Strolling by the River Meuse: A Definitive Case Against the Clean Hands Doctrine

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Introduction

Every once in a while, one or another international tribunal is faced with the resurgence of a question that should long have been regarded as settled: is there a doctrine of 'unclean hands' that exists in the form of a 'general principle of law' – in the sense of Article 38(1)(c) of the Statute of the International Court of Justice ("**ICJ**")? Such an argument is generally raised with escapist tendencies – a respondent State would contend that the claimant State's allegations are inadmissible because the claimant has engaged in illegalities in relation to the claim. Despite the lack of any considerable support for this doctrine, it has been frequently resurrected in recent ICJ litigations.

There could be several variations of this idea: one could argue that the claimant State engaged in illegalities in the facts of the same claim, or that the claimant in another context has engaged in conduct similar to what it now impugns – and so forth (more on this below). For instance, many have recently suggested that several Western States have previously engaged in illegal armed aggression that was similar to Russia's ongoing aggression in Ukraine. Although these authors do not raise this as a legal point, they have broadly commented that the West has no "standing" to criticize Russia or that it lacks "clean hands". Thus, certain proponents of the 'unclean hands' doctrine may potentially

consider that these States are legally barred from raising claims against Russia's aggression with such 'unclean hands' – *even if* an international court could otherwise find jurisdiction over Russia's aggression.

Through this article, and particularly for inter-State disputes, we aim to offer a closure for the debate over 'unclean hands'. In doing so, we focus on the jurisprudence of the ICJ and its predecessor, the Permanent Court of International Justice ("**PCIJ**"). First, we present an understanding of the 1937 *River Meuse* case which shows the flaws in relying on this case in support of the 'unclean hands' doctrine. This fresh understanding of *Meuse* is crucial because the case is apparently considered the origin of the doctrine by its proponents. Further, we consider the line of cases where the ICJ refused to apply such a doctrine despite having occasion to do so. Finally, we argue that this doctrine would license impunity in international law, which is against the purposes of the law of State responsibility.

The Meandering Legacy of River Meuse

The influence of the *Meuse* case on this dialogue is highly evident – it was cited most prominently in Judge Schwebel's dissenting opinion in the 1986 *Nicaragua* Merits case, where he argued that the Court should have rejected Nicaragua's claims against the armed interventions of the United States ("**US**"). This was because Nicaragua's hands were "odiously unclean" (para. 268) as Nicaragua had allegedly conducted similar interventions in its neighbouring States. Needless to mention, the Court's majority decided in favor of Nicaragua's claims without addressing any such contention. This, by implication, can be understood as rejecting Judge Schwebel's beliefs, as Iran argued in 2019 (para. 8.8).

What is important, however, is that Judge Schwebel's reading of the *Meuse* case has been cited with the majority opinion ever since by proponents of the doctrine and certain States (such as the United States at para. 4.14 of its Counter-Memorial in the 2004 *Avena* case). Such citations typically also include the separate opinion of Judge Hudson in the *Meuse* case. Allow us then to unpack what the PCIJ *actually* had to say in the *Meuse* case.

In the *Meuse* case, the PCIJ was asked by the Netherlands to find that Belgium's construction of the Neerharen lock on the river Meuse violated a bilateral treaty concerning the diversion of water from that river. However, the Court noted the fact that the Netherlands had itself constructed a very similar lock on the river. In a rather nebulous paragraph, the Court mentioned that the Netherlands was therefore not "now warranted in complaining" against an action of which "it set an example in the past" (p. 25). Judge Hudson separately noted that in such situations, equity demands that Courts decline reliefs to such claimants (p. 78). Thus, on the surface, it seems the *Meuse* case indeed supports the idea of "unclean hands".

Yet such an understanding of the judgment would ignore a plainly obvious fact – the Court found that *neither* of the parties' conduct was in violation of international law. It was therefore not an instance where the Netherlands' supposedly illegal construction of a

lock made its claim against Belgium's conduct inadmissible – because there was no illegality to begin with (p. 32). It is even possible that the conduct of both parties was a factor used by the majority to interpret the bilateral treaty in question and find that constructing such locks was permitted under the treaty – the judgment is unclear in this regard.

Admittedly, Judge Hudson did go beyond the majority in holding "on the assumption" that *if* Belgium's conduct had been found illegal, the Court should have declined the Netherlands' request for reasons of equity (p. 78-79). Nevertheless, Judge Schwebel's opinion in *Nicaragua* failed to appreciate this nuance and attributed to the majority judgment a value that was never under consideration. At best, the *Meuse* case ought to be treated as silent on this issue and Judge Hudson's separate opinion should be treated on par with the views of other renowned authorities, such as the late Judge Crawford and Professor Dugard, both of whom rejected the existence of this principle in their capacity as Special Rapporteurs (para. 335 and para. 18, respectively). As we will further demonstrate, Judge Hudson's conception of equity also suffers from fatal flaws. In sum, the *Meuse* case offers no or negligible support to the doctrine.

The International Court of Justice

As discussed, the ICJ had refused to apply the doctrine of unclean hands in the 1986 *Nicaragua* merits decision. The Court *once again* refused to do so in the 2004 *Avena* judgment (para. 47), where the US argued that Mexico could not complain of the US' failure to allow Mexico access to its nationals before their trial because Mexico had allegedly engaged in a similar practice with other States. Indeed, upholding its allegations, the Court granted certain reliefs to Mexico. A nearly identical argument was previously made by the US in the 2001 *LaGran* case against Germany in relation to consular rights. However, in that instance the Court simply found that there was insufficient evidence that Germany engaged in the conduct alleged by the US (para. 63).

In more recent cases, such as the 2019 *Certain Iranian Assets* case, the US yet again argued for the unclean hands doctrine, arguing that Iran could not allege violations of the Treaty of Amity in the freezing of its assets because Iran itself sponsored acts of terrorism in violation of international law – which in turn motivated such freezing (para. 6.38). Once more, the Court's majority rejected that contention as making Iran's claim inadmissible. Instead, it hinted that such a fact could at best be used as a defense on the merits (para. 123). Unfortunately, the Court was somewhat ambiguous in addressing the issue, as it further noted that its conclusion was "without having to take a position" on the doctrine (para. 122).

A similar blow to the doctrine is found in the 2017 *Somalia v. Kenya* preliminary objections judgment. There, the Court vaguely cautioned that it would not generally discuss if there are cases where the applicant's conduct would be of "such a character" as to make its claims inadmissible (para. 143). Nevertheless, the Court held that the fact that Somalia may have violated a treaty at issue would not "*per se* affect the admissibility of its application".

In light of all this case law, although we accept that the ICJ sometimes appears to tread a line of ambiguity, we submit that the Court's approach has been against the idea of unclean hands with regard to admissibility as it has never opted to reject a claim on this ground in all the aforementioned instances. There are also other tribunals that have openly rejected the existence of this principle, for instance in the *Guyana v. Suriname* decision of the Permanent Court of Arbitration (para. 418).

A License for Impunity: Rejecting the Doctrine

Recently, Special Rapporteur Vázquez-Bermúdez has suggested the possibility that a general principle can arise from *within* the international legal system itself (p. 57). This can happen, for instance, if the principle is widely recognized in international instruments or is fundamental to the "requirements" of international law. An example would be the need for State consent for jurisdiction (p. 26). There would then be no need to prove that municipal laws show general consensus on such a point, which would benefit proponents of the unclean hands doctrine because municipal laws are highly contradictory in addressing the doctrine.

Yet as is evident from the foregoing analysis, there is no possibility of claiming any wide international recognition of the principle. Furthermore, the application of this doctrine would in fact go *against* the fundamental requirement that all internationally wrongful acts must entail the "responsibility" of that State [see Article 1 of the Articles on State Responsibility for Internationally Wrongful Act ("**ARSIWA**")]. This is because it would allow States to escape scrutiny for violations of international law for the sole reason that another State committed similar or related illegalities to that case. An example would be the hypothetical giving of impunity to Russia's ongoing aggression in Ukraine for the fact of the West's past aggressions, as mentioned initially in this piece. Accordingly, the doctrine carries immense risks of inequity, contrary to Judge Hudson's suggestions in the *Meuse* case.

In fact, this sentiment against impunity guides other facets of international law, for example, the high constraints placed on the defense of countermeasures as a circumstance precluding wrongfulness and in view of the prohibition on reprisals against another State's internationally wrongful acts (see ARSIWA, Article 50). Thus, we argue the purpose of the law on State responsibility is to ensure *maximal* compliance with international law and to prevent unilateral state actions, especially considering other ideals such as the "proper administration of justice" and the pacific settlement of disputes that have been emphasized by the ICJ in the past (para. 59). Therefore, the threshold for the doctrine to constitute a general principle is far from satisfied.

Indeed, the Court in the 1997 *Gabčikovo-Nagymaros* decision noted that "facts which flow from wrongful conduct" cannot "determine the law" (para. 133). In that case, by holding *both* Hungary and Slovakia to have acted illegally around their reciprocal obligations concerning the system of locks, the Court impliedly rejected any idea of

“unclean hands” on admissibility, as observed by former Special Rapporteur Dugard (para. 5). This approach must continue in future case law to ensure that international courts do not abandon, but rather ensure, respect for international law in adjudication.

Concluding Remarks

Through this piece, we aimed to show that the unclean hands doctrine never had, and continues to lack, authoritative or policy basis as a general principle for inter-state disputes. Beginning from the *Meuse* case of the PCIJ to several recent case laws of the ICJ and other tribunals, we found concrete instances where this idea was considered both unfounded and inappropriate for the international legal community. Indeed, such a principle would result in obstructing the international administration of justice and would allow States impunity against their illegalities. Therefore, it is our hope that the ICJ’s signalling against this doctrine ensures that respondent States bury this escapist route to the grave, saving the time and resources of tribunals and ensuring smoother litigations.