

Comments on paragraph 67 of the judgement of ICJ in the case of immunities and criminal proceedings ——in the view of interpretation of the convention

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Abstract: *The decisive issue in this case is whether the building at 42 avenue Foch acquired the status of “premises of the mission” within the meaning of Article 1 (i) of the Convention. If it acquired that status before the action taken by France, there is a breach of the building’s inviolability under Article 22 of the Convention. Here the majority has wrongly conflated a requirement for the receiving State’s consent with the power of the receiving State to object. An intended use of premises for the purposes of the mission will suffice for those premises to be entitled to diplomatic protection when it is followed by actual use. Interpreting the Convention should be done in a way that is consistent with its object and purpose of promoting the achievement of friendly relations among nations on a basis that respects the principle of the sovereign equality of States and promotes the maintenance of international peace and security because it balances the interests of the sending and the receiving States.*

Keywords: *premises of the mission; interpretation of Article 1 (i) of Vienna Convention on the Diplomatic Relations; consent and objection; intended use; three purposes and principles*

1. Introduction

The evidence before the Court establishes that the building at 42 avenue Foch acquired the status of “premises of the mission” within the meaning of Article 1 (i) of the Vienna Convention on Diplomatic Relations. Therefore, the action taken by France of entering, searching, attaching, and ordering the confiscation of, the building breached its inviolability under Article 22 of the Convention as “premises of the mission”.

2. The Problem with the Finding in Paragraph 67

In paragraph 67, the majority holds that “in light of the foregoing, the Court considers that the Vienna Convention cannot be interpreted so as to allow a sending State unilaterally to impose its choice of mission premises upon the receiving State where the latter has objected to this choice”.^[1]

2.1 Legal basis for the finding in paragraph 67

The legal basis for this finding is not clear in light of the contradictory positions advanced by France and by the majority itself. This finding is only valid if the majority establishes that the receiving State has the power to object to the sending State’s designation of a building as premises of the mission, a test that the majority has not met. This opinion argues that if the sending State has a right to designate a building as premises of the mission, the majority has not established that the Convention vests the receiving State with the power to object to that designation. However, on several occasions France not only argues that as the receiving State it has a right to object to the granting of diplomatic status to the building, but also that the granting of that status is subject to its consent.

There are two other factors that go to the legal basis, and therefore, the validity, of the majority’s finding in paragraph 67. First, it is obvious that Equatorial Guinea’s case is presented as a response to a claim by France, not that it has a right to object to the designation of the building as mission premises, but rather, that such a designation is subject to its consent. Second, it is equally clear that the Judgment itself is substantially built on the argument that the receiving State’s consent is required for the designation of a building as premises of the mission. Thus, all the examples of the State practice set out in paragraph 69 are instances in which, as the Judgment itself states, the “prior approval” of the

receiving State is required for the designation of a building as premises of the mission. Patently, “approval” is another word for “consent”. Paragraph 72 of the Judgment presents an emblematic illustration of the majority’s confusion of the requirement for consent and the power of the receiving State to object. “Approval” has the same meaning as “consent”. Here the majority has wrongly conflated a requirement for the receiving State’s consent with the power of the receiving State to object, two wholly distinct régimes; in other words it has been indiscriminate in its use of the two different concepts of consent and objection.

The various references by France, by Equatorial Guinea, and in the Judgment itself to the requirement of the receiving State’s consent for the designation of a building as the premises of the mission and to the right of the receiving State to object to the sending State’s designation of a building as premises of the mission make it impossible to ascertain the rationale for the majority’s focus in paragraph 67 on the receiving State’s right to object to the sending State’s designation of a building as premises of the mission. The majority does not explain why it has not chosen to embrace the argument advanced by France on several occasions that the applicable criterion is that the designation by a sending State of a building as premises of the mission is subject to its consent. In fact, in the oral proceedings France stated that it “certainly has a practice of general tacit consent”.

2.2 Conflation of “requirement for consent” and “power to object”

There is an important legal distinction between a régime in which the designation of a building as premises of the mission is subject to the consent of the receiving State and one in which the receiving State has a power to object to that designation. Equating the receiving State’s power to object with a requirement for its consent is wrong. If the receiving State has the power to object to a sending State’s designation of a building as premises of the mission, the sending State may go ahead with the designation provided that the receiving State has not exercised its power to object; on the other hand, if the sending State’s designation of a building as premises of the mission is subject to the consent of the receiving State, the sending State is totally disabled from so designating the building before the receiving State’s consent is given.

The régime whereby consent of the receiving State is required is more rigorous in its protection of the interests of the receiving State than the régime in which the receiving State is given the power to object to action taken by the sending State.

In light of the foregoing analysis, the majority’s conflation of the two concepts — the requirement of the consent of the receiving State for the sending State’s designation of a building as premises of the mission and the power of the receiving State to object to such a designation — is a grave error of law. The failure of the majority to explain why in paragraph 67 of the Judgment it has concentrated on a régime in which the receiving State has the power to object to the designation by the sending State of a building as premises of the mission is irrational; what renders this approach even more confusing is that, in its reasoning, the majority relies on State practice requiring the receiving State’s consent for the designation of a building as premises of the mission, and not on State practice in which the receiving State has the power to object to that designation.

3. The Flaws in the Majority’s Interpretation of the Convention

The majority has presented three bases for its conclusion in paragraph 67 of the Judgment that “the Vienna Convention cannot be interpreted so as to allow a sending State unilaterally to impose its choice of mission premises upon the receiving State where the latter has objected to this choice”.

3.1 The first basis: “mutual consent” in Article 2 of the Convention

The first basis is set out in paragraph 63 of the Judgment. Article 2 of the Convention provides that “the establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent”. The majority concludes that Article 2 is inconsistent with “an interpretation of the Convention that a building may acquire the status of the premises of the mission on the basis of the unilateral designation by the sending State despite the express objection of the receiving State”. This conclusion calls for an explanation because, notwithstanding the existence of Article 2, the Convention enables the sending State and the receiving State to act unilaterally in relation to certain matters, even if there is an objection by the receiving State. To give just two examples, under Article 20 of the Convention, the sending State’s mission and its head have the right to use that State’s flag and

emblem on the premises of the mission; under Article 9 the receiving State has the power to declare a member of the mission *persona non grata*. In these two articles therefore the requirement for the mutual consent of the sending and receiving States in respect of the establishment of diplomatic relations and the right of the sending or receiving State to act unilaterally in certain situations are not mutually exclusive.

3.2 The second basis: personae non gratae mechanism in Article 9 of the Convention

The second basis is set out in paragraphs 64 and 65 of the Judgment. The majority argues that whereas the receiving State has the power under Article 9 of the Convention to declare members of a diplomatic mission *personae non gratae*, there is no similar mechanism for mission premises; consequently, it is contended that, if the receiving State does not have the power to object to the sending State's designation of premises of the mission, it would have to make a radical choice of granting protection to the premises or breaking off diplomatic relations with the sending State. There is no corresponding provision to the receiving State's power to declare a member of a mission *persona non grata* in relation to premises of the mission for the reason that the concept of *persona non grata* relates to persons and not things. However, it would be perfectly feasible for a receiving State, without breaking off diplomatic relations, to declare some members of the sending State's mission *personae non gratae*, thereby effectively disabling the mission.

3.3 The third basis: three purposes and principles in Convention's preamble

The third basis is set out in paragraph 66 of the Judgment, which addresses the Convention's preamble. In this case the majority has embarked on an extraordinary interpretation of the preamble of the Convention. The preamble is part of the context for the purposes of the interpretation of a treaty, and is often a valuable guide in its interpretation and application. In this case, however, the majority has carried out a strained interpretation of the preamble in order to shoehorn it into its desired conclusion.

The second preambular paragraph refers to three purposes and principles of the Charter of the United Nations as motivational factors in the conclusion of the Convention: sovereign equality of States, the maintenance of international peace and security and the promotion of friendly relations among nations. All three reflect not only rules of customary international law but norms of *jus cogens*. All three are fundamentally significant in the interpretation and application of the Convention. Yet throughout its analysis the majority only refers to the promotion of friendly relations among nations. The Convention was adopted in 1961, a time when many colonies were becoming independent. For that reason, it is surprising that the majority did not consider it appropriate to allude to the principle of sovereign equality of States in their interpretation of the Convention. That principle is as influential in the interpretation of the Convention as the purpose of the promotion of friendly relations among nations. It is a principle that can operate to censure conduct of the sending or receiving State that may compromise the right of the other party to equal treatment on the basis of its sovereignty. Also, not to be overlooked is the reference to the purpose of the maintenance of international peace and security, because a fractured diplomatic relationship between a sending State and a receiving State may have an adverse impact on international peace and security.

According to the majority, the preamble specifies that the Convention's aim is to "contribute to the development of friendly relations among nations". However, the preamble must also be construed as meaning that, in developing friendly relations among nations the Convention must be interpreted and applied having regard to the principle of the sovereign equality of States and the purpose of the maintenance of international peace and security. The majority then construes the preamble as meaning that the promotion of friendly relations "is to be achieved by according sending States and their representatives significant privileges and immunities". But that is not a proper interpretation of the preamble, which simply reflects the belief that the adoption of the Convention would contribute to the development of friendly relations among nations. The majority's interpretation is overblown.

The majority employs the preamble improperly as a basis for the distinction that it makes between the "significant privileges" of sending States and the "weighty obligations" imposed by the Convention on receiving States. Here the majority's purpose is transparent: it is intent on painting a picture of the Convention in which the receiving State is portrayed as overburdened with obligations, and for that reason it is understandable that the Convention would vest it with the power to object to the sending State's designation of mission premises. This interpretation is artificial and a figment that has no basis whatsoever in a reading of the 53 articles of the Vienna Convention.

The majority has overlooked a very important element in the balance that the Convention seeks to strike between the interests of the sending State and those of the receiving State. Article 47 (1) of the Convention provides that “the receiving State shall not discriminate as between States”. However, Article 47 (2) (a) of the Convention exempts from conduct that would otherwise be discriminatory an application by the receiving State of “any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State”. This retaliatory capacity — one that the Convention does not give to the sending State — significantly lightens what the majority refers to as the “weighty obligations” imposed by the Convention on receiving States.

More astounding is the majority’s suggestion that the preamble’s recognition of the principle that privileges and immunities must serve a functional, and not a personal and private purpose, is rendered understandable by the “weighty obligations” imposed on receiving States by the Convention’s inviolability régime. That principle is better explained by the grounding of the Convention in the three fundamental purposes and principles of the Charter set out in the second preambular paragraph. A better reading of the preamble is that it envisages a Convention with a coverage that extends beyond the bilateral relationship between the sending and the receiving State to a wider, global and communitarian purpose that is driven by the three aforementioned purposes and principles. In stark terms, the majority’s argument comes down to this: on the basis of the preamble, the cost of the “significant privileges” accorded to the sending State is the “weighty obligations” imposed on the receiving State. While it is undeniable that the Convention seeks to balance the rights and interests of the sending and receiving States, the majority’s interpretation of the preamble would seem to reduce the Convention to a wholly transactional arrangement in which everything is determined by a tit for a tat and a quid for a quo. By such an interpretation the Convention is stripped of any ideal beyond the narrow interests of the sending and receiving States.

The majority’s very consequential conclusion, which goes to the very heart of the case, is substantially based on its analysis of the preamble, since, as noted before, the majority derives no help from its analysis of Articles 2, 4, 7, 9, and 39 of the Convention. However, if that conclusion is correct, it is also arguable that, in light of the balance that the Convention sets out to achieve between the interests of the sending State and those of the receiving State, it cannot be interpreted as allowing the receiving State unilaterally to decide that a building that has been used for the purposes of the mission and has been so designated by the sending State, does not have the status of premises of the mission. This conclusion is strengthened by the preambular requirement to have regard to the object and purpose of developing friendly relations on a basis that respects the principle of the sovereign equality of States and the purpose of maintaining international peace and security.

While the majority cites provisions of the Convention showing how it seeks to strike a balance between the interests of the sending State and those of the receiving State, it fails to recognize that interpreting the Convention as empowering the receiving State to unilaterally negate the sending States’ choice of a building as premises of the mission seriously compromises that balance. That is so because that balance is meant to reflect the due recognition that is to be given in the interpretation and application of the Convention to the three purposes and principles set out in the preamble.

4. How the convention should be interpreted

Although the majority has examined the meaning of the term “premises of the mission” in Article 1 (i) of the Convention, the conclusion that it has arrived at in paragraph 67 of the Judgment is principally driven, not by the definition of premises of the mission in Article 1 (i) of the Convention, but by its view that the Convention does not enable Equatorial Guinea to designate the building as “premises of the mission” if France as the receiving State objects to that designation. By this approach the majority treats the definition of “premises of the mission” as virtually otiose. What is required by the VCLT is an interpretation of the term “used for purposes of the mission” in accordance with the ordinary meaning to be given to this term in its context and in light of the object and purpose of the Vienna Convention.

4.1 Interpretation of the term “used for the purposes of the mission”

For the ordinary meaning of the term “used for the purposes of the mission”, one can go to the Concise Oxford Dictionary (7th edition) which gives the meaning of the word “use” as “cause to act or serve a purpose”^[2]. It would seem therefore that for a building to qualify as “premises of the mission” one needs to have evidence that the building has served the purpose of a mission. We are therefore

looking for evidence that the functions of a diplomatic mission were carried out at the building; these functions are non-exhaustively described in Article 3 of the Convention. Further, the ordinary meaning of the phrase “used for the purposes of the mission” must be interpreted in the context in which it is used and in light of the object and purpose of the Vienna Convention.

On 4 October 2011, Equatorial Guinea sent a Note Verbale to France stating that it “has for a number of years had at its disposal a building located at 42 avenue Foch, Paris, (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to your Department”.

France argues that the building would only qualify as premises of the mission after an actual assignment, which takes place after the sending State has completely moved into the premises.^[3] There is merit in the response of Equatorial Guinea that on the basis of France’s approach, France as the receiving State would be able to enter the building without the permission of Equatorial Guinea as the sending State at any time up to the point at which the move was completed.

Equatorial Guinea cites the following evidence supporting its claim that the building at 42 avenue Foch was used for the purposes of the mission from 4 October 2011: France has argued that the building was not actually used for the purposes of the mission from 4 October 2011 to 27 July 2012. However, even if that is factually correct, the practice of some States, including judicial decisions, supports the view that an intended use of premises for the purposes of the mission will suffice for those premises to be entitled to diplomatic protection when it is followed by actual use.

4.2 An intended use for the purposes of the mission

The practice examined indicates that an intended use of the building is a relevant factor in determining its entitlement to immunity. Evidence of the intended use comes from Equatorial Guinea’s uncontradicted statement that in the period from 4 October 2011 to 27 July 2012 it was involved in organizing the transfer and actual move of the Embassy from one location to the building at 42 avenue Foch. Equatorial Guinea also sent a Note Verbale on 27 July 2012, informing the French authorities that actual use of the premises at 42 avenue Foch as its diplomatic mission commenced from that date. This actual use of the building as diplomatic premises would satisfy even France’s test of “actual assignment and effective use”. However, the examination of the practice of some States (paragraphs 43 to 54 of this opinion shows that a building is entitled to immunity on the basis of its intended use as diplomatic premises when that use is followed by actual use of the building as diplomatic premises). Thus, intended use and actual use may be seen as the beginning and the end of a continuum, every inch of which attracts immunity. Accordingly, the building at 42 avenue Foch acquired immunity on 4 October 2011 on the basis that that was the date of the commencement of its intended use for the purposes of the mission. This status was confirmed by the subsequent actual use of the premises for diplomatic purposes after 27 July 2012.

Equatorial Guinea bears the burden of establishing that the building at 42 avenue Foch qualified as premises of the mission within the meaning of Article 1 (i) of the Vienna Convention. Equatorial Guinea has discharged this burden because the Court has before it evidence showing an intention to use the building as premises of the mission from 4 October 2011, followed by actual use of the building as premises of the mission from 27 July 2012. If the Court does not accept that Equatorial Guinea discharged its burden on the basis of evidence that the building qualified for diplomatic protection from 4 October 2011, it certainly has evidence that from 27 July 2012 the building was effectively used for the purposes of the mission. However, this opinion argues that the building at 42 avenue Foch acquired the status of premises of the mission of Equatorial Guinea as at 4 October 2011.

5. Conclusions

The majority’s reasoning does not substantiate its conclusion in paragraph 67 of the Judgment. Interpreting the Convention should be done in a way that is consistent with its object and purpose of promoting the achievement of friendly relations among nations on a basis that respects the principle of the sovereign equality of States and promotes the maintenance of international peace and security because it balances the interests of the sending and the receiving States.

References

[1] *International Law Reports (ILR)*, 2008, Vol. 30, pp. 253.

[2] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, 4th edition, 2016, p. 147.

[3] *Counter-Memorial of France*, 2008, p. 33, paras. 2.21-2.24