

DECLARATION OF JUDGE GAJA

Assignment of a building for the use as premises of a diplomatic mission — Vienna Convention on Diplomatic Relations — Absence of a requirement that the receiving State gives its consent — Application of laws and regulations of the receiving State — Positions taken by certain receiving States with regard to the location of premises of missions — Alleged abuse of rights by the sending State — Compliance by the receiving State with its obligations under the Convention.

1. I agree with the decision of the Court that France did not commit any violation of its obligations under Article 22 of the Vienna Convention on Diplomatic Relations (hereinafter the “Convention”) with regard to the building located at 42 avenue Foch in Paris. However, in reaching this conclusion, I do not share the view that, by objecting to the notifications made by Equatorial Guinea on 4 October 2011 and again on later dates, France prevented the building at 42 avenue Foch from acquiring the status of premises of a diplomatic mission.

2. The issue is whether consent, expressed or implied, of the receiving State is a precondition for the sending State to be able to use a building as premises of a diplomatic mission. The starting-point of an analysis of this issue is the definition of “premises of the mission” contained in the Convention, to which both France and Equatorial Guinea are parties. According to Article 1 (*i*) of the Convention, “the ‘premises of the mission’ are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission”.

3. Article 1 (*i*) of the Convention refers to the use of a building by the sending State, whether as owner or as otherwise entitled to do so. The provision does not specify how a building may be chosen by the sending State in order to be “used for the purposes of the mission”. The definition in the Convention does not include any reference to a requirement that the receiving State previously consents, or at least does not object, to the sending State’s choice of the building. The text points to the absence of any such requirement.

4. The definition of premises of the mission has to be considered also in the context of other provisions of the Convention. A reference to the use of a building as premises of the mission may be found in Article 12, which reads: “The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.” This suggests that, on the basis of an *a contrario* argument, no consent, or at least no express consent, is required for the use as premises of the mission of a building located where “the mission itself is established”, ordinarily the capital city. Although this *a contrario* argument may not appear to be decisive, Article 12 reinforces the interpretation of the Convention to the effect that it does not require the receiving State’s consent in the far more frequent case of buildings located in the capital city. If consent of the receiving State were required for the choice of a building assigned to be premises of the mission, there would have been no need for the provision contained in Article 12, except for the specification that, when the buildings are located outside the capital city, consent needs to be “express”.

5. Another relevant reference to the premises of the mission is contained in Article 21, paragraph 1, of the Convention, according to which “[t]he receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way”. The purpose of this provision is to make it easier for the sending State to find a suitable building, not to prevent it

from using a building as premises of the mission. Also, this provision casts doubts on the existence of an implicit requirement for the receiving State's consent.

6. Thus, considered in its text and context, Article 1 (*i*) does not indicate that consent of the receiving State is required under the Convention. This finds an additional reason in the fact that an objection made by the receiving State would likely cause considerable inconvenience and financial loss to the sending State if it came after the acquisition of the building was completed.

7. To suggest, as the majority does, that an objection of the receiving State, when it passes a test of timeliness, non-arbitrariness and non-discrimination, precludes the use of a building for the purposes of the mission would be tantamount to setting forth a general requirement of consent on the part of the receiving State.

8. It has been maintained that respect for the sovereignty of the receiving State implies the need to let that State have a say in the location of the premises of the mission. However, the conception that these premises are "extraterritorial" has long been abandoned and has not been endorsed by the Convention. The premises of the mission are inviolable, but they do not impinge on the territorial sovereignty of the receiving State.

9. This does not mean that certain interests of the receiving State cannot be protected with regard to the location of diplomatic premises. Since premises of missions are placed in the receiving State's territory, legislation of the receiving State applies to the relevant building. As specified in Article 41, paragraph 1, of the Convention with regard to diplomatic privileges and immunities, "laws and regulations of the receiving State" need to be respected. These laws and regulations include provisions on town planning and on zoning for security reasons. However, no issue of town planning or zoning was raised in the present case. There are premises of diplomatic missions of several States in the area around 42 avenue Foch. Correspondence concerning a mission located at 64 avenue Foch was supplied by France (Counter-Memorial of France, Annexes 12 and 13).

10. A certain number of receiving States have enacted legislation or sent circular notes to foreign missions asserting a right to refuse their consent to the sending States' future choice of buildings as diplomatic premises. So far as is known, these statements have not elicited any objection by the sending States concerned, either in general or in a case where the receiving State refused consent. However, this practice, most of which is recent, is insufficient for establishing a customary rule or an "agreement between the parties regarding the interpretation" of the Convention, which would be relevant according to Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties. Legislation and circular notes are meant to address the specific situation of missions located in the territory of the receiving State. Many States which failed to react to the position taken by a receiving State did not necessarily acquiesce to acquiring an obligation to secure the receiving State's consent for the location of future premises. Some States may have refrained from reacting because they considered themselves unlikely to be affected by the position taken by the receiving State in question. Nevertheless, should a receiving State's position concerning the requirement of consent have been accepted by one or more sending States, this would lead to the establishment for those States of an obligation to secure the receiving State's consent before being able to assign a building as premises of their diplomatic mission.

11. While there is the possibility that certain sending States agreed to the requirement that consent be secured from a receiving State, it seems difficult to reach the conclusion that such a requirement has been set forth for sending States in their relations with France. There is no evidence of a claim by France that, in general, the location of premises of missions in Paris is conditional on the receiving State's consent or at least on the lack of objection on its part. In the absence of such a claim, no agreement concerning a requirement of the receiving State's consent for the assignment of premises of diplomatic missions in Paris may be said to have come into existence under international law. There is no mention of consent among the criteria summarized by the French Ministry of Foreign and European Affairs in its note of 11 October 2011 to the French Ministry of Justice when answering an inquiry by investigating judicial authorities (Memorial of Equatorial Guinea, Annex 35).

12. Even in its relations with Equatorial Guinea, France's objection to the assignment of the building was, from October 2011 to July 2012, focused on the lack of an effective use of the building for the purposes of the mission (Memorial of Equatorial Guinea, Annexes 34 and 45). Only on 6 August 2012 did the French Ministry of Foreign and European Affairs refer, as the reason for its objection, to criminal proceedings concerning the building and thus implicitly to the need for a form of consent on the part of the receiving State (Memorial of Equatorial Guinea, Annex 49).

13. France's subsidiary argument that the assignment of the building at 42 avenue Foch for the purpose of the diplomatic mission constituted an abuse of right by Equatorial Guinea is based on the idea that the attachment of the building (*saisie pénale immobilière*) and the subsequent confiscation in the criminal proceedings would have been affected by that step. However, neither measure was precluded, or could have been precluded, by the assignment of the building as premises of a diplomatic mission. These measures relate to the ownership of the building, not to its use as premises of a diplomatic mission. Therefore, the assignment of the building as premises of the mission, whatever its intended purpose, cannot be viewed as an abuse of rights.

14. Should the use of the building at 42 avenue Foch as premises of the diplomatic mission have started on 27 July 2012, as indicated in the Note Verbale of the sending State of the same date (Memorial of Equatorial Guinea, Annex 47), France was bound from that date to respect its obligations under Article 22 of the Convention with regard to that building. Equatorial Guinea failed to substantiate any claim that these obligations have been violated by France.

(Signed) Giorgio GAJA.
