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The Applicability of the (Un)clean Hands Doctrine before the International Court of Justice: The Case of South Africa vs. Israel[1]

1. *Introduction*

The doctrine of '(un)clean hands' is a legal principle that might prevent a party to a conflict to obtain relief from a court of law in case of engagement by that same party in improper or unethical activities in relation to the subject matter of the lawsuit.[2] Although there is no generally excepted definition of this doctrine in international law, while its status as a general principle within international law is not settled,[3] this doctrine has been applied by courts of law in common law jurisdictions.

This doctrine is derived from the principle of equity which principle endorses the notion that any party coming before the court of law into equity must do so with "clean hands".[4] The underlining notion of this principle is therefore to protect the integrity of the trial by denial equitable relief to a party who does not come before the court in good faith with respect to the subject matter of the claim.

This article will assess whether and how this principle could be applied within litigation before the International Court of Justice. Quite recently, the government of South Africa in December 2023 filed a lawsuit against the State of Israel for alleged violation of the Genocide Convention of 1948 with respect to the military operations of the IDF within Gaza after 7 October 2023. The question arises whether the clean hands doctrine, if raised within these proceedings could lead to the conclusion that the Court has to deny the relief sought by South Africa. Before answering this question, this article will first determine what the function of this doctrine has been within common law, in particular, whether it can serve as a procedural obstacle for the admissibility of a lawsuit.

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[2] Cleansing the (Un)clean: The Ongoing Saga of the Clean Hands Doctrine, William Kirtley, Thomas Davis (Aceris Law), *Kluwer Arbitration Blog*, September 2028: (https://arbitrationblog.kluwerarbitration.com/2018/09/08/cleansing-the-unclean-the-ongoing-saga-of-the-clean-hands-doctrine/.)

[3] *Permanent Court of Arbitration, Yukos Universal Ltd (Isle of Man) v. The Russian Federation*, PCA Case No AA227, 18 July 2014, [1363].

[4] Cornell Law School, Legal Information Institute, Clean hands doctrine. (https://www.law.cornell.edu/wex/clean_hands_doctrine)

2. (Un)clean hands doctrine within common law

Within common law, this doctrine has been applied in cases contract law, where one party asks the court to enforce an agreement, but the other party argues that the first party is in breach of the agreement because of their own misconduct.

An example is the *Holy Family Catholic School v. Boley* Case.[5] In this case, the defendant opened a pharmacy account for the benefit of the plaintiff, intended for work-related injuries. However, the plaintiff misused the account by charging unrelated items. As a result, the defendant closed the account, after which the plaintiff filed a lawsuit to keep it open. The court ruled that the plaintiff's misuse of the account showed unclean hands', and that requiring the defendant to keep the account open would be unjust. [6]

The US Supreme Court in its judgement of December 4, 1933, in the case of *Keystone Driller Co. v. General Excavator Co.,* was confronted with a petition for an infringement of several patents, while the other party was also involved in actions which compromised the same patents. [7] The US Supreme Court started its judgement by saying: *''He who comes into equity must come with clean hands.''* Yet, it formulated an important condition for this principle to apply: *''This maxim applies only when some unconscionable act of the plaintiff has immediate and necessary relation to the equity he seeks in the litigation. ''*[8]

The underlining notion of this principle and its proper application was well explained in the *Keystone Driller Co. v. General Excavator Co.* of the US Supreme Court on page 245: *"It is one of the fundamental principles upon which equity jurisprudence is founded that, before a complainant can have a standing in court, he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court."*

[5] *Court of Civil Appeals of Alabama in the case of Holy Family Catholic School v. Boley 847 So. 2d 371* (2002).
[6] *Court of Civil Appeals of Alabama in the case of Holy Family Catholic School v. Boley 847 So. 2d 371* (2002).
[7] *Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240 (1933).
[8] Ibid. Para. 2

In addition the US Supreme Court, while promulgating the essence of this doctrine within common law, did set forth another directive which might also be extendable to litigation before international

law fora: *''whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy has violated conscience or good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.''*

More recently, the court of civil appeals of Alabama in its ruling of December 6 2019 in the matter of *Colby Furniture Company, Inc. v. Belinda J. Overton*, a case which involved a neck injury sustained by an employee of Colby furniture, arisen out of an accident in the course of her employment with her employer, was equally called upon to apply this doctrine.[9] The employer brought before the court in motion arguing that the employee had no right to further medical treatment at its expense since the employer performed misconducted in violating a narcotics agreement with her doctors. As a result, the employer, while referring to the mentioned case of *Boley* argued that the (un)clean hands doctrine prevents the employee from enforcing her right to future medical benefits. In its judgement of December 6 2019, the Court of Appeals of Alabama, while denying the argument of the employer for other reasons than the clean hands doctrine, thus address the rationale of this doctrine as follows: *The clean-hands doctrine "prevent[s] a party from asserting his ... rights under the law when that party's own wrongful conduct renders the assertion of such legal rights `contrary to equity and good conscience'''.*

Although there is as mentioned no generally accepted definition and application of this doctrine in international law, it is safe to say that this doctrine has a standing within common law and might lead to the inadmissibility of lawsuits before courts of law.[10]

[9] *Colby Furniture Co. v. Overton*, 299 So. 3d 259 (Ala. Civ. App. 2019).
[10] G. Camilla, Unclean Hands, 23 January 2024.

3. Applicability before the ICJ under international law

In the 2014 *Yukos arbitration* decision, it was concluded that '(un)clean hands' does not exist as a general principle of international law. [11] However, many scholars do regard the doctrine of (un)clean hands as a general principle of law, recognized in both common and civil law.[12] This recognition extends across several legal systems, including Roman law, English law and even Islamic law. Although some scholars have expressed reservations to accept this doctrine as a general principle of law, a firm foundation in order to be perceived as such a principle seems to exist, as demonstrated above.[13]

Although the ICJ in general never ruled on the applicability of the (un)clean hands doctrine within its framework, this doctrine was several times raised by individual judges by the ICJ. In the Nicaragua v. United States of America case of 1986, judge Schwebel in his dissenting opinion addressed this doctrine in paragraph 268 of his opinion by saying that:

268. "Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible - but ultimately responsible- for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus, both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail."[14]

[11] *Permanent Court of Arbitration, Yukos Universal Ltd (Isle of Man) v The Russian Federation*, PCA Case No AA227, 18 July 2014, [1363]. See also the recent *South American Silver Limited* award.
[12] https://brill-com.vu-nl.idm.oclc.org/view/journals/jwit/21/4/article-p489_1.xml#d37456091e369
[13] *Ibid*. The Clean Hands Doctrine as a General Principle of International Law, The Journal of World Investment & Trade.; G. Camilla, Unclean Hands, 23 January 2024.
[14] See para 268 of the dissenting opinion of Judge Schwebel (1986).

Moreover, judge Schwebel referred to the underlying basis of the, in his view, applicability of this doctrine under international law:

269. "As recalled in paragraph 240 of this opinion, the Permanent Court of International Justice applied a variation of the "clean hands" doctrine in the *Diversion of Water from the Meuse* case. The basis for its so doing was affirmed by Judge Anzilotti "in a famous statement which has never been objected to: 'The principle . . . (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized that it must be applied in international relations. . .' " (Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, 1984, pp. 16- 17)."[15]

According to judge Schwebel further support of the applicability of this doctrine was to be found not only in the *Diversion of Water from the Meuse* case, but also in the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case.[16] In which case it was held that Mavrommatis was bound to perform the was bound to perform the acts which he actually did perform *"in order to preserve his contracts from lapsing as they would otherwise have done".*

Also, in the *Arrest Warrant* case of the ICJ of 11 April 2000, the ad hoc judge Christine van den Wyngaert, in her dissent touched upon the (un)clean hands doctrine on page 160. She specifically held that:

"The Congo did not come to the Court with "clean hands''. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith. It pretends to be offended and morally injured by Belgium by suggesting that Belgium's exercise of "excessive universal jurisdiction" (Judgment. para. 42) was incompatible with its dignity".[17]

[15] Idem: para 269.
[16] Idem: para 270.
[17] See dissenting opinion of judge Van den Wyngaert in the *Arrest Warrant case of 11 April 2000*, ICJ reports 2002 p. 160-161.

More recently, in the *Certain Iranian Assets* case (Islamic Republic of Iran v. United Stated of America) of 30 March 2023, as well as the *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* case (Ukraine v. Russian Federation) of 31 January 2024, the ICJ emphasized that it has always treated "The invocation of the "clean hands" doctrine with the utmost caution.

Furthermore, it held that:" In its 2019 Judgment in the present case, the Court stated that it did not have to "take a position on the 'clean hands' doctrine" (see paragraph 76 above), thus reserving its position on the legal status of the concept itself in international law. It notes, moreover, that the ILC declined to include the "clean hands" doctrine among the circumstances precluding wrongfulness in its Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility"), on the ground that this "doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied" (see the commentary on Chapter V of Part One of the ILC Articles on State Responsibility, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 72, para. 9)."[18]

In the other ICJ case of 2024, the Court went even further by saying that:

"The Court has hitherto treated the invocation of the "clean hands" doctrine with the utmost caution. It has never upheld the doctrine or recognized it either as a principle of customary international law or as a general principle of law. Furthermore, the Court has already rejected the invocation of the doctrine as an objection to admissibility, stating that it "does not consider that an objection based on the 'clean hands' doctrine may by itself render an application based on a valid title of jurisdiction inadmissible" (Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019 (II), p. 435, para. 61; Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Judgment of 30 March 2023, para. 81). Similarly, the Court considers that the "clean hands" doctrine cannot be applied in an inter-State dispute where the Court's jurisdiction is established, and the application is admissible. Accordingly, the

[18] See Judgment of 30 March 2023 in *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America) para 81.

invocation of the "clean hands" doctrine as a defense on the merits by the Russian Federation must be rejected." [19]

Based on the last ruling it could be said that the legal avenue to the invocation of the unclean hand doctrine seems firmly shut by the ICJ. However, in the *Certain Iranian Assets* case of 2023 the ICJ seems to have opened a possibility to invoke this doctrine at the merits stage. Once certain criteria would be met, the Court could be substantially engaged in entertaining this defense. In that case the ICJ was willing to analyze the conditions under which this doctrine could be applicable, as set forth by the US Government in its counter-memorial. It was the first time that the ICJ was willing to be engaged in a determination on the substance of this doctrine as a defense on the merits of the case.

The United States of America in its counter-memorial, did set forth 5 criteria to be considered for this defense which were: [20]

1. Whether there is a qualifying wrong or misconduct;
2. Whether the wrong or misconduct was undertaken by or on behalf of the applicant state;
3. Whether there is a nexus between the wrong or misconduct and the claims being made by the applicant state;
4. Whether the wrong or misconduct is of sufficient gravity to render the court's grant of the requested relief inequitable or improper; and
5. Whether there exists any countervailing misconduct or wrong on the part of the respondent state that may cause the court to decline to exercise its discretion in favor of applying the doctrine.

The ICJ in its judgement went into the first and third factor and held that the US had not argued that Iran, through its alleged conduct, did violate the Treaty of Amity upon which the application is based.

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[19] See Summary of the Judgment in 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* case (Ukraine v. Russian Federation) of 31 January 2024 p. 2.

[20] See Counter-Memorial of the United States of America in *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America) para 8.13; see for this topic Aryan Tulsyan in https://opiniojuris.org/2023/06/06/resurrecting-the-clean-hands-doctrine-and-mapping-its-history-at-the-icj/.

Secondly, the ICJ was not convinced that a "sufficient connection between the wrongful conduct imputed to Iran by the United States and the claims of Iran" was established.[21]

This ruling might imply that in case this first and third factor would have been complied with by the US, the decision as to the applicability of the (un)clean hands doctrine at the merits stage of the proceedings could have been different.

As a result, one can conclude that the (un)clean hands doctrine, although not firmly established as a potential defense before the ICJ in the context of international litigation, is conceived by several ICJ judges as a viable argument to challenge a legal claim made by a state against another state at the merits of the proceedings. [22]

In the *South Africa v. Israel* case at the ICJ, as will be addressed in the next paragraph, the assessment by the ICJ of the mentioned first and third factor could lead to a different outcome as opposed to the *Certain Iranian Assets* case.

4. Unclean Hands relating to the South Africa – Israel Case at the International Court of Justice

At the end of December 2023, the government of South Africa instituted proceedings before the International Court of Justice against the State of Israel for alleged violations of the Genocide Convention of 1948 to which convention both South Africa and Israel are parties and which convention, they both ratified. South Africa as well as other parties to the Genocide convention reported that Israel its military operations in Gaza constitute genocide against the Palestinian population.[23]

South Africa relies, in support of these allegations on various reports of the UN from 2009 onwards as well on various reports from the Human Rights Council.[24] It also relies upon several statements made by Israeli army officials, advisors and spokespersons as well as Israeli politicians, among which the president of Israel Mr. Herzog.[25]

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[21] Idem: para 83.
[22] See also Aryan Tulsyan in https://opiniojuris.org/2023/06/06/resurrecting-the-clean-hands-doctrine-and-mapping-its-history-at-the-icj/, page 5.
[23] See the application 29 December 2023, Application instituting proceedings and request for the indication of provisional measures, para. 12.
[24] See para. 30-31.
[25] See para. 101-107.

On the 26 January 2024, the International Court of Justice rendered its decision on interim measures requested by South Africa and imposed on the state of Israel in total five interim measures among which to take all measures within its power to prevent the commission of all acts within the scope of Article II of the Genocide Convention, in particular to prevent the killing of members of the Palestinian population.

Within the context of this Article, it is of relevance to determine whether the International Court of Justice should have declared the application of South Africa inadmissible based on the (un)clean hands doctrine. The consequence thereof could be a denial of the requested relief to South Africa with respect to the subject matter of the claim. The foundation to invoke this doctrine in the context of the case South Africa vs. Israel arose from a particular situation which occurred in 2015.

In that year, the then president of Sudan, Mr. Omar Al-Bashir visited South Africa in the context of a conference of the African Union while at that time an international arrest warrant was pending against him issued by the International Criminal Court (hereafter: ICC) at the Hague. Part of this international arrest warrant were two charges against Al-Bashir initiated by the Prosecutor of the ICC. The first charge pertained to war crimes and crimes against humanity while the second charge related to genocide under the Statute of the ICC. The factual foundation of these charges related to crimes committed by the supporters of Al-Bashir and the Janjaweed militia during the Sudan conflict. When Al-Bashir attended the mentioned conference in South Africa its authorities were well aware with this international arrest warrant but failed to comply to execute this arrest warrant whilst South Africa is a signatory to the Statute of the ICC.

This failure to comply with this arrest warrant in relation to the crime of genocide led to a judgment by the Supreme Court of Appeal in South Africa whereby the South African appeals judges held that the government of South Africa had violated its obligations to respect the Statute of the ICC by failing to arrest and surrender Omar Al-Bashir. The implication thereof was without doubt also a violation on part of South Africa to comply with the principles of the Genocide Convention, the very same principles as invoked by South Africa before the International Court of Justice against Israel.

In its ruling of 6 July 2017, the ICC Pre-Trial Chamber II, called upon to decide whether South Africa failed to comply with its obligations by not arresting and surrendering Omar Al-Bashir to the ICC while he was in South Africa between 13 -15 June 2015, held that indeed South Africa failed to comply with

these obligations. It also determined that by failing to comply, the ICC was prevented from exercising its functions and powers under the Statute in connection with the criminal proceedings instituted against Omar Al-Bashir. Yet, the judges of the ICC where not convinced that a referral to the Security Council of the United Nations for this failure would be warranted. The reason for this decision was that according to the ICC judges, the domestic courts in South Africa did already find South Africa to be in breach of its obligations under its domestic legal framework as well as its obligations under the Statute of the ICC. Notably, the Pre-Trial Chamber of the ICC also considered that the immunities of Omar Al-Bashir as Head of State under customary international law did not apply to the State Parties to the Statute of the ICC for the execution of the courts' request of his arrest and surrender. It also recalled that the ICC issued a warrant of arrest against Omar Al-Bashir, having found that there were reasonable grounds to believe that he is responsible for the crime of genocide.

When one portrays the test put forth by the US in the *Certain Iranian Assets* case, as applied by the ICJ with respect to the first and third factor, on to the *South Africa v. Israel* case, one might conclude that:

1. There is a qualifying wrong or misconduct on part of South Africa;
2. There is a nexus between the wrong or misconduct and the claims being made by South Africa.

After all, this connection lays within the fact that the alleged wrongful conduct imputed to Israel related to the violation of the Genocide Convention, which wrongful conduct was exactly imputed to South Africa in 2016 and 2017 by its own Supreme Court of Appeal and the judges of the ICC.

5. Concluding Remarks

Based upon these findings, it is tenable to say that South Africa, by filing suit against Israel before the International Court of Justice, does not *''come into equity with clean hands''* within the meaning of doctrine of (un)clean hands as set out above. It is also tenable to argue that the application of South Africa *''has immediate and necessary relation to the equity he seeks in the litigation.''*[26] After all, the pivotal argument of South Africa before the International Court of Justice relates to the allegation that the state of Israel violated the Genocide Convention, amongst which the obligation to prevent and

[26] *Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240 (1933), para. 2.

punish the crime of Genocide. The allegations South Africa makes before the International Court of Justice, as we have just observed, at the least coincide with prior conduct by the government of South

Africa in 2015 in regard to the willful failure of arrest and surrender of Omar Al-Bashir, which prior conduct is of the same nature as the accusations against Israel. In words of the US Supreme Court, South Africa seeks to set the judicial machinery of the International Court of Justice in motion and obtain a remedy on the basis of the Genocide Convention, while it has itself violated an equitable principle in its prior conduct which would lead to the conclusion that *''(…) the doors of the court will be shut against him in limine.*"

Not only for the development of this doctrine within the proceedings before the International Court of Justice in general but also in order to preserve the integrity of the current proceedings between South Africa and Israel in specific, it would be beneficial if the doctrine of clean hands could be made part of the litigation in this case, also in view of the findings of the ICJ in the *Certain Iranian Assets* case.