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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

Aleksandr Shapovalov

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

ALEKSANDR SHAPOVALOV*

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* Graduate of New York University School of Law, LL.M. in International Legal Studies (May, 2004) and Novosibirsk State University (Diploma in Law, June, 2001). I express my gratitude to Professor Benedict Kingsbury of the New York University School of Law for his suggestions and support. My special thanks go to Professor John Dugard of the Leiden University Faculty of Law, who is also a member of the U.N. International Law Commission, for his thoughtful guidance and comments. I also express my gratitude to my friend Mark Toufayan (NYU Law LL.M., May, 2004) for his assistance in working with French legal documents and for his thought-provoking conversations; the staff of the U.N. Library in Geneva, particularly Irina Gerassimova, for their research assistance; and Annemarieke Kunzli of Leiden University Faculty of Law for her comments. I am thankful to Susan Shapovalova for editing this work.

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INTRODUCTION

The application of the clean hands doctrine to diplomatic protection is the subject of considerable debate in the international legal community, particularly at the U.N. International Law Commission[1] ("ILC").[2] A suggestion was made at the ILC to include

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1. *See* U.N. Int'l L. Comm'n, *Introduction* (providing information on the ILC, including its structure and objectives), *at* http://www.un.org/law/ilc/introfra.htm (last visited Jan. 29, 2005). The ILC is an influential and respectable U.N. body charged with the codification and progressive development of international law. *Id.* The U.N. General Assembly established the ILC in 1947, and it is composed of thirty-four independent experts, each elected for a term of five years by the General Assembly. *Id.* The ILC was heavily involved in the elaboration of several milestone international legal documents, such as the Vienna Convention on the Law of Treaties, the Rome Statute of the International Criminal Court, and conventions on the Law of the Sea. *Id.*

2. *See Provisional Summary Record of the 2793rd Meeting*, U.N. Int'l L. Comm'n, *56th Sess.*, at 3-27, U.N. Doc. A/CN.4/SR.2793 (May 14, 2004) [hereinafter *ILC Meeting* 2793] (noting arguments of the members of the International Law Commission regarding the application of the clean hands doctrine to the field of diplomatic protection); *Provisional Summary Record of the 2792nd Meeting*, U.N. Int'l L. Comm'n, 56th Sess., at 17-18, U.N. Doc. A/CN.4/SR.2792 (May 28, 2004) (same); *Provisional Summary Record of the 2819th Meeting*, U.N. Int'l L. Comm'n, 56th Sess., at 10-13, U.N. Doc. A/CN.4/SR.2819 (27 July 2004) [hereinafter *ILC Meeting 2819*] (same);

the clean hands doctrine in the ILC's Draft Articles on Diplomatic Protection as a condition for admissibility of diplomatic protection.[3] This would mean that if an internationally wrongful act of a State that caused an injury to an alien resulted from this alien's initial wrongful conduct, the State of the alien's nationality should be precluded from exercising diplomatic protection over this person. The strongest supporter of this position at the ILC is Alain Pellet, who states that diplomatic protection is in fact the only field in which the clean hands doctrine comes into play.[4] John Dugard, Special Rapporteur on diplomatic protection, rejects this position, insisting on the inapplicability of the clean hands doctrine to diplomatic protection.[5]

This article discusses both the theoretical nature and the practical implications of applying the clean hands doctrine to diplomatic protection. Theoretically, this article analyzes the legal nature of the clean hands doctrine and examines whether or not the clean hands doctrine is part of diplomatic protection, and if so, whether the clean hands doctrine should be viewed as a prerequisite for the exercise of diplomatic protection.[6] On a practical level, this article discusses the appropriateness of including references to the clean hands doctrine as

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Provisional Summary Record of the 2791st Meeting, U.N. Int'l L. Comm'n, 56th Sess., at 9-11, U.N. Doc. A/CN.4/SR.2791 (May 7, 2004) [hereinafter *ILC Meeting 2791*] (same).

3. *See generally Diplomatic Protection: Titles and Texts of the Draft Articles Adopted by the Drafting Committee on First Reading,* U.N. Int'l L. Comm'n, 56th Sess., U.N. Doc. A/CN.4/L.647 (2004) [hereinafter *Diplomatic Protection*] (providing those draft articles already adopted by the drafting committee). Thus far no draft language on inclusion of the clean hands doctrine into the draft article has been proposed at the ILC.

4. *See ILC Meeting 2793*, *supra* note 2, at 4 ("[T]he [clean hands] doctrine produced effect only in the context of diplomatic protection."). "In proceedings between States the [clean hands] doctrine was inapplicable. However, where a case involved an individual and a State via diplomatic protection, the doctrine was relevant." *Id.* at 15.

5. *ILC Meeting 2791*, *supra* note 2, at 10.

6. *See* discussion *infra* Parts I-III (analyzing the application of the clean hands doctrine to diplomatic protection and inter-State disputes, and whether the doctrine is a question of admissibility or substantive law).

a condition for the admissibility of diplomatic protection into the ILC's Draft Articles on Diplomatic Protection.[7]

Defining the place of the clean hands doctrine in the law of diplomatic protection has both theoretical and practical significance. Diplomatic protection is undoubtedly an important tool in human rights protection.[8] The application of the clean hands doctrine to diplomatic protection may have far-reaching consequences on the law of diplomatic protection and human rights in general. For example, diplomatic protection may be rendered inadmissible in cases similar to *LaGrand*[9] and *Avena* if the doctrine of clean hands is applied.[10] It may also have a general negative impact on human

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7. *See* discussion *infra* Parts IV-V (revealing the lack of jurisprudential support for the clean hands doctrine in the context of diplomatic protection and arguing that its application would be problematic).

8. *See First Report of the International Law Commission on Diplomatic Protection*, U.N. Int'l L. Comm'n, 52nd Sess., at 10, U.N. Doc. A/CN.4/506 (2000) [hereinafter *ILC First Report*] (submitting that most countries treat a State's claim of diplomatic protection more seriously than an individual's complaint).

9. *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 488-89 (June 27) (denying a United States claim that Germany was precluded from asking the United States to adhere to criminal justice standards by which Germany itself did not abide). The Court cited the United States' inability to prove that Germany's own practice failed to conform to the standards it demanded from the United States. *Id.* at 489. Therefore, the Court did not need to decide whether the United States' argument, if true, would have rendered Germany's submissions inadmissible. *Id.*

10. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, ¶¶ 45-47 (Mar. 31) (dismissing the United States' objection, similar to that advanced in *LaGrand*, that the United States was being held to a different standard of international law under Mexico's interpretation of Article 36 of the Vienna Convention). The Court held that even if the United States had shown that Mexico's practice in regard to the treaty was not beyond reproach, "this would not constitute a ground of objection to the admissibility of Mexico's claim." *Id.* ¶ 47. A recent example of the *African Pride* case seems well fit to provide a practical framework for further discussion of the clean hands doctrine and its application to the law of diplomatic protection. In October 2003, the Nigerian Navy arrested some of the crew members of a vessel named *African Pride*, including twelve nationals of the Russian Federation. The vessel was allegedly smuggling 11,300 tons of crude oil worth about $2.5 million. *See Trial of Russian 'Oil Smugglers' Adjourned to May in Nigeria*, XINCHUA NEWS AGENCY, Mar. 22, 2005; Brimah Kamara, *Russian Envoy Hails Russo-Nigerian Relation*, ALL AFR., Jan. 4, 2005. The *African Pride* flew the Panamanian flag, belonged to a Greek shipping company, and was chartered to a Nigerian firm. *See Moscow Working on*

Releasing Russian Sailors in Nigeria, INTERFAX NEWS SERVICE, May 30, 2005. Reportedly, the vessel was arrested in neutral waters off the Nigerian coast. *See Russian Sailors Detained in Nigeria May Face Life Sentence*, RUSS. COURIER INFO. PORTAL, May 30, 2005 [hereinafter *Russian Sailors*], *available at* http://www.russiancourier.com/eng/news/31/5/2005/1917/ (last visited June 1, 2005). The crew members, currently facing a life sentence, maintain that they were not aware of the contents that were loaded, and acted strictly under instructions from the vessel owner. *See* Chica Amanze-Nwachuku, *Illegal Bunkering: Trial Continues June 8*, ALL AFR., June 3, 2004; Andrey Stenin, *Rossiiskie Moryaki ne Vinesut Prigovora* [*Russian Sailors Will Not Survive the Verdict*], GAZETA, *available at* http://www.gazeta.ru/2005/05/30/oa_159104.shtml (last visited June 1, 2005); *see also Russian Sailors*, *supra*. It appears that the Russian embassy in Lagos, Nigeria, was not informed of the arrest of the Russian nationals in a timely manner. *See* Boris Pilnikov, *Russian Embassy in Nigeria Probing into Tanker Crew Arrest*, ITAT-TASS WORLD SERVICE, Oct. 23, 2003. According to a letter by Alexander Yakovenko, the Spokesman of the Russian Ministry of Foreign Affairs, initially the conditions of the arrested crew members were "tolerable," but it changed abruptly after the hijacking of the vessel, which was reportedly done with the help of the crew remaining on board the *African Pride*. *See* Letter from Alexander Yakovenko, Ministry of Foreign Affairs of the Russian Federation, to the Izvestia Editors (May 30, 2005) [hereinafter Yakovenko Letter], *available at* http://www.ln.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/cfc84793c42f296c32570120037889f?OpenDocument (last visited June 1, 2005). This act was perceived by the Nigerian authorities as a "criminal plot" and, as a result, detention conditions of previously arrested crew "worsened considerably." *See id.* Reportedly, the Russian nationals are currently being held in the Kiriki Maximum Security Prison. *See* Kamara, *supra*. They were refused release on bail and were reportedly brought to the court in chains. *See id.*; Amanze-Nwachuku, *supra*. According to media reports, the arrested crew members are placed in groups of three people, chained, and held in one-man prison cells that are two by three meters. *See* Stenin, *supra*. Reportedly, the detainees are fed irregularly and continuously suffer from tropical diseases, largely due to the temperature in prison cells, which sometimes reaches fifty plus celsius. S*ee id.* The Nigerian authorities have reportedly refused the doctor from the Russian embassy in Lagos to provide medical assistance to detainees. *See* Yakovenko Letter, *supra*. Repeated attempts by the Russian Ministry of Foreign Affairs to assist the arrested crewman remain unanswered by the Government of Nigeria. It should be noted, however, that the families of the arrested crew members have repeatedly pointed out the insufficiency of efforts on the part of the Government of Russia to address the matter. In the beginning of March, the family members declared a hunger strike to attract attention of the authorities to the issue (*see* Sergei Perov, *Moryaki Golodayut v Nigerii, a ih Zheni – v Novorossiiske* [*Sailors are Starving in Nigeria, and Their Wives – in Novorossiysk*]; Adam Corbett, *Crew Wives in Desperate Plea for Help,* TRADEWINDS, Apr. 1, 2005, at 38. According to the Russian Ministry of Foreign Affairs, the Government of Nigeria claims that "this problem is in the legal field," and "any attempts to exert pressure on the court are unlawful." Yakovenko Letter, *supra*. Meanwhile, the conditions of the arrested crew members

rights protection by compromising its universal application; that is, because the clean hands doctrine subjects the exercise of diplomatic protection to limitations of the domestic legal system of a State which allegedly committed the internationally wrongful act.

This article argues that the exercise of diplomatic protection cannot be and should not be limited by the doctrine of clean hands for a number of reasons. Perhaps the main reason for this is because the clean hands doctrine, which seems to be nothing more than another name for the principle of good faith, cannot be used to question the admissibility of a claim.[11] The clean hands doctrine is an issue of substantive law and should be employed, if appropriate, at the stage of the consideration of merits.[12] In application, this means that the clean hands doctrine would come into play only when diplomatic protection has already been exercised and the international tribunal is considering the claim.[13] Consequently, the ILC should not include a requirement of "clean hands" in its current codification of the law of diplomatic protection.

I. THE APPLICATION OF THE CLEAN HANDS DOCTRINE TO DIPLOMATIC PROTECTION

The clean hands doctrine is not a novelty of international law. Being closely related to notions of equity and good faith, the doctrine finds some of its earlier expressions in the works of eighteenth-century writers, particularly Richard Francis, who stated: "He that hath committed Iniquity, shall not have equity."[14] The application of the doctrine in domestic legal systems varies from State to State and

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of the *African pride* continue to deteriorate. *See* Sergei Perov, *Zheni Arestovannih v Nigerii Rossiiskih Moryakov Edut v Sud* [*Wifes of Russian Sailors Arrested in Nigeria are Heading for the Court*], NOVIE IZVESTIYA, May 30, 2005; Stenin, *supra*.

11. *See* discussion *infra* Part III (arguing that the clean hands doctrine can only be examined once diplomatic protection has already been exercised, thus making it relevant only at the merits stage).

12. *See* discussion *infra* Conclusion (concluding that the clean hands doctrine is an established part of international law and is substantive in nature).

13. *See discussion infra* Conclusion (citing various international tribunals' practice of characterizing preliminary objections as related to questions of merit and refusing to consider their validity at the preliminary stage).

14. RICHARD FRANCIS, MAXIMS OF EQUITY 5 (1727).

from one area of law to another. Most commonly, the clean hands doctrine is understood as requiring that a party claiming equitable relief or asserting an equitable defense has itself acted in accordance with equitable principles.[15] Some sources mention willful intent of the initial wrongful conduct and a causal link between inequitable conduct of both parties as conditions for the application of the clean hands doctrine.[16]

In relation to diplomatic protection, the clean hands doctrine can be viewed in three ways.[17] First, the clean hands doctrine can

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15. *See* BLACK'S LAW DICTIONARY 268 (8th ed. 2004) (defining clean hands as "the principle that a party may not seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith"); *see also* William J. Lawrence, III, *The Application of the Clean Hands Doctrine in Damage Actions*, 57 NOTRE DAME LAW. 673, 674 (1982) (explaining that the doctrine is "a matter of sound discretion for the court, and should never prevent a court 'from doing justice'"). Other views on the clean hands doctrine have been expressed as well. For example, in his dissenting opinion in *Chapman v. United Kingdom*, Judge Bonello referred to the doctrine of clean hands as a "classic constitutional doctrine," which "precludes those who are in prior contravention of the law from claiming the law's protection." Chapman v. United Kingdom, 33 Eur. Ct. H.R. 339, 440-41 (2001).

16. *See* Lawrence, *supra* note 15, at 674 (finding that the willful conduct usually comprises "fraud, illegality, unfairness, or bad faith").

17. The ILC defines diplomatic protection as consisting of "resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State." *See Report of the International Law Commission on the Work of its Fifty-fifth Session*, U.N. GAOR, 58th Sess., Supp. No. 10, ¶¶ 152-53, U.N. Doc. A/58/10 (2003) [hereinafter *ILC 55th Session Report*] (outlining the ILC's current Draft Articles on diplomatic protection), *available at* http://www.un.org/law/ilc/reports/2003/2003report.htm (last visited Jan. 29, 2005). Diplomatic protection from the outset produces the impression of an established area of international law. Contrary to this opinion, however, diplomatic protection is a changing area of law in which many vital questions remain unanswered. This can largely be explained by the fact that diplomatic protection is (again contrary to wide-spread opinion) a "comparatively modern phenomenon in the evolution of the state, in constitutional and in international law." Edwin Borchard, *Basic Elements of Diplomatic Protection of Citizens Abroad,* 7 AM. J. INT'L L. 497, 497 (1913). As stated by Borchard, "[n]ot until the legal position of the state toward individuals, both of its own citizens and aliens, and of states between themselves, had become clearly defined in modern public law, did diplomatic protection become a factor in international intercourse." *Id.* An important point needs to be made about the ILC's definition of diplomatic

preclude a State from exercising diplomatic protection if it has acted in a similar manner to foreign nationals. Second, the doctrine may preclude diplomatic protection when the protecting State acted unlawfully in a particular case involving its national and consequently made its hands unclean. Third, the clean hands doctrine can be viewed as precluding a State from exercising diplomatic protection if its allegedly injured national suffered an injury as a consequence of his/her own wrongful conduct.[18] The third interpretation is the one that is at issue at the ILC. This interpretation substantially differs from the two other interpretations mentioned above because it suggests a link between the initial wrongful conduct of an injured alien and the subsequent wrongful conduct of a State. Perhaps more importantly, the suggested purpose of applying the clean hands doctrine to diplomatic protection in this third scenario is to preclude the State from exercising such protection when the initial wrongful conduct was performed not by the State, but by its national.[19]

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protection. From the textual interpretation of the ILC's definition of diplomatic protection it may seem that diplomatic protection may be exercised *only* in cases when an alien suffers an injury from an internationally wrongful act of a State. *See ILC 55th Session Report*, *supra* note 17, ¶ 152. Obviously, such a view is inconsistent with the nature and practice of diplomatic protection, especially considering the broad scope of the term adopted by the ILC (as including both adjudicatory and non-adjudicatory measures, such as assistance in obtaining legal and consular help). The confusion that Draft Article 1 causes in this regard needs clarification by the ILC in its commentaries on Draft Articles on Diplomatic Protection.

18. *See Sixth Report of the International Law Commission on Diplomatic Protection*, U.N. Int'l L. Comm'n, 57th Sess., at 2, U.N. Doc. A/CN.4/546 (2005) [hereinafter *ILC Sixth Report*] (outlining the various arguments that support the application of the clean hands doctrine to this interpretation of diplomatic protection).

19. Even though, according to traditional understanding of diplomatic protection, the State becomes sole claimant by taking over a claim of its national, it does not mean that the initial wrongful conduct of an alien becomes attributable to its State of nationality. For a discussion on state responsibility, see the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, at 29, U.N. Doc. A/56/10 (2001). The Draft Articles stated, *inter alia*, that "[a]s a general principle, the conduct of private persons or entities is not attributable to the State under international law." *Id.* at 103.

The analysis of the applicability of the clean hands doctrine to diplomatic protection is based on a twofold test.[20] The first element considers whether or not the clean hands doctrine has applicability to inter-State disputes, since diplomatic protection is still predominantly viewed as based on the "injury to the State" fiction.[21] The second element considers whether or not the doctrine of clean hands can be used as a question of admissibility.[22] If both of these questions are answered positively, it can be said that the doctrine of clean hands is a prerequisite for exercising diplomatic protection.[23]

In addition to the test outlined above, a second test is required to analyze the necessity of including the clean hands doctrine in the ILC's Draft Articles on Diplomatic Protection. On top of addressing the two questions presented in the first test, it would have to be shown that positive answers to these questions are supported by both secondary and primary authority.[24] Alternatively, it would need to be demonstrated that inclusion of the doctrine of clean hands in the law of diplomatic protection would progressively develop international law.[25]

The analysis below shows that in both tests, the only question answered positively is that of the applicability of the clean hands doctrine to inter-State disputes.[26] Consequently, the clean hands doctrine is not a condition of admissibility for diplomatic protection

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20. *See* discussion *infra* Parts II-III (analyzing the clean hands doctrine under both prongs of the twofold test).

21. *See* discussion *infra* Part II (finding that the clean hands doctrine has been applied in inter-State disputes).

22. *See* discussion *infra* Part III (revealing little support for the proposition that the doctrine of clean hands is a question of the admissibility of a claim).

23. *See* discussion *infra* Conclusion (concluding that the clean hands doctrine is not an established prerequisite for diplomatic protection and therefore should not be incorporated into the ILC's Draft Articles).

24. *See* discussion *infra* Part IV (analyzing the authorities often cited in support of the application of the clean hands doctrine to diplomatic protection).

25. *See* discussion *infra* Part V (discussing the potential impact of interpreting the clean hands doctrine as a preliminary objection to admissibility in the context of protecting human rights).

26. *See* discussion *infra* Part II (arguing that diplomatic protection's "injury to the State" fiction forms the basis for an inter-State dispute).

and should not be included as such in the ILC's Draft Articles on Diplomatic Protection.

II. IS THE CLEAN HANDS DOCTRINE APPLICABLE TO INTER-STATE DISPUTES?

During the ILC's fifty-sixth session, an argument was expressed that the doctrine of clean hands has no applicability to inter-State disputes and only comes into play when diplomatic protection is exercised.[27] Alain Pellet supported this view, but nevertheless conceded that the concept of clean hands "was not very different from the general principle of good faith in the context of relations between States, and had no autonomous consequences and little practical effect on the general rules of international responsibility."[28] Considering that Alain Pellet claims that the doctrine of clean hands has no significance in inter-State disputes, his view seems to imply that the principle of good faith also has no applicability in inter-State disputes.[29] This position is incorrect because apart from denying the role of the principle of good faith in international law, it also assumes that diplomatic protection has nothing to do with inter-State disputes.[30] Contrary to this view, diplomatic protection is currently understood in international law as a way to bring an individual's claim into the inter-State realm. Implicit in the concept of diplomatic protection is the notion that "once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant."[31] This so-called "injury

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27. *See ILC Meeting 2793*, *supra* note 2, at 4 ("[T]he [clean hands] doctrine produced effect only in the context of diplomatic protection."). "In proceedings between States the [clean hands] doctrine was inapplicable. However, where a case involved an individual and a State via diplomatic protection, the doctrine was relevant." *Id.* at 15.

28. *Id.* at 4.

29. *See infra* note 33 and accompanying text (explaining that the doctrine of clean hands and the doctrine of good faith are close if not similar).

30. *See infra* note 33 and accompanying text (citing several sources that describe good faith as a fundamental principle of international law).

31. *See* Case of the Mavrommatis Palestine Concessions (Greece v. U.K.), 1925 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30) (stating that although the dispute originated between a private person and Great Britain, the Greek government's

to the State" fiction represents the basis of the ILC's current work on diplomatic protection.[32] By exercising diplomatic protection, the State brings the claim of its national to the State-to-State level, making it an inter-State dispute.

The clean hands doctrine is indeed very close, if not similar, to the principle of good faith, which is an established general principle of law, and to the rule prohibiting one from benefiting from his/her own wrongful conduct, which is also considered by some scholars to be a general principle of law.[33] Consequently, the place of the clean hands

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intervention rendered the dispute ripe for review by the Permanent Court of International Justice).

32. Suggestions have been expressed to move away from the "injury to the State fiction" towards describing diplomatic protection in terms of agency-type relationships. *See ILC First Report*, *supra* note 8, at 6-7, 24. This discussion is related to the nature of citizenship and nationality, which some authors claim to be of contractual character. *See, e.g.*, Borchard, *supra* note 17, at 503.

33. *See* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 167-69 (1982) (discussing the role of the general principles of law in the jurisprudence of the ICJ); *see also* MALCOLM N. SHAW, INTERNATIONAL LAW 97-99 (5th ed. 2003) (describing good faith as a background principle that helps shape the law and limits the manner in which rules may be applied); Vladimir-Djuro Degan, *Some Objective Features in Positive International Law, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 128 (1996) (equating good faith to other general principles of law including prescription and circumstances negating the wrongfulness of an act like necessity and self-defense); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19 (5th ed. 1998) (including good faith among other types of general international law principles such as consent, reciprocity and equality of states); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 157 (1953) (stating that "the principle is of such a fundamental character that where an award disregarded it, a State, even if the award were in its favour, would hesitate to insist upon its enforcement"); Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 95 (Apr. 5) (Anzilotti, J., dissenting) (arguing that "an unlawful act cannot serve as the basis of an action at law"); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding the Security Council Resolution 276, 1971 I.C.J. 16, 46 (Advisory Opinion) (June 21) ("One of the fundamental principles governing the international relationship thus established, is that a party which disowns or does not fulfill its own obligations cannot be recognized as retaining the rights it claims to derive from the relationship."); Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20) ("One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."); Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 25 (June 28) (ruling that

doctrine in international law can hardly be disputed.[34] It should be noted, however, that international tribunals are rather reluctant to apply the clean hands doctrine even at the stage of consideration of merits.[35] The exact relation of the clean hands doctrine to the principle of good faith and the principle that no one can benefit from his/her own wrong is unclear.[36] Oral and written pleadings of some States in front of international tribunals create an impression that parties often use the term "clean hands" as a substitute for the term "good faith."[37] Attempts to explain the relationship between these

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under the circumstances the court found it "difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past"); Case Concerning the Factory at Chorzow (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 31 (July 26) (stating that

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.).

34. *See* Stephen M. Schwebel, *Clean Hands in the Court, in* THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS, AND THE DEVELOPMENT OF INTERNATIONAL LAW 74-78 (1999) (providing further discussion on the role of the clean hands doctrine in international law and arguments in support of its significance).

35. *See* discussion *infra* Part III (explaining that international tribunals make special efforts not to impinge on the merits of a claim whenever possible).

36. *See* Ted L. Stein, *Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt,* 76 AM. J. INT'L L. 499, 529 n.134 (1982) (suggesting that the rule that a party may not profit from its own wrongdoing "is related to, but admittedly somewhat distinct from, the 'unclean hands' doctrine in that it bears directly on the foundation of the plaintiff's right, rather than merely on the availability of a remedy"); *see also* F. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 127 (1974) (referencing examples of where the prohibition from benefiting from one's own wrongful conduct may be referred to as the clean hands doctrine).

37. A good example from the practice of the European Court of Human Rights is *Van der Tang v. Spain*, in which the Spanish government in its preliminary objection referred to the doctrine of clean hands, whereas it could have with the same success referred to the principle of good faith. 22 Eur. Ct. H.R. 363, 381 (1993). On *Van der Tang* and existing erroneous interpretations of this case in the context of the clean hands doctrine, see *infra* note 132. Similar examples are present as well in the practice of the International Court of Justice. *See generally* Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 1 (Nov. 5) (Courter-

concepts can be best described in words of the "godfathers" of Russian science fiction, Arkady and Boris Strugatsky: "it is the same as describing a glass or, god-forbid, a wine-glass: you just move your fingers and curse from the absolute futility of your attempts."[38] The ambiguous difference between these doctrines of international law produced a debate over whether the doctrine of clean hands is a distinct general principle of law in its own right. Ian Brownlie, a member of the ILC, stated that he "had never been convinced that the clean hands doctrine was part of the general international law."[39] Charles Rousseau expressed a similar position stating "it is not possible to consider the theory of clean hands as an institution of general customary law."[40] Some scholars, however, go as far as claiming that the clean hands doctrine is "undoubtedly" a general principle of law in its own right.[41] An interesting comment on the status of the clean hands doctrine was expressed by Luis Garcia-Arias, who pointed out that he failed to find any cases "adjudicated before international tribunals where the doctrine of 'clean hands' has been applied directly," but nevertheless admitted that "there are cases where the essence of this doctrine has been alluded to."[42] It seems that every time anyone uses the phrase "clean hands" in primary or secondary sources, the assumption is made by the international legal community that it is somehow distinct from the principle of good faith and the principle of prohibition of benefiting from one's own wrongful conduct. However, case law analysis shows that clean

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Memorial and Counter-Claim in U.S. Preliminary Objections, June 23, 1997); (Nicar. v. U.S.), 1991 I.C.J. 47 (Sept. 26) (dissenting opinions); Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 1 (Feb. 14).

38. ARKADY STRUGATSKY & BORIS STRUGATSKY, PIKNIK NA OBOCHINE [ROADSIDE PICNIC] ("eto vse ravno chto stakan komu-nibud' opisivat', ili, ne dai bog, ryumku: tolko paltsami shevelish i chertihaeshsya ot polnogo bessiliya.").

39. *ILC Meeting 2791*, *supra* note 2, at 11.

40. CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 177 (1983).

41. *See* CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING 165 (1993) (arguing that socialist and continental judges, not just those trained in the common law, have applied the doctrine).

42. Luis Garcia-Arias, *La Doctrine des "Clean Hands" en Droit International Public*, *in* ANNUAIRE DES ANCIENS AUDITEURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 18 (1960).

hands is often nothing but a category used to express the subjective legal status of one of the parties in cases where one of the two abovementioned principles is applied.[43] Regardless of whether we understand the clean hands doctrine as a separate legal concept related to notions of equity and good faith, or as a synonym for the principle of good faith, it seems doubtless that it has been referred to and applied in many inter-State disputes.[44]

III. IS THE CLEAN HANDS DOCTRINE A QUESTION OF ADMISSIBILITY OR SUBSTANTIVE LAW?

The question addressed in this section is detrimental to the discussion of the role of the clean hands doctrine in the area of diplomatic protection.[45] Is this doctrine a defense at the stage of the consideration of the merits of a claim, or a condition for the admissibility of the claim? Several scholars are of the opinion that the clean hands doctrine is a question of admissibility, and as such, may be raised as an objection to the exercise of diplomatic protection.[46] Addressing grounds for inadmissibility, Ian Brownlie

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43. *See* CHENG, *supra* note 33, at 156 (referencing *The Good Return Cases*, in which an American member of the Ecuadorian-United States Claims Commission asked: "Can [Captain Clark] be allowed, as far as the United States are concerned, to profit by his own wrong?" and stated that "[a] party who asks for redress must present himself with clean hands"); *see also* Schwebel, *supra* note 34, at 74-78 (failing to explain how this doctrine differs from the principle of good faith and the rule prohibiting benefiting from one's own wrongful conduct).

44. It is interesting to note that Alain Pellet, who rejected the application of the clean hands doctrine to inter-State disputes, himself pointed out that:

> [A] situation in which a State complaining of a violation of international law by another State had itself violated international law neither afforded grounds for inadmissibility nor constituted a circumstance precluding wrongfulness. In the context of inter-state relations, the fact that two States were in violation of international law did not preclude the responsibility of both States being invoked.

ILC Meeting 2793, *supra* note 2, at 3.

45. *See* discussion *infra* Part III (highlighting the importance of determining how to apply the clean hands doctrine).

46. *See, e.g.*, JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 162 (2002) (arguing that "the so-called 'clean hands' doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied"); *see* Gerald Fitzmaurice, *The General Principles of International Law Considered from*

referred to the doctrine of clean hands as one of many "instances in which questions of inadmissibility and 'substantive' issues are difficult to distinguish."[47] The view that the clean hands doctrine may render a claim inadmissible finds support in Judge Schwebel's dissenting opinion in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*[48] and the dissenting opinion of Judge Van den Wyngaert in the recently decided *Case Concerning the Arrest Warrant of 11 April 2000*.[49]

Numerous secondary sources, primarily emanating from French legal jurisprudence, refer to the clean hands doctrine as rendering diplomatic protection inadmissible in those cases in which an alien's wrongful conduct caused the internationally wrongful conduct of a State.[50] Inclusion of the clean hands doctrine in the Draft Article on

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the Standpoint of the Rule of Law, *in* RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 119 (1957) (noting that

> 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, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it).

47. *See* BROWNLIE, *supra* note 33, at 508 (clarifying that a claimant's illegal activity under either a municipal or international claim could potentially bar the claim under the doctrine of clean hands).

48. (Nicar. v. U.S.), 1986 I.C.J. 14, 394 (June 27) (Schwebel, J., dissenting) (suggesting that Nicaragua's conduct

> should have been reason enough for the Court to hold that Nicaragua had deprived itself of the necessary *locus standi* to complain of corresponding illegalities on the part of the United States, especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality—'in short were provoked by it').

49. (Congo v. Belg.), 2002 I.C.J. 1, ¶ 84 (Feb. 14) (Van den Wyngaert, J., dissenting) (claiming that "the Congo did not come to the International Court with clean hands, and its Application should have been rejected").

50. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 269 (1997) (theorizing that if a State cannot make a claim for a national who suffered an injury due to his own activities then the injury suffered by the national should be "roughly proportional" to the impropriety of the activity); *see also* EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 735 (1915) (emphasizing that when one of its citizens violates the law of another country, a government such as the United States would do little more than secure a fair trial

Diplomatic Protection was discussed at several sessions of the International Law Commission, and was specifically addressed at its fifty-sixth session in 2004.[51] Alain Pellet expressed the position of proponents of the applicability of the clean hands doctrine to diplomatic protection at the ILC, stating:

> If a private individual who enjoyed diplomatic protection violated either the internal law of the protecting State – and it should be noted that internal law played no role at all in cases involving relations between States – or international law, then in the general context of the claim, the State called upon to exercise protection could no longer do so.[52]

It was suggested at the ILC that the clean hands doctrine refers to the question of the admissibility of a claim.[53] Alain Pellet went even as far as saying that the "absence of the clean hands doctrine will

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and ensure a proportionate punishment); B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 372 (3d ed. 1988) (highlighting that as long as an arrested alien receives a minimum standard of care throughout his detention, there will be minimal intervention by the alien's country); JEAN SALMON, DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 677-78 (2001) (maintaining that the International Law Commission, in its project of international responsibility, mandated that the responsibility of a State should not be invocated if: 1) the request was not presented in conformity with the applicable rules of the subject of the nationality of the complaints and 2) if all of the internal domestic remedies haven't been exhausted in a case where the request is subjugated); DAVID RUZIÉ, DROIT INTERNATIONAL PUBLIC 95 (14th ed. 1999) (arguing that in the theory of clean hands, the victim does not have the ability to reproach the incorrect behavior due to her carelessness); ROBERT KOLB, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC 568-571 (2000) (stating that clean hands may not become a criteria of a discretionary provision to afford diplomatic protection and that a State cannot present an international reclamation unless the reprehensible behavior of its alien was the primary cause to amplify the wrong); DOMINIQUE CARREAU, DROIT INTERNATIONAL 460-74 (7th ed. 2001) (discussing the application of the clean hands doctrine to diplomatic protection); JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 596-97 (5th ed. 2001) (discussing the clean hands doctrine); Garcia-Arias, *supra* note 42, at 14-22 (stating that even though there is a certain lack of primary sources supporting the application of the clean hands doctrine, the doctrine itself has been "alluded to").

51. *See Diplomatic Protection*, *supra* note 3 (outlining the general provisions of diplomatic protection).

52. *See ILC Meeting 2793*, *supra* note 2, at 4.

53. *See id.* at 3-5 (arguing for a need to incorporate the clean hands doctrine into the law of diplomatic protection).

paralyze the exercise of diplomatic protection."[54] However, there was no agreement at the ILC on whether clean hands is a condition of admissibility or an issue of substantive law raised during the consideration of merits. Interestingly, Alain Pellet, the fiercest supporter of the clean hands doctrine at the ILC, acknowledged that in inter-State disputes, "no court had ever subsequently found that the [clean hands doctrine] automatically rendered a claim inadmissible."[55]

The position that the clean hands doctrine is a question of admissibility is incorrect. The clean hands doctrine is a question of substantive law, not a procedural question referring to the admissibility of the claim, and may be raised and considered during the consideration of merits and examined on a case-by-case basis.[56] The result of this is that the clean hands doctrine cannot preclude States from exercising diplomatic protection, since it will be considered when the diplomatic protection has already been exercised.[57]

At preliminary proceedings, international tribunals try not to impinge upon the merits, when possible.[58] For instance, the International Court of Justice ("ICJ") may declare at the stage of the consideration of preliminary objections, inter alia, that objections are

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54. *Id.* at 4.

55. *Id.* at 3.

56. *See* discussion *infra* notes 60-71 and accompanying text (providing a collection of cases in which the Court chose to consider preliminary objections later in the case when it considered merits).

57. *See* discussion *infra* notes 60-71 and accompanying text (suggesting that States will or will not already have chosen to exercise diplomatic protection by the time that the clean hands doctrine is raised).

58. *See* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 459 (1985) (describing this as a "rough rule-of-thumb," according to which

> it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend, or when to decide the objection would require decision on what, in the concrete case, are substantive aspects of the merits, the plea is not an objection but a defence to merits).

possibly valid but not of an exclusively preliminary character.[59] The Court may then join the objection to the consideration of the merits, or one of the parties may bring it up later as a defense at the stage of the consideration of merits.[60] The Court has declared preliminary objections as related to questions of merits in several cases, including the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,*[61] *Right of Passage Over Indian Territory,*[62] and *Barcelona Traction, Light and Power Company, Limited.*[63] The Permanent Court of International Justice ("PCIJ") made similar findings in both the *Pajzs, Csáky, Esterházy* case[64] and the *Losinger & Co.* case.[65] In *Norwegian Loans* and *ELSI*, the parties agreed that

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59. *See id.* at 459-60 (outlining a series of cases in which the Court recognized objections at different stages throughout the trial). Furthermore, if the Court is not satisfied that a plea advanced as a preliminary objection has been adequately argued by the parties, they may raise the objection at a later stage. *Id.* at 460.

60. *See id.* (referring to Electric Company of Sofia & Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 79 (Dec. 5), in order to illustrate that "the rejection of any such pleas as a preliminary objection, as opposed to its dismissal as such, is without prejudice to the freedom of the parties to take it up again in support of their case on the merits").

61. (Nicar. V. U.S.) 1986 I.C.J. 14, 29 (June 27) (declaring that the case at hand "is the first in which the Court has had occasion to exercise the power first provided for in the 1972 Rules of Court to declare that a preliminary objection 'does not possess, in the circumstances of the case, an exclusively preliminary character'").

62. (Port. v. India), 1957 I.C.J. 125, 151-52, 174 (Nov. 26) (Judgment on Preliminary Objections) (proclaiming that the Court often "join[s] the Objection to the merits because the Court feels that it is impossible to arrive at a decision on [the] issue without investigating into the merits of the subject").

63. (Belg. v. Spain), 1964 I.C.J. 6, 45-46 (July 24) (Preliminary Objections) (deciding to join a preliminary objection to the merits because the Court had better knowledge of the facts).

64. (Hung. v. Yugoslavia), 1936 P.C.I.J. (ser. A/B) No. 66, at 9 (May 23) (Preliminary Objection) (finding that some questions raised by objections are "too intimately related and too closely interconnected" for the Court to decided upon the preliminary objections without considering the merits). Consequently, proceedings on the merits "will place the Court in a better position to adjudicate with a full knowledge of the facts [of the objections]." *Id.*

65. (Switz. v. Yugoslavia), 1936 P.C.I.J. (ser. A/B) No. 67, at 24 (June 27) (Preliminary Objection) (reiterating that the Court has the ability to give its decision upon an objection and on the merits in the same judgment).

objections to admissibility should be heard and decided at the stage of the consideration of merits.[66]

According to the PCIJ in *Pajzs, Csàky, Esterhàzy*, a preliminary objection should join the consideration of merits when preliminary objections and submissions on merits "are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudicing the latter."[67] Addressing such objections at the merits stage would "enable the Court to obtain a 'clear understanding' of some aspects of the preliminary objections and a 'full knowledge of facts' relating thereto."[68] Surely, a question of the lack of clean hands, which has purely substantive character and relates to attenuation or exoneration of responsibility, should be addressed at the merits stage. In no ICJ cases has the Court supported the clean hands doctrine as a preliminary objection to the admissibility of a claim, and rightfully so, since the clean hands doctrine is precisely a question of merits, as was recently exemplified in the *Case Concerning Oil Platforms*.[69] In the Counter-Memorial and Counter-Claim submitted by the United States on June

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66. *See* Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 22 (July 6) (reporting that the French government asked the Court to attach the Norwegian government's preliminary objections to the merits and that the Norwegian government did not raise an objection to the request); *see also* Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 18 (July 20) (stating that in congruence with Article 79, paragraph 8, of the Rules of the Court, the Parties to the case agreed that the Court should hear and determine objections within the framework of the merits); ROSENNE, *supra* note 58, at 459-60 (providing an additional list of cases in which the ICJ dealt with the issue of addressing questions raised as preliminary objections at the stage of consideration of merits); LAUTERPACHT, *supra* note 33, at 113-15 (referring to a number of cases to illustrate instances in which the Court joined the preliminary objection to the merits).

67. *Pajzs, Csáky, Esterházy*, 1936 P.C.I.J. at 9 (finding that the objections introduced in the Hungarian government's appeal should proceed on the merits to provide the Court with a better understanding of the issues).

68. LAUTERPACHT, *supra* note 33, at 114 (providing the Court's rationale that the preliminary objections may be considered to constitute part of the defense on the merits).

69. (Iran v. U.S.) 2003 I.C.J. 1, ¶¶ 29-30 (Nov. 5) (deciding that the United States' claim that Iran's conduct precludes it from relief should not be determined at the preliminary stage since the Court "would have to examine Iranian and U.S. actions in the Persian Gulf" for proper adjudication).

23, 1997 in this case, the United States raised the doctrine of clean hands as a preliminary objection to admissibility.[70] The Court rejected this position and underlined that the clean hands doctrine was of substantive character and went beyond the framework of preliminary objections to admissibility:

> The United States invites the Court to make a finding "that the United States measures against the platforms were the consequence of Iran's own unlawful uses of force" and submits that the "appropriate legal consequences should be attached to that finding". The Court notes that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period – which it has also to do in order to rule on the Iranian claim and the United States counter-claim.[71]

IV. APPLICATION OF THE CLEAN HANDS DOCTRINE TO DIPLOMATIC PROTECTION DOES NOT HAVE SUBSTANTIAL SUPPORT AMONG PRIMARY AUTHORITY

Interestingly, there are numerous secondary sources supporting the application of the clean hands doctrine to diplomatic protection, including those by scholars from several different legal systems.[72] A typical argument marshalled by these authors is represented by a quote from Edwin Borchard, who states, "It is a general rule that an injury to an alien arising out of a breach of or failure to observe the local law or police regulations involves a complete or partial forfeiture by the alien of the protection of his own government."[73]

Most scholars supporting such a position come from the French school of international law.[74] Regrettably, they all fail to provide solid references to decisions of international tribunals. When trying

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70. *See id.* ¶ 101 (claiming that the United States filed a Counter-Claim against Iran based on actions by Iran in the Persian Gulf which violated the 1955 Treaty).

71. *Id.* ¶ 29 (delaying the Court's consideration of the United States' request to dismiss Iran's claim until the Court could conduct an examination of the merits).

72. *See* discussion *supra* note 50 and accompanying text (presenting a compilation of international secondary sources that endorse the clean hands doctrine).

73. BORCHARD, *supra* note 50, at 735 (noting that international commissions have adhered to this rule).

74. *See supra* note 50 (providing a significant list of French sources by French scholars suggesting that misconduct on the part of an alien will likely preclude him or her from diplomatic protection in a foreign nation).

to provide such references, advocates of the application of the clean hands doctrine to diplomatic protection tend to repeat a limited number of cases, namely *Ben Tillett*,[75] the *Virginius* incident,[76] *Gabcikovo-Nagymaros Project*,[77] *Case Concerning Oil Platforms*, and the dissenting opinion of Judge Van den Wyngaert in the *Arrest Warrant* case. Some recent cases, in which some of the parties raised the doctrine of clean hands, should also be mentioned, such as *Legality of the Use of Force*[78] and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[79]

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75. *See, e.g.*, KOLB, *supra* note 50, at 571 (reporting that the case involved a British trade unionist who did not have clean hands); *see* ANTOINE PILLET & PAUL FAUCHILLE, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 46-55 (1899) (discussing a case involving a British national who traveled to Belgium to give a speech at a meeting of dock workers and was deported back to Great Britain after a brief detention). This case has been frequently and mistakenly cited by supporters of the application of the clean hands doctrine to diplomatic protection. *See* CARREAU, *supra* note 50, at 468 (summarizing the case and highlighting that the British national broke Belgian laws and consequently did not have clean hands); *see also ILC Meeting 2793*, *supra* note 2, at 4 (noting that

> If a private individual who enjoyed diplomatic protection violated either the internal law of the protecting State—and it should be noted that internal law played no role at all in cases involving relations between States—or international law, then in the general context of the claim, the State called upon to exercise protection could no longer do so. A good example of such a situation was the decision rendered in 1898 in the *Ben Tillett* arbitration case. The solution applied in that case has subsequently been applied in numerous cases in which the doctrine of "clean hands" effectively rendered a request for diplomatic protection inadmissible.).

76. *See* JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 895-903 (1906) (examining an incident in October of 1893 in which about a third of 155 crew members and passengers aboard a steamer flying an American flag and having an American register were captured by a Spanish ship, tried by court-martial, charged with piracy, and executed).

77. (Hung. v. Slovakia), 1997 I.C.J. 7 (Sept. 25) (presenting a scenario in which the Court considered whether Hungary was permitted to suspend and eventually abandon a project and whether the Czech and Slovak Federal Republic could consequently construct a dam in the Danube river).

78. (Serb. & Mont. v. Belg.), 1999 I.C.J. 105 (June 2), 38 I.L.M. 950 (1999) (Request for the Indication of Provisional Measures) (containing Yugoslavia's argument that Belgium violated international law in its bombing campaign against Yugoslavia); *see* Case Concerning Legality of Force (Serb. & Mont. v. U.K.), 1999 I.C.J. 1 (June 2) 38 I.L.M. 1167 (1999) (Preliminary Objections of the United Kingdom) (expressing Yugoslavia's position that Great Britain "violated its

The clean hands doctrine in the context of diplomatic protection remains a primarily theoretical concept lacking jurisprudential support. Several scholars have expressed criticism of the use of the doctrine in international law.[80] Interestingly, Alain Pellet — contrary to the position he expressed during the meeting of the Drafting Committee on Diplomatic Protection — has not included the doctrine of clean hands in his scholarly works as a condition for the admissibility of diplomatic protection.[81] Outside of French legal jurisprudence, Edwin Borchard, whose comments are somewhat contradictory, makes references to the clean hands doctrine in

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international obligation banning the use of force against another State" and "the obligation not to intervene in the internal affairs of another State").

79. Advisory Opinion (I.C.J. July 9, 2004), 43 I.L.M. 1009 (2004) (disclosing Palestine's complaint that Israel lacks compliance with International Law due to the construction of the wall in the Palestinian territory); Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (I.C.J. July 9, 2004), 43 I.L.M. 1009 (2004) (Written Statement of the Government of Israel on Jurisdiction and Propriety).

80. *See* ROUSSEAU, *supra* note 40, at 172 (stating that the issue of violation of national laws by a claimant is not a necessary element when considering the issue of admissibility of a claim); *see also* Fitzmaurice, *supra* note 46, at 120 (discussing the inapplicability of the clean hands doctrine in cases involving violations of human rights and *jus cogens* norms); Gerard Cohen-Jonathan & Jean-François Flauss, *Protection Internationale des Droits de L'Homme, in* ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 688 (2002) (expressing reservations about the use of the doctrine in certain cases); Jean Salmon, *Des "Main Propres" Comme Condition de Recevabilité des Réclamations Internationales, in* ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 225-66 (1964) (stating that "if by theory of 'clean hands' we mean that a government is entitled to refuse to exercise diplomatic protection on behalf of an undeserving (unworthy) national, this theory is useless as it is nothing more than a case of application of the discretionary character of diplomatic protection").

81. *See* NGUYEN QUOC DINH, ALAIN PELLET & PATRICK DAILLER, DROIT INTERNATIONAL PUBLIC 760-64 (5th ed. 1994) [hereinafter DROIT INTERNATIONAL, 5th ed.] (discussing the conditions in which diplomatic protection can be utilized and refraining from mentioning the doctrine of clean hands); NGUYEN QUOC DINH, ALAIN PELLET & PATRICK DAILLER, DROIT INTERNATIONAL PUBLIC 808-16 (7th ed. 2002) [hereinafter DROIT INTERNATIONAL, 7th ed.] (summarizing issues of diplomatic protection, such as the nationality of the protected individual, and the application and exhaustion of diplomatic remedies problems posed by the abandonment of diplomatic protection, but not bringing to light the issue of the clean hands doctrine).

relation to diplomatic protection.[82] Edwin Borchard cites several cases and incidents in which States refrained from interfering in a situation on behalf of their nationals.[83] However, in each of these cases, none of the States whose citizens were involved in the matter were *precluded* from exercising diplomatic protection; instead, the States made decisions not to interfere when their nationals had unclean hands.[84] As Edwin Borchard contends, even in situations of violations of criminal law, "protection has not been absolutely declined, but it has in general been strictly limited to securing a fair trial and the application of the ordinary penalties or a concurrent attempt to ameliorate the harshness of arbitrary measures."[85] Thus, Borchard's comments support the position that the breach of national law (i.e., unclean hands) does not automatically render diplomatic protection inapplicable, but may only impose *limitations* on diplomatic protection at the discretion of the alien's State of nationality. In short, the clean hands doctrine is one factor that a State may take into consideration when deciding whether to exercise diplomatic protection; more specifically, it is a way for a State to avoid exercising diplomatic protection when choosing to do so.

Analysis of cases referred to by supporters of the application of the clean hands doctrine to diplomatic protection shows that these cases can be divided into two groups. The first group of cases contains references to the clean hands doctrine in a State's submissions or tribunals' opinions outside the context of diplomatic

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82. *See generally* BORCHARD, *supra* note 50, at 733-36 (examining whether or not diplomatic protection exists in relation to the clean hands doctrine).

83. *See* EDWIN BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 713-91 (1928) (exploring numerous instances in which an individual forfeits diplomatic protection on account of his or her conduct).

84. *See id.* at 713 (arguing that in "those cases in which foreign offices or international commissions have refused, or at least, limited the protection ordinarily extended to injured citizens," it is "because the acts of the claimant himself have made such protection unjustifiable either in whole or in part").

85. BORCHARD, *supra* note 50, at 734 (providing an example where Ireland arrested many naturalized Americans suspected of inciting the Fenian movement, and where the United States attempted to avoid interference outside of protecting its innocent citizens that did not subject themselves to suspicion of complicity with treasonable practices).

protection, and includes cases such as: *Van der Tang v. Spain*; *Case Concerning Oil Platforms*; *Arrest Warrant*; *Gabcikovo-Nagymaros Project*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; and *Legality of the Use of Force*. The second group of cases provides a striking example of disputes that arise when the clean hands doctrine could have been raised but never was, and contains cases such as *Ben Tillett* and *Virginius*. For example, in *Case Concerning Oil Platforms*, the clean hands doctrine arose in connection with wrongful conduct carried out by Iran prior to those actions by the United States that constituted the subject matter of the case, and consequently had nothing to do with the exercise of diplomatic protection.[86] The same can be said about the dissenting opinion of Judge Van den Wyngaert in the *Arrest Warrant* case, in which she suggested rendering Congo's application inadmissible on the basis of Congo's unclean hands.[87] However, Judge Van den Wyngaert did not speak of clean hands in the context of diplomatic protection; instead, she referred to Congo's own failure to carry out investigations and prosecutions as an indication of bad faith, and consequently, a lack of clean hands.[88] Another case often referred to is *Gabcikovo-Nagymaros Project,* but it has no relevance to the clean hands doctrine in the context of diplomatic protection, since it involved a direct State-to-State dispute.[89] In *Legal Consequences of the Construction of a Wall in the Occupied*

86. *See* Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 1, ¶ 29 (Nov. 5) (presenting the United States' request to the Court to find that the United States' measures against the platforms resulted from Iran's unlawful use of force and making no mention of diplomatic protection).

87. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 1, ¶ 84 (Feb. 14) (Van den Wyngaert, J., dissenting) (declaring that any potential infringement of international obligation by Belgium is "trivial in comparison" to the infringements of Congo).

88. *See id.* (alleging that Congo failed to comply with the obligations of Article 146 of the Fourth Geneva Convention because Congo did not investigate and prosecute charges of war crimes or crimes against humanity committed within its borders).

89. *See Gabcikovo-Nagymaros Project*, (Hung. v. Slovakia), 1997 I.C.J. 7, 11 (Sept. 25) (outlining the dispute between the Czech and Slovak Federal Republic (and later the Slovak Republic as the sole successor State in respect of rights and obligations relating to the Gabcikovo-Nagymaros Project) and the Republic of Hungary based upon the implementation and termination of the Treaty on the Construction and Operation of the Gabcikovo-Nagymaros Barrage System).

Palestinian Territory and *Legality of the Use of Force*, the clean hands doctrine was also brought up outside the context of diplomatic protection. Moreover, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Court did not address the clean hands argument raised in Israel's Written Statement on Jurisdiction and Propriety. In *Legality of the Use of Force*, the argument regarding Yugoslavia's unclean hands was also not considered by the Court. It is also worth noting that in all of the cases mentioned above (except for Judge Van den Wyngaert's dissenting opinion in the *Arrest Warrant* case), the clean hands doctrine, when addressed by the Court, was never examined as a question of admissibility, but was always reviewed as a question of merits.

Some scholars present the *Ben Tillett* and *Virginius* cases as two historical examples of the effect of the clean hands doctrine on diplomatic protection.[90] Legal literature has not dedicated sufficient discussion to either of these cases, which may be the reason why they are repeatedly and erroneously cited as supporting the application of the clean hands doctrine to diplomatic protection. For example, Dominique Carreau provides *Ben Tillett* and *Virginius* as examples in support of his position that diplomatic protection may not be exercised over an individual that committed wrongful conduct.[91] Dominique Carreau states that "conduite blâmable" (in other words, unclean hands) may exonerate the responsibility of the State that committed an internationally wrongful act by rendering diplomatic protection inadmissible or unfounded.[92] However, in both *Ben Tillett* and *Virginius,* the parties never raised the issue of the inadmissibility of diplomatic protection because of unclean hands.[93] There was an exercise of diplomatic protection in both of these cases,

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90. *See* CARREAU, *supra* note 50, at 468 (stating that this type of behavior would render diplomatic protection inadmissible, as well as attentuate or exonerate the resonsibility of a State that committed the internationally wrongful act).

91. *See id.* at 467-68 (stating that the individual for whom the state exercises or intends to exercise diplomatic protection must not have been engaged in "wrongful behavior").

92. *See id.*

93. *See ILC Sixth Report*, *supra* note 18, ¶ 11 (noting that the cases do not invoke the language of the clean hands doctrine).

and none of the opposing sides seemed to object to it.[94] Reference to both of these cases seems to play a significant role during the discussion of the role of the clean hands doctrine in diplomatic protection, including debates at the ILC; therefore, they require additional consideration.[95] An outline of these cases is presented below.[96]

A. THE *VIRGINIUS* INCIDENT[97]

On October 31, 1873, a Spanish military vessel captured the steamer *Virginius* on the high seas after an eight-hour chase.[98] *Virginius* flew a U.S. flag without a right to fly it, as the United States later determined.[99] The steamer carried arms and ammunition and was initially headed for Cuba.[100] After the Spanish man-of-war *Tornado* intercepted *Virginius*, it took *Virginius* to Santiago de Cuba, where the Spanish court-martial declared that 53 out of 155 crew members and passengers—including nationals of the United States, Great Britain, and Cuba—were guilty of piracy and executed them.[101]

Analysis of documents produced during negotiations between Spain and the United States leaves no doubt that both parties agreed that the United States had a right to exercise diplomatic protection in

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94. *See id.* ¶ 13 (clarifying that there was no disagreement between the United States and Spain about the right of the United States to exercise diplomatic protection).

95. *See id.* ¶ 3 (summarizing the ILC arguments and debates regarding the clean hands doctrine).

96. *See* discussion *infra* notes 97-115 and accompanying text (providing the background of the *Tillett* and *Virginius* cases).

97. *See* MOORE, *supra* note 76, at 895-903 (involving Spanish charges of piracy against the crew and passengers of a vessel carrying the U.S. flag).

98. *See id.* at 895 (noting that the entire pursuit took place on the high seas).

99. *See id.* at 898-99 (describing the Attorney General's opinion to the President that the *Virginius* did not have a right to carry the U.S. flag at the time of capture).

100. *See id.* at 896 (explaining that the vessel was heading to Cuba to aid in the insurrection).

101. *See id.* at 895 (noting that Spain held the remaining crew members as prisoners).

this case.[102] Also, as evidenced from the conduct of negotiations between the United States and Spain, both parties agreed that Spain was not exonerated from responsibility for violation of international law regardless of whether *Virginius* was engaged in transportation of ammunition or rebels and had a right to fly the U.S. flag.[103] Moreover, both the United States and Spain agreed that the United States could represent its interests if it proceeded to arbitration, which never occurred due to successful negotiations.[104] The protocol of the conference held at the Department of State on November 29, 1873 between the United States and Spanish officials stated: "Other reciprocal reclamations to be the subject of consideration and arrangement between the two Governments; and, in case of no agreement, to be the subject of arbitration, if the constitutional assent of the Senate of the United States be given thereto."[105]

B. THE *BEN TILLETT* CASE[106]

Ben Tillett was a national of Great Britain and an activist of the labor union movement.[107] On August 21, 1896, he arrived in Belgium to participate in a meeting of dockworkers.[108] Authorities arrested Tillett on the same day he arrived in Belgium, subsequently detained him for several hours, and then deported him back to Great Britain.[109] Great Britain claimed, on behalf of its national, that Belgium violated

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102. *See id.* at 896 (providing the text of the protocol from a conference between U.S. Secretary of State Hamilton Fish and Rear-Admiral Don José Palo de Bernabe of Spain).

103. *See id.* at 895-903 (noting that Spain violated high seas freedoms of the *Virginius*). The British Government also obtained compensation for families of executed British subjects who were aboard *Virginius*. *Id.* at 903.

104. *See id.* at 897 (stating that the two governments would engage in arbitration in the case of no agreement).

105. *Id.*

106. *See* PILLET & FAUCHILLE, *supra* note 75, at 46-55.

107. *Id.* at 46.

108. *Id.*

109. *Id.*

its own law and demanded compensation of 75,000 francs.[110] The case proceeded to arbitration after negotiations failed.[111]

Analysis of the arbitration agreement between Belgium and Great Britain and of the arbitral award show that the issue of the inadmissibility of diplomatic protection was not even considered.[112] Great Britain, however, undoubtedly exercised diplomatic protection when it took over Ben Tillett's claim,[113] but ultimately lost the case on substantive grounds. The main argument in favor of Belgium was that the act the country committed was not an internationally wrongful act.[114] Moreover, causation between Ben Tillett's injuries and Belgium's actions could not be established.[115]

V. PROBLEMS THAT WOULD ARISE THROUGH APPLICATION OF THE CLEAN HANDS DOCTRINE TO DIPLOMATIC PROTECTION

Even assuming that the clean hands doctrine is applicable to diplomatic protection, the scope of its application appears unclear and problematic. What types of action in the exercise of diplomatic protection would the clean hands doctrine preclude? Would it render inadmissible all diplomatic actions or only those related to the presentation of a claim before an international tribunal? It is clear from Article 1 of the ILC's Draft Articles on Diplomatic Protection that the ILC does not view diplomatic protection as including only

110. *Id.*

111. *Id.* at 46-48.

112. *Id.* at 46-51.

113. *ILC Sixth Report*, *supra* note 18, ¶ 12 (contending that the case does not discuss or address the clean hands doctrine).

114. *See* PILLET & FAUCHILLE, *supra* note 75, at 46-51.

115. *See ILC Sixth Report*, *supra* note 18, ¶ 12 (contending that the interpretation of Dominique Carreau, who stated that Ben Tillett did not have clean hands and that the "arbitrator rejected Great Britain's claim because of Ben Tillett's violation of Belgian law," is erroneous). It should be noted that even if Dominique Carreau was right and Great Britain lost because of unclean hands, it would only confirm that the clean hands doctrine is a defense at the merits stage and not an element of admissibility.

adjudicatory dispute settlement procedures.[116] The ILC's adopted definition of "diplomatic protection" also embraces all "lawful procedures employed by States to inform each other of their views and concerns, including protest, request for an enquiry and negotiations aimed at the settlement of disputes."[117] These lawful procedures are called "diplomatic actions" in the Draft Articles on Diplomatic Protection and are sometimes referred to as "informal representations"[118] or "consular protection"[119] in various sources.[120] The ILC's understanding of the term "diplomatic protection" as covering both adjudicatory and non-adjudicatory measures is a correct reflection of international practice.[121] The division between

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116. *See Report of the International Law Commission Fifty-Fourth Session*, U.N. GAOR, 57th Sess., Supp. No. 10, at 171, U.N. Doc. A/57/10 (2002) [hereinafter *ILC 54th Session Report*] (noting, however, that the use of force is not a permissible method for the enforcement of the right of diplomatic protection).

117. *Id.* at 170.

118. *See* Colin Warbrick, *Protection of Nationals Abroad*, 37 INT'L & COMP. L.Q. 1002, 1006-08 (1988) (setting forth general rules of the United Kingdom regarding the taking up of international claims to a foreign state on behalf of a national); *see also* R (Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs, 2002 BRIT. Y.B. INT'L L. 414, 423 (noting that claimants sought "merely informal diplomatic representation, rather than the presentation of a formal claim"); *Diplomatic Protection: United Kingdom Practice*, 1999 BRIT. Y.B. INT'L L. 526, 527 [hereinafter *Diplomatic Protection: United Kingdom Practice*] (expressing that "[i]t may sometimes be permissible and appropriate to make informal representations even where the strict application of the rules would bar the presentation of a formal claim").

119. *See* Warbrick, *supra* note 118, at 1002 (explaining that a State's right to use consular action to intervene with another State in order to protect an individual is typically based on multilateral treaties or bilateral arrangements).

120. *See* discussion *supra* notes 118-19 (referencing sources discussing "diplomatic actions").

121. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. b (2004) (mentioning communications with a national arrested or charged with a crime and the provision of assistance as examples of actions taken in exercise of diplomatic protection); *see also Diplomatic Protection: United Kingdom Practice*, *supra* note 118, at 527 ("It may sometimes be permissible and appropriate to make informal representations even where the strict application of the rules would bar the presentation of a formal claim."); LUKE T. LEE, CONSULAR LAW AND PRACTICE 124-88 (2d ed. 1991) (providing an overview of United States' practice of protection of nationals). *See generally* Jean-Pierre Puissochet, *La Pratique Francaise de la Protection Diplomatique, in* LA PROTECTION

formal and informal diplomatic representation appears fictitious, since a diplomatic or consular representative making such a representation always acts in his or her official capacity. However, it is possible to draw a distinction within diplomatic protection between bringing claims before a tribunal and other types of actions.[122] The latter are referred to as "diplomatic actions" in the Draft Articles on Diplomatic Protection, while the former are called "other means of peaceful settlement."[123]

If we understand the term "diplomatic protection" to include more than a representation of the claim before an international tribunal, application of the clean hands doctrine to diplomatic protection in certain situations might run contrary to the Vienna Convention of Consular Relations of 1963, particularly Article 36.[124] The only way

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DIPLOMATIQUE 115-20 (2003) (outlining French practice). It should be noted, however, that some sources regard certain actions, such as assistance to detained individuals in arranging for legal defense, as separate from diplomatic protection. *See* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1046 (Rudolf Bernhardt ed., 1992) (explaining that a State practices diplomatic protection, as a rule, against another State, but that the arrangement of legal defense for a detained national is not necessarily directed against the other State); *see also* Wilheim Karl Geck, *Diplomatic Protection and the Extension of Individual Rights Through Treaties*, *in* 31 L. & ST. 42, 45 (Institute for Scientific Co-operation ed., 1985) (contending that diplomatic protection includes only protection against foreign States' actions which are contrary to international law).

122. *See ILC 54th Session Report*, *supra* note 116, at 170 (observing that various judicial decisions have distinguished between diplomatic protection in the form of diplomatic action and in the form of judicial proceedings).

123. *See id.* at 170-71 (stating that "other means of peaceful settlement" include negotiation, mediation, arbitration, and judicial proceedings).

124. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 262, 293-94. Paragraph 1 of Article 36 of the Vienna Convention of Consular Relations of 1963 states:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any

to incorporate the clean hands doctrine into the ILC's Draft Articles on Diplomatic Protection would be by narrowing the definition of diplomatic protection in the Draft Articles or by strictly defining the scope of the clean hands doctrine to adjudicatory procedures (or, in the language of the ILC's Draft Articles, "other means of peaceful settlement").

Also, other questions are likely to arise when trying to incorporate the clean hands doctrine into diplomatic protection. For example, would the clean hands doctrine cover both intentional and unintentional initial wrongful conduct of an alien? Perhaps, more importantly, application of the clean hands doctrine to diplomatic protection may contradict the general orientation of the Draft Articles on Diplomatic Protection towards considering diplomatic protection as a tool by which to advance human rights.[125] If we agree that "until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection,"[126] the same can be said about applying the clean hands doctrine to diplomatic protection. Such application will obliterate the effectiveness of the very institution of diplomatic protection.

For example, the clean hands doctrine may preclude a State from exercising diplomatic protection in the form of assistance in cases of

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communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Id.

125. *See ILC First Report*, *supra* note 8, ¶ 32 (declaring that "every effort should be made to strengthen the rules that comprise the right of diplomatic protection" because it "remains the most effective remedy for the promotion of human rights").

126. *Id.* ¶ 29.

arrest and detention of its nationals by authorities of a foreign State when an individual has not been detained arbitrarily (i.e. has unclean hands).[127] More often than not, an injury to a foreign national is based upon his alleged violation of a State's domestic law. Even subsequent procedural violations or treatment below a certain minimum standard can be claimed to result from the initial wrongful conduct that brought the individual to jail in the first place.[128] Such a position may negate attempts to exercise diplomatic protection, since "state practice shows that intervention of assistance is required mainly in cases of arrest and detention of a national, [and] cases of denial of justice in judicial proceedings."[129]

Thus, the scope of the suggested application of the clean hands doctrine to cases involving human rights violations is unclear. Diplomatic protection is an institution of international law aimed at benefiting individuals, and frequently concerns the protection of human rights.[130] A number of authors have referred to the growing importance of human rights and pointed out that "diplomatic protection has to take account of the developments in international human rights law."[131] Consequently, some commentators have suggested banishing the clean hands doctrine from cases involving

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127. *See* BORCHARD, *supra* note 50, at 735 (contending that it is a general rule that an injury to an alien arising out of a breach of local law affects complete or partial forfeiture of diplomatic protection).

128. *See* Fitzmaurice, *supra* note 46, at 119 (interpreting principles of equity as suggesting that a State guilty of illegal conduct may be deprived of juridical grounds of complaint and opportunity to seek judicial redress for corresponding illegalities on the part of another State, particularly where the illegalities were committed to counter the initial wrongful conduct).

129. SEN, *supra* note 50, at 371 (explaining that it is a well recognized practice of states to allow the opportunity for an arrested or detained alien to consult diplomatic or consular representatives to evaluate whether he or she has been treated in a proper manner with due regard to minimum standards).

130. *See ILC First Report*, *supra* note 8, ¶ 31 (suggesting that States will treat other States' diplomatic protection claims more seriously than complaints to human rights bodies).

131. Michael K. Addo, *Interim Measures of Protection for Rights Under the Vienna Convention on Consular Relations*, 10 EUR. J. INT'L L. 713, 721 (1999) (asserting that protection of individual rights cannot be based solely on traditional principles of diplomatic protection).

the protection of human rights.[132] Even though this position is not commonly accepted, it is enjoying growing support.[133] Indeed, applying the clean hands doctrine as a preliminary objection to admissibility and as a defense at the merits stage in cases involving diplomatic protection and the violation of human rights would only aid the State violating an individual's rights and lead to impunity.

CONCLUSION

The analysis in this paper is based upon two tests.[134] The aim of the first test is to establish whether or not the clean hands doctrine is

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132. *See, e.g.*, Fitzmaurice, *supra* note 46, at 120 (arguing that certain forms of illegal action, including violations of human rights, can never be justified by prior illegal action of another State, even when intended as a reply to such action); *see ILC Meeting 2793*, *supra* note 2, at 16-17 (providing references to sources supporting such position). Some sources erroneously cite the recent *Van der Tang* case decided by the European Court of Human Rights as supporting the non-applicability of the clean hands doctrine to cases involving human rights violations. *See* Cohen-Jonathan & Flauss, *supra* note 80, at 688 (mentioning that *Van der Tang* was the only case where the theory of clean hands was expressly advanced as such). In this case, Van der Tang brought an action against Spain for an alleged unreasonable length of pre-trial detention. Van der Tang v. Spain, 22 Eur. Ct. H.R. 363, ¶ 46 (1993). A peculiar detail in this case was that Van der Tang, after he was released on bail, failed to comply with the conditions imposed on him. *Id.* ¶¶ 21, 27, 29. Van der Tang's violation of bail conditions formed the basis of Spain's preliminary objections to Van der Tang's claim. *Id.* ¶ 49. Spain presented its preliminary objection as based on the clean hands doctrine, which is a somewhat unusual interpretation of the doctrine, since Van der Tang's violation occurred after allegedly wrongful conduct of Spain. *Id.* Spain's preliminary objection was rejected not because the Court believed that the clean hands doctrine was not applicable to human rights violations, but because the Court did not see any connection between the wrongful conducts of Spain and Van der Tang. *Id.* ¶ 53. The issue of clean hands was not even addressed by the Court. *Id.* ¶¶ 49-53. References to this case as supporting the inapplicability of the clean hands doctrine to diplomatic protection are thus incorrect.

133. *See* discussion *supra* note 80 and accompanying text (describing criticism of the use of the clean hands doctrine in international law).

134. *See* discussion *supra* Part I (describing the analysis of whether the clean hands doctrine is applicable to diplomatic protection and whether it is necessary to include it in the ILC Draft Articles).

an established part of the law of diplomatic protection.[135] The second test is employed to evaluate whether the doctrine of clean hands should be included in the ILC's Draft Articles on Diplomatic Protection.[136] Analysis in both cases shows that the doctrine of clean hands is not an established part of diplomatic protection as a condition for admissibility and, consequently, should not be incorporated into the Draft Articles on Diplomatic Protection.[137]

The ILC is a body charged with the codification and progressive development of international law.[138] Incorporation of the clean hands doctrine into the Draft Articles on Diplomatic Protection will represent neither a codification of international law, since the doctrine remains highly controversial and overwhelming support exists against applying the doctrine to the field of diplomatic protection, nor a progressive development of international law, since it would weaken the protection of natural and legal persons from violations of their rights.[139] It hardly seems true that "States might be puzzled by the omission of any reference to the doctrine of clean hands in the [ILC's] report,"[140] as Ian Brownlie claimed at the ILC.

Incorporating the clean hands doctrine into diplomatic protection as a prerequisite for its exercise has no support in international jurisprudence or state practice.[141] Secondary authority supporting such incorporation is unpersuasive and fails to provide adequate

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135. *See* discussion *supra* Parts II-III (applying a two-part test consisting of (1) whether the clean hands doctrine applies to inter-State disputes and (2) whether the clean hands doctrine is a question of admissibility or substantive law).

136. *See* discussion *supra* Parts IV-V (discussing support and criticism of application of the clean hands doctrine to diplomatic protection).

137. *See* discussion *supra* Parts II-V (explaining various problems that would arise from application of the clean hands doctrine to diplomatic protection).

138. *See* Statute of the International Law Commission, G.A. Res. 174, U.N. GAOR, 2d Sess., art. 1(1), U.N. Doc. A/519 (1947) (stating that the "International Law Commission shall have for its object the promotion of the progressive development of international law and its codification"), *available at* http://www.un.org/law/ilc/texts/statufra.htm (last visited Jan. 30, 2005).

139. *See* discussion *supra* Part IV (discussing conflicting opinions regarding the application of the clean hands doctrine to diplomatic protection).

140. *ILC Meeting 2819*, *supra* note 2, at 11.

141. *See* discussion *supra* Part IV (analyzing the treatment of the clean hands doctrine in various international cases).

examples from the practice of international tribunals.[142] Many authoritative primary and secondary sources make no mention of the clean hands doctrine when speaking about prerequisites for the exercise of diplomatic protection.[143] Those decisions of the ICJ most commonly referred to by proponents of incorporating the clean hands doctrine into diplomatic protection have nothing to do with diplomatic protection or the clean hands doctrine itself.[144] Among the most recent examples of cases decided by the ICJ in which the clean hands doctrine could have been upheld by the Court as a preliminary objection but was not are the *Arrest Warrant*, *LaGrand* and *Avena* cases.[145] As the Court pointed out in the *Avena* case, "even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim."[146] In any event, the issue of the lack of clean hands was not raised as a preliminary objection to admissibility in the context of diplomatic protection in any of these cases.[147]

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142. *See* discussion *supra* Part IV (explaining why cases under international tribunals fail to support scholars' arguments in support of the clean hands doctrine in diplomatic protection).

143. *See*, *e.g.*, *supra* note 81; *see also* Warbrick, *supra* note 118, at 1006-08 (setting forth the United Kingdom's general rules which apply when a British national appeals to the British government for diplomatic protection).

144. *See* discussion *supra* Part IV (referring, *inter alia*, to the *Arrest Warrant*, *Case Concerning Oil Platforms*, and *Gabcikovo-Nagymoros Project* cases, which all involved disputes involving direct inter-State disputes rather than diplomatic protection of a national).

145. *See* discussion *supra* Part IV (noting that in all the cases mentioned, the clean hands doctrine, when raised, was considered only as a question of merits).

146. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1, ¶ 47 (March 31).

147. In the *LaGrand* and *Avena* cases the United States raised arguments close to that of clean hands, but in a context that was not related to the initial wrongful conduct of an alien. Thus, these cases should not be viewed as supporting the application of the clean hands doctrine to diplomatic protection. In its preliminary objections the United States focused on Mexico's and Germany's own implementation of the Vienna Convention on Consular Relations of 24 April 1963. LaGrand (F.R.G. v. U.S.), Counter-Memorial of the United States, 2000 I.C.J. Pleadings, pt. V, ch. III (Mar. 27, 2000). This argument does not fit within the framework of the application of the clean hands doctrine to diplomatic protection

Parties only rarely invoke the clean hands doctrine as a preliminary objection to the admissibility of a claim.[148] Further, the ICJ has never sustained such an objection—even beyond cases dealing with diplomatic protection.[149] The clean hands doctrine, whether a doctrine in its own right or just another name for the principle of good faith, may be applied only at the merits stage, thus giving adequate legal consideration to claimants' arguments and possibly precluding claimants from obtaining relief due to an absence of clean hands on their part.[150] Thus, as a doctrine dealing with substantive law in international adjudication, the clean hands doctrine is an established part of international law. However, such a description does not apply to the doctrine of clean hands when parties attempt to use it as a condition for the admissibility of diplomatic protection.

As Sir Hersch Lauterpacht so eloquently expressed, "like law as a whole, 'general principles of law' are, in substance, an expression of what has been described as socially realizable morality."[151] It hardly seems a fair expression of a "socially realizable morality" to excuse internationally wrongful conduct of States by wrongful conduct of aliens, particularly when a State's wrongful conduct may violate jus

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discussed in this paper and currently at issue in the ILC. *Id.* Perhaps it would be better to identify the United States' arguments in the *LaGrand* and *Avena* cases as simply based on the principle of "good faith." *See ILC Sixth Report*, *supra* note 18, ¶ 9 (discussing the arguments of the United States in the *LaGrand* and *Avena* cases and their implications for the law of diplomatic protection).

148. *See* discussion *supra* Part IV (discussing *Oil Platforms*, where the ICJ rejected the United States' preliminary objection based on clean hands because of the doctrine's substantive nature).

149. *See* discussion *supra* Part IV (discussing various cases where preliminary objections based on the clean hands doctrine were either rejected or never raised).

150. *See* discussion *supra* Part IV (analyzing whether the clean hands doctrine is a question of admissibility or substantive law). There is growing support for excluding application of the clean hands doctrine even at the stage of the consideration of merits from cases involving violation of *jus cogens* norms and human rights violations, a development which could only be welcomed. *See, e.g.*, Fitzmaurice, *supra* note 46, at 120 (asserting that there are types of illegal action, such as violations of human rights that can never be justified by or precluded from legitimate complaint by the prior illegal action of another State).

151. LAUTERPACHT, *supra* note 33, at 172 (observing that courts are historically responsible for infusing morals into law).

cogens norms or *obligatio ergo omnes*.[152] It would be particularly strange to excuse *internationally* wrongful conduct of States by pointing to conduct which is less severe and is not considered internationally wrongful. Consequently, the doctrine of clean hands should not be included in the ILC's Draft Articles on Diplomatic Protection as a condition for the admissibility of diplomatic protection.[153]

It was suggested that in the absence of the clean hands doctrine "the exercise of diplomatic protection was paralyzed."[154] Analysis shows, contrary to this opinion, that application of the clean hands doctrine will in fact jeopardize the institution of diplomatic protection.[155] Individuals still have limited recourse by which to address violations of international law committed by States.[156] Consequently, suggestions that developments in the field of human rights law have "rendered diplomatic protection obsolete"[157] do not reflect the present state of international law, as John Dugard pointed out in his First Report on Diplomatic Protection.[158] Thus, it is

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152. *See* Sompong Sucharitkul, *State Responsibility and International Liability in Transnational Relations*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 296 (1996) (referring to an obligation to maintain the minimum standard of human rights and non-discriminatory treatment of all aliens as an *obligatio ergo omnes*).

153. *See ILC Sixth Report*, *supra* note 18, ¶ 18 (remarking that a clean hands doctrine provision would be unwarranted as an exercise in progressive development because of the uncertainty about its existence and applicability to diplomatic protection).

154. *ILC Meeting 2793*, *supra* note 2, at 4.

155. *See ILC First Report*, *supra* note 8, ¶ 29 (arguing that it would ultimately be a setback for human rights to abandon or cripple diplomatic protection).

156. *See id.* ¶ 31 (explaining that diplomatic protection offers a more effective remedy than many other human rights laws because it is a customary rule of international law with universal application).

157. *Id.* ¶ 22 (examining the view of the first Special Rapporteur Garcia Amador that the alien, as "a true subject" of international rights, should protect himself when traveling abroad, save for extraordinary circumstances).

158. *See id.* ¶¶ 22, 24, 29 (explaining that although the individual may now have more rights under international law, the remedies remain limited and thus, it would be a setback for human rights to abandon diplomatic protection).

important to ensure that this avenue remains as wide as possible for individuals to gain access to justice.[159]

159. *See id.* ¶ 29 (asserting that the use of diplomatic protection should be strengthened and encouraged).