Hague Case Law: Latest Developments

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Published online: 15 November 2017

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International Court of Justice

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

On 21 July 2017, the International Court of Justice placed on record the discontinuance by the Slovak Republic of the procedure begun by means of its Request for an additional judgment in the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia).

On 2 July 1993, Hungary and Slovakia jointly submitted to the Court certain issues arising out of differences regarding the implementation and the termination of the Treaty of 16 September 1977 on the construction and operation of the Gabčíkovo-Nagymaros barrage system. In its Judgment of 25 September 1997, the Court, having ruled on the issues submitted by the Parties, called upon both States to negotiate in good faith in order to ensure the achievement of the objectives of the 1977 Treaty, which it declared was still in force, while taking account of the factual situation that had developed since 1989.

On 3 September 1998, Slovakia filed in the Registry of the Court a Request for an additional judgment in the case. Such an additional judgment was necessary, according to Slovakia, because of the unwillingness of Hungary to implement the Judgment delivered by the Court in that case on 25 September 1997. Hungary filed a written statement of its position on the Request for an additional judgment made by

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Slovakia. The Parties have subsequently resumed negotiations and have informed the Court on a regular basis of the progress made.

By a letter dated 30 June 2017, the Slovak Government requested the Court to place on record the discontinuance of the proceedings and to remove the case from the List. The Hungarian Government did not oppose the discontinuance of the proceedings for an additional judgment.

International Criminal Court

(1) *The Prosecutor v. Ahmad Al Faqi Al Mahdi*

On 27 September 2016, Trial Chamber VIII of the International Criminal Court ('Trial Chamber' or 'Chamber') unanimously found Mr Al Mahdi guilty beyond reasonable doubt as a co-perpetrator of the war crime consisting in intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, in June and July 2012 and sentenced Mr Al Mahdi to 9 years of imprisonment.

On 17 August 2017, the Trial Chamber issued a Reparations Order in the case of *Al Mahdi*, concluding that Mr Al Mahdi is liable for 2.7 million Euro's in expenses for individual and collective reparations for the community of Timbuktu for intentionally directing attacks against religious and historic buildings in that city. Noting however Mr Al Mahdi's indigence, the Chamber encouraged the Trust Funds for Victims to complement any individual or collective reparations to the extent possible.

The Trial Chamber stressed that reparations in the present case are designed—to the extent achievable—to relieve the suffering caused by the serious crime committed and enable victims to recover their dignity and deter future violations. Reparations may assist in promoting reconciliation between the victims of the crime, the affected communities and the convicted person. The Chamber also highlighted the importance of cultural heritage and stressed that, because of their purpose and symbolism, most cultural property and cultural heritage are unique and of sentimental value. Their destruction thus carries a message of terror and helplessness; destroys part of humanity's shared memory and collective consciousness, and renders humanity unable to transmit its values and knowledge to future generations.

The Chamber ordered reparations for three categories of harm: damage to the attacked historic and religious buildings, consequential economic loss, and moral harm. The Chamber ordered individual reparations for those whose livelihoods exclusively depended upon the attacked buildings and those whose ancestors' burial sites were damaged in the attack. Moreover, the Chamber ordered collective reparations for rehabilitation of the sites and for the community of Timbuktu as a whole, to address the financial loss and economic harm as well as the emotional distress suffered as a result of the attack. It may also include symbolic measures—such as a memorial, commemoration or forgiveness ceremonies—to give public recognition of the moral harm suffered by the Timbuktu community and those within it.

As regards Mr Al Mahdi's apology, the Chamber concluded that it considered it to be genuine, categorical and empathetic. To ensure that victims have access to Mr Al Mahdi's apology an excerpt of the video of Mr Al Mahdi's apology has been posted on the Court's website. Finally, the Chamber ordered one symbolic euro to be received by the Malian State and UNESCO given the specific nature of the case.

(2) Arrest Warrant for Mahmoud Mustafa Busayf al-Werfalli

On 15 August 2017, Pre-Trial Chamber I of the International Criminal Court issued an arrest warrant for Mahmoud Mustafa Busayf al-Werfalli. The Chamber found reasonable grounds to believe that Mr al-Werfalli committed murder as a war crime by allegedly directly participating in seven incidents in which 33 individuals were killed, which took place from on or before 3 June 2016 until on or about 17 July 2017 in Benghazi or surrounding areas, in Libya. The situation in Libya was referred to the ICC Prosecutor by the United Nations Security Council in its Resolution 1970 dated 26 February 2011. On 3 March 2011, the Prosecutor announced the decision to open an investigation into the situation in Libya.

On 21 August 2017, the Court formally requested Libya's cooperation in the arrest and surrender of Mr al-Werfalli to the ICC. Following the issuance of the arrest warrant, the General Command of the Libyan National Army ('LNA') issued an official statement reporting that Mr al-Werfalli had been arrested and was under investigation by the military prosecutor. The LNA's statement also expressed gratitude to the ICC for its 'efforts in finding stability, public security and protecting people from the scourge of war and conflicts'.

The Prosecutor welcomed these reports, as well as the LNA's supportive words for the ICC's work, but also noted that she had received reports alleging conversely that the suspect is at large and may have been involved in additional killings since the ICC warrant of arrest was issued. The Office of the Prosecutor is currently investigating these reports. She also invited the LNA to demonstrate its stated support for the Court by working with the Libyan authorities to facilitate Mr al-Werfalli's immediate surrender to the ICC so that his guilt or innocence can be established before the Court's judges. Similarly, she again appealed to all States, including members of the United Nations Security Council, to support Libya's efforts to ensure the arrest and surrender of Mr al-Werfalli to the Court without further delay. She stressed that bringing safety, security and stability to Libya is a must and that the pursuit of stability and accountability for atrocity crimes are mutually reinforcing.

Special Tribunal for Lebanon

Case Number STL-17-07

On 18 October 2017 the Appeals Chamber of the Special Tribunal for Lebanon has issued a decision on 15 preliminary questions submitted by the Pre-Trial Judge in relation to case number STL-17-07. Those questions related to: The material

element (*actus reus*) and the intentional element (*mens rea*) of the crime of criminal association; the distinctive elements between criminal association and conspiracy; and the criteria for reviewing the indictment.

As regards the definition of the crime of criminal association the Appeals Chamber clarified that the crime of criminal association is composed of the following material elements: (i) an agreement, oral or written, between two or more people; (ii) a particular purpose of the agreement, being the commission of one or more felonies against persons or property, or felonies undermining the authority of the State, its prestige or its civil, military, financial or economic institutions. Regarding these material elements, the Appeals Chamber specified that under Lebanese law it is not necessary to identify all the members of a criminal association, nor is it important what form the agreement takes. Regarding the intentional elements of the crime, the Appeals Chamber clarified that criminal association requires an intention to join the association or agreement aimed at committing one or more of the felonies mentioned in Article 335, and the knowledge that the purpose of the association or agreement is to commit such a crime. A participant in the criminal association does not need to know precisely the crimes intended to be committed.

As regards the distinction between criminal association and conspiracy the Appeals Chamber stated that criminal association and conspiracy, though similar, are separate crimes under Lebanese law. While both are forms of agreement to commit crimes, their distinctive characteristics are twofold: (1) a criminal association can be directed at a broader range of crimes than a conspiracy; and (2) in a conspiracy, the members have to agree on the means to commit the crime, whereas in a criminal association they do not. The assassination of a political figure is not an element of conspiracy or criminal association.

Regarding the criteria for reviewing the indictment the Appeals Chamber held that the Pre-Trial Judge must assess whether the materials provided by the Prosecutor in support of the indictment demonstrate a credible case which could, if not contradicted, be a sufficient basis to convict the suspect on the charges in the indictment. Furthermore, the Appeals Chamber stated that the Pre-Trial Judge can only review material that has been provided to him by the Prosecutor.

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