligation to prevent was performed, hence at the merits stage.[90]

Second, the Court itself also enjoys discretion in the performance of its judicial function. This translates, inter alia, into appreciating the existence of a dispute as 'a matter for objective determination by the Court'.[91] As the Court has regularly reiterated, whether a dispute falls under the jurisdiction of the Court is not a mechanical or formalist exercise, but rests with the Court's objective appreciation. For this very reason, some have regarded the power of the Court to determine the existence of a dispute for jurisdictional purposes as 'the most political aspect of all Court's activities'.[92] As this power is expression of the Court's judicial function, the underpinning idea of judicial function under which the Court operates may be a determining factor for the Court's course of action. I respectfully contend that, in *Allegations of Genocide*, the Court should have considered more carefully its role as the primary judicial organ of the UN potentially sanctioning/stigmatising conduct which may, at best, be anti-social in the international community (for the sociability among states) or, at worse, harmful or even aggressive to communities and individuals. In the social space of the international community, the exercise of a right is always relative, in the sense that harmful legal positions and the effects that a certain exercise of rights poses to others, particularly if harmful, shall be tempered.[93] Given the seriousness of the dispute between Ukraine and Russia, the Court could have considered avenues capable to bring the dispute under its purview, in a way not to frustrate the requirement of state consent. As I will show, this hurdle was not insurmountable – this is my *third* point.

In the literature, the principle of good faith is classically described as a principle of law, codified under Articles 26 and 31 of the VCLT. This was also the way in which several of the 32 States intervening in the dispute between Ukraine and Russia referred to good faith.[94] However – as mentioned earlier – good faith can also be approached as a psychological fact – to the exclusion of bad faith – or as an objectivising legal standard that can be used synonymously with 'reasonable'. The prohibition of abuse of rights flows from the latter, in the sense that the exercise of discretion afforded to states by the Genocide Convention in the performance of their obligation to prevent and to punish shall not only be exercised within the limits of the Convention but actually at protection of the finality of the rights and powers enshrined therein, in the spirit of cooperation. In this vein, Lauterpacht posits that

> The essence of the doctrine [of abuse of rights] is that, as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest

[90] In her Separate Opinion to the Judgment on Preliminary Objections in *Allegations of Genocide*, Judge Charlesworth also noted that "the Court has to navigate carefully between the interpretation of the treaty for the purposes of determining its jurisdiction *ratione materiae* and the same task to be performed for the purposes of resolving the dispute on the merits" (para 10). See Separate opinion of Judge Charlesworth (icj-cij.org), paras 10-12.

[91] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 65, 74. See also *Georgia/Russian Federation, Preliminary Objections,* para. 30; *Alleged violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua/Colombia), Preliminary Objections, Judgment,* ICJ Reports 2016, p. 3, para 50.

[92] Rosenne S (2014) Law and Practice of the International Court. Brill, p 236.

[93] Kolb, Good Faith (note 19), p 135.

[94] See e.g. Italy's Written Observations on Article IX and other provisions of the Convention, 28 June 2023.

> 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.[95]

Similarly, Kiss notes that "in international law, abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State."[96] This dimension of good faith is doctrinal – as the classical denomination of abuse of rights as 'doctrine' or as a 'theory' would suggest[97] – and would hence be a tool to which the Court may resort in the exercise of its judicial function. For example, the doctrine of inherent powers or that of the persistent objector have a doctrinal footprint, rather than stemming from positive legal sources.[98] Similarly, equity, which 'refers to considerations of fairness and reasonableness often necessary for the application of settled rules of law',[99] 'is not itself a source of law, yet it may be an important factor in the process of decision-making.'[100] As noted by Crawford, 'equity may play a significant role in supplementing the law, or may unobtrusively enter judicial reasoning.'[101] As the Court's caselaw shows, the Court resorted to doctrines on several occasions when interpreting the law. The acceptance of these doctrines as correct among the international legal operators (including judges) makes it possible for these doctrines to bear on decision-making processes. As such, doctrines carry an epistemic value as they ensue from shared understandings as to how international law operates in practice. It follows that, had the Court approached abuse of rights as a doctrine rather than a legal principle, that is, as an theoretical lens to interpret Article I of the Convention, the jurisdiction *impasse* would have been overcome.

4. Abuse of rights and state sovereignty: Fleshing out the *public* dimension of public international law

Although state sovereignty is a constant in international legal discourse, this is neither absolute nor unrestrained.[102] Reasonably, these limits find their justification in the need to ensure sociability among the members of the international community, restrain abuse and protect the general interest or community interests. Endicott, for instance, postulates that a state has responsibility for a community… and for peace, order, and good government. And the state has responsibility to act as a member of the international community."[103] In 1950, in a dissenting opinion which retains absolute

[95] Lauterpacht, The Function of Law (note 30), p. 294.
[96] Kiss, Abuse of Rights (note 42), p. 1.
[97] See inter alia Politis (note 30); Schlochauer H-J (1933) Die Theorie des abus de droit in Völkerrecht'. Zeitschrift für Völkeerrecht 17:373-394; Separate Opinion of Judge Anzilotti in *Electricity Company of Sofia*, PCIJ Series A/B, No. 77 (1939), p. 98: "The theory of abuse of right is an extremely delicate one…"; Lauterpacht, The Development (note 31), p. 162.
[98] On the relationship between doctrines and international law, see also Lo Giacco L (2023) Private entities shaping community interests: (re)imagining the "publicness" of public international law as an epistemic tool. Transnational Legal Theory, 14:270-306, at 278.
[99] Crawford J (2019) Brownlie's Principles of Public International Law. 9th ed, Oxford University Press, p. 41.
[100] Ibid.
[101] Ibid. Crawford also refers to 'considerations of humanity' and 'legitimate interests' as other factors influencing judicial reasoning. See ibid, pp. 42-44.
[102] Among critical voices of sovereignty, Louis Henkin considers it 'an illegitimate offspring' which has brought distortion and confusion. At times it was even 'destructive of human values.' Henkin L (1999) That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera'. *Fordham Law Review* 68:114, at 1-2.
[103] Endicott T (2013) The Logic of Freedom and Power. In: Besson S and Tasioulas J (eds) The Philosophy of International Law. Oxford University Press, pp. 245-259, at 254.

currency today, Judge Alvarez similarly diagnosed a shift from absolute to limited sovereignty in international law, by the interposition of, inter alia, community interests:[104]

> According to classic international law, the sovereignty of States, and the rights which flowed therefrom, were absolute. Consequently, any State could exercise its rights without limit, or rather, the sole limits were the rights of other States (coalition of rights), and only rarely the general interest. In addition, each State was perfectly free to exercise its rights, and even to abuse them, without having to justify its conduct to anybody. Today the situation has changed; the notion of absolute sovereignty has had its day. *The general interest, the interests of international society, must constitute the limits of the rights of States and make it possible to determine whether there has been an abuse of these rights*. It would be meaningless to speak of solidarity, interdependence, co-operation, the general interest, human happiness, etc., if States could continue to exercise all their rights freely and without restriction. If these concepts are to have any meaning, these rights must be subject to the limitations which I have just outlined.[105]

The tension between state sovereign powers and community interests mirrors therefore in a delicate balance to strike, particularly given the increasing relevance of constructs such shared responsibility and community interests in international practice. The literature is ample on the concept of community interests[106] and I would therefore limit myself to simply indicating that most of these interests are protected via multilateral conventions, such as the Genocide Convention or the Convention Against Torture, among several others, resting on the idea that common concerns require coordinated action and international cooperation. The object and purpose of these conventions could be aptly recast in a *social* register: while the obligation to prevent and punish genocide, being designed to serve a common interest or meet a common concern, is socially relevant, abusing the powers afforded to serve a general interest to advance self-interest would be anti-social at best. The doctrine of abuse of rights could be a valuable vehicle to frame and assess arguments along the frictions between individual/collective, sovereign/societal, private/public, and the like. Indeed, the gist of abuse of rights lies with balancing, on the one hand, the exercise of sovereign rights connected to rules that are not precisely defined and, on the other hand, protecting the common good of the society from potential abuse. However, defining exact limits to the exercise of discretion by sovereign states is not an easy task and perhaps not even a desirable one. As Kolb observes, 'the intervention of the judge must be limited to cases of *manifest* abuse'[107] for findings that a state acted in bad faith may actually be detrimental to the activity of courts in the international legal order. This also appears in line Kiss's position in relation to the implementation of the prohibition of abuse of rights: '[i]t seems that the fact of injury resulting from an abuse of rights is a fundamental element

[104] *Admission case*, Dissenting Opinion of Judge Alvarez, p. 14.
[105] Ibid (emphasis added).
[106] Simma B (1994) From Bilateralism to Community Interest in International Law. 250 Recueil des Cours de l'Académie de Droit International 217; Villalpando S (2010) The Legal Dimension of the International Community: How Community Interests Are Protected in International Law. EJIL 21:387-419; Gaja G (2011) The Protection Of General Interests in the International Community General Course on Public International Law'. 364 Recueil des Cours de l'Académie de Droit International 19; Fastenrath U, and others (eds) (2011) From Bilateralism to Community Interest: Essays in Honour of Bruno Simma. Oxford University Press; Benvenisti E and Nolte G (eds) (2018) Community Interests across International Law. Oxford University Press; Zyberi G (2021) The Protection of Community Interests in International Law: Some Reflections on Potential Research Agendas. Intersentia; Wolfrum R (2021) Solidarity and Community Interests. Brill; Iovane M et al (eds) (2021) The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry. Oxford University Press.
[107] Kolb, Good Faith (note 19), p. 138.

in the implementation of that principle.'[108] This becomes particularly pressing when the abuse in manifest and a state is gravely injured by the abuse of rights by another state, particularly with a view to preserve and even reaffirm the normative function of the law. If abuse of rights sits at the intersection between the exercise of sovereign rights and the protection of the common good of the society from malicious abuses, then resurrecting this doctrine appears all the more needed in the increasing mobilization of community interests in international judicial proceedings. To quote Judge Alvarez, '[b]ecause of the new conditions that have arisen in the life of peoples, it is necessary today to find a place for this concept [of abuse of rights], and the International Court of Justice must take its share in this evolution.'[109]

5. Conclusions

International law is going through unprecedented challenges. Current times probe that pernicious uses of international law aimed at harming, oppressing, subjugating and conquering do not simply belong to a far distant time but are part and parcel of our experienced present. Both the Russian aggression on Ukraine, waged on the basis of, inter alia, a purported genocide by Ukraine of Russian ethnic minorities in Eastern Ukraine, and Israel's wide-scale annihilating military campaign in Gaza, waged on self-defence arguments, are emblematic of this practice. While an easy argument could be levied as to the pliability of international law to different political ends – pernicious/benevolent, regressive/progressive, realist/idealist – there are some important legal facets connecting to this political element. Such legal aspects translate into principles that are axiomatic and foundational to the international legal order. One for all, the principle of good faith.

Arguably, the credibility of international law as a progressive project within the international community is cracking under multiple calls to do more to tackle ongoing abuses, even more so if such abuses are not duly stigmatised and sanctioned. One way to do that would be to resort to judicial proceedings to set the record straight and demand the alleged abuse to be acknowledged. In a way, such judicial proceedings would present an important opportunity to preserve the credibility of international law as an emancipatory project or at least as an instrument for redress – in particular for those directly at the mercy of neatly superior military powers. What is a community left to believe if not even the most manifest abuses of international law are sanctioned? International courts should thus be more reflective of their far-reaching function in the international legal order, which arguably exceeds the narrow, surgical confines of a legal dispute. For instance, courts significantly contributed to articulate doctrinal constructions and methodological steps which still inform legal interpretation to date. The ICJ has been central to this. Suffice to recall its jurisprudence on *erga omnes* obligations – a concept first articulated by the Court in *Barcelona Traction* – and the related interpretation of legal standing based on common interests which ushered very concrete effects regarding their enforcement. Similarly, in *Allegations of Genocide*, the Court could have contributed an important brick to the international legal infrastructure, offering its authoritative pronouncement on the doctrine of abuse of rights as a framework to asses claims of manifest abuse of an international convention enshrining community interests. The Court missed this opportunity when deciding the case at the preliminary objections stage, although some room for this might still materialise at the merits stage.

For sure, the abuse of rights of doctrine presents itself as capable to frame issues and situate claims arising from the tension between community or public interests, on the one hand, and individual or private interests, on the other, in a different light. Legal questions arising in the context of climate

[108] Kiss, Abuse of Rights (note 42), para 31.
[109] *Admission case*, Dissenting Opinion of Judge Alvarez, p. 15.

change[110] may yet offer a suitable terrain for the ICJ to unearth the abuse of rights doctrine to ultimately express the public nature of the international legal order and protect its integrity as a normative system.

[110] See Request for an Advisory Opinion on Obligations of States in Respect of Climate Change, 12 April 2023.