Hague Case Law: Latest Developments

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Published online: 14 August 2018
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International Court of Justice

Equatorial Guinea v. France

On 6 June 2018, the International Court of Justice (ICJ) delivered its Judgment on the preliminary objections raised by France in the case concerning Immunities and Criminal Proceedings (*Equatorial Guinea v. France*). The Court found that it had jurisdiction on the basis of the Optional Protocol to the Vienna Convention.

On 2 December 2008, the association Transparency International France lodged a complaint with the Paris public prosecutor against certain African Heads of State and members of their families in respect of allegations of misappropriation of public funds in their country of origin, the proceeds of which had allegedly been invested in France. The investigation focused, in particular, on Mr. Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who had acquired various objects of considerable value and a building located at 42 Avenue Foch in Paris. In 2011 and 2012, the building was the subject of an attachment order and various objects found on the premises were seized.

Equatorial Guinea systematically objected to these actions and Mr. Teodoro Nguema Obiang Mangue, who became Second Vice-President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012, challenged the measures taken against him and on several occasions invoked immunity from jurisdiction to which he believed he was entitled on account of his functions. He was nonetheless indicted by the French judiciary in March 2014. All the legal remedies taken by Mr. Teodoro Nguema Obiang Mangue against the indictment were rejected, as were the diplomatic protestations of Equatorial Guinea. Following the investigation, Mr. Teodoro Nguema Obiang Mangue was referred for trial before the *Tribunal correctionnel de Paris* for alleged money-laundering offences committed in France between 1997 and October 2011.

On 13 June 2016, Equatorial Guinea instituted proceedings against France with regard to a dispute concerning the immunity from criminal jurisdiction of

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Mr. Teodoro Nguema Obiang Mangue and the legal status of the building which ‘houses the Embassy of Equatorial Guinea’, located at 42 Avenue Foch in Paris. In its Application, Equatorial Guinea sought to found the Court’s jurisdiction, first, on Article 35 of the United Nations Convention against Transnational Organized Crime (‘Palermo Convention’) and, second, on Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes (‘Optional Protocol to the Vienna Convention’). On 31 March 2017, France raised preliminary objections to the jurisdiction of the Court.

As regards the first preliminary objection, the Court concluded that it lacked jurisdiction pursuant to the Palermo Convention, as Article 4 of the Palermo Convention does not incorporate the customary international rules relating to immunities of States and State officials. Furthermore, the Court noted that France’s alleged over-extension of jurisdiction over predicate offences associated with the crime of money laundering did not fall within the provisions of the Palermo Convention.

The Court however found that it had jurisdiction, on the basis of the Optional Protocol to the Vienna Convention. The Court observed that Equatorial Guinea’s claim based on the Vienna Convention concerned France’s alleged failure to respect the inviolability of the building at 42 Avenue Foch in Paris as the premises of Equatorial Guinea’s diplomatic mission. According to the Court, where, as in this case, there is a difference of opinion as to whether or not this building qualifies as ‘premises of the mission’ and, consequently, whether it should be accorded or denied protection under Article 22, this aspect of the dispute can be said to arise out of the interpretation or application of the Vienna Convention within the meaning of Article I of the Optional Protocol to that Convention. The Court therefore concluded that it had jurisdiction to entertain the aspect of the dispute relating to the status of the building at 42 Avenue Foch in Paris.

International Criminal Court

(1) *The Prosecutor v. Jean-Pierre Bemba Gombo*

On 8 June 2018, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (Main Case), the Appeals Chamber of the International Criminal Court decided, by majority, to acquit Mr. Bemba from charges of war crimes and crimes against humanity allegedly committed in the Central African Republic (‘CAR’).

This Appeals Chamber’s Judgment reversed Trial Chamber III’s decision of 21 March 2016, which had concluded that, as a person effectively acting as a military commander and with effective control over the *Mouvement de libération du Congo* (MLC) troops, Mr. Bemba was criminally responsible pursuant to Article 28(a) of the ICC Rome Statute for the crimes against humanity and the war crimes committed by the MLC troops in the CAR from on or about 26 October 2002 to 15 March 2003.

The Appeals Chamber found that Trial Chamber III had erred on two important issues: (1) it had erroneously convicted Mr. Bemba for specific criminal acts that were outside the scope of the charges as confirmed; and (2) in its assessment of whether Mr. Bemba had taken all necessary and reasonable measures to prevent,

repress or punish the commission by his subordinates of the other crimes within the scope of the case, the Trial Chamber had erred in its evaluation of Mr. Bemba's motivation and the measures that he could have taken in the light of the limitations he faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country; in whether he had made efforts to refer the allegations of crimes to the CAR's authorities; and in whether he had intentionally limited the mandate of commissions and inquiries that he had established. Furthermore, in the view of the Appeals Chamber majority, there was an apparent discrepancy between the limited number of crimes, within the scope of the case, for which Mr. Bemba was held responsible and the Trial Chamber's assessment of which measures Mr. Bemba should have taken.

On 8 June 2018, the Appeals Chamber decided, by majority, to acquit Mr. Bemba from the charges of war crimes and crimes against humanity allegedly committed in the CAR. In this Judgment, the Appeals Chamber also indicated that there was no reason to continue Mr. Bemba's detention on the basis of the case related to alleged crimes in the CAR and that it would be for Trial Chamber VII to decide whether Mr. Bemba's continued detention was warranted in relation to his conviction for offences against the administration of justice in the *Bemba et al.* case.¹

On 12 June 2018, Trial Chamber VII ordered the interim release under specific conditions for Mr. Bemba. Taking into account all the relevant factors and the circumstances of the case as a whole, Trial Chamber VII considered that the legal requirements for continued detention were not met. Specifically, and noting that Mr. Bemba had served more than 80% of the maximum possible sentence, the Chamber considered it disproportionate to further detain Mr. Bemba merely to ensure his appearance for sentencing.

On 15 June 2018, Jean-Pierre Bemba Gombo was provisionally released with specific conditions on the territory of the Kingdom of Belgium.

(2) *The Prosecutor v. Germain Katanga*

On 19 July 2018, Trial Chamber II of the International Criminal Court issued its decision in the case of *The Prosecutor v. Germain Katanga*. The Chamber dismissed requests for reparations on the basis of transgenerational harm.

On 7 March 2014, Mr. Katanga was found guilty, as an accessory, of crimes against humanity and war crimes committed during the Bogoro attack of 24 February 2003 and was sentenced to 12 years' imprisonment. His sentence was subsequently reduced, and he completed it on 18 January 2016. On 24 March 2017,

¹ On 19 October 2016, Trial Chamber VII of the International Criminal Court (ICC) delivered its judgment in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* and found the five accused guilty of various offences against the administration of justice. These offences related to the false testimonies of defence witnesses in another case before the ICC: *The Prosecutor v. Jean-Pierre Bemba Gombo* (Main Case). On 22 March 2017, Trial Chamber VII delivered the sentences in the case. On 8 March 2018, the Appeals Chamber confirmed the convictions in respect of most of the charges. However, it acquitted Mr. Bemba, Mr. Kilolo and Mr. Mangenda of the charge of presenting evidence that a party knows is false or forged and remanded the matter to the Trial Chamber for a new determination.

Trial Chamber II issued an Order for Reparations, setting the amount for which Mr. Katanga was liable at USD 1 million. The Chamber also ordered reparations to be awarded to 297 victims identified in the form of a symbolic award of USD 250 per victim and four types of collective reparations. The Appeals Chamber confirmed in large part the Order for Reparations. However, regarding the appeal lodged by the legal representative of the five victims applying for reparations on the basis of transgenerational harm—suffered in connection with what their parents had experienced during the attack—the Appeals Chamber decided to refer the matter to the Trial Chamber.

Trial Chamber II took note of the progress of scientific studies on the transgenerational transmission of trauma and examined the requests for reparations basing itself on the legal principle according to which a clear causal nexus is needed between a criminal act and the alleged harm. In this context, the Chamber also noted that the chain of causation between an act and the result of that act can be interrupted when an event occurs after the commission of the initial act and contributes to the suffering of the people concerned.

Trial Chamber II dismissed the requests for reparations made by these applicants, finding that the applicants concerned had not established to the requisite standard of proof the causal nexus between the psychological harm they had personally suffered and the crimes of which Mr. Katanga was convicted.

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