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INTRODUCTORY NOTE TO IMMUNITIES AND CRIMINAL PROCEEDINGS(*) (EQUATORIAL GUINEA V. FRANCE) (MERITS) (ICJ)

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Abstract: On 11 December 2020, the International Court of Justice rendered its judgment related to immunities and criminal proceedings. The Court rejected Equatorial Guinea's claims based on the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter Palermo Convention) and the Optional Protocol to the Vienna Convention on Diplomatic Relations. In the Judgment on preliminary objections, the Court upheld France's objection to jurisdiction over the Palermo Convention; on the other hand, it rejected France's second objection on jurisdiction of the Court under the Optional Protocol Vienna Convention on Diplomatic Relations. The Court struggled with the silence of the Vienna Convention on Diplomatic Relations on how to determine the "mission of premises," which leads the Court to consider its judgment based on the material proofs instead of interpreting article 1(i) of the Convention.

Keywords: ICJ, Immunities and Criminal Proceedings, Immunities, Vienna Convention on Diplomatic Relations, United Nations Convention Against Transnational Organized Crime.

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ULUSLARARASI ADALET DİVANI'NIN DOKUNULMAZLIKLAR VE CEZAİ İŞLEMLER (EKVATOR GİNESİ V. FRANSA) KARARI İNCELEMESİ

Öz: Uluslararası Adalet Divanı 11 Aralık 20220 tarihinde dokunulmazlıklar ve ceza muhakemesi işlemleri hakkındaki kararını açıkladı. Divan, Ekvator Ginesi'nin Birleşmiş Milletler Sınır Aşan Organize Suçlarla Mücadele Sözleşmesi ve Diplomatik İlişkiler Hakkında Viyana Sözleşmesi'nin Ek Protokolüne dayanan iddialarını reddetti. Divan, öninceleme safhasında iken Fransa'nın, Palermo Sözleşmesi'nden kaynaklı yargılama yetkisine itirazını onaylarken, Viyana Konvansiyonu Ek Protokolünden kaynaklı yargılama yetkisine itirazını reddetti. Ayrıca Divan, Diplomatik İlişkiler hakkındaki Viyana Konvansiyonu'nun 'misyon binaları' kavramının belirlenmesine dair açık bir hüküm içermemesi nedeniyle karar vermekte zorlandı, bu durum Divan'ı kararında Konvansiyonun 1(i) maddesini yorumlaması yerine maddi delilleri değerlendirmeye yönlendirdi.

Anahtar Kelimeler: UAD, Dokunulmazlıklar ve Cezai İşlemler, Dokunulmazlıklar, Diplomatik İlişkiler hakkında Viyana Konvansiyonu, Birleşmiş Milletler Sınır Aşan Organize Suçlarla Mücadele Sözleşmesi

I. BACKGROUND

On 2 December 2008, Transparency International France filed a complaint to the French judicial authorities against Mr. Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea and the Minister of Agriculture of Equatorial Guinea at that date.[1] In 2010, the French judicial authorities found those claims admissible. They opened an investigation regarding the claims that were based on economic offenses, such as money laundering, misuse of corporate assets, etc.[2] The common point between the Case and this criminal proceeding is the building located at 42 Avenue Foch in Paris. Due to criminal proceedings, the French judicial authorities ordered to search the building and

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1 Case Concerning *Immunities and Criminal Proceedings (Equatorial Guinea v France) (Merits) (ICJ)* [11 December 2020] (hereinafter the Judgment), at para 26. Also see, GRANDA-UBERT Victor, "Executing on State Property in Criminal Proceedings: Rethinking International Immunities in Light of the Dispute between Equatorial Guinea and France" Rev. BDI, 2017/2, 2017, p. 513-545.

2 Ibid.

seized some belongings of Mr. Teodoro Nguema Obiang Mangue on 28 September 2011, and on 3 October 2011, the luxury vehicles of Mr. Teodoro Nguema Obiang Mangue were seized by a French Court's decision.[3] On 4 October 2011, Equatorial Guinea sent its first Note Verbale to the French Ministry of Foreign and European Affairs (hereinafter the French Ministry of Foreign Affairs), stating that "[t]he Embassy ... 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."[4] The French Ministry of Foreign Affairs stated that the building did not become part of Equatorial Guinea's diplomatic mission, and it is within the private domain, and it is subject to ordinary law.[5] Then, both parties had continued the communication related to the same situation. On 27 July 2012, Equatorial Guinea sent another Note Verbale to the French Ministry of Foreign Affairs, and stated that "as from Friday 27 July 2012, the Embassy's offices are located at 42 Avenue Foch, Paris (16th arr.), a building which it is henceforth using for the performance of the functions of its diplomatic mission in France."[6] Lastly, the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue are still ongoing in France.[7]

II. JUDGMENT

The International Court of Justice (hereinafter the Court) rendered its judgment by examining two-fold. Firstly, how to determine the status of the "premises of the mission" under the Vienna Convention on Diplomatic Relations (hereinafter the Vienna Convention or the Convention), and secondly, what is the status of the building located at 42 Avenue Foch in Paris?

1. Determination of the status of the "premises of the mission" under the Vienna Convention

The Court stated that it had to determine this question within the meaning of Article 1(i) of the Vienna Convention.[8] Nevertheless, as noted prior, the

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3 Judgment at para 27.

4 Judgment at para 27.

5 Ibid.

6 Judgment at para 32.

7 Judgment at para 37-8.

8 Judgment at para 41.

provisions of the Convention offer little help to do this determination.[9] Therefore, the Court had tried to interpret meaningful implications from the object, purposes, and preamble of the Vienna Convention.[10] As stated in Article 2 of the Convention, diplomatic relations are established on mutual consent. Thus, the Court noted that in light of the Convention, a sending State could not force its choice for mission premises against the receiving State's will because it would "not be consistent with the friendly relations among nations."[11] On the one hand, the Court pointed out that compared to the "persona non grata" mechanism for people, there is no mechanism for premises, which is why the Court did not agree the Equatorial Guinea's argument. Based on this argument, the sending State could have unilaterally declared its choice on designation because the receiving State had no choice but agree with that declaration due to Article 22 of the Convention.[12] On the other hand, the Court agreed France's argument that the Convention contains "two cumulative conditions": first, that the receiving State does not expressly object to the granting of "diplomatic status" to the building in question, and, secondly, that the building is "actually assigned" for the purposes of the diplomatic mission."[13] Also, France gave some States' practices as precedents, respectively Germany, South Africa, and Brazil.[14]

However, it has to be expressed that this interpretation is contrary to some scholarly opinion; on the one hand, Eileen Denza mentions that "Article 1(i) of the Convention does not require a sending State to seek the approval of the receiving State before acquiring property for use as premises of its mission."[15] On the other hand, regarding mutual consent, James Crawford states that "The mutual consent involved may be expressed quite informally."[16] Also, Ivor Roberts notes that "neither the sending or receiving

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9 Judgment at para 62.

10 Judgment at para 66.

11 Judgment at para 67.

12 Judgment at para 65.

13 Judgment at para 52.

14 Judgment at para 69.

15 DENZA Eileen, "Definitions", in DENZA Eileen (ed), **Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations**, 4th edn, Oxford University Press, Oxford, 2016, p. 16. Also see, AHMAD Nehaluddin et al., "Abuse of Diplomatic Immunities and Its Consequences Under the Vienna Convention: A Critical Study" Transnational aw & Contemporary Problems, V: 30/2, 2021, p. 165-190.

16 CRAWFORD James, **Brownlie's Principles of Public International Law**, 9th edn, Oxford University Press, Oxford, 2019, p. 382; D'ASPREMONT Jean, "Premises of Diplomatic Missions", in PETERS Anna, **Max Planck Encyclopedias of International Law**, Oxford University Press, Oxford, 2009, para 16.

State has a right unilaterally to identify specific buildings as embassy premises."[17]

Then, the Court examined the Vienna Convention's preparatory work to interpret Article 1(i) of the Convention, but it was not decisive.[18] After that, the Court applied customary interpretative process that states that a receiving State may object to the choice of the sending State's mission premises, but this objection has to "be exercised reasonably and in good faith,"[19] and stated that the objection should be communicated in a timely manner and neither arbitrary nor discriminatory in character.[20]

2. The Status of the Building at 42 Avenue Foch in Paris

At this point, the Court examined the objection of France, then considered the status of the building based on the above-mentioned requirements. Even though "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are sources of international law,[21] the Court rendered its judgment relied on material proofs, such as "On the same date, paper signs were put up at the building marked."[22]

On 11 October 2011 and 6 August 2012, both parties of the Case continued to assert their claims via Note Verbales. Therefore, the Court determined that "France consistently expressed its objection to the designation of the building at 42 Avenue Foch in Paris as part of the premises of Equatorial Guinea's diplomatic mission."[23] Thus, France met one of the objection requirements. Further, during the foregoing Note Verbale process, "France promptly communicated its objection," which is why the Court noted that France met the time requirement.[24] Then, the Court

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17 ROBERTS Ivor, **Satow's Diplomatic Practice**, 7th edn, Oxford University Press, Oxford, 2016, p. 232. Also see, DUQUET Sanderjin, WOUTERS Jan, "Diplomatic and Consular Relations", in CHESTERMAN Simon et al., **The Handbook of United Nations Treaties**, Oxford University Press, Oxford, 2019, p. 580.

18 Judgment at para 70.

19 Judgment at para 73.

20 Ibid.

21 The Statute of the International Court of Justice, Article 38(4).

22 Judgment at para 78.

23 Judgment at para 92.

24 Ibid.

stated that Equatorial Guinea "was aware, or could not have been unaware, on 4 October 2011 that the building had been searched in the context of the ongoing criminal proceedings."[25] Therefore, it concluded that France's objections withstood on reasonable grounds.[26] Moreover, the Court noted that the Vienna Convention does not require co-operation between sending State and receiving State before objection; based on this fact, the Court stated that France was not required to co-operate.[27]

After that, while determining the discrimination claims, the Court examined the evidence presented by Equatorial Guinea, such as four letters sent to that building by the French Ministry of Foreign Affairs and the French Court's order. The Court found that this evidence is not irrelevant but is insufficient. Hence, it rejected this claim, too.[28] Then, the Court noted that Equatorial Guinea already had diplomatic premises in Paris, recognized by France; for this reason, the objections of France "did not prevent Equatorial Guinea from maintaining a diplomatic mission in France."[29] In the end, the Court rejected Equatorial Guinea's claims and rendered that "the building located at 42 Avenue Foch in Paris has never acquired the status of "premises of the mission" of the Republic of Equatorial Guinea in the French Republic within the meaning of Article 1(i) of the Vienna Convention on Diplomatic Relations."[30]

III. CONCLUDING REMARKS

The Judgment was rendered on split votes, nine against seven, which is why the Judgment may separate the academia because of the Court's way of handling this problem. As rightly stated by Başak Etkin, "The consent requirement and reasonableness test are unsatisfactory, especially because they're trying to solve a non-issue."[31] Especially as dissenting judges indicated that the Court could have focused on the term "use" instead of

25 Judgment at para 109.

26 Judgment at para 109-10.

27 Judgment at para 111.

28 Judgment at para 114-5.

29 Judgment at para 116.

30 Judgment at para 126.

31 ETKİN Başak, "An Analysis of the ICJ's Judgment on the Merits of the Immunities and Criminal Proceedings (Equatorial Guinea v. France) Case: All for nothing?" EJIL:Talk!, available at https://www.ejiltalk.org/an-analysis-of-the-icjs-judgment-on-the-merits-of-the-immunities-and-criminal-proceedings-equatorial-guinea-v-france-case-all-for-nothing/ (last accessed date 28.03.2022).

saying that article 1(i) of the Convention is unhelpful.[32] According to this approach, Judge Yusuf (President at the time) noted that the Court should have determined that Equatorial Guinea met the conditions to designate its "premises of mission" from 27 July 2012 because using that building as a diplomatic premise was stated via Note Verbale by Equatorial Guinea. Besides that, Judge Yusuf criticized the majority because he said that the Court's Judgment added a new requirement to the determination of the "premises of the mission," which was unnecessary since it "is not based on any of the sources of international law."[33] Another significant critique was made by Judge Xue (Vice-President at the time), who expressed that the Judgment also should have been focused on the criminal proceedings and the immunity of the building, whether than only on the building's status.[34] The last point was indicated by Judge Gaja, who stated that "Equatorial Guinea failed to substantiate any claim that these obligations have been violated by France."[35] According to Judge Gaja, Equatorial Guinea could have claimed that France was bound by Article 22 of the VCDR, and France violated it based on the 27 July 2012 dated Note Verbale.[36] Briefly, dissenting opinion-wrote judges noted that notification of the sending State to the receiving State should be enough to recognize that premises as the 'premises of mission'.

In conclusion, this Judgment has been a disappointment because the situation could have been an opportunity for the Court to explain how to determine the 'premises of mission.' Besides, it needs to be expressed that based on Article 31 paragraph 1 of the Vienna Convention on the Law of Treaties; the Court should have interpreted the meaning of premises of mission "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 1(i) of the VCDR contains nothing but "used for the purposes of the mission;" the term "use" should have been the main focus of the examination in order to examine whether the building is considered within the "premises of the mission." Also, it begs the question of why the

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[32] See, Dissenting Opinion of Judge Gaja at para 3; Dissenting Opinion of Judge Bhandari at para 33-60.

[33] Dissenting Opinion of President Yusuf at para 28.

[34] Dissenting Opinion of Vice-President Xue at para 1.

[35] Dissenting Opinion of Judge Gaja at para 14.

[36] Ibid.

Court just focused on the material proofs, mainly Note Verbales, to render its Judgment rather than other international law sources, such as "the general principles of law recognized by civilized nations," "judicial decisions and the teachings of the most highly qualified publicists of the various nations."[37] Last but not least, since the building's status became controversial related to criminal proceedings, the Court should not have remained silent on this issue. The Court should have examined the judicial immunity of Mr. Teodoro Nguema Obiang Mangue; had it done so, the outcome of the judgment could have changed totally. Based on all of these reasons, this Judgment has been disappointing; as mentioned prior, it was given split votes, and it has to be expressed that the Court would possibly change its attitude in later cases.

[37] The Statute (n 21) Article 38(3), (4).

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