



## Hague Case Law: Latest Developments

Anna Meijknecht<sup>1</sup>

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### International Criminal Court

#### (1) *Al Hassan Case*

On 30 September 2019, Pre-Trial Chamber I of the International Criminal Court (ICC) issued a confidential decision confirming the charges of war crimes and crimes against humanity brought by the Prosecutor against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ('Mr Al Hassan') and committed him to trial before a Trial Chamber. Pre-Trial Chamber I concluded that Mr Al Hassan is responsible for crimes against humanity and war crimes committed in Mali, in the context of a widespread and systematic attack by the armed groups Ansar Eddine/Al Qaeda in the Islamic Maghreb against the civilian population of Timbuktu and its region between 1 April 2012 and 28 January 2013. The crimes committed were, *inter alia*, torture, rape, sexual slavery, forced marriages, persecution, cruel treatment, outrages upon personal dignity, the passing of sentences without a previous judgement having been pronounced by a regularly constituted court, and intentionally directing attacks against buildings dedicated to religion and historic monuments. The decision confirming the charges can be appealed only with the authorization of Pre-Trial Chamber I.

#### (2) *Decision of Pre-Trial Chamber I on the 'Application for Judicial Review by the Government of the Union of the Comoros' of 15 November 2018*

On 2 September 2019, the Appeals Chamber of the International Criminal Court delivered its judgment and rejected the appeal of the Prosecutor against the decision of Pre-Trial Chamber I on the 'Application for Judicial Review by the Government of the Union of the Comoros' of 15 November 2018.

On 14 May 2013, a referral was received by the Office of the Prosecutor from the authorities of the Union of the Comoros in relation to an attack on 31 May 2010

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✉ Anna Meijknecht  
a.k.meijknecht@asser.nl

<sup>1</sup> Tilburg Law School, Tilburg, The Netherlands

by the Israeli Defense Forces on the Humanitarian Aid Flotilla bound for the Gaza Strip. On 6 November 2014, the Prosecutor issued her decision not to investigate the attack. On 16 July 2015, Pre-Trial Chamber I, by majority, requested the Prosecutor to reconsider this decision. Subsequently, on 29 November 2017 the Prosecutor filed her decision, which she considered to be final, reaffirming her previous decision not to investigate the attack. On 15 November 2018, Pre-Trial Chamber I directed the Prosecutor to reconsider her decision of 6 November 2014 not to investigate the attack in light of the specific directions of the Pre-Trial Chamber's 16 July 2015 Decision. The Prosecutor then appealed this decision.

The Appeals Chamber Judgment of 2 September 2019 confirmed the Pre-Trial Chamber's decision of 15 November 2018 to the effect that the Prosecutor must reconsider her decision on the Comoros' referral, by 2 December 2019, in light of the specific directions of the Pre-Trial Chamber's 16 July 2015 Decision and the directions of the Appeals Chamber in its judgment. The Appeals Chamber nevertheless maintained that the 'ultimate decision' as to whether or not to initiate an investigation is that of the Prosecutor.

The Appeals Chamber considered that Pre-Trial Chamber I did not err in reviewing whether a decision of the Prosecutor that she considered to be 'final' subsequent to a first request for reconsideration, does actually amount to a proper 'final decision'. The scope of the Pre-Trial Chamber's review in such a case is limited to establishing whether or not the Prosecutor carried out the reconsideration in accordance with the Pre-Trial Chamber's request.

The Appeals Chamber also noted that the Prosecutor is required to demonstrate how she addressed the relevant issues in light of the Pre-Trial Chamber's directions. It also indicated that where questions of law arise, the only authoritative interpretation of the relevant law is that adopted by the judges of the Court. Also, the Prosecutor must comply, if directed by the Pre-Trial Chamber, to take into account certain available information when determining whether there is a sufficient factual basis to initiate an investigation.

However, the Appeals Chamber found that it is not for the Pre-Trial Chamber to direct the Prosecutor as to how to assess this information and which factual findings she should reach. The Appeals Chamber found that the Prosecutor failed to follow the Pre-Trial Chamber's legal interpretations and thus the Pre-Trial Chamber did not err when it decided to direct the Prosecutor to carry out a new reconsideration of her decision not to investigate.

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