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PREFACE

This is a new start of an old activity of the Max-Planck-Institute for foreign public law and international law in Heidelberg. Since 1931 a Digest of the Decisions of the Permanent Court and later the International Court of Justice has been published. The last volume appeared in 1990 covering the period 1976–1985. The general title was "Fontes Iuris Gentium" and the subtitle "Digest of the Decisions of the International Court of Justice". The Institute has now decided to publish the Digest under the short title "World Court Digest", in English only.

The general pattern of the earlier volumes has been maintained but a few important changes should be noted. The parts of the judgments or separate opinions reproduced are frequently longer, to make it easier for the reader to see the context of a specific statement. Separate opinions are being reproduced in a restrictive manner, only where they concern essential points of a judgment. The order of presentation has been changed to allow for a better possibility to work with the Digest.

The most important change for the production of the Digest is the use of a scanner in the Institute to read the excerpts of the decisions into a computer. By this method it has been possible to reduce the price of the volume considerably. However, this reduction can only be maintained if the sale of the volume will be increased. The editors hope that many international lawyers should wish to get their own copy of the World Court Digest.

The Digest has been prepared by a working group in the Institute composed of Rainer Hofmann, Juliane Kokott, Karin Oellers-Frahm, Stefan Oeter, Andreas Zimmermann.

Jochen Abr. Frowein
Director at the Institute

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1. THE FOUNDATIONS OF INTERNATIONAL LAW

1.1. Good Faith

Border and Transborder Armed Actions (Nicaragua/Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69

[p. 105] The Court has also to deal with the contention of Honduras that Nicaragua is precluded not only by Article IV of the Pact of Bogotá but also "by elementary considerations of good faith" from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded. The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" (*Nuclear Tests, I.C.J. Reports 1974*, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist.

Elettronica Sicula S.p.A. (ELSI) Judgment of 20 July 1989 I.C.J. Reports 1989, p. 15

[pp. 76-77] Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of "arbitrary action" being "substituted for the rule of law" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light.

The United States argument is not of course based solely on the findings of the Prefect or of the local courts. United States counsel felt able to describe the requisition generally as being an "unreasonable or capricious exercise of authority". Yet one must remember the situation in Palermo at the moment of the requisition, with the threatened sudden unemployment of some 800 workers at one factory. It cannot be said to have been unreasonable or merely capricious for the Mayor to seek to use the powers conferred on him by the law in an attempt to do something about a difficult and distressing situation. Moreover, if one looks at the requisition order itself, one finds an instrument which in its terms recites not only the reasons for its being made but also the provisions of the law on which it is based: one finds that, although later annulled by the Prefect because "the intended purpose of the requisition could not in practice be achieved by the order itself" (paragraph 125 above), it was nonetheless within the

competence of the Mayor of Palermo, according to the very provisions of the law cited in it; one finds the Court of Appeal of Palermo, which did not differ from the conclusion that the requisition was *intra vires*, ruling that it was unlawful as falling into the recognized category of administrative law of acts of "*eccesso di potere*". Furthermore, here was an act belonging to a category of public acts from which appeal on juridical grounds was provided in law (and indeed in the event used, not without success). Thus, the Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts. These are not at all the marks of an "arbitrary" act.

The Chamber does not, therefore, see in the requisition a measure which could reasonably be said to earn the qualification "arbitrary", as it is employed in Article I of the Supplementary Agreement. Accordingly, there was no violation of that Article.

[pp. 114-115 **D.O. Schwebel**] It has, it is believed, been shown in the foregoing section that the measure of requisition was unreasonable and capricious since, cumulatively:

- the legal bases on which the Mayor's order relied were justified only in theory;
- the order was incapable of achieving its purported purposes;
- the order did not achieve its purported purposes;
- the order, issued, as it specified, "also" because "the local press is taking a very great interest in the situation and... the press is being very critical toward the authorities and is accusing them of indifference to this serious civic problem", was in part designed to give an impression of the Mayor confronting the problem "in one way or another", rather than prescribing a measure which could have been responsive to the problem;
- the order accordingly was not simply unlawful but "a typical case of excess of power";
- a paramount purpose of the requisition was to prevent the liquidation of ELSI's assets by ELSI, a purpose pursued without regard to treaty obligations of contrary tenor (and the Treaty's obligations, Italy maintains, bound it not only externally but were self-executing internally);
- the Mayor transgressed the terms of his own order by failing to issue a decree for indemnification for the requisition and by failing to offer or pay that indemnification.

By its nature, what is unreasonable or capricious is subject in a given instance to a range of appreciation; these are terms which, while having a sense in customary international law, have no invariable, plain meaning but which are capable of application only in the particular context of the facts of a case. Given the facts of this case, it is concluded, for the reasons stated, that the order of requisition as motivated, issued and implemented was unreasonable and capricious and hence arbitrary.

Military and Paramilitary Activities (Nicaragua/United States of America Merits. J. 27.6.1986, I.C.J. Reports 1986, p. 14

[p. 272 **D.O. Schwebel**] In contemporary international law, the State which first undertakes specified unprovoked, unlawful uses of force against another State - such as substantial involvement in the sending of armed bands onto its territory - is, prima facie, the aggressor. On examination, Nicaragua's status as the prima facie aggressor can only be definitively confirmed. Moreover, Nicaragua has compounded its delictual behaviour by pressing false testimony on the Court in a deliberate effort to conceal it. Accordingly, on both grounds, Nicaragua does not come before the Court with clean hands. Judgment in its favour is thus unwarranted, and would be unwarranted even if it should be concluded - as it should not be - that the responsive actions of the United States were unnecessary or disproportionate.

[pp. 392-394 **D.O. Schwebel**] Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible - but ultimately responsible - for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail.

As recalled in paragraph 240 of this opinion, the Permanent Court of International Justice applied a variation of the "clean hands" doctrine in the *Diversion of Water from the Meuse* case. The basis for its so doing was affirmed by Judge Anzilotti "in a famous statement which has never been objected to: 'The principle ... (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized that it must be applied in international relations ...'"(Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, 1984, pp. 16-17). That principle was developed at length by Judge Hudson. As Judge Hudson observed in reciting maxims of equity which exercised "great influence in the creative period of the development of Anglo-American law", "Equality is equity", and "He who seeks equity must do equity". A court of equity "refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper" (citing Halsbury's *Laws of England*, 2nd ed., 1934, p. 87). Judge Hudson noted that, "A very similar principle was received into Roman law ... The *exceptio non adimpleti contractus* ..." He shows that it is the basis of articles of the German Civil Code, and is indeed "a general principle" of law. Judge Hudson was of the view that Belgium could not be ordered to discontinue an activity while the Netherlands was left free to continue

a like activity - an enjoinder which should have been found instructive for the current case. He held that, "The Court is asked to decree a kind of specific performance of a reciprocal obligation which the demandant is not performing. It must clearly refuse to do so." (*Loc. cit.*, pp. 77-78. And see the Court's holding, at p. 25.) Equally, in this case Nicaragua asks the Court to decree a kind of specific performance of a reciprocal obligation which it is not performing, and, equally, the Court clearly should have refused to do so.

The "clean hands" doctrine finds direct support not only in *the Diversion of Water from the Meuse* case but a measure of support in the holding of the Court in the *Mavrommatis Palestine Concessions* case, *P.C.I.J., Series A, No. 5*, page 50, where the Court held that: "M. Mavrommatis was bound to perform the acts which he actually did perform *in order to preserve his contracts from lapsing as they would otherwise have done.*" (Emphasis supplied.) Still more fundamental support is found in Judge Anzilotti's conclusion in the *Legal Status of Eastern Greenland P.C.I.J., Series A/B, No. 53*, page 95, that "an unlawful act cannot serve as the basis of an action at law". In their dissenting opinions to the Judgment in *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* pages 53-55, 62-63, Judges Morozov and Tarazi invoked a like principle. (The Court also gave the doctrine a degree of analogous support in the *Factory at Chorzów case, P.C.I.J., Series A, No. 9*, p. 31, when it held that "one party cannot avail himself of the fact that the other has not fulfilled some obligation ... if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question ...") The principle that an unlawful action cannot serve as the basis of an action at law, according to Dr. Cheng, "is generally upheld by international tribunals" (Bin Cheng, *General Princples of Law as Applied by International Courts and Tribunals,* 1958, p. 155). Cheng cites, among other cases, the Clark Claim, 1862, where the American Commissioner disallowed the claim on behalf of an American citizen in asking: "Can he be allowed, so far as the United States are concerned, to profit by his own wrong? ... A party who asks for redress must present himself with clean hands ..." (John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, 1898, Vol. III, at pp. 2738, 2739). Again, in the *Pelletier* case, 1885, the United States Secretary of State "peremptorily and immediately" dropped pursuit of a claim of one Pelletier against Haiti - though it had been sustained in an arbitral award - on the ground of Pelletier's wrongdoing:

"Ex turpi causa non oritur: by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied." (*Foreign Relations of the United States*, 1887, p. 607.)

The Secretary of State further quoted Lord Mansfield as holding that: "The principle of public policy is this: *ex dolo malo non oritur actio*." (At p. 607.)

More recently, Sir Gerald Fitzmaurice - then the Legal Adviser of the Foreign Office, shortly to become a judge of this Court - recorded the application in the international sphere of the common law maxims: "He who seeks equity must do equity" and "He who comes to equity for relief must come with clean hands", and concluded:

"Thus 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." ("The General Principles of International Law", 92 *Collected Courses*, Academy of International Law, The Hague, (1957-II), p. 119. For further recent support of the authority of the Court to apply a "clean hands" doctrine, see Oscar Schachter, "International Law in the Hostage Crisis", *American Hostages in Iran*, 1985, p. 344.)

1.2. Equity

Frontier Dispute, Judgment
(Burkina Faso/Republic of Mali)
I.C.J. Reports 1986, p. 554

[pp. 567-568] It is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*. On the other hand, it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes. As the Court has observed: "It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law." (*Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 33, para. 78; p. 202, para. 69.) How in practice the Chamber will approach recourse to this kind of equity in the present case will emerge from its application throughout this Judgment of the principles and rules which it finds to be applicable.

[pp. 632-633] It should again be pointed out that the Chamber's task in this case is to indicate the line of the frontier inherited by both States from the colonizers on their accession to independence. For the reasons explained above, this task amounts to ascertaining and defining the lines which formed the administrative boundaries of the colony of Upper Volta on 31 December 1932. Admittedly, the Parties could have modified the frontier existing on the critical date by a subsequent agreement. If the competent

authorities had endorsed the agreement of 15 January 1965, it would have been unnecessary for the purpose of the present case to ascertain whether that agreement was of a declaratory or modifying character in relation to the 1932 boundaries. But this did not happen, and the Chamber has received no mandate from the Parties to substitute its own free choice of an appropriate frontier for theirs. The Chamber must not lose sight either of the Court's function, which is to decide in accordance with international law such disputes as are submitted to it, nor of the fact that the Chamber was requested by the Parties in their Special Agreement not to give indications to guide them in determining their common frontier, but to draw a line, and a precise line.

As it has explained, the Chamber can resort to that equity *infra legem*, which both Parties have recognized as being applicable in this case (see paragraph 27 above). In this respect the guiding concept is simply that "Equity as a legal concept is a direct emanation of the idea of justice" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 60, para. 71). The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity. These frontiers, however unsatisfactory they may be, possess the authority of the uti possidetis and are thus fully in conformity with contemporary international law. Apart from the case of a decision ex aequo et bono reached with the assent of the Parties, "it is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law" (*Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 33, para. 78). It is with a view to achieving a solution of this kind that the Chamber has to take account, not of the agreement of 15 January 1965, but of the circumstances in which that agreement was concluded.

1.3. Estoppel and Acquiescence

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) Application to Intervene, Judgment of 13 September 1990, I.C.J. Reports 1990, p. 92

[pp. 118-119] Nicaragua has presented a particular argument whereby it would apparently be dispensed from producing evidence of the existence of the legal interests on which it relies, by reason of the assertions of the Parties. This argument has at times been denominated "equitable estoppel" and at times "recognition"; in its clearest form it was put forward at the hearings as follows :

"In the submission of the Government of Nicaragua the assertions of fact and law on the

part of El Salvador and Honduras in the course of these proceedings constitute recognition of the existence of major legal interests pertaining to Nicaragua which form an inherent part of the parcel of legal questions placed in front of the Chamber by the Special Agreement."

So far as Nicaragua relies on estoppel, the Chamber will only say that it sees no evidence of some essential elements required by estoppel: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it. The indications to be found in the pleadings of the views of the Parties as to the existence or nature of Nicaraguan interests within or without the Gulf, no doubt amount to some evidence which the Chamber can take into account. None of these however amounts to an admission, recognition or statement that, in the view of the Party concerned, there are interests of Nicaragua such that they may be affected by the decision of the Chamber in the case.

2. SOURCES OF INTERNATIONAL LAW

2.1. General Questions

2.1.4. Ius cogens

Military and Paramilitary Activities
(Nicaragua/United States of America)
Merits. J. 27.6.1986
I.C.J. Reports 1986, p. 14

[pp. 100-101] As regards the United States in particular, the weight oof an expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933), Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of State participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to "refrain in their mutual relations, *as well as in their international relations in general*," (emphasis added) from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

A further confirmation of the validity as customary international law of the principle of