



Hague Case Law: Latest Developments

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International Court of Justice

Certain Iranian Assets, Islamic Republic of Iran v. United States of America **(Judgment)**

On 30 March 2023, the International Court of Justice (ICJ) delivered its judgment in the case concerning *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*. In its judgment, the Court upheld the objection to jurisdiction raised by the United States of America relating to the claims of the Islamic Republic of Iran under the 1955 Treaty of Amity, to the extent that they relate to treatment accorded to Bank Markazi and, accordingly, found that it has no jurisdiction to consider those claims. Further, the Court rejected the objection to admissibility raised by the United States of America relating to the failure by Iranian companies to exhaust local remedies. Moreover, the Court found that the United States of America had violated its obligation under the 1955 Treaty of Amity, namely that the property of nationals and companies of the Contracting Parties ‘shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation’. Finally, the Court found that the United States of America is under obligation to compensate the Islamic Republic of Iran for the injurious consequences of the violations of international obligations. The Court rejected all other submissions made by the Parties.

Factual Background

On 15 August 1955, the Parties signed the Treaty of Amity, which entered into force on 16 June 1957. Iran and the United States ceased diplomatic relations in 1980, following the Iranian Revolution in early 1979 and the seizure of the United States Embassy in Tehran on 4 November 1979. In October 1983, the United States Marine Corps barracks in Beirut, Lebanon, were bombed, killing 241 United States service

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members who were part of a multinational peacekeeping force. Iran rejects these allegations.

In 1984, in accordance with its domestic law, the United States designated Iran as a ‘State sponsor of terrorism’, a designation which it has maintained ever since. In 1996, the United States amended its Foreign Sovereign Immunities Act (hereinafter the ‘FSIA’) to remove the immunity from suit before its courts of States designated as ‘State sponsors of terrorism’ in certain cases involving allegations of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such acts (Section 1605 (a)(7) of the FSIA). It also provided exceptions to immunity from execution applicable in such cases. Plaintiffs then began to bring actions against Iran before United States courts for damages arising from deaths and injuries caused by acts allegedly supported, including financially, by Iran. These actions gave rise to the *Peterson* case, concerning the bombing of the United States barracks in Beirut, among other cases concerning alleged acts of terrorism. Iran declined to appear in these lawsuits on the ground that the United States legislation was in violation of the international law on State immunities. In 2008, the United States further amended the FSIA, enlarging the categories of assets available for the satisfaction of judgment creditors, in particular to include all property of State-owned entities of those States having been designated ‘State sponsors of terrorism’. In 2012, the President of the United States issued Executive Order 13599, which blocked all assets of the Government of Iran, including those of Bank Markazi and of other Iranian financial institutions, where such assets are within United States territory or ‘within the possession or control of any United States person, including any foreign branch’. Also in 2012, the United States adopted the Iran Threat Reduction and Syria Human Rights Act, which made the assets of Bank Markazi subject to execution in order to satisfy debts under default judgments against Iran in the *Peterson* case. Bank Markazi challenged the validity of this provision before the United States courts; the United States Supreme Court ultimately upheld its constitutionality.¹ Following the legislative and executive measures taken by the United States, many default judgments and substantial damages judgments have been entered by United States courts against the State of Iran and, in some cases, against Iranian State-owned entities. Further, the assets of Iran and certain Iranian entities, including Bank Markazi, were subject to enforcement proceedings in various cases in the United States or abroad.

History of the Proceedings

On 14 June 2016, Iran instituted proceedings before the ICJ, arguing that, as a result of the United States’ executive, legislative and judicial acts, Iran and Iranian entities were suffering serious and ongoing harm. In particular, the Islamic Republic of Iran requested the Court to adjudge, order and declare that the United States of America had breached certain obligations under the Treaty of Amity and that it was under an

¹ *Bank Markazi v. Peterson et al.* U.S. Supreme Court, 20 April 2016, *Supreme Court Reporter*, Vol. 136, p. 1310 (2016).

obligation to make full reparation for the damage thus caused to the Islamic Republic of Iran. As the basis for the jurisdiction of the ICJ, Iran invoked Article XXI, paragraph 2, of the Treaty of Amity.

On 1 May 2017, the United States of America raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. The United States contended, *inter alia*, that Iran's Application was inadmissible because Iran came to the Court with 'unclean hands'. It alleged, in particular, that Iran had 'sponsored and supported international terrorism' and had 'taken destabilizing actions in contravention of nuclear non-proliferation [...] obligations'.² In its judgment, the Court stated that, '[w]ithout having to take a position on the "clean hands" doctrine, [it] consider[ed] that, even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the "clean hands" doctrine'. It added that '[s]uch a conclusion [was] however without prejudice to the question whether the allegations made by the United States, concerning notably Iran's alleged sponsoring and support of international terrorism and its presumed actions in respect of nuclear non-proliferation and arms trafficking, could, eventually, provide a defence on the merits'.³ On 13 February 2019, the Court found that it had jurisdiction to rule on part of the Application filed by the Islamic Republic of Iran, and that the Application was admissible.

The United States repeated its arguments based on Iran's 'unclean hands' in support of its defence on the merits. In its final submissions, it requested that the Court '[d]ismiss all claims brought under the Treaty of Amity on the basis that Iran comes to the Court with unclean hands'. According to the United States, Iran has engaged in a concerted and consistent campaign to advance its own political interests through destabilizing acts, contrary to international law; terrorism is alleged to be a core component of that campaign, which has specifically targeted United States nationals.

Iran noted that the United States had overlooked the fact that the Court had already ruled on the same argument in its judgment on preliminary objections. Iran further contended that, although the 'clean hands' doctrine has often been invoked, it has never been applied by international courts and tribunals.

The Court observed that it is in principle open to a State to repeat in substance, in support of a defence on the merits, arguments it previously relied on unsuccessfully to support an objection to jurisdiction or admissibility. The Court further noted that, though often invoked in international disputes, the argument based on the 'clean hands' doctrine has only rarely been upheld by the bodies before which it has been raised. The Court itself has never held that the doctrine in question was part of customary international law or constituted a general principle of law. As a defence on the merits, the Court has always treated the invocation of 'unclean hands' with the utmost caution. The Court noted that, in the view of the Respondent itself, at least several conditions must be met for the 'clean hands' doctrine to be applicable

² *Islamic Republic of Iran v. United States of America*, Preliminary Objections, Judgment, ICJ Reports 2019 (I), p. 43, para. 116.

³ *Ibid.*, p. 44, paras. 122 and 123.

in a given case. Two of those conditions are that a wrong or misconduct has been committed by the applicant or on its behalf, and that there is ‘a nexus between the wrong or misconduct and the claims being made by the applicant State’. The United States added that ‘[t]he level of connection between the misconduct or wrong and the applicant’s claim will depend on the circumstances of the case’. In the view of the Court, there was not, in any case, a sufficient connection between the wrongful conduct imputed to Iran by the United States and the claims of Iran, which are based on the alleged violation of the Treaty of Amity. For the above reasons, the defence on the merits based on the ‘clean hands’ doctrine could not be upheld.

Kosovo Tribunal

The Specialist Prosecutor v. Salih Mustafa (Judgment and Reparation Order)

On 16 December 2022, Trial Panel I pronounced its judgment in the case of *The Specialist Prosecutor v. Salih Mustafa*. The judgment marks a milestone for the Kosovo Specialist Chambers (KSC), as it represents the first judgment by this tribunal in a war crimes case.

The Trial Panel found Mr. Mustafa guilty of the war crimes of arbitrary detention, torture and murder and sentenced him to a prison sentence of 26 years. The Trial Panel emphasized that the charges in this case relate solely to the individual criminal responsibility of Mr. Mustafa and his involvement in the alleged war crimes of the detention, cruel treatment, torture and murder of the victims. Noting that the victims in this case are Kosovo Albanians, the Trial Panel further emphasized that, ‘their efforts to seek justice and truth lies at the heart of these proceedings’.

The crimes for which Mr. Mustafa was found guilty took place in April 1999 at a compound in the village of Zllash/Zlaš, Kosovo, which was used as a base by the BIA Guerrilla unit of the Kosovo Liberation Army (KLA), of which Mr. Mustafa was the commander.

In its judgment, the Trial Panel established that during the conflict between the KLA and Serbian forces, Mr. Mustafa was the only and overall commander of the BIA Guerrilla unit of the KLA until it was disbanded; that he was in command of the Zllash/Zlaš compound during the period of the alleged crimes; and that he had the power to make appointments within the BIA Guerrilla unit, issue orders to his subordinates and to discipline them.

When determining the sentencing of Mr. Mustafa, the Panel considered the gravity of the crimes and Mr. Mustafa’s personal contribution to the crimes. The particular cruelty of the torture, Mr. Mustafa’s superior position, as well as his personal direct involvement in this crime, were considered by the Panel as aggravating factors.

When pronouncing the trial judgment, the Panel acknowledged the tremendous courage of witnesses and victims who testified, despite being labelled in Kosovo as ‘traitors’ or ‘collaborators’ and subjected to threats and intimidation for cooperating with the Specialist Chambers or with the Specialist Prosecutor. The Panel explained that this climate of fear and intimidation is the reason why Judges ordered protective

measures for many witnesses and victims in this case and pointed out that it was also one of the reasons why this Court was created and why it was relocated to The Hague.

On 6 April 2023, Trial Panel I issued the reparation order in the case of Salih Mustafa. The Panel ordered Mr. Mustafa to pay an overall sum of €207,000 as compensation for the harm inflicted on the victims of the crimes for which he had been convicted. While the Panel recalled that the responsibility to pay the compensation lies exclusively with Mr. Mustafa, they noted that Mr. Mustafa currently does not have the means to fully comply with the order. The Trial Panel indicated that Kosovo's current Crime Victim Compensation Programme could be an alternative to execute the Reparation Order. Further, the Panel invited Kosovo to create a new reparation mechanism for victims of crimes within the jurisdiction of the KSC in order to ensure equal treatment between the suspects and accused before the KSC, who are financially supported for their defence through the Kosovo budget, whereas nothing is provided for the victims of crimes within the jurisdiction of the KSC. Furthermore, the Panel observed that the legislation in Kosovo addressing harm and injuries suffered in the context of the war in Kosovo in 1998–1999 refers exclusively to the victims of the enemy forces which, in the view of the Panel, creates discrimination between the victims of this war. In addition, the Panel recommended the establishment of a trust fund for victims of crimes under the jurisdiction of the KSC.

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