



INTERNATIONAL  
HUMAN RIGHTS  
PROGRAM

TO: Andrew Brouwer, Jackman and Associates  
FROM: Kimberly Condon and Gunwant Gill, IHRP Clinic Students  
RE: **The Right to an Effective Remedy under Article XVIII of the American Declaration**  
DATE: January 27, 2011

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## ISSUES

- Where a request for a PRRA is summarily dismissed on the basis that country conditions have improved, and where a request for judicial review of the PRRA decision is denied, is there a breach of of the *American Declaration of the Rights and Duties of Man* (“the American Declaration”) (the right to an effective remedy)?
- Does application of the “clean hands” doctrine, such that the petitioner is denied an extension of time to perfect a leave application, result in a breach of the American Declaration?

## BRIEF ANSWER

The facts disclose a breach of Article XVIII (effective remedy) in connection with Article I (torture) and Article XXVI (right to seek asylum):

- It is well established that deportation without an adequate hearing is a breach of the right to an effective remedy in connection with the right to be free from torture.<sup>1</sup>
- Refusal to review the decision to deport is arguably a breach of the right to an effective remedy in connection with the right to seek asylum.<sup>2</sup>
- Refusal to allow an extension of time to perfect the leave application is a breach of the right to an effective remedy.
- The ‘clean hands’ doctrine is arguably insufficient grounds to refuse to allow an extension of time to perfect the leave application.<sup>3</sup>

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<sup>1</sup> IACHR, Report No. 20/88, Case 9855, Haiti, IACHR Annual Report 1987-1988, 16 September 1988.

<sup>2</sup> IACHR, *The Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, Case 10.675, March 13, 1997.

<sup>3</sup> ECHR, *Van Der Tang v. Spain*, Application No. 19382/92 (September 9 1994) online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695823&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; IACHR, *Francisco Martorell v. Chile*, Report No. 11/96, Case 11.230 (March 13 1987) at para. 7 online at <http://www.unhcr.org/refworld/docid/3ae6b6d40.html>

## ANALYSIS

### I. Source and scope of Article XVIII (the right to an effective remedy)

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.<sup>4</sup>

The right to an effective judicial remedy for breaches of human rights is found in most international human rights instruments. The scope of Article XVIII should be determined with reference to contemporary international standards. Failure to provide an effective remedy for breach of human rights is an independent violation.

#### *a) Right to a remedy is a well-established principle of international law*

The right to effective remedy is found in most international human rights treaties, indicating widespread acceptance of this principle. The Commission should have regard to these other treaties when interpreting the scope of Canada's obligations to provide an effective remedy in the case at bar.

Most international human rights treaties call for States Parties to provide effective domestic remedies for violations of human rights.<sup>5</sup> This right is enunciated in article 8 of the UDHR,<sup>6</sup> article 2(3) of the ICCPR,<sup>7</sup> article 13 of the European Convention,<sup>8</sup> article 7(1) of the African Charter on Human and People's Rights,<sup>9</sup> and article 25 of the American Convention.<sup>10</sup>

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<sup>4</sup> *American Declaration of the Rights and Duties of Man*. Online at <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

<sup>5</sup> Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) at 69.

<sup>6</sup> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

<sup>7</sup> "Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

<sup>8</sup> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

<sup>9</sup> "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a

It is well established that the Commission should look to general international law to evaluate States Parties' compliance with fundamental human rights standards.<sup>11</sup> The provisions of the American Declaration should be interpreted with regard to contemporary international standards.<sup>12</sup> The fact that the right to a remedy is nearly universal in international human rights treaties is evidence that this right is widely accepted as a general principle of international human rights law. The Inter-American Commission (the "Commission") should look to these other instruments when interpreting the scope of Article XVIII in the case at bar.

***b) The right to a remedy is a pillar of the rule of law***

Article 25 of the American Convention informs the scope of Canada's obligations to provide an effective remedy, even though Canada is not a signatory to the Convention.

The Commission recently stated that article 25 of the American Convention is a pillar of the rule of law in a democratic society. In *Manoel Leal de Oliveira v. Brazil*<sup>13</sup> the Commission cited a statement of the Inter-American Court in the Mapiripán Massacre Case:

Under Article 25, in relation to Article 1.1 of the American Convention, the State has the duty to guarantee to every person the right to administration of justice and, principally, to simple and prompt recourse to ensure, among other measures, that those responsible for human rights violations are prosecuted and that reparations are made for the harm

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competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.”

<sup>10</sup> “1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

“2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.”

<sup>11</sup> Ruth Mackenzie et al., *Manual on International Courts and Tribunals*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2010) at 372. *Victims of the Tugboat "13 de Marzo" v. Cuba*, IACHR, Case 11.436, Report No. 47/96, (1997) at paras. 77-78. IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* OEA/Ser.L/V/II.106 Doc. 40 rev. February 28, 2000 at para. 38.

<sup>12</sup> Wayne Smith, *Hugo Armendariz, et al., United States*, IACHR, Report No. 81/10, Case 12.562, 12 July 2010 at para. 46, online at <http://www.cidh.oas.org/casos/10.eng.htm>. Dinah Shelton, “The Inter-American System for the Protection of Human Rights: Emergent Law” in Irwin Cotler and F. Pearl Eliadis, *International Human Rights Law: Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) at 384.

<sup>13</sup> *Manoel Leal de Oliveira v. Brazil*, IACHR, Report No 37/10, Case 12.308, 17 March 2010, online at <http://www.cidh.oas.org/casos/10.eng.htm> [Manoel Leal de Oliveira].

suffered. As this Court has affirmed, Article 25 “is one of the basic pillars, not only of the American Convention but of the very rule of law in a democratic society....”<sup>14</sup>

Because the right to a remedy is a “pillar of the rule of law,” article 25 of the American Convention applies to Canada insofar as it informs the scope of Canada’s international human rights obligations under Article XVIII of the Declaration and under general international law.

***c) Failure to provide a remedy is an independent human rights violation***

When a state fails to provide an adequate and effective remedy for a violation of a fundamental right under the American Declaration, that deficiency creates an independent violation of the right to judicial protection under Article XVIII of the American Declaration.<sup>15</sup>

**II. The State’s actions breached the right to an effective remedy**

***a) In order to satisfy Article XVIII, the remedy must be effective***

The Inter-American System of Human Rights (IASHR) defines the “effectiveness” of a remedy as entailing distinct normative and empirical aspects. The former is concerned with the suitability of the remedy to potentially “determine whether a violation of human rights had been committed.”<sup>16</sup> Suitability of the judicial remedy is not at issue here as judicial review of the PPRA decisions is a viable mechanism to provide judicial oversight. The effectiveness of a remedy with respect to its empirical nature involves, among other aspects, a consideration of whether the remedy is illusory.

**(i) A remedy which is illusory because of the circumstances of a given case is not effective**

In the case at bar, the circumstances are such that the petitioner was unable to access a remedy. The Inter-American Court has stated that a remedy is not effective if it is illusory because of the particular circumstances of a given case. :

A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered

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<sup>14</sup> Mapiripán Massacre Case, Judgment of September 15, 2005. Series C No 134, at para. 111, quoted in Manoel Leal de Oliveira, *ibid* at para. 113.

<sup>15</sup> Wayne Smith, Hugo Armendariz, et al., *United States*, IACHR, Report No. 81/10, Case 12.562, 12 July 2010 at para. 62, online at <http://www.cidh.oas.org/casos/10.eng.htm>. IACHR, *Rafael Ferrer-Mazorra, et al. v. United States*, Report No. 51/01 (merits report), Case No. 9903, para. 244 (April 4, 2001) online at <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/USA9903b.htm>. *International Human Rights Law: Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) at 384.

<sup>16</sup> IACHR, “Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights,” at para. 251 online at [http://www.cidh.org/countryrep/AccessoDESC07eng/Accessodescv.eng.htm#\\_ftn15](http://www.cidh.org/countryrep/AccessoDESC07eng/Accessodescv.eng.htm#_ftn15).

effective... this could be the case, for example,....in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy<sup>17</sup>

Similarly, the ECHR has also emphasized in a number of cases before the Court that the illusory aspect of a remedy negates its effectiveness:

It should be remembered that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.<sup>18</sup>

***b) Deportation without an adequate hearing is a breach of the right to an effective remedy in connection with the right to be free from torture***

**(i) There is a right under general international law to challenge an order of expulsion**

The petitioner was prevented from meaningfully challenging the order of expulsion because he was denied the opportunity to present additional submissions on the risk of torture following the end of the war. The Commission has held that Article 25 of the American Convention will be breached where an individual is denied the right to challenge an order of expulsion.<sup>19</sup>

There is a general international law right to present a defence against deportation based on humanitarian and other considerations and the State must consider the defense. In *Wayne Smith, Hugo Armendariz, et al. v. United States* the Commission found that it was a breach of Article XVIII to refuse to allow discretionary relief from deportation to permanent residents convicted of certain crimes.

The Inter-American Commission further concludes that it is well-recognized under international law that a Member State must provide non-citizen residents an opportunity to present a defense against deportation based on humanitarian and other considerations,

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<sup>17</sup> IACtHR, Advisory Opinion OC-9/87 of October 6, 1987, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) of the American Convention on Human Rights*, Series A No. 9 at para. 24.

<sup>18</sup> See *Kudak v. Lithuania*, (merits and just satisfaction) Case No. 15869, para.58 (23 March 2010), *Rafael Ferrer-Mazorra, et al. v. United States*, Report No. 51/01 (merits report), Case No. 9903, para. 244 (April 4, 2001). Citing *Artico v. Italy*, May 13, 1980, Series A N° 37, 3 E.H.R.R. 1, at para. 33.]  
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<sup>19</sup> IACHR, Report No. 20/88, Case 9855, Haiti, IACHR Annual Report 1987-1988, 16 September 1988.

such as the rights protected under Articles V, VI, and VII of the American Declaration. Each Member State’s administrative or judicial bodies, charged with reviewing deportation orders, must be permitted to give meaningful consideration to a non-citizen resident’s defense, balance it against the State’s sovereign right to enforce reasonable, objective immigration policy, and provided effective relief from deportation if merited.<sup>20</sup>

While the Commission has not defined the term “meaningful consideration” it seems to require States to provide a judicial mechanism to consider humanitarian defences and offer an effective remedy.<sup>21</sup> The balancing test is not rigid. It must be flexible to the specific facts of each individual case.<sup>22</sup> Although the decision in *Wayne Smith* concerned the opportunity to present a defense based on the right to family, the flexible nature of the balancing test suggests that it must also include consideration of other fundamental rights, such as the right to be free from torture.

(ii) Deportation must be carried out in accordance with the fundamental values of democratic societies

The Commission has also held that, in exercising its right to deport non-citizens, States must have regard to certain protections which enshrine fundamental values of democratic societies.<sup>23</sup> These include the right of foreign national not to be deported without a decision firmly supported by the law, as well as an immigration policy which guarantees to all an individual decision with guarantees of due process and which respects the right to life, the right to physical and mental integrity, and the right to family.<sup>24</sup> At a minimum, the fundamental values of democratic societies must include the right to defend against deportation based on risk of torture.

(iii) Denial of the chance to provide additional submissions deprived the petitioner of the chance to present a defense.

The petitioner was not able to make submissions on the continuing risk of torture following the end of the war [REDACTED]. The officer relied on the assumption that conditions had improved and did not give the petitioner an opportunity to argue that, although the war was over, the petitioner was still at risk of torture. This can be viewed as a breach of the right to an effective remedy in connection with the right to be free from torture. The petitioner did not have an opportunity to make submissions regarding current country conditions. As a result, he was unable to make out a defense based on the risk that he would face torture if deported. Because

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<sup>20</sup> IACHR, *Wayne Smith, Hugo Armendariz, et al. v. United States*, Report No. 81/10, Case 12.562, 12 July 2010 at para. 5.

<sup>21</sup> *Ibid.* at para. 64.

<sup>22</sup> *Ibid.* at para. 55.

<sup>23</sup> IACHR, *Andrea Mortlock, United States*, Report No. 63/08, Case 12.534, 25 July 2008 at para.78 online at <http://www.cidh.oas.org/annualrep/2008eng/USA12534eng.htm>.

<sup>24</sup> *Ibid.*

the petitioner was unable to present information relevant to this defense the officer cannot be said to have meaningfully considered it. In the circumstances, this remedy cannot be regarded as effective.

***c) Refusal to review the decision to deport is a breach of the right to an effective remedy in connection with the right to seek asylum***

(i) The right to seek asylum includes the right to appeal a decision

International law recognizes the right of a person seeking refuge to a hearing to determine whether that person meets the criteria of the Refugee Convention.<sup>25</sup> There is also support for the position that refugee claimants should be entitled to review of this decision. In the case at bar, the petitioner was denied the possibility of judicial review because he had “unclean hands”.

The UNHCR has strongly urged all States to ensure that refused refugee claimants have access to a merits-based review and are permitted to remain in the country while their appeal is pending.<sup>26</sup> In *The Haitian Centre for Human Rights et al. v. United States*, the Commission cites Richard Plender, stating that if refugee status is denied, claimants should be allowed to apply for review of the decision:

Applicants whom a state initially rejects “should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial...”<sup>27</sup>

The Commission has previously expressed concern over the discretionary nature of access to judicial review in refugee decisions in Canada, noting that this results in a gap in the protections available to claimants who allege they are at risk of torture.

Notwithstanding the combination of mechanisms potentially available, there is thus a gap in the protections available to a refused refugee claimant alleging that he or she will be subjected to torture if removed...Fundamental rights such as the right to be free from torture must always be subject to effective guarantees, including the availability of judicial protection. These protections are required, not discretionary. Accordingly, given

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<sup>25</sup> IACHR, *The Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, Case 10.675, March 13, 1997, at para. 155, online at <http://www.cidh.oas.org/annualrep/96eng/USA10675.htm>.

<sup>26</sup> IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* OEA/Ser.L/V/II.106 Doc. 40 rev. February 28, 2000 at para. 100, online at <http://www.cidh.oas.org/countryrep/Canada2000en/table-of-contents.htm>, citing UNHCR Rec. No 8 (XXVIII) "Determination of Refugee Status," (1977), at secs. (e)(vi) and (vii).

<sup>27</sup> IACHR, *The Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, Case 10.675, March 13, 1997, at para. 144, online at <http://www.cidh.oas.org/annualrep/96eng/USA10675.htm>.

that the combination of procedures available does not ensure full compliance with Canada’s obligations to prevent and protect against torture, resolution of the concerns highlighted with respect to the respective roles of these mechanisms and judicial review must take into account the need to close the gap with respect to torture claims.<sup>28</sup>

***d) Refusal to allow an extension of time to perfect the leave application resulted in a breach of the right to an effective remedy***

**(i) International human rights law recognizes the importance of effective judicial review on substantive grounds**

The refusal to allow an extension of time to perfect the petitioner’s application for leave for judicial review resulted in a denial of leave and breached the petitioner’s right to an effective remedy. The motion for an extension was denied on the basis that the claimant had “unclean hands” as a result of his failure to report for deportation. This decision did not take into account the petitioner’s allegation that he faced a risk of torture or consider the merits of his application.

Jurisprudence from international human rights bodies such as the ECHR underscores the importance of an effective judicial review based on substantive grounds of an application. For instance, the ECHR held in *Miragall Escolano v. Spain*<sup>29</sup> that “an unreasonable construction of a procedural requirement prevented a claim for compensation being examined on the merits and thereby entailed a breach of the right to the effective protection of the courts.”<sup>30</sup> Though the facts vary considerably from the petitioner’s case, the underlying sentiment is applicable: that merits, not solely procedural timelines, be the basis upon which an application for judicial review is assessed.

***e) The ‘clean hands’ doctrine is insufficient grounds to refuse to allow an extension of time to perfect the leave application.***

The ‘clean hands’ doctrine is the recognition of a general principle of equity whereby a person ‘who asks for redress must present himself with clean hands.’<sup>31</sup> This common law principle<sup>32</sup>

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<sup>28</sup> IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* OEA/Ser.L/V/II.106 Doc. 40 rev. February 28, 2000 at para. 122, online at <http://www.cidh.oas.org/countryrep/Canada2000en/table-of-contents.htm>.

<sup>29</sup> At issue in *Miragall Escolano v. Spain* was the interpretation of a time limitation for launching an appeal against the alleged infringement of the applicants’ right to a fair hearing.

<sup>30</sup> ECHR, *Miragall Escolano and others v. Spain*, 25 January 2000, at para. 37 online at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&source=tkp&highlight=miragall&sessionid=63685564&skin=HUDOC-EN>

<sup>31</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 156 (1987).

<sup>32</sup> See Black’s law dictionary 268 (8<sup>th</sup> ed. 2004) (defines 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”).

arises from the concept of *in parti delicto* (of equal fault) which seeks to examine variable levels of culpability of disputing parties in order to determine fault and liability. The doctrine essentially seeks to balance blame in determining causation of injury and harm by assuring that “no polluted hand shall touch the pure fountains of justice.”<sup>33</sup> International courts and tribunals such as the ECHR have made reference to the doctrine.<sup>34</sup>

i) International human rights jurisprudence does not support the application of the ‘clean hands’ doctrine to bar effective judicial review

There is no international human rights law jurisprudence to unequivocally support or deny the petitioner’s complaint against the application of the clean hand’s doctrine. The Commission has not specifically addressed the application of the ‘clean hands’ doctrine; no individual has lodged a complaint against their country for denial of an effective judicial remedy on the basis of the doctrine. However, reference to the doctrine was made by the Commission at a 1987 hearing before the Inter-American Court of Human Rights. The Commission was asked with reference to a particular case, if there could be “any possible relationship or tie between the violation of human rights and the so-called Clean Hands Theory, well known in international law.” The Commission’s response to the judge’s question was the following:

The answer is obviously no. The Commission protects human beings, irrespective of their ideology *or their behaviour*. Certain rights are inherent to every person, the right to life being the most important of all. Regardless of ideology, behaviour or nature, if a person does not have “clean hands” it is of course the state’s duty to conduct a regular proceeding against that person.<sup>35</sup>

The sole ECHR case analogous to that of the petitioner and involving the application of the ‘clean hands’ doctrine is that of *Van der Tang v. Spain*. Van der Tang alleged the violation of his right to be tried within a reasonable time or released pending trial as provided by the

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<sup>33</sup> Lisa J. Laplante, “*The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru’s Political Transition*,” (2007-2008) 23 Am. U. Int’l L. Rev. 51 at 60.

<sup>34</sup> In ECHR, *Chapman v. the UK* with respect to whether a public authority was in breach of his legal obligations, the dissenting judge made reference to the ‘classic constitutional doctrine of ‘clean hands’ which “precludes those who are in prior contravention of the law from claiming the law’s protection.”<sup>34</sup> See ECHR, *Chapman v. UK Application no. 27238/95*, 18 January 2001, at para. 5 online at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=chapman&sessionid=63726631&skin=hudoc-en>.

<sup>35</sup> IACHR, *Francisco Martorell v. Chile*, Report No. 11/96, Case 11.230 (March 13 1987) at para. 7 online at <http://www.unhcr.org/refworld/docid/3ae6b6d40.html>

European Convention on Human Rights (article 5, para. 3).<sup>36</sup> The government of Spain asserted that the complainant was not entitled to bring a claim before the Commission because he had broken the conditions attached to his provisional release - absconding and evading trial after being released on bail; his resultant lack of ‘clean hands,’ the government argued, ought to prevent him from bringing the present action.

If the petitioner’s case was brought before the Commission, reference to *Van der Tang v. Spain* would support the petitioner’s claim that the ‘clean hands’ doctrine on its own is not a bar to assessing the merits of a motion seeking extension of time to perfect a leave application for judicial review.

The ECHR ruling in *Van der Tang v. Spain* is suggestive of the ‘clean hands’ doctrine not being a bar to admissibility of a case before a human rights body. While the ECHR did not address the clean hands argument directly in *Van der Tang v. Spain*, its primary focus being alternative grounds of admissibility, the Court stated that the applicant’s unlawful conduct in the instant case was not the source of the violation he complained of nor did it contribute to bringing it about.”<sup>37</sup>

(ii) Scholars support the inapplicability of the ‘clean hands’ doctrine to international human rights law

Human rights scholars arguing in favour of the inapplicability of the ‘clean hands’ doctrine to international human rights law strengthens the petitioner’s claim. Analysis of the scholarly human rights position is important given the lacuna of jurisprudence on the doctrine itself. The position taken by such scholars are likely to influence the direction that such international bodies take.

Lisa J. Laplante contends:

this [clean hands] doctrine should not apply in international human rights law given the very nature and purpose of these protections. Specifically, human rights guarantees specifically protect against as much state abuse and domination as against state

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<sup>36</sup> ECHR, *Van Der Tang v. Spain*, Application No. 19382/92 (September 9 1994) at para. 48 online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695823&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

<sup>37</sup> ECHR, *Van Der Tang v. Spain*, Application No. 19382/92 (September 9 1994) at para. 6 online at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695823&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

negligence. Thus, a state's failure to observe these international norms should result in remedying resulting harm regardless of the status of the victim.<sup>38</sup>

Similarly, Alex Twanda Magaisa argues the following:

Even an accused who has confessed to committing an offence is still entitled to constitutional protection by the courts when he alleges that his constitutional rights have been violated. Prisoners who have committed offences against the state are still entitled to that protection despite having so-called "unclean hands" for disobeying the laws of the state ... There are other cases throughout the world where progressive courts have held that where the surrender of fundamental constitutional rights is concerned, the court's inquiry cannot be limited to the "clean hands" of the complainant. The focus of constitutional rights protection is not on the guilt of the applicant but the constitutionality of laws or policies of the state.<sup>39</sup>

Dinah Shelton in her discussion of remedies in international human rights law maintains that:

in general, the character of the victim should not be considered because it is irrelevant to the wrong and to the remedy, and implies a value judgment on the worth of an individual that has nothing to do with the injury suffered.<sup>40</sup>

There does not appear to be strong scholarly support of the application of the 'clean hands' doctrine to international human rights law. This is likely due to the fact that human rights scholars view the application of the 'clean hands doctrine' as derogating from an individual complainant's human rights.

(iii) 'Clean hands' doctrine as applied to inter-state disputes in international law is not a set legal principle

Though the human rights context of the petitioner's claim is different, analysis of the inter-state dimension assists in elucidating its potential applicability to such a case. The application of the 'clean hands' doctrine has been addressed with regards to inter-state disputes brought before international tribunals and courts.

There does not appear to be consensus on the applicability and relevance of the 'clean hands' doctrine to international law. The United Nation's International Law Commission (ILC) has

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<sup>38</sup> Lisa J. Laplante, "*The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*," (2007-2008) 23 Am. U. Int'l L. Rev. 51 at 64.

<sup>39</sup> Alex Tawanda Magaisa, "*'Clean Hands'? Thou Hath Blood on Your Hands': A Critique of the Supreme Court Judgement in the ANZ Case*, (2003) 1 INT'L J. Civ. Society L. 93 at 94-95.

<sup>40</sup> Laplante, at 65.

considered the application of the doctrine in regards to the area of diplomatic protection. Review of the ILC debates from 1999-2004 reflect the uncertainty of the legality and applicability of the clean hands doctrine.

The unclear status of the ‘clean hands’ doctrine in international law supports the petitioner’s claim of its inapplicability. There was considerable disagreement as to whether the ‘clean hands’ doctrine is a distinct general principle of international law at the fifty-sixth session of International Law Commission (2004).<sup>41</sup> Ian Brownlie, a member of the ILC and international law scholar, stated he "had never been convinced that the clean hands doctrine was part of the general international law."<sup>42</sup> Academic, Charles Rousseau expresses a similar position stating "it is not possible to consider the theory of clean hands as an institution of general customary law."<sup>43</sup> Other scholars, however, claimed that the clean hands doctrine is "undoubtedly" a general principle of law. 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."<sup>44</sup>

The ongoing uncertainty as to the doctrine’s relevant in international law also supports the petitioner’s case. In 2001, the ILC outright dismissed the ‘clean hands’ doctrine in regards to its discussion of “circumstances precluding wrongfulness” found in chapter V of the state responsibility articles.<sup>45</sup> The ILC’s 2001 annual report explains that “the so-called ‘clean hands’ doctrine has been invoked principally in the context of the admissibility of claims before the international courts and tribunals though rarely applied.”<sup>46</sup> Therefore, the ‘clean hands’ doctrine cannot be categorized as a set legal principle in international law.

(iv) The ‘clean hands’ doctrine is an issue not of admissibility of a claim but of substantive law

The Canadian Federal Court did not undertake a substantive review of the petitioner’s request for an extension of time to perfect his application for judicial review. Though there is a lack of jurisprudence on the issue, many scholars hold that the doctrine is more appropriately an issue of

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<sup>41</sup> 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)

<sup>42</sup> 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) (noting arguments of the members of the International Law Commission of the application of the ‘clean hands’ doctrine to diplomatic protection.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> See *Report of the International Law Commission on the Work of its 53<sup>rd</sup> Session*, U.N. GAOR, 56th Sess., Supp. No. 10, Ch. V, U.N. Doc. A/56/10 (1999).

<sup>46</sup> See *Report of the International Law Commission on the Work of its 53<sup>rd</sup> Session*, U.N. GAOR, 56th Sess., Supp. No. 10, Ch. V, U.N. Doc. A/56/10 (1999).

substantive law which should be employed, at the stage of consideration of the merits of a case and not the initial question of admissibility of a claim.<sup>47</sup> With respect to inter-state disputes, “no court has rendered a claim inadmissible because of the clean hands doctrine.”<sup>48</sup> Given the treatment of the doctrine in the inter-state dispute context, its application to international human rights law may likely be argued in a similar vein.

Arguing that consideration of the ‘clean hands’ doctrine occur under substantive consideration of the case as opposed to admissibility strengthens the petitioner’s claim. That is, the consideration of ‘clean hands’ of an applicant in a dispute need not bar a claimant from the substantive evaluation of his application for judicial review.

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<sup>47</sup> 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,” (2005) *Am. U. Int’l L.* 20, at 845.

<sup>48</sup> *Ibid.*