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BRIEFLY NOTED*

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Judicial and Similar Proceedings

1. Saakashvili v. Georgia (European Court of Human Rights – May 23, 2024)

<https://hudoc.echr.coe.int/?i=001-233761>

On May 23, 2024, the Fifth Section of the Court issued its judgment in *Saakashvili v. Georgia* concerning the immunity of former Georgian President Mikheil Saakashvili from prosecution for acts committed while in office. After giving up his Georgian citizenship and becoming a Ukrainian national, Saakashvili was convicted *in absentia* in two separate sets of criminal proceedings against him and was sentenced to a total of six years in prison. As part of a larger effort to make reparations for past wrongdoing, the Georgian Government received over 20,000 complaints from people claiming to be victims of serious human rights violations committed during the rule of Saakashvili's political party, the United National Movement, and under his presidency. The first case concerned a July 2005 attack on a member of parliament who was forced out of his car, beaten by several men, and was left permanently disfigured. The member of parliament alleged that the attack was retaliation for an interview he gave in which he spoke negatively about Saakashvili and his wife. The second case concerned Saakashvili's pardoning of four former high-ranking officials of the Ministry of the Interior who had been convicted of murder. That led to a separate investigation being opened in 2014 to explore charges of abuse of power.

Saakashvili argued against the legitimacy of certain testimony, labeling it as hearsay evidence and unreliable because it was offered by his political opponents. He also argued in the case concerning the pardons that the judge was not independent or impartial because he assisted judges in one of the murder cases against one of the four pardoned. All of his arguments were rejected.

He brought the case before the ECtHR alleging a violation of his Article 6 right to a fair trial and right to obtain attendance and examination of witnesses. He also alleged that the right to no punishment without law under Article 7 was violated because he could not have foreseen that he might be held criminally liable for exercising presidential pardons. Finally, he argued that political persecution motivated the criminal cases against him in violation of Article 18's limitation on the use of restrictions on rights.

The Court rejected all of Saakashvili's arguments regarding Article 6. Regarding Article 7, Saakashvili essentially argued that he was unlawfully convicted for granting a pardon, whereas the Government countered that he wasn't convicted of his use of the pardon power but rather of the abuse of official authority because, as was discovered in the domestic investigation, Saakashvili promised the then-Director of the Constitutional Security Department that in exchange for the four suspects pleading guilty, their families would be compensated, their conditions of detention would be comfortable, and their sentences would be shortened. This was intended as a means of obstructing the investigation into the death of the victim. According to the Court, "it should have been a matter of common sense for the applicant to have been able to foresee that there would have been serious consequences arising from his decision to collude with the people who had either directly committed the homicide or had conspired to cover up the scope of that very serious crime."

2. U.S. Attorney General v. Wynn (U.S. Court of Appeals for the D.C. Circuit – June 14, 2024)

On June 14, 2024, the United States District Court in Washington D.C. decided a case involving FARA – the Foreign Agent Registration Act, a law enacted in the United States in 1938 to promote transparency in foreign influence on U.S. policy and public opinion.

Stephen Wynn, a casino owner and real estate developer, who allegedly acted as a foreign agent for China in 2017 (but has since ceased such activity) was challenged for neglecting to register under FARA for his alleged interactions with Chinese officials. The Circuit Court upheld a lower court opinion that Wynn had no

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obligation to register under the Act. The Court relied on the precedent set in *United States v. McGoff* (831 F.2d 1071), which states that the registration obligation expires when the individual is no longer acting as a foreign agent.

This case has several implications. The first is the reaffirmation that the government cannot retroactively enforce individuals to register under FARA after they have ceased their activities. It also establishes a clear temporal limit on FARA's registration obligation. The decision additionally incentivizes the Department of Justice to act promptly and efficiently in pursuing potential FARA violations. However, the ruling may also bring challenges for current FARA investigations by the DOJ, which may face difficulties in gathering evidence and building cases against individuals who are no longer participating in foreign agent activities. The heightened attention on FARA enforcement, coupled with the limitations on retroactive registration, could lead to greater scrutiny of foreign influence activities and increased pressure on individuals and organizations to comply with FARA's requirements.

3. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (International Criminal Court – June 26, 2024)

<https://www.icc-cpi.int/mali/al-hassan>

On June 26, 2024, Trial Chamber X of the Court issued its merit judgment in the above case. Trial Chamber X found Al Hassan guilty of some of the charges of war crimes and crimes against humanity brought against him for acts committed between April 2, 2012, and January 29, 2013, in Timbuktu. According to a press release issued by the Court, the Court found that Al Hassan became a senior member of the Islamic Police and was given the task of, among other things, organizing police work. The Islamic Police played a "pivotal" role in the system put in place by armed groups Ansar Dine and Al-Qaida in Islamic Maghreb (AQIM)—a system put in place to commit the crimes at issue. The Court also determined that Al Hassan contributed to the police system put in place by Ansar Dine and AQIM through actions including writing and signing police reports, taking part in the transfer of accused persons to the Islamic Court, and implementing the Court's judgments and sentences. He was committed of the direct commission of crimes, contributing to crimes with others, and aiding and abetting the crimes of others in relation to crimes against humanity and torture, and the war crimes of torture and outrages upon personal dignity. He was convicted of contributing to crimes of Ansar Dine and AQIM in relation to the war crimes of mutilation, cruel treatment and passing sentences without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable, and the crimes against humanity of persecution and other inhumane acts.

Al Hassan was found not guilty of crimes of sexual violence that the Court determined to have taken place in Timbuktu during the material time and hence was acquitted of the war crimes of rape and sexual slavery, and the crimes against humanity of rape, sexual slavery and other inhumane acts in the form of forced marriage. He was also acquitted of the war crime of attacking protected objects.

Judge Tomoko Akane's separate and partly dissenting opinion outlines his different reasoning for concluding that Al Hassan was not guilty of the crimes of rape, sexual slavery and forced marriage as an other inhumane act. He also disagreed with the majority's interpretation of the "lawful sanctions" clause and did concur with the scope of the crime against humanity of persecution. Judge Akane also felt it was improper to enter factual findings concerning rape solely on the basis of journalistic work products, as that would contravene the fundamental principles of evidence and "falls short of satisfying the beyond the reasonable doubt standard."

Judge Kimberly Prost's separate and partly dissenting opinion disagreed with the majority's acquittal of Hassan on the charges of contributing to rape as a war crime and a crime against humanity in relation to detained women.

Judge Mindua's opinion discussed the legitimacy of the peoples' right to take up arms against their government with respect for international law. He focuses on six points including obligations of international armed groups in relation to the local population and the "relatively positive contribution" of Al Hassan and the armed groups despite their serious crimes ["la relative contribution positive d'Al Hassan et des groupes armés malgré les graves crimes commis"].

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