

DISCUSSION

THE 'CLEAN HANDS' DOCTRINE IN INTERNATIONAL LAW

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Abstract: *The clean hands doctrine does not belong in international law. It is a non-legal norm with the capability to mediate between international legal norms. Clean hands may be characterized as part of equity but such a characterization does not make the doctrine a part of public international law. The principle of equity exists at the gates of public international law and, so far, has not transferred the clean hands doctrine from international politics to international law.*

Keywords: *Clean Hands Doctrine, Equity, General Principle of Law, General Principle of International Law, Non-Legal Norm, European Court of Human Rights, McCann Judgment*

INTRODUCTION

The clean hands doctrine is the principle that the past unfair conduct of the claimant prevents the aid of the court to the claimant.¹ In a legal dispute a party's misconduct precludes that party's equitable claims and defenses.² The clean hands doctrine has not been codified in any treaty.³ The doctrine is not regarded as a customary norm of international law, nor has it been recognized as a general principle of law.⁴ That is notwithstanding the fact that parties to international disputes invoke the clean hands doctrine before international courts and tribunals.⁵ The clean hands doctrine has been indirectly envisaged in the shadow of some other concepts such as international public policy,⁶ the principle of good faith,⁷ the principle of equity,⁸ or similar principles.⁹

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¹ El Ghabban Tarek, Unclean Hands, *Jus Mundi*, para.1. In: *Jus Mundi* [online]. 7. 2. 2025 [2025-03-25]. Available at: <<https://jusmundi.com/en/document/publication/en-unclean-hands>>.

² Legal Information Institute. In: *Cornell Law School – Legal Information Institute* [online]. [2025-03-25]. Available at: <https://www.law.cornell.edu/wex/clean_hands_doctrine>.

³ LOWE, V. *International Law*. New York: Oxford University Press, 2007, p. 87.

⁴ *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America. In: *International Court of Justice* [online]. 30. 3. 2023 [2024-09-10]. Available at: <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-jud-01-00-en.pdf>).

⁵ e. g. *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment. In: *International Court of Justice* [online]. 13. 2. 2019 [2024-03-31]. Available at: <<https://www.icj-cij.org/sites/default/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>>.

⁶ DUMBERRY, P. New developments in the interpretation and application of the clean hands doctrine by investment tribunals. *Journal of International Dispute Settlement*. 2023, Vol. 14, No. 4, pp. 6, 7, 8, 13, 14.

⁷ SHAPOVALOV, A. Should a requirement of “clean hands” be a prerequisite to the exercise of diplomatic protection? Human rights implications of the International Law Commission's debate? *American University International Law Review*. 2005, Vol. 20, No. 4, pp. 834, 839.

⁸ *Ibid.*, p. 834.

⁹ CONSTANTINO CAYCHO, R. A. Clean hands and a pure heart?: The application of the clean hands doctrine by the Inter-American Court of Human Rights. *Estudios de Derecho*. 2022, Vol. 79, No. 173, pp. 12–36.

So far, the clean hands doctrine has operated only in one case: *McCann and others v. the United Kingdom* (the *McCann* judgment).¹⁰ Apart from the latter, international courts and tribunals have not applied the clean hands doctrine to any of the three parts of a court proceeding: admissibility of the claim, the merits and the damages (compensation). The *McCann* judgment applied the clean hands doctrine to damages. The seventh section of this paper explores this landmark case, which has still not garnered sufficient attention from international law academia.

The argument of this paper is that international law has still not reached a stage where it can co-opt the clean hands doctrine. The clean hands doctrine is a non-legal norm that mediates between international legal norms;¹¹ it is thus a political concept which merely helps choose amongst international legal norms. It continues to exist as an inherent feature of international politics with a weak prospect of becoming a source of public international law.

To substantiate the above argument, this paper is organized as follows. The first section explores the relationship between international politics and international law. The second section analyses international jurisprudence. The third section compares and contrasts the notions of general principle of *law* and general principle of *international law*. The fourth section discusses the dichotomy of bilateral law and multilateral law with a view to international law. The fifth section looks at the principle of equity. The sixth section deals with the above-mentioned decision of the European Court of Human Rights, the *McCann* judgment. The paper concludes by highlighting the non-law status of the clean hands doctrine.

I. INTERNATIONAL POLITICS AND INTERNATIONAL LAW

Certain presumptions exist within international politics and the clean hands doctrine rests on one of those presumptions, namely, that states (mutually) expect each other to act in compliance with international law. Interestingly, being a state compliant with international law is a powerful trump card in international politics. International politics regards compliance with international law as a benchmark in ranking the subjects of international law – states, international organizations and individuals.

According to the clean hands doctrine, if a subject of international law demands another subject of international law to abide by international law, the former should itself in the first place have a provable track record of abiding with international law. This mutual compliance – and expectation of compliance – with international law enables a stable global system. A certain level of trust in international politics builds upon the reciprocal and consistent acts in regard to relationship with international law.

The demand placed by the interlocutors of a state is that the state in question be consistent and predictable in its acts in light of international law. Put another way, the state is expected to be ‘clean’ in its acts with respect to international law. Invocation of clean hands is a readily available toolkit of states and is a cogent political defense against another state which may not have a clean record in relation to international law.

¹⁰ Case of *McCann and others v. The United Kingdom*. In: *European Court of Human Rights* [online]. 27. 9. 1995 [2024-03-31]. Available at: <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57943%22%5D%7D>>.

¹¹ LOWE, V. *International Law*. pp. 98–99.

In fact, the demand for clean hands is based upon a certain normativity which is enshrined in international politics and outside international law. That is a non-legal normativity¹² invoking principles of fairness.¹³ Rather than being in the straitjacket of positive law, the clean hands doctrine is a non-law concept which resides in “the general framework of normative argument in the international society in which states operate.”¹⁴ The doctrine is in close contact with legal rules, but which itself is still not a legal rule as such.¹⁵ The clean hands doctrine is a non-law concept which requires states and other subjects of international law to have a meaningful and coherent relationship with international law.

Non-legal normativity presents a challenge for international law, which is that international law has to decide whether and when to take non-law normativity within its fold. But, until such entry into international law takes place, a non-legal norm may effectively mediate among international legal norms. There may be a competition between legal norms, and the selection of the legal norm to be applied to a case may ultimately depend on a non-legal norm.

The counter argument is that one can spot a certain entry of clean hands doctrine into international law, albeit via a different terminology. Indeed, the International Court of Justice (ICJ) has held that “*trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential.*”¹⁶ Trust is essential to peaceful and secure international relations, which is the utmost objective of the United Nations.¹⁷ Arguably, one may interpret trust as a reflection of the clean hands doctrine in international law.

There already exists a general principle of law which commends trust and confidence in state acts, and this is the principle of good faith, a principle that ensures the basic consistency of state acts in international relations¹⁸ and which requires a certain consistent attitude vis-à-vis international law. This paper argues that the clean hands doctrine aims to build upon and enlarge the principle of good faith by strictly linking the existence of trust and confidence with the past compliance with international law. The doctrine requires an absolutely consistent relation in respect of international law beyond the requirements of the principle of good faith.

However, current international law does not require a state to have a clean track record when it challenges other states. At present, even if a state does not have clean hands with regard to international law, it can still accuse other states of violation of international law. Any state may invoke international law, whether it has clean hands or not. Those states that have unclean hands are not relegated to a lower rank in terms of the capability to invoke international law as against other states – no such hierarchy exists among states in international law. Positive international law has still not accepted the development

¹² LOWE, V. *International Law*. pp. 98–99.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 99.

¹⁵ *Ibid.*

¹⁶ Nuclear Tests case, *New Zealand v. France*. In: *International Court of Justice* [online]. 20. 12. 1974 [2023-06-06]. Available at: <<https://www.icj-cij.org/sites/default/files/case-related/59/059-19741220-JUD-01-00-EN.pdf>>.

¹⁷ United Nations Charter, Article 1(1).

¹⁸ BASARAN, H. R. The Principle of Good Faith in International Law. *Hong Kong Law Journal*. 2021, Vol.51, No. 2, p. 600.

of the principle of good faith into a principle of clean hands and has still not embraced the clean hands doctrine.¹⁹

II. INTERNATIONAL JURISPRUDENCE

Granted, every now and then, the clean hands doctrine rears its head before various international courts and tribunals. Yet, apart from the *McCann* judgment, there is no instance where the clean hands doctrine has played a role in the settlement of an international legal dispute. And, even in the *McCann* judgment, the clean hands doctrine entered the stage merely as a non-legal norm mediating between legal norms. Aside from the instance of the *McCann* judgment, the clean hands doctrine remains an embellishment in the international law landscape. Indeed, in its final engagement with the clean hands doctrine, in 2023, the International Court of Justice (ICJ) held that:

*“The Court notes that, though often invoked in international disputes, the argument based on the “clean hands” doctrine has only rarely been upheld by the bodies before which it has been raised. The Court itself has never held that the doctrine in question was part of customary international law or constituted a general principle of law.”*²⁰

As of now, the clean hands doctrine remains a feature of international politics – not a legal norm to be considered by the ICJ. In particular, the doctrine constitutes a defense by governments to other governments’ claims in their bilateral political disputes. If a government demands another government to act in a certain manner, the latter may respond to the former that, either in relation to the same claim or in relation to general international law, the former does not have (enough) clean hands to make such a claim in the first place. The accusations of hypocrisy and double standards in regard to the subject-matter of a claim or general international law would be levelled by the latter government against the former.²¹ Actually, the invocation of unclean hands between governments has become so casual in international politics that one cannot even imagine that it has transformed into a legal norm under public international law.²²

¹⁹ The weakness of the clean hands doctrine has been noticed by the international community. Indeed, in the *Certain Iranian Assets* case, Iran clearly pointed out the ineffectiveness of the clean hands doctrine in international jurisprudence. *Certain Iranian Assets (Iran v. United States)*. In: *International Court of Justice* [online]. 30. 3. 2023 [2024-03-31]. Available at: <<https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf>>.

²⁰ Ibid.

²¹ TERRY, P. C. R. “Don’t Do as I Do” – The US Response to Russian and Chinese Cyber Espionage and Public International Law. *German Law Journal*. 2018, Vol.19, No. 3, p. 626.

²² See, in general, WILDE, R. Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, And Sociopathic, Racist Gaslighting. In: *Opinio Juris* [online]. 17. 3. 2022 [2025-07-03]. Available at: <<https://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/>>; LABUDA, P. I. On Eastern Europe, Whataboutism and West(s)plaining: Some thoughts on international lawyers’ responses to Ukraine. In: *Ejil Talk* [online]. 12. 4. 2022 [2025-07-03]. Available at: <<https://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/>>; SMOLENSKI, J., DUTKIEWICZ, J. The American Pundits Who Can’t Resist “West(s)plaining” Ukraine. In: *The New Republic* [online]. 4. 3. 2022 [2025-07-03]. Available at: <<https://newrepublic.com/article/165603/carlson-russia-ukraine-imperialism-nato>>.

At present, the doctrine of clean hands is neither treaty law, nor customary international law²³ nor a general principle of law.²⁴ Granted, there may be implicit or explicit references to the clean hands doctrine by international courts and tribunals,²⁵ but none of them admitted the clean hands argument was the determinative basis of their decision. Apart from the *McCann* judgment, which is discussed below, there is still no judicial or arbitral decision that has utilized the clean hands doctrine as a determinative element. When an international adjudicatory body seems to entertain the doctrine of clean hands,²⁶ another legal basis, in fact, constitutes the real determinative cause of its decision.²⁷

For instance, in international investment arbitration, the determinative legal basis is the violation of the national law of the host state by the foreign investor.²⁸ International investment arbitral tribunals may mention the violation of the host state law, where investment is made, together with the clean hands doctrine to decide in favor of the host state.²⁹ But, the violation of the host state law by the foreign investor is the determinative reason for the rejection of the foreign investor's claims by investment arbitration tribunals.³⁰ The breach of the local law of the host state where foreign investment is made is deemed by international investment arbitration as a sufficient cause for justifying the host state intervention in foreign investment.

III. GENERAL PRINCIPLE OF LAW OR GENERAL PRINCIPLE OF INTERNATIONAL LAW

Apart from general principles of law that exceptionally embody peremptory norms of international law (*jus cogens*),³¹ general principles of law remain in the shadow of treaties and customary international law. Arguably, general principles of law assume a secondary role in the settlement of international legal disputes. For instance, to date, the ICJ has never settled a dispute merely based on a general principle of law.

²³ TERRY, P. C. R. "Don't Do as I Do" – *The US Response to Russian and Chinese Cyber Espionage and Public International Law*. p. 624.

²⁴ *Yukos Universal Ltd (Isle of Man) v. The Russian Federation*, Permanent Court of Arbitration Case no. AA227, 18 July 2014, 1363.

²⁵ e. g. *Incesya Vallisoletana SL v. El Salvador*. In: *International Centre for Settlement of Investment Disputes* [online]. [2024-04-01]. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf>.

²⁶ e. g. *Hesham Talaat M. Al Warraq v. The Republic of Indonesia*, ad hoc arbitration, Final Award, 15 December 2014, paras. 646-647. In: *Jus Mundi* [online]. [2024-04-01]. Available at: <https://jusmundi.com/fr/document/decision/en-hesham-talaat-m-al-warraq-v-the-republic-of-indonesia-final-award-monday-15th-december-2014#decision_177>.

²⁷ *Ibid.*, paras. 645, 647.

²⁸ *Ibid.*, para. 645.

²⁹ *Ibid.*, para. 647.

³⁰ *Ibid.*, para. 645.

³¹ Vienna Convention on the Law of Treaties, Article 53 [*Treaties conflicting with a peremptory norm of general international law ("jus cogens")*]: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. In: *Vienna Convention on the Law of Treaties* [online]. [2024-03-23]. Available at: <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

Labelling such secondary role as an embellishment would be too harsh a judgment. A general principle of law shall rather be regarded as a facilitator accompanying other sources of international law – i.e., treaties and customary international rules. That may be true of a purported general principle of clean hands, too. On this view, clean hands need not be the direct and sole legal basis for the settlement of international legal disputes.

Still, “a certain level of recognition and consensus” is necessary to turn a doctrine into a general principle of law.³² In that respect, international courts and tribunals are the foremost authority. “The right to have recourse to general principles of law gives international courts and tribunals a powerful instrument for judicial creativity and innovation – though courts and tribunals have, as yet, used it sparingly.”³³ Indeed, due to the lack of a support on the part of the international courts and tribunals, it is difficult to argue that there exists a general principle of law encompassing the clean hands doctrine.

One should then resort to an alternative notion to define the presence of the clean hands doctrine in international law: the notion of a “general principle of *international law*”.³⁴ General principles of international law directly reflect the nature of the international legal system.³⁵ They fill the gaps of the international system. Importantly, while general principles of *law*³⁶ are inspired by national legal orders, general principles of *international law* are inspired by the international legal order as such. Typical examples of general principles of international law are equality of states, reciprocity between states, state consent and the principle of good faith.³⁷ In particular, as mentioned above, the principle of reciprocity and the principle of good faith are closely bound up with the doctrine of clean hands.

However, it may sometimes prove difficult to make a distinction between general principles of law and general principles of international law; there may be a considerable overlap between the two.³⁸ Actually, difficulties with the distinction among sources of international law demonstrate “the inappropriateness of rigid categorization of the sources.”³⁹ It would be more prudent to look at the effect of the purported sources of international law on a given dispute and not at their rigid classification.

In particular, if the clean hands doctrine might be identified as a peremptory norm of international law (*jus cogens*), it would have a huge effect in international law. Such identification would facilitate the integration of the doctrine of clean hands into international law. Peremptory rules of international law are a distinct and direct source of international law and as such reflect the international legal system. They are the utmost principles with which states, international organizations and individuals are to comply. Any treaty which is in violation of a peremptory norm of international law is deemed void.⁴⁰

³² Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014), para.1359.

³³ LOWE, V. *International Law*. p. 88.

³⁴ DUMBERRY, P. The Clean Hands Doctrine as a General Principle of International Law. *Journal of World Investment & Trade*. 2020, Vol. 21, No. 4, pp. 489–527.

³⁵ LOWE, V. *International Law*. p. 100.

³⁶ Article 38 of the Statute of the International Court of Justice (ICJ).

³⁷ BROWNLIE, I. *Principles of Public International Law*. New York: Oxford University Press, 2008, p. 19.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Vienna Convention on the Law of Treaties, Article 53.

However, arguably, the clean hands doctrine does not belong among *jus cogens* norms, as it does not represent a fundamental value of the international society. This is much clearer from the laxity with which states invoke the past violations of international law by other states while they themselves have track records of not complying with international law. Those states that have regularly violated international law do not hesitate to casually highlight violations of international law by other states.⁴¹

Still, the clean hands doctrine may be analyzed through another general principle of international law: responsibility of states for their internationally wrongful acts. The latter is an established principle of the international legal system.⁴² The principle of responsibility means attaching a legal consequence to the breach of an international legal obligation. Rather than a moral responsibility, a legal responsibility shall exist for the injury caused by the breach of an international rule. Legal responsibility may be enforced, for example, through the payment of damages. Actually, “true rules of international law are secured through the principle of responsibility.”⁴³

The contribution of the clean hands doctrine to the principle of responsibility would be this: a state that has an unclean track record concerning its international responsibility for wrongful acts shall not be able to invoke the international responsibility of other states. Yet, as of now, there is neither a treaty nor a customary norm nor a general principle of law which precludes or lightens the responsibility of states for their internationally wrongful acts on account of the clean hands doctrine. According to the clean hands doctrine, the state that in the past has not abided by international expectations of responsibility shall not invoke the responsibility of another state for an internationally wrongful act. However, this has not come to be endorsed by positive international law.

The doctrine of clean hands could eventually be endorsed by international courts and tribunals as an extension of the principle of responsibility and this may be done without specifically mentioning whether it is a “general principle of law” or a “general principle of international law”. International courts and tribunals may find such distinction too academic and theoretical. Yet whatever the label for such an endorsement, international courts and tribunals shall sense that the international community is ripe for a policy to import the clean hands doctrine from international politics into the international legal regime of responsibility for internationally wrongful acts. As of now, there exists no apparent international policy in that direction.

Actually, endorsing a principle of clean hands under international law is much easier than accepting it as a customary norm of international law. In contrast to customary international law, a principle does not require practice. A principle merely needs endorsement from various authorities of international law, such as international courts and legal

⁴¹ See, in general, WILDE, R. Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, And Sociopathic, Racist Gaslighting. In: *Opinio Juris* [online]. 17. 3. 2022 [2025-07-03]. Available at: <<https://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/>>; LABUDA, P. I. On Eastern Europe, Whataboutism and West(s)plaining: Some thoughts on international lawyers' responses to Ukraine. In: *Ejil Talk* [online]. 12. 4. 2022 [2025-07-03]. Available at: <<https://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/>>.

⁴² LOWE, V. *International Law*. pp. 100, 119.

⁴³ *Ibid.*, p. 120.

scholars, who are designated as the subsidiary means for the determination of the rules of law under Article 38(1)(d) of the Statute of the ICJ.⁴⁴ Yet, so far, in general, international jurisprudence and international doctrine have refrained from endorsing the doctrine of clean hands as a self-standing and determinative principle under international law. Currently, the clean hands doctrine exists in the non-legal realm – it is an extra-legal principle and involves a certain normativity outside positive international law.⁴⁵

Arguably, if imported into positive international law, the clean hands doctrine may have serious repercussions, in particular, in respect to the bilateral relationships between subjects of international law. That is why, at this juncture, a closer look at the bilateral-multilateral dichotomy in international law is in order.

IV. BILATERAL LAW - MULTILATERAL LAW

Some argue that the clean hands doctrine is a principle that is merely concerned with reciprocal rights and obligations.⁴⁶ Hence, one cannot apply the clean hands doctrine to matters such as human rights violations, where non-negotiable values above bilateral relations between the subjects of international law are at stake. For instance, in international criminal law, fundamental values and objective obligations are in question, not reciprocal rights between subjects of international law.⁴⁷ The invocation of the clean hands doctrine by states within the realm of international criminal law must be regarded as rhetorical rather than legal.⁴⁸

Yet, outside those limited fields representing the core values of humanity, the subjects of international law engage, by and large, in bilateral relationships. In bilateral relationships, the invocation of clean hands as a political trump card between states is common⁴⁹ and that political trump card from time to time gets to be issued by states before international courts and tribunals either as a substitute for the principle of good faith⁵⁰ or as an independent source of international law.⁵¹

Actually, the clean hands doctrine cannot go beyond the bilateral realm without a strong endorsement by the international community in general and by international courts and tribunals in particular. A multilateral order encompassing the clean hands doctrine can be established if the international community and international courts and

⁴⁴ Statute of the International Court of Justice, Article 38(1)(d): The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. In: *International Court of Justice* [online]. [2024-03-23]. Available at: <<https://www.icj-cij.org/statute>>.

⁴⁵ LOWE, V. *International Law*. p. 97.

⁴⁶ BARNÁ GERGŐ, B. La doctrine des mains propres (“clean hands”) dans le contentieux international des droits de l’homme et du droit international pénal. *Annales Universitatis Scientiarum Budapestinensis*. 2021, p. 114.

⁴⁷ *Ibid.*, p. 127, 128.

⁴⁸ *Ibid.*

⁴⁹ SCHWEBEL, S. M. *Clean Hands, Principle*. Oxford: Oxford Public International Law, 2013.

⁵⁰ SHAPOVALOV, A. *Should a requirement of “clean hands” be a prerequisite to the exercise of diplomatic protection? Human rights implications of the International Law Commission’s debate?* p. 840.

⁵¹ BARNÁ GERGŐ, B. *La doctrine des mains propres (“clean hands”) dans le contentieux international des droits de l’homme et du droit international pénal*. p. 114.

tribunals believe that it is necessary. Indeed, the only endorsement of such necessity within a multilateral order has taken place, via the *McCann* judgment of the European Court of Human Rights, which will be elaborated upon in the sixth section. Importantly, such necessity is closely tied up with the principle of equity.

V. EQUITY

A supposedly multilateral order undergirding international law connotes a certain elemental sense of justice – i.e., equity.⁵² Yet, it may be a challenge to define the sense of justice inherent in the international community. In other words, equity is a large, amorphous and sometimes unpredictable concept in regard to international law. Equity is a non-legal concept which knocks on the door of public international law.

Equity is not part of public international law. Equity represents the filter through which non-legal norms belonging in the domain of international politics try to enter the sphere of public international law. This entry into international law may take place because it may be believed that the non-legal norm can contribute to international law. A non-legal norm may become so preponderant that the international community may decide to import it through the principle of equity. In other words, the principle of equity is the gate through which a non-legal norm is integrated into international law. Hence the argument of this article: that the clean hands doctrine is still not regarded as eligible to enter into and become part of public international law. Rather, the clean hands doctrine remains a non-legal norm with a slight prospect of infiltrating into public international law. One can speculate on the reasons for this.

One reason may be that the doctrine of clean hands is found to be potentially dangerous. The doctrine risks impunity for internationally wrongful acts because the doctrine attenuates or exonerates responsibility for internationally wrongful acts.⁵³ A government which commits an internationally wrongful act may invoke the clean hands doctrine as against other governments to exonerate itself from responsibility. This jeopardizes the principle of responsibility for internationally wrongful act and may also be in violation of equity,⁵⁴ as equity requires the discharge of responsibility for internationally wrongful acts. The discharge of responsibility is essential to the existence of an equitable multilateral public order.

Nevertheless, there is another side aspect that must be taken into consideration with regard to the relationship between equity and the clean hands doctrine. It may be wholly equitable to invoke clean hands as against a state, or against other subjects of international law. Equity may require us to have a look at the past record of a government to decide whether that government can invoke the responsibility of another government.

⁵² LOWE, V. *International Law*. p. 97.

⁵³ SHAPOVALOV, A. *Should a requirement of “clean hands” be a prerequisite to the exercise of diplomatic protection? Human rights implications of the International Law Commission’s debate?* p. 847.

⁵⁴ SHRIVASTAVA, A. LAKRA, R. *Strolling by the River Meuse: A Definitive Case Against the Clean Hands Doctrine*. In: *Opinio Juris* [online]. 22. 4. 2022 [2024-01-19]. Available at: <<https://opiniojuris.org/2022/04/22/strolling-by-the-river-meuse-a-definitive-case-against-the-clean-hands-doctrine/>>.

Yet, even on that optimistic note, a certain difficulty exists, in that it is difficult to pinpoint and separate an element of equity and turn it into an independent source of international law. Equity is a large concept which is possessive as regards its components. Indeed, if the clean hands doctrine is a component of equity, it is difficult to argue that it possesses a self-standing status, one that is independent from equity.

One may speculate on the reasons for the dependency of the clean hands doctrine on the principle of equity. The first reason concerns the general tendency to resort to positive international law in the settlement of international disputes.⁵⁵ A certain caution exists in approaches towards equity, which is regarded as the last resort in the event of the lack of positive international legal rules. Equity is the natural law backstop for positive international law.

The acknowledgement of equity, in respect of specific dispute, as a source of international law would be a concession of sorts given by positive international law for the sake of the survival of the all-encompassing international law where a *non liquet* (the inexistence of applicable law) is to be avoided. Where positive international law is lacking, natural law – usually wearing the garb of equity – steps on the stage to prevent *non liquet*. Yet, this sort of concession by positive international law to equity is to be interpreted narrowly and would not readily allow for a new independent principle under international law.

The second reason concerns the inherent ambiguity of the principle of equity. The ambiguity is due to the presence of so many elements within equity. Various notions for which a place under the roof of positive international law cannot be found get to be stored under the roof of equity. Arguably, this is also true with the doctrine of clean hands. While the clean hands doctrine is still a potential source of international law, it remains in the non-legal realm within the confines of the principle of equity.

The third reason for the dependency of the doctrine of clean hands on equity is concerned with the use of equity as a cover for policy. According to the positivist understanding of international law, international disputes are to be settled under international legal norms. International courts and tribunals shall not decide disputes through non-legal norms. Non-legal norms are policy considerations – that is, they are part of the political realm, and an international court shall not base its judgments on policy.

Hence the preeminent role of equity. There is a need to avoid overt policy decision-making in international courts and tribunals. There is a need for cover. If the international court makes a policy decision in a covert manner to bend the positive rules of international law or to fill a gap among positive rules of international law, this may preferably take place under the cover of equity.⁵⁶ As the clean hands doctrine cannot become a norm of positive international law and as it may be necessary to bend the norms of positive international law, equity is the most plausible venue through which the clean hands doctrine may be invoked.

⁵⁵ CASSESE, A. *Five Masters of International Law: Conversations with R-J Dupuy, E. Jimenez de Arechaga, R. Jennings, L. Henkin and O Schachter*. Oxford: Hart Publishing, 2011.

⁵⁶ SHAW, M. N. *International Law, 6th Edition*. New York: Cambridge University Press, 2008, p. 22.

The existing rules of international law may not always respond to the actual needs of the international community. Positive international law may not catch up with the growing demand on the part of the international community. In that case, a certain policy activism on the part of the legal doctrine or international courts may be necessary to adapt international law to the facts. Yet, such policy activism is a matter within the ambit of political science and not of law.⁵⁷ How should legal doctrine and international courts engage in such policy activism without losing their legal identity? In other words, legal doctrine and international courts determine a political demand and attempt to respond to that. They engage in politics, but still shall cover their politics with legal normativity so as to not lose their legal façade. Thus, equity may operate as the bridge from policy to legal normativity.

Some may consider this an ordinary functioning of the international legal process. It is possible that international dispute settlement, as a “legal process”, engages non-legal sources of normativity and policy considerations together with existing legal rules.⁵⁸ There is an “essential relationship between positive law and policy”⁵⁹ and equity functions as a convenient bridge between the two.

Still, equity may not perform well as it is amenable to being a weak cover for policy and can be a source of ambiguity. Invocation of equity may jeopardize legal security as it tries to convert non-legal norms into legal norms in the decision-making of international courts and tribunals. Equity does not rely on positive international law;⁶⁰ it relies on judicial discretion and subjective appreciation.⁶¹ Equity packages international policy preferences due to the weakness of positive international law.⁶² If the positive rules of international law are not enough, equity enters the stage and this carries a certain risk for the reliability of international law, which in turn presents a risk to international legal security. Equity has limits. It is a mere corrective to reduce unfairness in current international law. It is difficult to derive an independent and robust clear hands norm from the principle of equity.

Be that as it may, “it is desirable that the policy factors be dealt with systematically and openly.”⁶³ International legal process shall openly acknowledge policy factors which contribute to the interpretation and the modification of positive international law. Hence, if the clean hands doctrine is to be applied by an international court, such application shall be determinative. Being a non-legal norm, the clean hands doctrine’s role should be clear in decisions of international courts and tribunals.

Indeed, in the *McCann* decision, the European Court of Human Rights did utilize the clean hands doctrine in a determinative way although the Court did not explicitly use

⁵⁷ *Ibid.*, p. 49.

⁵⁸ HIGGINS, R. *Problems & Process/International Law and How We Use It*. New York: Oxford University Press, 1994, p. 5.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p. 227.

⁶¹ *Ibid.*, p. 226.

⁶² *Ibid.*, p. 224.

⁶³ *Ibid.*

the term “clean hands”. Hence the need to look at the *McCann* decision, a unique case, where the clean hands doctrine achieved a certain visibility in the European Court of Human Rights – an international court.

VI. MCCANN AND OTHERS VS. THE UNITED KINGDOM

McCann and his two friends, all members of the Irish Republican Army (IRA), were planning to plant a bomb on British territory, on Gibraltar. British intelligence learned about the plan and began a pursuit of the three IRA members. The British security forces did not arrest them on the border when entering Gibraltar but waited until after they had parked their car in a public place in Gibraltar. Being sure of the preparation and presence of a remote detonated car bomb, British security forces conducted an operation against the three associates and killed them all in the Gibraltar apartment in which they were staying. The families of the three killed IRA members applied to the European Court of Human Rights after exhausting domestic remedies. The Court held that the British state violated the three men’s right to life, as stated in Article 2 of the European Convention on Human Rights.⁶⁴

Notwithstanding the violation of the right to life by the British state, the European Court of Human Rights held that the families of the three killed IRA members did not have the right to damages to be paid by the British state. In other words, while the responsibility of the British state for its wrongful act was established by the Court, the Court declined the payment of compensation. Actually, this is the point where the doctrine of clean hands played a determinative role in the *McCann* judgment.

The three killed persons were found not to have had clean hands, which would have otherwise merited them damages. Below is the exact paragraph where the Court denies damages under the doctrine of clean hands, without specifically mentioning the term “clean hands”⁶⁵:

“...In any event, having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head. It therefore dismisses the applicants’ claim for damages.” (underlines added)

The Court implied that terrorists shall not totally benefit from the international legal system as created by the European Convention on Human Rights, because that would not be appropriate. Notwithstanding the acknowledgement by the Court that the unarmed terrorists’ right to life had been violated by the British security forces due to poor planning and execution and the unreasonable force by the British operation, at the end of the day, the terrorists were not deemed to be at the same level as the British state. The British state is obliged to protect the general public as a corollary of its national sover-

⁶⁴ Article 2. In: *European Convention on Human Rights* [online]. [2024-09-25]. Available at: <https://www.echr.coe.int/documents/d/echr/Convention_ENG>.

⁶⁵ Para. 219.

eignty⁶⁶ and in doing so, it may have miscalculated the planning and the execution of the security operation against the terrorists. In the Court's words, paying damages would "not be appropriate". That expression implies the unclean hands of the three terrorist suspects.

The denial of damages to the families of the terrorists smacks of equity. Granted, the Court avoided using the term "equity" in the abovementioned paragraph concerning the denial of the award of damages. Still, the term "appropriate" in and of itself connotes equity. The clean hands doctrine under the shadow of equity, in and of itself, was deemed sufficient by the Court to deny damages for the three killed IRA members. One cannot equate the state with suspected terrorists intending to plant a bomb in a public place. The two sides do not occupy the same moral ground – that is a corollary of equity.

Although the Court did not mention the term "clean hands" in the body of the judgement, this is the only instance where an international court applied the clean hands doctrine in a determinative manner to settle a dispute – i.e., to the part of the dispute concerning damages. Here the clean hands doctrine remained a non-legal norm and worked two effects on the judgement of the Court. First, as IRA members are violators of international law in that they threaten human life and the public order, they are deemed to have unclean hands. Second, as a non-legal norm, clean hands mediated between two international legal norms: the legal norm of national sovereignty on the one hand and the legal norm of the grant of damages in the event of the violation of the right to life, (a direct legal consequence of the principle of responsibility for internationally wrongful acts) on the other. Of the two, the former prevailed through the mediation of the clean hands doctrine. The clean hands doctrine rectified the principle of responsibility and favored national sovereignty.

The Court was aware of the fact that the doctrine as such did not belong in international law and used the doctrine as a non-legal norm through which the European multilateral public order would be sustained, thereby implying that the European public order would not and could not tolerate the payment of damages to suspected terrorists as they had 'unclean hands'. The Court did not regard the matter between the United Kingdom and the claimants as a private / bilateral matter but as a matter for the European public order, and that order requires the denial of damages, notwithstanding the violation of the human right to life by the United Kingdom. The Court summed up the clean hands doctrine in the word "appropriate" and chose the legal norm of national sovereignty over the legal norm of the payment of damages for the wrongful act.

CONCLUSION

The clean hands doctrine does not belong in international law. It is a non-legal norm with the capability to mediate between international legal norms. Clean hands may be

⁶⁶ CHEVALIER-WATTS, J. A rock and a hard place: has the European Court of Human Rights permitted discrepancies to evolve in their scrutiny of right to life cases? *The International Journal of Human Rights*. 2010, Vol. 14, No. 2, p. 304.

characterized as part of equity but such a characterization does not make the doctrine a part of public international law. The principle of equity exists at the gates of public international law and, so far, has not transferred the clean hands doctrine from international politics to international law.

In the *McCann* decision, the European Court of Human Rights endorsed the clean hands doctrine as an element of the European public order and confirmed the capability of the clean hands doctrine to conduct mediation among legal norms. However, that endorsement has still not turned the clean hands doctrine into a legal norm. Being fully aware of the non-legal status of the clean hands doctrine, the European Court applied the doctrine without any legal elaboration.