Resurrecting the Clean Hands Doctrine and Mapping its History at the ICJ

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The International Court of Justice ("ICJ"), in its recent decision of *Certain Iranian Assets (Merits) 2023* has resurrected the Clean Hands doctrine, muddying the grounds for its applicability at the merits stages of disputes presented before it. The clean hands doctrine can be understood as follows: a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States; or simply, 'he who comes to equity for relief must come with clean hands'. The application of this doctrine, as well as its mere existence, has been a matter of debate, and the ICJ's recent decision contributes to it.

Clean Hands at the Preliminary Objections Stage

The ICJ had clarified in the *Jadhav* case that it could 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" (para 61). Further, in *Certain Iranian Assets (Preliminary Objections)*, the ICJ found that "even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the 'clean hands' doctrine" (para 122). Thus, it is sufficiently clear that as per the jurisprudence of the ICJ, that a State may not invoke the clean hands doctrine at the jurisdiction or the admissibility stage of proceedings.

Clean Hands at the Merits Stage

However, the same conclusion cannot be drawn for invoking the clean hands doctrine at the merits stage of a proceeding. While refusing to consider the doctrine as a bar to hearing Iran's claims, the ICJ, in *Certain Iranian Assets (Preliminary Objections)*, did find that such a conclusion is *"*without prejudice to the question whether the [Respondent's] allegations . . . could . . . provide a defence on the merits*"* (para 123). This implies that while States *cannot* successfully argue that the ICJ does not have jurisdiction on the ground that the Complainant-State comes to the Court with 'unclean hands', States are not necessarily precluded from arguing that *since* the Complainant-State comes to the Court with unclean hands, the Court should not rule in their favor.

In *Certain Iranian Assets (Merits)*, this very question was considered. Here, firstly, the ICJ found that the fact that the US had raised the defense of the clean hands doctrine at the preliminary objections stage, does not impose the bar of *res judicata*, and they are open to repeating their arguments at this stage. Then, the ICJ opined that it has treated the clean hands doctrine as a defense of merits with "utmost caution". More importantly, the ICJ then analyzed the conditions where the clean hands doctrine could be applicable, as argued by the US in their counter-memorial. It is critical that we pause here first. This is the first time that the ICJ has delved into a substantial analysis of the clean hands doctrine as a defense on merits, and has taken into account the various considerations that attract its application. This in itself is an unprecedented exercise (as analyzed later), and provides a legal basis for the future application of the doctrine.

The US, in their counter-memorial, provided five factors that are to be considered for the application of the clean hands doctrine as a defense on merits (para 8.13). These are:

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 favour of applying the doctrine.

To this, the ICJ found relevant the first and third considerations, and declared that “the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based” and that there is no “sufficient connection between the wrongful conduct imputed to Iran by the United States and the claims of Iran” (para 83). The ICJ thus found that the US has not sufficiently demonstrated the successful application of the clean hands principle to act as a valid defense on merits.

Notwithstanding the unfavorable finding against the US, the five factors presented by them to be considered at the application of the clean hands doctrine to the merits stage could be a substantial legal development. Unlike past interactions with the clean hands doctrine, the ICJ did not simply refuse to consider an argument on the clean hands doctrine without engaging with it. While the Court did not categorically pronounce upon the applicability of the doctrine, it can be deduced through necessary implication that *prima facie* there is no bar on the applicability of the doctrine at the merits stage, and the Court would substantially engage with the defense.

Mapping the History of Clean Hands

The reason why the 2023 judgement of the ICJ in *Certain Iranian Assets* is relevant is because it sets the dais for future application of the doctrine of clean hands at the merits stage. No past engagement with the doctrine by the ICJ has involved an analysis of a ‘clean hands test’ so to speak. Table 1 below demonstrates how the ICJ in eight (majority) decisions has refused to apply the clean hands doctrine.

Judgment	para	Treatment of the Clean Hands Doctrine
Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992	¶¶ 37-38	1. Rejection on its application as a bar to inadmissibility. 2. No test employed
LaGrand (Germany v. United States of America), 2001	¶¶ 61-63	1. Rejection on its application as a bar to inadmissibility. 2. No test employed
Avena and Other Mexican Nationals (Mexico v. United States of America), 2004	¶¶ 45-47	1. Rejection on its application as a bar to inadmissibility. 2. No test employed
Oil Platforms (Islamic Republic of Iran v. United States), 2003	¶¶ 27–30	1. Rejection on its application as a bar to jurisdiction. 2. No test employed

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004	¶¶ 63–64	1. Rejection on its application as a bar to jurisdiction as it is an UNGA-requested advisory opinion. 2. No test employed
Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), 2017	¶¶ 135-144	1. Rejection on its application as a bar to inadmissibility. 2. No test employed
Jadhav Case (India v. Pakistan), 2019	¶¶ 59-61	1. Rejection on its application as a bar to inadmissibility. 2. No test employed
Certain Iranian Assets (Preliminary Objections) (Iran v. United States), 2019	¶¶ 116-124	1. Rejection on its application as a bar to inadmissibility. 2. No test employed

Table 1: Application of the Doctrine of Clean Hands at the ICJ (self-compiled)

From Table 1, two conclusions can be made. *First*, that the ICJ has never engaged with the clean doctrine as defense on merits, and *second*, the ICJ has never considered or analyzed a test based on the clean hands doctrine. In Table 2 below, I analyze the application of the clean hands doctrine in three Dissenting Opinions of ICJ judgements. Again, I find that while these opinions do apply and uphold the clean hands doctrine as a bar to the jurisdiction/admissibility of the Court, they do not employ a test to reach such a conclusion.

Judgment	**para**	**Treatment of the Clean Hands Doctrine**
Military and Paramilitary Activities in Nicaragua (Nicaragua v. United States of America), 1986 (Dissenting Opinion of Judge Schwebel)	¶¶ 268-272	As Nicaragua came to the Court With unclean hands, the US should not be held responsible.No test employed
Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 (Dissenting opinion of Judge ad hoc Van den Wyngaert)	¶ 35	As DRC came to the Court with unclean hands, Belgium should not be responsible. No test employed
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 (Dissenting Opinion of Judge ad hoc Kateka)	¶¶ 46 & 61	As DRC came to the Court with unclean hands, Uganda should not be held responsible. No test employed

Table 2: Application of the Doctrine of Clean Hands in Dissenting Opinions of ICJ judgements (self-compiled)

Therefore, as evident from the engagement of the clean hands doctrine even in Dissenting Opinions of the Court's judgements, there has never been an application of a test to find the successful invocation of the doctrine. It may be argued that *since* the Court has shied away from engaging in such a test, future benches of the Court have similarly refused to engage in the same. Thus, the test used in the *Certain Iranian Assets (Merits)* might pave a way for the Court to apply the doctrine.

Conclusion

While the final conclusion in *Certain Iranian Assets (Merits)* is not materially different from the past jurisprudence of the ICJ, i.e., the Court refused to uphold the claim of unclean hands, it may be argued that the means employed to reach such a conclusion is different than ICJ's past approach. This is so because the ICJ engaged with the doctrine as a defense of merits, as well as interacted with the test put forth by the US. The ICJ only found two prongs of the US's test (out of five) relevant for analysis, finding that the US could not satisfy those two elements of the test. However, it is unclear whether the ICJ did not engage with the other three elements because (1) the US did satisfy those elements **or** (2) those elements are irrelevant for the application of the clean hands doctrine. Irrespective of the same, it is likely that in future objections on the grounds of the clean hands doctrine, the ICJ would use a similar test to possibly uphold an argument on the clean hands doctrine as a defense on merits.