Diplomatic relations — Vienna Convention on Diplomatic Relations, 1961 ("VCDR") — Article 1(i) — Definition of "premises of the mission" — Circumstances under which a building may acquire status of "premises of the mission" under Article 1(i) of VCDR — Whether consent of receiving State necessary for a property to become "premises of the mission" pursuant to Article 1(i) of VCDR

Treaties — Interpretation — Vienna Convention on Diplomatic Relations, 1961 — Article 1(i) — Vienna Convention on the Law of Treaties, 1969 ("VCLT") — Customary rules of treaty interpretation — Ordinary meaning — Context — Comparison with VCDR provisions concerning the treatment of diplomatic personnel — Object and purpose — Relevance of VCDR's preamble to determining its object and purpose — VCDR founded on mutuality and respect between sovereign equals — Whether State practice in relation to the recognition of diplomatic status of premises amounting to subsequent practice within meaning of Article 31(3)(b) of VCLT — Article 1(i) of VCDR requiring the actual use of a building for it to qualify as "premises of the mission" — A receiving State may object to the sending State's designation of "premises of the mission" — Objection had to be timely, non-arbitrary and non-discriminatory

Immunities and Criminal Proceedings

(Equatorial Guinea *v.* France)[1]

International Court of Justice

Merits. 11 *December* 2020

(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa, *Judges*; Kateka, *Judge ad hoc*)

[1] Counsel for the Parties are listed in para. 21 of the Court's judgment.
The Court's Order on Provisional Measures of 7 December 2016 and judgment on Preliminary Objections of 6 June 2018 are reported at 191 ILR 219.

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SUMMARY:[2] *The facts*:—On 13 June 2016, Equatorial Guinea filed with the International Court of Justice ("the Court") an application instituting proceedings against France in a dispute concerning alleged breaches of the immunity from criminal jurisdiction claimed in respect of the Vice-President of Equatorial Guinea, Mr Teodoro Nguema Obiang Mangue ("Mr Obiang") and a building at 42 avenue Foch which was said to form part of the premises of the Embassy of Equatorial Guinea.

Equatorial Guinea's application stemmed from certain measures taken and judicial decisions made by the French authorities since 2 December 2008,[3] namely: (i) the search of the building at 42 avenue Foch on 14-16 February 2012; (ii) the issuing of an arrest warrant against Mr Obiang on 13 July 2012; (iii) the attachment of the building at 42 avenue Foch on 19 July 2012; (iv) the rejection by the Paris *Cour d'appel*, on 11 August 2015, of Mr Obiang's appeal against his indictment on the basis that he did not enjoy immunity from criminal jurisdiction in relation to the charges against him; and (v) the confirmation of the *Cour d'appel*'s decision by the *Cour de Cassation* on 15 December 2015.[4]

Equatorial Guinea sought to found the Court's jurisdiction: (i) in relation to Mr Obiang's immunity *ratione personae*, on Article 35(2), of the United Nations Convention on Transnational Organized Crime, 2000 ("the Palermo Convention"); and (ii) in relation to the immunity of the building at 42 avenue Foch, on Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations, 1961.

The Court indicated provisional measures on 7 December 2016, ordering France to take all measures at its disposal to ensure that the premises at 42 avenue Foch in Paris enjoyed treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, 1961 ("VCDR")[5] pending a final decision (191 ILR 219 at 232).

On 27 October 2017, the *Tribunal correctionnel* found Mr Obiang guilty of money laundering, sentenced him to a suspended custodial sentence and ordered the confiscation of, *inter alia*, 42 avenue Foch. Mr Obiang appealed this decision. The appeal having suspensive effect, the measures ordered by the *Tribunal correctionnel* were not enforced.

In its judgment on preliminary objections of 6 June 2018, the Court found that it lacked jurisdiction to entertain the merits of the case under the

[2] Prepared by Dr M. Lando.

[3] On 2 December 2008, the French courts declared admissible a complaint filed by Transparency International France against, *inter alia*, Mr Obiang, then Minister of Agriculture and Forestry of Equatorial Guinea, and concerning the alleged misappropriation and misuse of public funds, as well as their use to purchase property in France. Such property was said to include 42 avenue Foch and objects located therein. Mr Obiang was appointed Second Vice-President of Equatorial Guinea, in charge of Defence and State Security, on 21 May 2012, and Vice-President of Equatorial Guinea, in charge of Defence and State Security, on 21 June 2016.

[4] See *Transparency International France* v. *Mr X* (195 ILR 219).

[5] For the text of Article 22 of the Vienna Convention on Diplomatic Relations, 1961, see para. 39 of the judgment.

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Palermo Convention, it had jurisdiction to entertain the merits of the case under the VCDR and that Equatorial Guinea's claims under the VCDR were admissible (191 ILR 219 at 272).

On 10 February 2020, the Paris *Cour d'appel* upheld the decision of the *Tribunal correctionnel*. At the time of the hearings on the merits before the Court, a *pourvoi en Cassation* was pending against the decision of the *Cour d'appel*. The *pourvoi en Cassation* having suspensive effect, the measures ordered by the *Tribunal correctionnel* and upheld by the *Cour d'appel* were not enforced.

Equatorial Guinea maintained that it had declared the building in the avenue Foch to be part of the premises of its diplomatic mission before it had been subjected to measures by the French authorities. According to Equatorial Guinea, in order for a building to acquire the status of "premises of the mission", it was sufficient that the sending State had assigned it for the purposes of being part of the premises of the diplomatic mission and notified the receiving State. The text, context and object and purpose of the VCDR supported this view. Equatorial Guinea stated that a sending State's contentions concerning the diplomatic status of a building had to be presumed valid. The VCDR did not subject the acquisition of diplomatic status to any consent by the receiving State. Therefore, measures by receiving States had to be notified in advance to all sending States and apply to all of them in a reasonable and non-discriminatory manner. According to Equatorial Guinea, even if there were a requirement that a building be used "effectively" for diplomatic purposes, it would be satisfied by purchasing or renting such a building, and designating it as one housing the diplomatic mission.

France contended that sending States could not unilaterally impose their choices of premises for their diplomatic missions. Two cumulative conditions had to be met for buildings to acquire diplomatic status: lack of objection by the receiving States and actual assignment of the buildings for the purposes of diplomatic missions. France supported these contentions by reference to the text, context and object and purpose of the VCDR, as well as the practice of several States. Concerning the suggestion by Equatorial Guinea that the sending State's designation of "premises of the mission" should be presumed valid, France objected that, should the presumption even exist, it would not be irrebuttable. France further contended that buildings may acquire diplomatic status only if actually used for diplomatic purposes.

Equatorial Guinea argued that France's refusal to recognize the diplomatic status of the building at 42 avenue Foch was arbitrary and discriminatory. According to Equatorial Guinea, France's refusal was based on manifest errors of fact and law. Moreover, it maintained that France failed to observe the typical procedures France itself would have followed in such cases and that, in any event, France should have co-ordinated with Equatorial Guinea before unilaterally refusing the designation of 42 avenue Foch as the premises of the latter's diplomatic mission. Equatorial Guinea also submitted that France's position with respect to the status of 42 avenue Foch had been inconsistent

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over time. France rejected such contentions by Equatorial Guinea, arguing that its position had been consistent over time and that it had engaged promptly with Equatorial Guinea on the matter of 42 avenue Foch, without discriminating against it.

Held:—(1) (by nine votes to seven, President Yusuf, Vice-President Xue, Judges Gaja, Sebutinde, Bhandari and Robinson and Judge ad hoc Kateka dissenting) The building at 42 avenue Foch never acquired the status of "premises of the mission" of Equatorial Guinea in France within the meaning of Article 1(i) of the VCDR.

(a) The Court first had to determine the circumstances in which a property acquired diplomatic status under Article 1(i) of the VCDR. The VCDR had to be interpreted according to the customary rules of international law on treaty interpretation, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969 ("VCLT"). The text of Article 1(i) of the VCDR was not helpful in determining the circumstances in which buildings acquired diplomatic status. Concerning the context of that provision, Article 2 of the VCDR emphasized that diplomatic relations were established by "mutual consent", while Article 4 provided that the sending State's choice of head of mission was subject to the *agrément* of the receiving State; moreover, under Article 9 the receiving State might declare certain members of diplomatic missions *personae non gratae*. If sending States could unilaterally designate buildings as having diplomatic status, receiving States would have no choice but to accept this designation. Concerning the VCDR's object and purpose, the preamble indicated that the VCDR aimed to contribute to the development of friendly relations among nations and that privileges and immunities were not to benefit individuals. The VCDR could not be interpreted as allowing sending States unilaterally to impose their choices of "premises of the mission" on receiving States (paras. 61-7).

(b) State practice supported this conclusion, as several receiving States required sending States to notify them of the designation of buildings for diplomatic purposes, without this practice being contested by sending States; however, this practice fell short of establishing the "agreement of the parties" within the meaning of Article 31(3)(b) of the VCLT. The preparatory works of the VCDR did not give clear indications as to the circumstances in which properties might acquire diplomatic status. The VCDR did not contain either requirement to which Equatorial Guinea referred, namely that the receiving States' control measures had to be notified to sending States in advance and that, lacking formalities in this regard, the designation of diplomatic premises by sending States would be conclusive (paras. 69-72).

(c) However, the receiving States' power to object to designations of diplomatic premises by the sending States was not unlimited. As discretionary powers conferred on States under treaties had to be exercised reasonably and in good faith, the receiving States' objection could not be discriminatory in character. In conclusion, a property would not acquire diplomatic status under

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Article 1(i) of the VCDR if receiving States objected to the sending States' designations in a timely fashion, and if that objection was neither arbitrary nor discriminatory (paras. 73-4).

(2) (by twelve votes to four, Vice-President Xue, Judges Bhandari and Robinson and Judge ad hoc Kateka dissenting) France did not breach its obligations under the VCDR.

(a) The Court had to consider whether France's objection to Equatorial Guinea's designation of 42 avenue Foch as "premises of the mission" fulfilled the above criteria. In the period between 11 October 2011 and 6 August 2012, France objected to the designation of 42 avenue Foch as the "premises of the mission" of Equatorial Guinea, including by means of: communications from the Protocol Department of its Ministry of Foreign Affairs; searches of the property, including seizure of certain items found therein, by its law enforcement officials; and orders by French judicial organs to attach the building in the context of the proceedings against Mr Obiang. France had communicated its objection to Equatorial Guinea promptly on 11 October 2011, only one week after Equatorial Guinea had first asserted that 42 avenue Foch was part of its diplomatic mission on 4 October 2011. France was similarly prompt in objecting in all the subsequent exchanges in which Equatorial Guinea had reaffirmed its designation of 42 avenue Foch as the premises of its diplomatic mission. Therefore, France's objections were consistent and timely (paras. 79-92).

(b) France's view, expressed in its *note verbale* of 11 October 2011, that 42 avenue Foch fell within the private domain was not without justification, because French authorities had visited the property before that date and had found nothing indicating that it was being used for diplomatic purposes. Equatorial Guinea was unable to establish that 42 avenue Foch had been used as its "premises of the mission" between 4 October 2011 and 27 July 2012: first, none of the property seized by French officials between 14 and 23 February 2012 belonged to Equatorial Guinea's diplomatic mission; secondly, Equatorial Guinea's *note verbale* of 27 July 2012 stated that 42 avenue Foch would be used as premises of its mission "henceforth". At the time of Equatorial Guinea's first assertion of diplomatic status on 4 October 2011, France had sufficient information reasonably to conclude that 42 avenue Foch was not being used, and was not prepared to be used, as Equatorial Guinea's diplomatic mission, including knowing that acknowledging the diplomatic status of the building would have hindered the proper functioning of its criminal justice system, specifically the investigation against Mr Obiang. As a result, France's objection to the designation of 42 avenue Foch as "premises of the mission" was not arbitrary. France was not required to co-ordinate with Equatorial Guinea in relation to the status of 42 avenue Foch, given that there was no obligation to do so under the VCDR. Furthermore, Equatorial Guinea was not able to prove that France had acted differently in respect of other buildings housing diplomatic missions in comparable circumstances; therefore, France's objection relating to 42 avenue Foch was not discriminatory,

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nor did France, by objecting, deprive Equatorial Guinea of diplomatic premises, as the latter already had an embassy located at 29 boulevard de Courcelles. It followed that the building at 42 avenue Foch had never acquired the status of "premises of the mission" under Article 1(i) of the VCDR (paras. 107-18).

(c) Accordingly, the acts of which Equatorial Guinea complained did not constitute breaches of France's obligations under the VCDR; France had not incurred international responsibility for such acts. Moreover, as it had objected to the designation of 42 avenue Foch as "premises of the mission" in a timely manner, non-arbitrarily and non-discriminatorily, France was not obliged to recognize the status of 42 avenue Foch as the diplomatic premises of Equatorial Guinea (paras. 121-5).

(3) (by twelve votes to four, Vice-President Xue, Judges Bhandari and Robinson and Judge ad hoc Kateka dissenting) All other submissions of Equatorial Guinea were rejected.

Separate Opinion of President Yusuf: (1) The Court was wrong to hold that the prior approval of the receiving State, or at least its absence of objection, was needed for buildings to acquire diplomatic status. This requirement was not based on any source of international law. The Court ignored the criterion of "use" of buildings for diplomatic purposes, recognized by both domestic and international courts (paras. 1-4).

(2) Nothing in the text of Article 1(i) of the VCDR helped to determine what constituted the "premises of the mission", but stated that a property had to be "used" as a diplomatic mission in order for it to fall within the definition under that provision. "Used" meant that the building had already been put to use as a diplomatic mission. The criterion of actual use had been recognized in the decisions of national courts, including in Egypt, France, Germany and the United Kingdom. The Court should have considered that Article 1(i) of the VCDR, as a definitional provision, contributed to defining the scope of application of the Convention itself, as it had done in respect of other definitional provisions in earlier judgments (paras. 5-22).

(3) The prior consent requirement was nowhere to be found in the VCDR and could not stem from an interpretation of Article 1(i) in the light of its context or object and purpose. However, the Court endorsed such a requirement without considering that the law on diplomatic relations, as codified in the VCDR and interpreted by national courts, did not impose any such requirement. The Court focused on the practice of a limited number of States, which did not justify its conclusion that there was a "power to object" to the designation of buildings as "premises of the mission". This requirement was further complicated by its unqualified character and lack of foundation in customary international law (paras. 23-36).

(4) The exchanges between Equatorial Guinea and France indicated that 42 avenue Foch had become part of the diplomatic mission of the latter on 27 July 2012, which was also tacitly accepted by France when it stopped

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entering and searching the building at that time. As to the searches by French officials between September 2011 and February 2012, they could not engage France's international responsibility because they did not adversely impact the use of 42 avenue Foch as part of the diplomatic mission of Equatorial Guinea (paras. 37-58).

Dissenting Opinion of Vice-President Xue: (1) The evidence before the Court established that the dispute between the Parties went well beyond whether 42 avenue Foch was part of the "premises of the mission" of Equatorial Guinea. The dispute between the Parties over the status of 42 avenue Foch hinged on the ownership of the building, which had consequential effects on the conduct of France in relation to the seizure and confiscation of that building. However, by narrowing down the dispute between the Parties at the preliminary objections stage, the Court avoided addressing such underlying matters, which could not be considered as only being matters of French domestic law (paras. 2-12).

(2) It was incorrect for the Court to find that the persistent objection by a receiving State of the designation by a sending State of certain premises as having diplomatic status could dictate the outcome of disputes as to the acquisition of that status. The relations between sending and receiving States were governed by principles of sovereign equality and mutual respect, which should have guided the Court in interpreting Article 1(i) of the VCDR. Lacking established practice among all Parties to the VCDR, France's practice in relation to the recognition of diplomatic status to premises governed. By focusing on the circumstances in which 42 avenue Foch acquired diplomatic status, the Court avoided the main issue in the case, namely whether France wrongfully exercised its jurisdiction in respect of that building by attaching it and imposing measures of constraint (paras. 13-18).

(3) The Court's criteria of timeliness, non-arbitrariness and non-discrimination raised no issue in principle. However, the Court's application of those criteria was entirely one-sided because it did not consider that France's real reason for denying diplomatic status to 42 avenue Foch was that there were ongoing criminal proceedings against Mr Obiang. On the Court's reasoning, there were at least four years between 27 July 2012 and Equatorial Guinea's application instituting proceedings against France on 13 June 2016 during which Equatorial Guinea's diplomatic mission was without protection under the VCDR; this situation was not normal in diplomatic relations and did not resemble a relationship between two sovereign equals (paras. 19-28).

Declaration of Judge Gaja: By objecting to the notification by Equatorial Guinea dated 4 October 2011, France did not prevent 42 avenue Foch from acquiring the status of "premises of the mission". The issue was whether the consent of the receiving State was a precondition for the sending State to be able to use a building as its diplomatic premises. No such precondition could

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be found in the text and context of Article 1(i) of the VCDR. To suggest that receiving States could preclude the use of buildings as diplomatic premises if their objections passed the tests of timeliness, non-arbitrariness and non-discrimination was tantamount to imposing a general consent requirement on the receiving State. France was only obliged to respect the inviolability of 42 avenue Foch as of the date of its effective use as premises of the mission, on 27 July 2012 (paras. 1-14).

Separate Opinion of Judge Sebutinde: (1) To determine whether 42 avenue Foch was part of Equatorial Guinea's "premises of the mission" under Article 1(i) of the VCDR, the Court had to inquire into the actual use of that property and whether that use was subject to any prior consent by France. Equatorial Guinea did not adduce sufficient evidence to show that 42 avenue Foch had been actually used as the premises of its diplomatic mission from 4 October 2011 or 17 October 2011, the latter being the date when Equatorial Guinea informed France that Ms Bindang Obiang would head its Embassy as Chargée d'affaires *ad interim*. Equatorial Guinea provided sufficient evidence to show that the building had been in actual use as the premises of its mission since 27 July 2012 (paras. 7-22).

(2) The VCDR was silent on whether there was a requirement of prior consent on the part of the receiving State for a building to acquire the status of "premises of the [sending State's] mission". No answer was found in the VCDR's drafting history; France's diplomatic practice showed that it had a "no-objection" regime, under which buildings would acquire diplomatic status upon France not objecting to it; the only ground for objecting was that a building was not in fact used as part of the "premises of the mission". Since 42 avenue Foch had been used as premises of the mission since 27 July 2012, it had become part of those premises starting on that date. All searches and seizures by French authorities before 27 July 2012 could not have breached the VCDR. The confiscation order of 27 October 2017, confirmed on 10 February 2020 by the *Cour d'appel*, did not impede the use of the building as a diplomatic mission, only affecting its ownership. Therefore, that order did not breach France's obligations under the VCDR (paras. 23-31).

(3) Abuse of rights was a controversial claim which should be made only in exceptional circumstances. Mr Obiang, in divesting himself of the ownership of 42 avenue Foch, acted under pressure of the criminal proceedings against him in France. However, the transparent admission by Equatorial Guinea of the reason why it was moving its diplomatic mission to 42 avenue Foch was indicative of intention to maintain a fraternal relationship with France, rather than of bad faith (paras. 32-9).

Dissenting Opinion of Judge Bhandari: (1) The Court's judgment led to the conclusion that buildings could not acquire the status of "premises of the mission" without the prior consent of the receiving States. The historical

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background of the law of diplomatic privileges and immunities indicated that the VCDR had to be interpreted so as to offer significant leeway to the facilitation of the efficient performance of diplomatic relations. Moreover, the Court had to be guided by the object and purpose of the VCDR, which was to facilitate co-operation among States, on bases of mutual consent and respect for each other's sovereign equality. This was reflected in Article 2 of the VCDR, which clearly stated that diplomatic relations took place by mutual consent; but, apart from this provision on mutual consent, nothing in the VCDR stated that the establishment of "premises of the mission" required the consent of the receiving State (paras. 1-22).

(2) The ordinary meaning of Article 1(i) did not specify how property acquired the status of "premises of the mission", but it indicated that the crucial criterion was one of actual use of a property for the purposes of a diplomatic mission. This interpretation was confirmed by the context of Article 1(i), especially Articles 4 and 5 of the VCDR, as well as by its object and purpose. It seemed not conducive to the efficient establishment of diplomatic relations that the receiving State did not know the location of the premises of a diplomatic mission; in the interest of certainty, receiving States had to be notified of that location at least. The State practice to which the Parties referred fell short of being subsequent practice within the meaning of Article 31(3)(b) of the VCLT; the drafting history of the VCDR confirmed the interpretation pursuant to the ordinary meaning, the context and the object and purpose (paras. 33-58).

(3) No act by France carried out until 27 July 2012 was a breach of France's international obligations under the VCDR, but France's persistent refusal to recognize the status of 42 avenue Foch as "premises of the mission" since that date appeared to be unjustifiable. It was inconsistent with the VCDR if France could unilaterally block the acquisition of diplomatic status by 42 avenue Foch, also because it was not in line with the principle of sovereign equality of States (paras. 62-77).

Dissenting Opinion of Judge Robinson: (1) There was no clear legal basis for the Court's finding that the VCDR did not allow sending States unilaterally to impose on receiving States their choices of "premises of the mission". The Court took a flawed approach to the interpretation of the VCDR, insofar as it overlooked some important elements of the context of Article 1(i) and chose to understand the Convention's preamble in an extraordinary manner. The most problematic point in the Court's reasoning was its treatment of State practice in the context of diplomatic relations, as it neither established a rule of customary international law, nor amounted to subsequent practice within the meaning of Article 31(3)(b) of the VCLT (paras. 7-37).

(2) The ordinary meaning of Article 1(i) of the VCDR, considered in the light of its context, indicated that buildings can be "premises of the mission" when sending States intended to use such premises for the purposes of their diplomatic missions, so long as this intended use was followed by actual use.

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State practice, especially in the form of judicial decisions, confirmed the interpretation of Article 1(i) of the VCDR that gave pre-eminence to the criterion of intended use of a certain building over that of actual use. As a result, 42 avenue Foch became the "premises of the mission" of Equatorial Guinea on 4 October 2011, when Equatorial Guinea communicated to France that it would use that building as its diplomatic mission (paras. 39-57).

(3) By searching the building in February 2012, making an order for its attachment on 19 July 2012, and ordering its confiscation in the criminal proceedings against Mr Obiang, France breached the inviolability of 42 avenue Foch under Article 22 of the VCDR. In terms of remedies, Equatorial Guinea was entitled to an order for cessation of France's internationally wrongful act, as well as one for assurances and guarantees of non-repetition, satisfaction and compensation of losses suffered. Concerning France's abuse of rights argument, the Court was not in a position necessarily to deal with it, since the VCDR, as a self-contained regime, already included an appropriate remedy in case of abuse of rights, namely the expulsion of the mission and termination of diplomatic relations (paras. 58-75).

Dissenting Opinion of Judge ad hoc Kateka: (1) The Court was incorrect when it stated that the consent or non-objection of the receiving State must be obtained in order for a building to become part of the "premises of the mission" of the sending State: the VCDR was silent on this requirement and, where consent was required, stated so expressly. Moreover, that conclusion was supported by an *a contrario* reading of Article 12 of the VCDR. The Court's analogy between the VCDR provisions on the "premises of the mission" and *personae non gratae* was misplaced: receiving States could use the same sanctions available in relation to *personae non gratae* to deal with building-related issues, namely the breaking off of diplomatic relations. The mutuality of the VCDR's regime entailed that, before acting in respect of 42 avenue Foch, France should have consulted with Equatorial Guinea. France did not have any consistent practice in relation to how it treated diplomatic premises, which indicated that its approach to 42 avenue Foch was arbitrary and discriminatory with respect to Equatorial Guinea. As to the criterion of "use", it covered not only actual use, but also the preparatory steps to that actual use, given that moving diplomatic missions from one building to another could take a long time (paras. 9-25).

(2) 4 October 2011 was the date from which 42 avenue Foch had the status of "premises of the mission" under the VCDR, while the time between that date and 27 July 2012 was used logistically to transfer the mission from its previous building to the new location. As a result, France was in breach of its obligations under the VCDR by not recognizing the inviolability of 42 avenue Foch starting on 4 October 2011, including by ordering the confiscation of the building in the criminal proceedings against Mr Obiang (paras. 26-35).

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The text of the judgment and accompanying opinions and declaration is set out as follows:

The following is the text of the judgment of the Court:

[300] TABLE OF CONTENTS

[304] 1. On 13 June 2016, the Government of the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") filed in the Registry of the Court an Application instituting proceedings against the French Republic (hereinafter "France") with regard to a dispute concerning

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the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security [Mr Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea in France, both as premises of the diplomatic mission and as State property.

2. 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 of 15 November 2000 (hereinafter the "Palermo Convention"), and, second, on Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, of 18 April 1961 (hereinafter the "Optional Protocol to the Vienna Convention").

[305] 3. The Registrar immediately communicated the Application to the French Government, in accordance with Article 40, paragraph 2, of the Statute of the Court. He also notified the Secretary-General of the United Nations of the filing of the Application by Equatorial Guinea.

4. In addition, by a letter of 20 June 2016, the Registrar informed all Member States of the United Nations of the filing of the Application of Equatorial Guinea.

5. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar subsequently notified the Members of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text.

6. Since the Court included upon the Bench no judge of the nationality of Equatorial Guinea, the latter proceeded to exercise the right conferred upon it by Article 31, paragraph 2, of the Statute to choose a judge ad hoc to sit in the case; it chose Mr James Kateka.

7. By an Order dated 1 July 2016, the Court fixed 3 January 2017 and 3 July 2017 as the respective time-limits for the filing of a Memorial by Equatorial Guinea and a Counter-Memorial by France. The Memorial of Equatorial Guinea was filed within the time-limit thus prescribed.

8. On 29 September 2016, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court, Equatorial Guinea submitted a Request for the indication of provisional measures.

9. The Registrar immediately transmitted a copy of the Request for the indication of provisional measures to the French Government, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of this filing.

10. By an Order of 7 December 2016, the Court, having heard the Parties, indicated the following provisional measures:

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France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability.

11. In accordance with Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the Palermo Convention the notification provided for in Article 63, paragraph 1, of the Statute; he also addressed to the European Union, as party to that Convention, the notification provided for in Article 43, paragraph 2, of the Rules of Court. In addition, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notification provided for in Article 34, paragraph 3, of the Statute.

12. By a letter dated 28 April 2017, the Director-General of the European Commission's Legal Service informed the Court that the European Union did not intend to submit observations under Article 43, paragraph 2, of the Rules of Court concerning the construction of the Palermo Convention.

13. Pursuant to Article 43, paragraph 1, of the Rules of Court, the Registrar also addressed to States parties to the Vienna Convention on Diplomatic Relations (hereinafter the "Vienna Convention" or the "Convention"), and to States **[306]** parties to the Optional Protocol to the Vienna Convention, the notification provided for in Article 63, paragraph 1, of the Statute.

14. On 31 March 2017, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, France raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 5 April 2017, the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the proceedings on the merits were suspended, fixed 31 July 2017 as the time-limit within which Equatorial Guinea could present a written statement of its observations and submissions on the preliminary objections raised by France. Equatorial Guinea filed such a statement within the time-limit so prescribed.

15. Public hearings on the preliminary objections raised by France were held from 19 to 23 February 2018.

16. By its Judgment of 6 June 2018, the Court upheld the first preliminary objection raised by France that the Court lacks jurisdiction on the basis of Article 35 of the Palermo Convention. However, it

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rejected the second preliminary objection that the Court lacks jurisdiction on the basis of the Optional Protocol to the Vienna Convention, and the third preliminary objection that the Application is inadmissible for abuse of process or abuse of rights. The Court thus declared that it has jurisdiction, on the basis of the Optional Protocol to the Vienna Convention, to entertain the Application filed by Equatorial Guinea, in so far as it concerns the status of the building located at 42 avenue Foch in Paris as premises of the mission, and that this part of the Application is admissible.

17. By an Order of 6 June 2018, the Court fixed 6 December 2018 as the time-limit for the filing of the Counter-Memorial of France. The Counter-Memorial was filed within the time-limit thus fixed.

18. By an Order of 24 January 2019, the Court authorized the submission of a Reply by Equatorial Guinea and a Rejoinder by France, and fixed 24 April 2019 and 24 July 2019 as the respective time-limits for the filing of those pleadings.

19. By an Order of 17 April 2019, further to a request made by Equatorial Guinea, the President of the Court extended those time-limits and fixed 8 May 2019 and 21 August 2019, respectively, as the new time-limits for the filing of the Reply and the Rejoinder. Those pleadings were filed within the time-limits thus extended.

20. Pursuant to Article 53, paragraph 2, of its Rules, after ascertaining the views of the Parties, the Court decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

21. Public hearings were held from 17 to 21 February 2020, during which the Court heard the oral arguments and replies of:

For Equatorial Guinea: H.E. Mr Carmelo Nvono Ncá,
Sir Michael Wood,
Mr Jean-Charles Tchikaya,
Mr Francisco Evuy,
Mr Maurice Kamto.

For France: Mr François Alabrune,
Mr Mathias Forteau,
Mr Hervé Ascensio,
[307] Mr Pierre Bodeau-Livinec,
Ms Maryline Grange,
Mr Alain Pellet.

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22. In the Application, the following claims were made by Equatorial Guinea:

In light of the foregoing, Equatorial Guinea respectfully requests the Court:

(a) With regard to the French Republic's failure to respect the sovereignty of the Republic of Equatorial Guinea,
  (i) to adjudge and declare that the French Republic has breached its obligation to respect the principles of the sovereign equality of States and non-interference in the internal affairs of another State, owed to the Republic of Equatorial Guinea in accordance with international law, by permitting its courts to initiate criminal legal proceedings against the Second Vice-President of Equatorial Guinea for alleged offences which, even if they were established, *quod non*, would fall solely within the jurisdiction of the courts of Equatorial Guinea, and by allowing its courts to order the attachment of a building belonging to the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France;

(b) With regard to the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security,
  (i) to adjudge and declare that, by initiating criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, His Excellency Mr Teodoro Nguema Obiang Mangue, the French Republic has acted and is continuing to act in violation of its obligations under international law, notably the United Nations Convention against Transnational Organized Crime and general international law;
  (ii) to order the French Republic to take all necessary measures to put an end to any ongoing proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security;
  (iii) to order the French Republic to take all necessary measures to prevent further violations of the immunity of the Second Vice-President of Equatorial Guinea in charge of Defence and State Security and to ensure, in particular, that its courts do not initiate any criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in the future;

(c) With regard to the building located at 42 avenue Foch in Paris,
  (i) to adjudge and declare that, by attaching the building located at 42 avenue Foch in Paris, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations and the United Nations Convention [against **[308]** Transnational Organized Crime], as well as general international law;

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(ii) to order the French Republic to recognize the status of the building located at 42 avenue Foch in Paris as the property of the Republic of Equatorial Guinea, and as the premises of its diplomatic mission in Paris, and, accordingly, to ensure its protection as required by international law;

(d) In view of all the violations by the French Republic of international obligations owed to the Republic of Equatorial Guinea,

(i) to adjudge and declare that the responsibility of the French Republic is engaged on account of the harm that the violations of its international obligations have caused and are continuing to cause to the Republic of Equatorial Guinea;

(ii) to order the French Republic to make full reparation to the Republic of Equatorial Guinea for the harm suffered, the amount of which shall be determined at a later stage.

23. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Equatorial Guinea,
in the Memorial:

For the reasons set out in this Memorial, the Republic of Equatorial Guinea respectfully requests the International Court of Justice:

(a) With regard to [the] French Republic's failure to respect the sovereignty of the Republic of Equatorial Guinea,

(i) to adjudge and declare that the French Republic has breached its obligation to respect the principles of the sovereign equality of States and non-interference in the internal affairs of another State, owed to the Republic of Equatorial Guinea, in accordance with the United Nations Convention against Transnational Organized Crime and general international law, by permitting its courts to initiate criminal legal proceedings against the Vice-President of Equatorial Guinea for alleged offences which, even if they were established, *quod non*, would fall solely within the jurisdiction of the courts of Equatorial Guinea, and by allowing its courts to order the attachment of a building belonging to the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France;

(b) With regard to the Vice-President of the Republic of Equatorial Guinea in charge of National Defence and State Security,

(i) to adjudge and declare that, by initiating criminal proceedings against the Vice-President of the Republic of Equatorial Guinea in charge of National Defence and State Security, His Excellency Mr Teodoro Nguema Obiang Mangue, the French Republic has acted and is continuing to act in violation of its obligations under

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international law, notably the United Nations Convention against Transnational Organized Crime and general international law;

(ii) to order the French Republic to take all necessary measures to put an end to any ongoing proceedings against the Vice-President of the Republic of Equatorial Guinea in charge of National Defence and State Security;

[309] (iii) to order the French Republic to take all necessary measures to prevent further violations of the immunity of the Vice-President of the Republic of Equatorial Guinea in charge of National Defence and State Security and, in particular, to ensure that its courts do not initiate any criminal proceedings against him in the future;

(c) With regard to the building located at 42 avenue Foch in Paris,

(i) to adjudge and declare that, by attaching the building located at 42 avenue Foch in Paris, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations and the United Nations Convention against Transnational Organized Crime, as well as general international law;

(ii) to order the French Republic to recognize the status of the building located at 42 avenue Foch in Paris as the property of the Republic of Equatorial Guinea, and as the premises of its diplomatic mission in Paris, and, accordingly, to ensure its protection as required by international law;

(d) In view of all the violations by the French Republic of international obligations owed to the Republic of Equatorial Guinea,

(i) to adjudge and declare that the responsibility of the French Republic is engaged on account of the harm that the violations of its international obligations have caused and are continuing to cause to the Republic of Equatorial Guinea;

(ii) to order the French Republic to make full reparation to the Republic of Equatorial Guinea for the harm suffered, the amount of which shall be determined at a later stage.

in the Reply:

For the reasons set out in its Memorial and in this Reply, the Republic of Equatorial Guinea respectfully requests the International Court of Justice to adjudge and declare that:

(i) by entering the building at 42 avenue Foch in Paris used for the purposes of the diplomatic mission of the Republic of Equatorial Guinea in Paris, and by searching, attaching and confiscating that building, its furnishings and other property therein, the French Republic is in breach of its obligations under the Vienna Convention on Diplomatic Relations;

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(ii) the French Republic must recognize the status of the building at 42 avenue Foch in Paris as premises of the diplomatic mission of the Republic of Equatorial Guinea, and, accordingly, ensure its protection as required by the Vienna Convention on Diplomatic Relations;
(iii) the responsibility of the French Republic is engaged on account of the violations of its obligations under the Vienna Convention on Diplomatic Relations;
[310] (iv) the French Republic has an obligation to make reparation for the harm suffered by the Republic of Equatorial Guinea, the amount of which will be determined at a later stage.

On behalf of the Government of France,
in the Counter-Memorial:

For the reasons set out in this Counter-Memorial, and on any other grounds that may be produced, inferred or substituted as appropriate, the French Republic respectfully requests the International Court of Justice to reject all of the claims made by the Republic of Equatorial Guinea.

in the Rejoinder:

For the reasons set out in this Rejoinder and in the Counter-Memorial of the French Republic, and on any other grounds that may be produced, inferred or substituted as appropriate, the French Republic respectfully requests the International Court of Justice to reject all the claims made by the Republic of Equatorial Guinea.

24. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Equatorial Guinea,

The Republic of Equatorial Guinea respectfully requests the International Court of Justice to adjudge and declare that:

(i) the French Republic, by entering the building located at 42 avenue Foch in Paris, which is used for the purposes of the diplomatic mission of the Republic of Equatorial Guinea in Paris, by searching, attaching and confiscating the said building, its furnishings and other property therein, has acted in violation of its obligations under the Vienna Convention on Diplomatic Relations;
(ii) the French Republic must recognize the status of the building located at 42 avenue Foch in Paris as the premises of the diplomatic mission of the Republic of Equatorial Guinea, and, accordingly, ensure its protection as required by the Vienna Convention on Diplomatic Relations;
(iii) the responsibility of the French Republic is engaged on account of the violations of its obligations under the Vienna Convention on Diplomatic Relations;

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(iv) the French Republic has an obligation to make reparation for the harm suffered by the Republic of Equatorial Guinea, the amount of which will be determined at a later stage.

On behalf of the Government of France,

For the reasons set out in its Counter-Memorial, its Rejoinder and the oral argument of its counsel during the hearings in the case concerning *Immunities and Criminal Proceedings* between Equatorial Guinea and France, the French Republic respectfully requests the International Court of Justice to reject all the claims made by the Republic of Equatorial Guinea.

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[**311**] I. FACTUAL BACKGROUND

25. The Court will begin with a brief description of the factual background to the present case, as previously recalled in its Judgment on preliminary objections of 6 June 2018 (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, ICJ Reports 2018 (I)*, pp. 303-7, paras. 23-41). It will return to each of the relevant facts in greater detail when it comes to examine the legal claims relating to them.

26. On 2 December 2008, the association Transparency International France filed 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. This complaint was declared admissible by the French courts, and a judicial investigation was opened in 2010 in respect of "handling misappropriated public funds",

> complicity in handling misappropriated public funds, complicity in the misappropriation of public funds, money laundering, complicity in money laundering, misuse of corporate assets, complicity in misuse of corporate assets, breach of trust, complicity in breach of trust and concealment of each of these offences.

The investigation focused, in particular, on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including Mr Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who was at the time Minister of State for Agriculture and Forestry of Equatorial Guinea and who

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became Second Vice-President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012.

27. The investigation more specifically concerned the way in which Mr Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 avenue Foch in Paris. On 28 September 2011, investigators conducted a search at 42 avenue Foch in Paris and seized luxury vehicles which belonged to Mr Teodoro Nguema Obiang Mangue and were parked on the premises. On 3 October 2011, the investigators seized additional luxury vehicles belonging to Mr Teodoro Nguema Obiang Mangue in neighbouring parking lots. On 4 October 2011, the Embassy of Equatorial Guinea in France sent a 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". By a Note Verbale dated 11 October 2011, the Protocol Department of the French Ministry of Foreign Affairs indicated to the Embassy of Equatorial Guinea that the "building [located at 42 avenue Foch, Paris (16th arr.)] does not form **[312]** part of the premises of Equatorial Guinea's diplomatic mission. It falls within the private domain and is, accordingly, subject to ordinary law." The Protocol Department of the French Ministry of Foreign Affairs indicated in a communication of the same date addressed to the investigating judges of the Paris *Tribunal de grande instance* that "the building [located at 42 avenue Foch, Paris (16th arr.)] does not form part of the premises of the Republic of Equatorial Guinea's diplomatic mission, that it falls within the private domain and is, accordingly, subject to ordinary law".

28. By a Note Verbale dated 17 October 2011, the Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that the "official residence of [Equatorial Guinea's] Permanent Delegate to UNESCO [wa]s on the premises of the diplomatic mission located at 40-42 avenue Foch, 75016, Paris". By a Note Verbale to the Embassy of Equatorial Guinea dated 31 October 2011, the Protocol Department of the French Ministry of Foreign Affairs reiterated that the building at 42 avenue Foch in Paris was "not a part of the mission's premises, ha[d] never been recognized as such, and accordingly [wa]s subject to ordinary law".

29. From 14 to 23 February 2012, further searches of the building at 42 avenue Foch in Paris were conducted, during which additional items were seized and removed. By Notes Verbales dated 14 and 15

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February 2012, describing the building as the official residence of the Permanent Delegate to UNESCO and asserting that the searches violated the Vienna Convention, Equatorial Guinea invoked the protection afforded by the said Convention for such a residence.

30. By a Note Verbale dated 12 March 2012, the Embassy of Equatorial Guinea asserted that the premises at 42 avenue Foch in Paris were used for the performance of the functions of its diplomatic mission in France. The Protocol Department of the French Ministry of Foreign Affairs responded on 28 March 2012, referring to its "constant practice" with respect to the recognition of the status of "premises of the mission" and reiterating that the building located at 42 avenue Foch in Paris could not be considered part of the diplomatic mission of Equatorial Guinea.

31. One of the investigating judges of the Paris *Tribunal de grande instance* found, *inter alia*, that the building at 42 avenue Foch in Paris had been wholly or partly paid for out of the proceeds of the alleged offences under investigation and that its real owner was Mr Teodoro Nguema Obiang Mangue. He consequently ordered on 19 July 2012 the "attachment of the building" (*saisie pénale immobilière*), a protective measure provided for by the French Code of Criminal Procedure which may be taken by a judge investigating a case in order to preserve the effectiveness of the potential confiscation of a building that might subsequently be ordered as a penalty. This decision was upheld on 13 June 2013 by the *Chambre de l'instruction* of the Paris *Cour d'appel*, before which Mr Teodoro Nguema Obiang Mangue had lodged an appeal.

32. By a Note Verbale dated 27 July 2012, the Embassy of Equatorial Guinea in France informed the Protocol Department of the French Ministry of Foreign Affairs 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".

33. By a Note Verbale dated 6 August 2012, the Protocol Department of the French Ministry **[313]** of Foreign Affairs drew the Embassy's attention to the fact that the building located at 42 avenue Foch in Paris was the subject of an attachment order under the Code of Criminal Procedure, dated 19 July 2012, and that the attachment had been recorded in the mortgage registry (*Conservation des hypothèques*) on 31 July 2012. The Protocol Department stated that it was thus "unable officially to recognize the building located at 42 avenue Foch, Paris (16th arr.), as being the seat of the chancellery as from 27 July 2012".

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34. The investigation was declared to be completed and, on 23 May 2016, the Financial Prosecutor filed final submissions (*réquisitoire définitif*) seeking in particular that Mr Teodoro Nguema Obiang Mangue be tried for money laundering offences. On 5 September 2016, the investigating judges of the Paris *Tribunal de grande instance* ordered the referral of Mr Teodoro Nguema Obiang Mangue—who, by a presidential decree of 21 June 2016, had been appointed as the Vice-President of Equatorial Guinea in charge of National Defence and State Security—for trial before the Paris *Tribunal correctionnel* for alleged offences committed in France between 1997 and October 2011.

35. On 2 January 2017, a hearing on the merits took place before the Paris *Tribunal correctionnel*. The President of the tribunal noted, *inter alia*, that, pursuant to the Order of the International Court of Justice of 7 December 2016, any confiscation measure that might be directed against the building located at 42 avenue Foch in Paris could not be executed until the conclusion of the international judicial proceedings.

36. The *Tribunal correctionnel* delivered its judgment on 27 October 2017, in which it found Mr Teodoro Nguema Obiang Mangue guilty of money laundering offences committed in France between 1997 and October 2011. The tribunal ordered, *inter alia*, the confiscation of all the movable assets seized during the judicial investigation and of the attached building at 42 avenue Foch in Paris. Regarding the confiscation of this building, the tribunal, referring to the Court's Order of 7 December 2016 indicating provisional measures, stated that "the . . . proceedings [pending before the International Court of Justice] make the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty".

37. Following delivery of the judgment, Mr Teodoro Nguema Obiang Mangue lodged an appeal against his conviction with the Paris *Cour d'appel*. This appeal having a suspensive effect, no steps were taken to enforce the sentences handed down to Mr Teodoro Nguema Obiang Mangue.

38. The Paris *Cour d'appel* rendered its judgment on 10 February 2020. It upheld, *inter alia*, the confiscation of the "property located in the **[314]** municipality of Paris, 16th arrondissement, 40-42 avenue Foch, attached by order of 19 July 2012". Mr Teodoro Nguema Obiang Mangue lodged a further appeal (*pourvoi en cassation*) against this judgment. This appeal having a suspensive effect, no steps have been taken to enforce the sentences handed down to Mr Teodoro Nguema Obiang Mangue.

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II. CIRCUMSTANCES IN WHICH A PROPERTY ACQUIRES THE STATUS OF "PREMISES OF THE MISSION" UNDER THE VIENNA CONVENTION

39. In its Judgment on France's preliminary objections, the Court concluded that "it has jurisdiction to entertain the aspect of the dispute relating to the status of the building, including any claims relating to the furnishings and other property present on the premises at 42 avenue Foch in Paris" (*ICJ Reports 2018 (I)*, p. 334, para. 138). The Parties disagree on whether that building constitutes part of the premises of Equatorial Guinea's diplomatic mission in France and is thus entitled to the treatment afforded to such premises under Article 22 of the Vienna Convention. They also disagree on whether France, by the actions of its authorities in relation to the building, is in breach of its obligations under Article 22 (*ibid.*, pp. 315-16, para. 70).

40. Article 22 of the Vienna Convention states that:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

41. The Court must first determine in which circumstances a property acquires the status of "premises of the mission" within the meaning of Article 1*(i)* of the Vienna Convention. That Article provides that 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".

* *

42. In Equatorial Guinea's view, for a building to acquire "diplomatic status" and to benefit from the protections afforded by the Vienna **[315]** Convention, it is "generally sufficient" for the sending State to assign the building for the purposes of its diplomatic mission and notify the receiving State accordingly. The Applicant acknowledges that the definition of "premises of the mission" contained in Article 1*(i)* of the Vienna Convention is silent as to the respective roles of the

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sending State and receiving State in the designation of diplomatic premises, but maintains that the text, context, and object and purpose of the Convention indicate that this role belongs to the sending State.

43. Equatorial Guinea contends that the object and purpose of the Vienna Convention is to create conditions that promote friendly relations between equal sovereign States, and it rejects the notion that the spirit of the Convention is rooted in mistrust or concerns about possible abuse. In light of this object and purpose, Equatorial Guinea argues that a sending State's contentions regarding the "diplomatic status" of property should be presumed valid. In its view, provisions of the Convention designed to address possible abuses—such as the power under Article 9 to declare mission staff *personae non gratae*—provide further evidence of this presumption of validity. According to Equatorial Guinea, these provisions exist because the Vienna Convention presupposes that diplomatic immunity will be respected, and not subject to evaluation, verification or approval by the receiving State in the first instance.

44. The Applicant takes the position that the Vienna Convention does not make the granting of the status of "diplomatic premises" subject to any explicit or implicit consent by the receiving State, as evidenced by the Convention's silence on this point. It argues that, when the drafters of the Vienna Convention considered it necessary for an act of the sending State to be made subject to the consent of the receiving State, they ensured that the Convention was explicit in this regard. Equatorial Guinea further contends that while Article 2 of the Vienna Convention provides that diplomatic relations can only be established by mutual consent, this does not mean that every aspect of those relations, once established, depends on such consent. In this regard, it notes several provisions of the Vienna Convention which require no consent on the part of the receiving State.

45. Equatorial Guinea points to the text of Article 12 of the Convention, which requires that the prior express consent of the receiving State be obtained before the sending State may establish offices forming part of its diplomatic mission in localities other than those in which the mission itself is established. In Equatorial Guinea's view, an *a contrario* reading of this provision confirms that the designation of premises within the locality in which the mission is established is not subject to the consent of the receiving State.

46. The Applicant takes issue with France's interpretation of Article 12, according to which the receiving State's implicit—if not express—consent must still be obtained even when opening new offices of a diplomatic mission in the same locality or transferring premises of the

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[316] mission within this locality. In Equatorial Guinea's view, such a concept of "implicit consent" would place the sending State in an uncertain and vulnerable position, as it would not know whether and when the premises of its mission would benefit from "diplomatic status".

47. Equatorial Guinea acknowledges that several States make the designation of the premises of diplomatic missions on their territory subject to some form of consent, and that this practice is not forbidden by the Vienna Convention. However, it contends that these States, by means of national legislation or clearly established practice, have explained their positions clearly and transparently to States which intend to establish or relocate diplomatic missions in their territory. Equatorial Guinea argues that any "control measure" the receiving State seeks to impose upon the designation of diplomatic premises by a sending State must be notified in advance to all diplomatic missions, must serve an appropriate objective that is consistent with the object and purpose of the Vienna Convention, and must be exercised in a reasonable and non-discriminatory manner. In the absence of such legislation or clearly established practice, the sending State's designation of the premises of the mission is "conclusive", and the receiving State may only object to this designation in co-ordination with the sending State (*"en concertation avec l'Etat accréditant"*).

48. Equatorial Guinea asserts that France has no legislation or established practice which would require a sending State to obtain France's consent prior to designating property as premises of its diplomatic mission. In such circumstances, Equatorial Guinea considers that it is entitled to rely upon what it describes as a "long-standing bilateral and reciprocal" practice between itself and France, whereby the sending State's notification of the assignment of a building for the purposes of a diplomatic mission is sufficient for the building to acquire "diplomatic status".

49. Beyond the issue of consent, Equatorial Guinea argues that, even if there exists a requirement that property must be "effectively used for the purposes of the mission" in order to benefit from the status of "premises of the mission", this requirement is met where a building purchased or rented by a State is designated by that State as serving the purposes of its diplomatic mission and undergoes the necessary planning and refurbishment works to enable it to house the mission.

50. The Applicant rejects the notion that "actual" or "effective" assignment occurs only when a diplomatic mission has completely moved into the premises in question. In its view, such a position would not only be inconsistent with France's own practice but would

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constitute an extremely restrictive interpretation of the term "used for the purposes of the mission" in Article 1*(i)* of the Vienna Convention. Equatorial Guinea further asserts that this interpretation would be unreasonable and would deprive the provision in Article 22 of the Vienna Convention on the inviolability of mission premises of *effet utile*, as the receiving State would be able to enter the premises of the sending State's diplomatic mission up **[317]** until the point at which the move was fully completed. Reviewing judicial practice in France and a number of other States, Equatorial Guinea contends that there is no evidence of a requirement that a mission fully move into a building before that building can be deemed "used for the purposes of the mission". Equatorial Guinea thus concludes that the notion of premises "used for the purposes of the mission" must encompass not only premises where a diplomatic mission is fully moved in, but also those which the sending State has assigned for diplomatic purposes.

51. Finally, Equatorial Guinea argues in the alternative that even if a receiving State enjoys discretion over the choice of premises of diplomatic missions in general, such discretion should be exercised in a manner that is reasonable, non-discriminatory and consistent with the requirements of good faith. In this respect Equatorial Guinea recalls Article 47 of the Vienna Convention, which provides that "[i]n the application of the provisions of the present Convention, the receiving State shall not discriminate as between States".

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52. According to France, Equatorial Guinea incorrectly argues that a sending State can unilaterally impose its choice of premises for its diplomatic mission upon the receiving State. In France's view, the applicability of the Vienna Convention's régime of protection to a particular building is subject to compliance with "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.

53. France acknowledges that the Vienna Convention provides no details on the procedure for the granting of "diplomatic status" to the premises in which a sending State wishes to establish a diplomatic mission. It argues, however, that the ordinary meaning to be given to the definition of "premises of the mission" in Article 1*(i)*, interpreted in light of the Convention's object and purpose, runs counter to Equatorial Guinea's argument that a sending State has "complete freedom in designating or changing the premises of its mission".

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54. In developing this argument, France refers to what it characterizes as the "essentially consensual letter and spirit" of the Vienna Convention. It notes that Article 2 of the Convention provides that "[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent". It further observes that while the receiving State must accept significant restrictions on its territorial sovereignty through the application of the Vienna Convention's inviolability régime, the sending State must use the rights conferred on **[318]** it in good faith. There exists, in France's view, the need for a "bond of trust" between the sending and receiving States. In keeping with this *ratio legis*, France contends, the designation of buildings as premises of the mission is not left to the sole discretion of the sending State.

55. France rejects Equatorial Guinea's *a contrario* reading of Article 12 of the Vienna Convention, noting that this provision refers only to "the express consent of the receiving State" being required for the establishment of mission offices in localities other than that in which the mission is located. In France's view, this provision does not indicate that the consent of the receiving State is not required for the designation of the premises of a diplomatic mission in the capital, but rather that consent in that case may be implicit.

56. France also invokes the practice of several States which it argues "make the establishment of premises of foreign diplomatic missions on their territory explicitly subject to some form of consent". In France's view, the fact that such practice exists, and that it is not considered to be contrary to the Vienna Convention, shows that the Convention does not confer upon the sending State any unilateral right to designate the buildings that are to house its mission. To the contrary, France maintains that nothing in the Vienna Convention prevents the receiving State from exercising some control over the designation of buildings that the sending State intends to use for its diplomatic mission. The fact that several States have adopted national practices to this effect corroborates, according to France, the "existence of a régime based on agreement between the parties, in accordance with the object and purpose of the Vienna Convention".

57. According to France, the absence of any instrument or text formalizing the practices of the receiving State is irrelevant from the point of view of international law. It asserts that many States which have not legally formalized their practices reserve the right to ascertain whether the sending State's choice of premises is acceptable both in fact and law, and that this is not considered to be contrary to the Vienna Convention.

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58. Responding to Equatorial Guinea's assertion regarding the existence of a presumption of validity for the sending State's designation of diplomatic premises, France notes that Equatorial Guinea does not argue that such a presumption would be irrebuttable. Therefore, France considers that even if such a presumption did exist, it would mean that the receiving State would still possess the right to call into question the sending State's designation.

59. France further contends that a building constitutes diplomatic premises only if it is "effectively used" for the purposes of the sending State's diplomatic mission. In France's view, this results from the fact that Article 1*(i)* defines the premises of the diplomatic mission as the buildings and lands "used for the purposes of the mission". The plain meaning of this definition, France contends, is that it is not sufficient for the building in question to have been chosen and designated by the sending State, but rather it is necessary for it to be actually assigned for the **[319]** purposes of the functions of the mission as defined in Article 3, paragraph 1, of the Vienna Convention. According to France, State practice confirms that this criterion of actual assignment ought to be met for a building to constitute "premises of the mission" within the meaning of the Vienna Convention. This practice is said to be evident in decisions of national and international courts, including those of France itself.

60. Finally, France does not deny that a receiving State must exercise the discretion it enjoys over the sending State's choice of diplomatic premises in a reasonable and non-discriminatory manner. However, it argues that, in order to demonstrate discriminatory treatment, the Applicant would at the very least have to establish that French authorities had reacted differently in a factual context similar to the present case. France contends that no other sending State has ever conducted itself in France as Equatorial Guinea did in the present case.

* *

61. The Court will interpret the Vienna Convention on Diplomatic Relations according to customary rules of treaty interpretation which, as it has repeatedly stated, are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (see, for example, *Jadhav (India* v. *Pakistan), Judgment, ICJ Reports 2019 (II)*, pp. 437-8, para. 71; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, ICJ Reports 2004 (I)*, p. 48, para. 83). Under these rules of customary international law, the provisions of the Vienna Convention on Diplomatic Relations must be interpreted in good faith

in accordance with the ordinary meaning to be given to their terms in their context and in the light of the object and purpose of the Convention. To confirm the meaning resulting from that process, to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse may be had to subsidiary means of interpretation, which include the preparatory work of the Convention and the circumstances of its conclusion.

62. The Court considers that the provisions of the Vienna Convention, in their ordinary meaning, are of little assistance in determining the circumstances in which a property acquires the status of "premises of the mission". While Article 1*(i)* of the Vienna Convention provides a definition of this expression, it does not indicate how a building may be designated as premises of the mission. Article 1*(i)* describes the "premises of the mission" as buildings "used for the purposes of the mission". This provision, taken alone, is unhelpful in determining how a building may come to be used for the purposes of a diplomatic mission, whether there are any prerequisites to such use and how such use, if any, is to be ascertained. As both Parties have acknowledged, Article 1*(i)* is silent as to the respective roles of the sending and receiving States in the designation of mission premises. Article 22 of the Vienna Convention provides no further **[320]** guidance on this point. The Court will therefore turn to the context of these provisions as well as the Vienna Convention's object and purpose.

63. Turning first to context, Article 2 of the Vienna Convention provides that "[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent". In the Court's view, it is difficult to reconcile such a provision 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.

64. Moreover, the provisions of the Convention dealing with the appointment and immunities of diplomatic personnel and staff of the mission illustrate the balance that the Convention attempts to strike between the interests of the sending and receiving States. Article 4 provides that the sending State's choice of head of mission is subject to the *agrément* of the receiving State. It further provides that the receiving State does not need to provide reasons for any refusal. On the other hand, the receiving State's prior approval is not generally required for the appointment of members of the mission's staff under Article 7. Pursuant to Article 39, those individuals who enjoy privileges and immunities enjoy them from the moment they arrive on the

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territory of the receiving State, or if they are already on the territory of the receiving State, from the moment their appointment is notified to the receiving State. However, these broad immunities are counterbalanced by the power of the receiving State, under Article 9, to declare members of a diplomatic mission *personae non gratae*.

65. In contrast, the Vienna Convention establishes no equivalent to the *persona non grata* mechanism for mission premises. If it were possible for a sending State unilaterally to designate the premises of its mission, despite objection by the receiving State, the latter would effectively be faced with the choice of either according protection to the property in question against its will, or taking the radical step of breaking off diplomatic relations with the sending State. Even in the latter situation, Article 45 of the Vienna Convention requires the receiving State to continue to respect and protect the premises of the mission together with its property and archives, prolonging the effects of the sending State's unilateral choice. In the Court's view, this situation would place the receiving State in a position of imbalance, to its detriment, and would go far beyond what is required to achieve the Vienna Convention's goal of ensuring the efficient performance of the functions of diplomatic missions.

66. As to the Vienna Convention's object and purpose, the preamble specifies the Convention's aim to "contribute to the development of friendly relations among nations". This is to be achieved by according sending States and their representatives significant privileges and immunities. The preamble indicates that "the purpose of such privileges and **[321]** immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". The inclusion of this statement is understandable considering the restrictions of sovereignty imposed upon receiving States by the Vienna Convention's immunity and inviolability régime. The preamble thus reflects the fact that diplomatic privileges and immunities impose upon receiving States weighty obligations, which however find their *raison d'être* in the objective of fostering friendly relations among nations.

67. 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. In such an event, the receiving State would, against its will, be required to take on the "special duty" referred to in Article 22, paragraph 2, of the Convention to protect the chosen premises. A unilateral imposition of a sending State's choice of premises would thus clearly not be consistent with the

object of developing friendly relations among nations. Moreover, it would leave the receiving State vulnerable to a potential misuse of diplomatic privileges and immunities, which the drafters of the Vienna Convention intended to avoid by specifying, in the preamble, that the purpose of such privileges and immunities is not "to benefit individuals". As the Court has emphasized,

> [t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, ICJ Reports 1980*, p. 40, para. 86).

68. Equatorial Guinea contends that the Vienna Convention expressly states when the receiving State's consent is required, notably in Article 12, and that the lack of such a provision regarding the designation of the premises of the mission indicates that the receiving State's consent is not required in that context. The Court is not persuaded by this *a contrario* reasoning, since such an interpretation "is only warranted . . . when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, ICJ Reports 2016 (I)*, p. 19, para. 37). In the present case, the Court does not consider such an *a contrario* reading to be consistent with the object and purpose of the Vienna Convention, as it would allow for the unilateral imposition of a sending State's choice of premises upon the receiving State and require **[322]** the latter to undertake the weighty obligations contained in Article 22 against its will. As the Court has observed, this would be detrimental to the development of friendly relations among nations and would leave receiving States without any appropriate and effective remedy in case of potential abuses. Moreover, with regard to Article 12 specifically, the fact that the Convention requires the express consent of the receiving State prior to the establishment of diplomatic offices outside the locality in which the mission is established is unsurprising, given that the receiving State would likely need to make special arrangements for the security of that office. However, this does not indicate that the receiving State cannot object to the sending State's assignment of a building to its diplomatic mission, thus preventing the building in question from acquiring the status of "premises of the mission".

69. State practice further supports this conclusion. Both Parties acknowledge that a number of receiving States, all of which are party to the Vienna Convention, expressly require sending States to obtain their prior approval to acquire and use premises for diplomatic purposes. For instance, Germany's Protocol Handbook of the Federal Foreign Office states that the "use for official purposes of property (land, buildings, and parts of buildings) for diplomatic missions and consular posts is possible only with the prior agreement of the Federal Foreign Office". Section 12 of South Africa's Diplomatic Immunities and Privileges Act of 2001 requires foreign missions to submit a written request to the Director-General of International Relations and Cooperation prior to undertaking a relocation. Brazil's 2010 Manual of Rules and Procedures on Privileges and Immunities provides that the establishment of seats of diplomatic missions, as well as the acquisition or lease of real property for that purpose, are subject to prior authorization by the Ministry of Foreign Affairs. France refers to this practice and to the similar practice of an additional 11 States in its written pleadings. Neither Equatorial Guinea nor France has suggested that such practice is inconsistent with the Vienna Convention, and the Court is unaware of any argument having been made to that effect. The Court does not consider that this practice necessarily establishes "the agreement of the parties" within the meaning of a rule codified in Article 31, paragraph 3*(b)*, of the Vienna Convention on the Law of Treaties as regards the existence of a requirement of prior approval, or the modalities through which a receiving State may communicate its objection to the sending State's designation of a building as forming part of the premises of its diplomatic mission. Nevertheless, the practice of several States which clearly requires the prior approval of the receiving State before a building can acquire the status of "premises of the mission"—and the lack of any objection to such practice—are factors which weigh against finding a right belonging to the sending State under the Vienna Convention unilaterally to designate the premises of its diplomatic mission.

[323] 70. In the Court's view, the preparatory work of the Vienna Convention provides no clear indication of the circumstances in which a property may acquire the status of "premises of the mission" within the meaning of Article 1*(i)*.

71. Equatorial Guinea itself recognizes that the receiving State may, in at least some circumstances, require that its prior approval be obtained before a given property may acquire the status of "premises of the mission" within the meaning of Article 1*(i)*. However, it takes the position that "any control measure in the receiving State's domestic

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law must . . . be notified in advance to all diplomatic missions" and that "in the absence of formalities set out clearly and applied without discrimination, the designation of premises of the mission by the sending State is conclusive". It further states that, in the absence of legislation or established practice, the receiving State may only object to the designation by the sending State of its diplomatic premises in co-ordination with the sending State.

72. The Court considers that the conditions referred to by Equatorial Guinea do not exist under the Vienna Convention. Rather, if the receiving State may object to the sending State's choice of premises, it follows that it may choose the modality of such objection. To hold otherwise would be to impose a restriction on the sovereignty of receiving States that finds no basis in the Vienna Convention or in general international law. Some receiving States may, through legislation or official guidelines, set out in advance the modalities pursuant to which their approval may be granted, while others may choose to respond on a case-by-case basis. This choice itself has no bearing on the power of the receiving State to object.

73. The Court emphasizes, however, that the receiving State's power to object to a sending State's designation of the premises of its diplomatic mission is not unlimited. The Court has repeatedly stated that, where a State possesses a discretionary power under a treaty, such a power must be exercised reasonably and in good faith (see *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, ICJ Reports 1952*, p. 212; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, ICJ Reports 2008*, p. 229, para. 145). In light of the above-mentioned requirements, and the Vienna Convention's object and purpose of enabling the development of friendly relations among nations, the Court considers that an objection of a receiving State must be timely and not be arbitrary. Further, in accordance with Article 47 of the Vienna Convention, the receiving State's objection must not be discriminatory in character. In any event, the receiving State remains obliged under Article 21 of the Vienna Convention to facilitate the acquisition on its territory, in accordance with its laws, by the sending State of the premises necessary for its diplomatic mission, or otherwise assist the latter in obtaining accommodation in some other way.

[324] 74. Given the above considerations, the Court concludes that—where the receiving State objects to the designation by the sending State of certain property as forming part of the premises of its diplomatic mission, and this objection is communicated in a timely

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manner and is neither arbitrary nor discriminatory in character—that property does not acquire the status of "premises of the mission" within the meaning of Article 1*(i)* of the Vienna Convention, and therefore does not benefit from protection under Article 22 of the Convention. Whether or not the aforementioned criteria have been met is a matter to be assessed in the circumstances of each case.

75. In view of these conclusions, the Court will proceed to examine whether, on the facts before the Court, France objected to the designation of the building at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission and whether any such objection was communicated in a timely manner, and was neither arbitrary nor discriminatory in character. If necessary, the Court will then examine the second condition which, according to France, must be met for a property to acquire the status of "premises of the mission", namely the requirement of actual assignment.

III. STATUS OF THE BUILDING AT 42 AVENUE FOCH IN PARIS

1. Whether France objected through diplomatic exchanges between the Parties from 4 October 2011 to 6 August 2012

76. Having determined that the objection of the receiving State prevents a building from acquiring the status of the "premises of the mission" within the meaning of Article 1*(i)* of the Convention, the Court will now consider whether France objected to the designation of the building at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission.

77. First, the Court will take account of the diplomatic exchanges of the Parties in the period between 4 October 2011, when Equatorial Guinea first notified France that the property "form[ed] part of the premises of the diplomatic mission", and 6 August 2012, shortly after the "attachment of the building" (*saisie pénale immobilière*) on 19 July 2012. The Court recalls that Equatorial Guinea accepts that the claims it made with respect to the conduct of French authorities prior to 4 October 2011 "were based on the protection claimed for the building at 42 avenue Foch in Paris as property of a foreign State under the Palermo Convention". Accordingly, they fall outside the Court's jurisdiction under the Optional Protocol to the Vienna Convention.

78. The initial searches at the property by the French investigative authorities took place on 28 September 2011 and 3 October 2011, during **[325]** the course of which luxury vehicles belonging to

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Mr Teodoro Nguema Obiang Mangue were seized (see paragraph 27 above). On 4 October 2011, the Embassy of Equatorial Guinea addressed a Note Verbale to the French Ministry of Foreign Affairs, which stated the following:

> The Embassy of the Republic of Equatorial Guinea . . . 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 [Protocol] Department.
>
> Since the building forms part of the premises of the diplomatic mission, pursuant to Article 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Republic of Equatorial Guinea wishes to give you official notification so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention.

On the same date, paper signs were put up at the building marked "République de Guinée équatoriale—locaux de l'ambassade" (Republic of Equatorial Guinea—Embassy premises).

79. On 11 October 2011, the Protocol Department of the French Ministry of Foreign Affairs addressed a Note Verbale to the Embassy of Equatorial Guinea, which stated that "the . . . building [at 42 avenue Foch in Paris] does not form part of the premises of Equatorial Guinea's diplomatic mission. It falls within the private domain and is, accordingly, subject to ordinary law."

80. On 17 October 2011, the Embassy of Equatorial Guinea addressed a Note Verbale to the French Ministry of Foreign Affairs. This Note Verbale informed the Ministry that the term of the previous Ambassador of Equatorial Guinea to France had ended, and that pending the arrival of a new Ambassador, the diplomatic mission of Equatorial Guinea to France would be headed (as Chargée d'affaires *ad interim*) by Ms Mariola Bindang Obiang, the Permanent Delegate of the Republic of Equatorial Guinea to UNESCO. The Note went on to state that "the official residence of the Permanent Delegate to UNESCO is on the premises of the diplomatic mission located at 40-42 avenue Foch, 75016, Paris, which is at the disposal of the Republic of Equatorial Guinea".

81. On 31 October 2011, the Protocol Department of the French Ministry of Foreign Affairs responded in a Note Verbale addressed to the Embassy of Equatorial Guinea. The Ministry referred back to its Note Verbale of 11 October 2011, reiterating that the building at 42 avenue Foch in Paris "is not a part of the mission's premises, has never been recognized as such, and accordingly is subject to ordinary

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law". Additionally, the Note Verbale stated that the appointment of Ms Bindang Obiang as Chargée d'affaires *ad interim* was contrary to Article 19 of the Convention, as she was not a member of Equatorial Guinea's diplomatic mission in France. It also observed that any change of address of the **[326]** Permanent Delegate to UNESCO should be communicated directly to the Protocol Department of UNESCO, and not to the Protocol Department of the Ministry.

82. Between 14 and 23 February 2012, the French authorities conducted further searches of the building at 42 avenue Foch in Paris, in the course of which various items were seized and removed (see paragraph 29 above). On 14 February 2012, the Equatorial Guinean Ministry of Foreign Affairs addressed a Note Verbale to the French Ministry of Foreign Affairs to express regret about France's actions regarding the building, which was identified as "the residence of the Chargée d'affaires and Permanent Representative of Equatorial Guinea to UNESCO in Paris". On the same day, the Embassy addressed a Note Verbale to the French Ministry of Foreign Affairs protesting against the search of the building, which it described as the "the place of residence of the Permanent Delegation of the Republic of Equatorial Guinea to UNESCO". On the following day, the Embassy protested again, through a second Note Verbale, against the searches and seizures in the building, which it considered inviolable premises under the Convention, being "the official residence of the Chargée d'affaires heading the Embassy of Equatorial Guinea in France". Also on 14 February 2012, the President of Equatorial Guinea wrote to his French counterpart, stating that the building at 42 avenue Foch in Paris

> is a property that was lawfully acquired by the Government of Equatorial Guinea and is currently used by the Representative to UNESCO, who is in charge of the Embassy's property. The said property is afforded legal and diplomatic protection under the Vienna Convention and the bilateral agreements signed by the two States.

Additionally, on the same date, the Permanent Delegation of Equatorial Guinea to UNESCO addressed a Note Verbale to UNESCO informing it that the official residence of the Permanent Delegate was located at 42 avenue Foch in Paris. UNESCO transmitted a copy of this Note to the French Ministry of Foreign Affairs.

83. On 20 February 2012, the Protocol Department of the French Ministry of Foreign Affairs responded in a Note Verbale addressed to the Embassy of Equatorial Guinea. France recalled its previous Notes Verbales of 11 October 2011 and 31 October 2011, reiterating that it

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did not recognize the building as the official residence of Ms Bindang Obiang. France stated that

> [t]he Protocol Department recalls that it can only take into account a change of address for a chancellery or a residence if it has been provided with certain verified information:
>
> — The end-occupancy date of the previous premises and the new status thereof (sale or end of rental agreement, with supporting **[327]** documents) which results in the end of the official status and the related privileges and immunities.
> — The date of moving into the new premises, officially notified by Note Verbale (in this case, by the UNESCO Protocol Department).

The Note Verbale concluded by stating that the Note Verbale sent by UNESCO, transmitting Equatorial Guinea's Note Verbale of 14 February to UNESCO "[could] not be taken into account because the date of 14 February [was] the date on which searches of that same building began".

84. On 9 March 2012, the Minister of Justice of Equatorial Guinea wrote to his French counterpart, stating that the building at 42 avenue Foch in Paris was "assigned to [Equatorial Guinea's] diplomatic mission and declared as such . . . by Note Verbale No 365/11 of 4 October 2011". On 12 March 2012, the Embassy of Equatorial Guinea addressed a Note Verbale to the French Ministry of Foreign Affairs, in which it contested France's position, expressed in the latter's Note Verbale of 11 October 2011, that the building at 42 avenue Foch in Paris did not form part of the premises of its diplomatic mission.

85. On 28 March 2012, the Protocol Department of the French Ministry of Foreign Affairs addressed a Note Verbale to the Embassy of Equatorial Guinea, referring to the latter's Note Verbale of 12 March 2012. The Ministry stated the following:

> The building located at 42 avenue Foch in Paris (16th arr.) cannot be considered as part of the premises of the diplomatic mission, since it has not been recognized as such by the French authorities, given that it has not been assigned for the purposes of the mission or as the residence of the head of the mission in accordance with . . . Article 1, paragraph *(i)*, of the Vienna Convention.

86. On 25 April 2012, the Embassy of Equatorial Guinea addressed a Note Verbale to the French Ministry of Foreign Affairs, reiterating that "its premises at 42 avenue Foch are indeed assigned for the use of its diplomatic mission" and should have enjoyed the benefit of diplomatic protection as from 4 October 2011. On 2 May 2012, the Protocol

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Department of the French Ministry of Foreign Affairs responded, referring the Embassy to its previous Note Verbale of 28 March 2012.

87. An investigating judge in the proceedings referred to in paragraph 26 above ordered the "attachment of the building" (*saisie pénale immobilière*) on 19 July 2012 (see paragraph 31 above). On 27 July 2012, the Embassy of Equatorial Guinea addressed a Note Verbale to the French Ministry of Foreign Affairs, informing it 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" (see paragraph 32 above).

[328] 88. On 2 August 2012, the Embassy addressed a further Note Verbale to the French Ministry of Foreign Affairs, stating that "it hereby confirms that its chancellery is indeed located at . . . 42 avenue Foch, Paris (16th arr.), a building that it uses as the official offices of its diplomatic mission in France". In a Note Verbale of 6 August 2012, the Protocol Department of the French Ministry of Foreign Affairs replied to the Embassy's Note Verbale of 27 July 2012, stating that

> the building located at 42 avenue Foch, Paris (16th arr.), was the subject of an attachment order *(ordonnance de saisie pénale immobilière)*, dated 19 July 2012. The attachment was recorded and entered in the mortgage registry on 31 July 2012.
>
> 3. The Protocol Department [of the Ministry] is thus unable officially to recognize the building located at 42 avenue Foch, Paris (16th arr.), as being the seat of the chancellery as from 27 July 2012.
>
> *The seat of the chancellery thus remains at 29 boulevard de Courcelles, Paris (8th arr.)*, the only address recognized as such. (Emphasis in the original.)

89. The facts recounted above demonstrate that, between 11 October 2011 and 6 August 2012, 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.

2. Whether the objection of France was timely

90. The Court now turns to the examination of whether France's objection was made in a timely manner. On 11 October 2011, France notified Equatorial Guinea in clear and unambiguous terms that it did not accept this designation. France communicated its objection promptly, exactly one week after Equatorial Guinea first asserted the building's status as premises of its diplomatic mission in its Note Verbale of 4 October 2011. In the Note Verbale of 17 October 2011, Equatorial Guinea again asserted that the building formed part

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of the premises of its diplomatic mission, and also that it housed the residence of the Permanent Delegate of Equatorial Guinea to UNESCO, who it indicated would henceforth also serve as Chargée d'affaires *ad interim* of its diplomatic mission to France. In its Note Verbale of 31 October 2011, France reiterated its objection to accept Equatorial Guinea's designation of the building as part of the premises of its diplomatic mission in France.

91. When the new searches commenced at the building at 42 avenue Foch in Paris on 14 February 2012, Equatorial Guinea sent a number of diplomatic communications to France complaining against the actions of the French authorities. Responding on 20 February 2012, France refused **[329]** again to recognize the status of the building and indicated the procedure to be followed in order for a property to acquire the status of premises of a diplomatic mission. On 9 March and 12 March 2012, two Notes Verbales were addressed to France by Equatorial Guinea which again asserted that the building formed part of the premises of its diplomatic mission in France. France again clearly rejected this claim on 28 March 2012. On 25 April 2012, Equatorial Guinea reiterated its claim; on 2 May 2012, France reiterated its objection. Following the "attachment of the building" *(saisie pénale immobilière)* on 19 July 2012, Equatorial Guinea sent two further Notes Verbales to France on 27 July 2012 and 2 August 2012 asserting the status of the building as premises of its diplomatic mission; France responded on 6 August 2012, again expressly refusing to recognize that the building formed part of the premises of Equatorial Guinea's diplomatic mission.

92. Assessing this record overall, the Court notes that France promptly communicated its objection to the designation of the building at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission following the notification of 4 October 2011. France then consistently objected to each assertion, on the part of Equatorial Guinea, that the building constituted the premises of the diplomatic mission, and maintained its objection to the designation of the building as premises of Equatorial Guinea's diplomatic mission. The Court considers that, in the circumstances of the present case, France objected to the designation by Equatorial Guinea of the building as premises of its diplomatic mission in a timely manner.

3. Whether the objection of France was non-arbitrary and non-discriminatory

93. The Court now turns to the question whether France's objection to the designation by Equatorial Guinea of the building at

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42 avenue Foch in Paris as premises of its diplomatic mission was non-arbitrary and non-discriminatory in character. In Equatorial Guinea's view, four factors indicate that the conduct of France was of an arbitrary and discriminatory character.

94. First, Equatorial Guinea submits that the initial refusal by France to recognize the status of the building as premises of its diplomatic mission was based on "manifest errors of fact and law". Equatorial Guinea refers to the Note Verbale of 11 October 2011, in which France stated that the building "f[ell] within the private domain and [was], accordingly, subject to ordinary law". Equatorial Guinea interprets the Note Verbale as stating that recognition of the building's status as premises of Equatorial Guinea's diplomatic mission was refused because the building was privately owned. According to Equatorial Guinea, this conclusion was based on an error of fact, because Equatorial Guinea had acquired ownership of the building on 15 September 2011. In addition, the conclusion rested on an error of law, because it reflected an assessment of the building's **[330]** ownership status, even though the "premises of the mission" under Article 1*(i)* of the Convention are those used for the purposes of the mission, "irrespective of ownership".

95. Second, Equatorial Guinea complains that France failed to observe the procedure which France itself had laid out for the recognition of the status of the premises. In a communication addressed to the investigating judges of the Paris *Tribunal de grande instance* on 11 October 2011, the Protocol Department of the French Ministry of Foreign Affairs stated that a building is recognized as enjoying the status of premises of the mission "[o]nce it has been verified that the building is actually assigned to a diplomatic mission". According to Equatorial Guinea, no such process of "verification" ever took place between Equatorial Guinea's notification on 4 October 2011 and France's refusal on 11 October 2011. In this connection, Equatorial Guinea considers that the searches of 28 September 2011 and 3 October 2011 cannot be regarded as verification, because the French authorities did not enter the interior of the building.

96. Third, Equatorial Guinea considers that France should have sought to co-ordinate with Equatorial Guinea before refusing the latter's claim that the building at 42 avenue Foch in Paris enjoyed the status of premises of the mission.

97. Fourth, Equatorial Guinea contends that France's position on the conditions to be met and the procedures to be followed for a building to acquire the status of premises of the mission has varied over time, at least as far as Equatorial Guinea is concerned. Equatorial

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Guinea points out that the communication sent by the Protocol Department of the French Ministry of Foreign Affairs to the investigating judges of the Paris *Tribunal de grande instance* on 11 October 2011 suggests that effective use of the premises for diplomatic purposes ought to precede the notification of the French authorities, which in turn precedes the process of "verification", the final step prior to recognition. According to Equatorial Guinea, this contradicts a Note Verbale by the Protocol Department of the French Ministry of Foreign Affairs that it received on 28 March 2012, which suggested that notification of France ought to take place prior to the acquisition of the intended property; after this follows actual use of the premises, which is in turn followed by the recognition by France of the status of the building as premises of the mission, without any need for prior "verification". Additionally, making reference to a Note Verbale sent by the Protocol Department of the French Ministry of Foreign Affairs to the Embassy of Equatorial Guinea on 6 July 2005 concerning the official residence of the Ambassador, Equatorial Guinea considers that France had indicated that the intention to use the premises exclusively as the official residence of the Ambassador sufficed for the property to acquire the status of official residence. According to Equatorial Guinea, France's inconsistent position indicates that its conduct was targeted against Equatorial Guinea, singling it out from other sending States in an arbitrary and discriminatory way.

[331] 98. Relatedly, Equatorial Guinea submits that France's position with respect to the status of the building has been inconsistent. Equatorial Guinea observes that France's current position is contradicted by an interim order of the *Tribunal de grande instance* of Paris of 22 October 2013, which affirmed the status of the building as premises of Equatorial Guinea's diplomatic mission. Equatorial Guinea stresses that it promptly notified the French Ministry of Foreign Affairs of the tribunal's order but that the Ministry did not protest. Equatorial Guinea also contends that, while France refuses expressly to recognize the building as the premises of the diplomatic mission, French officials have visited the building, on the instructions of the French Ministry of Foreign Affairs, for the purpose of obtaining visas, and the French authorities have granted protection to the premises when necessary during a demonstration in 2015 and the presidential elections in Equatorial Guinea in 2016. It also refers to four letters sent by the French Ministry of Foreign Affairs to the Embassy of Equatorial Guinea in 2019, which were addressed to 42 avenue Foch in Paris. Equatorial Guinea argues that these instances "can only be interpreted as tacit recognition by France of the building's diplomatic

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status" which, in turn, demonstrates France's "arbitrary and discriminatory conduct".

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99. France refutes these arguments. With respect to the letter of 11 October 2011 addressed to Equatorial Guinea, France submits that its conclusion that the building "f[ell] within the private domain" should not be read as referring to the building's ownership status but rather to France's assessment that the building was not then used for the purposes of the diplomatic mission and therefore did not attract the protection of "premises of the mission" within the meaning of Article 1*(i)* of the Convention. According to France, the term *domaine public* in French law describes the domain composed of the property assigned either to public use or to a public service and subject as such to a special legal régime, while *domaine privé* refers to the domain which is composed, in principle, of all other property and is subject to ordinary law. France considers that ownership of a building is irrelevant for the purposes of acquiring the status of premises of the mission under the Convention. Moreover, it contends that the building at 42 avenue Foch in Paris is owned not by Equatorial Guinea itself but rather by five Swiss companies, whose shares Equatorial Guinea attempted unsuccessfully to acquire under French law.

100. Furthermore, France submits that its assessment as to the status of a building as premises of the mission does not rely on "verification" through physical or coercive means of investigation but instead on verified information evidencing the transfer of the sending State's mission from old into new premises by providing documentation (for example, as **[332]** to the sale or end of tenancy of the previous premises, with supporting documents), usually in advance of the move. France asserts that Equatorial Guinea was aware of this process and had followed it in the past when it installed its Embassy in different premises, but it failed to approach the French authorities with such documentation in relation to its move to 42 avenue Foch in Paris. In this connection, France recalls that, at the time it refused to recognize the building's status as premises of Equatorial Guinea's diplomatic mission, it possessed sufficient evidence to indicate that the building was not used for diplomatic purposes. France further recalls that the building was targeted in ongoing criminal proceedings.

101. In response to Equatorial Guinea's accusations that France failed to co-ordinate with the sending State, the latter contends that Equatorial Guinea itself sought unilaterally to impose its position with respect to the status of the building without previously co-ordinating

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with France as the receiving State. France draws attention to the fact that the Ambassador of Equatorial Guinea in France addressed a letter to the French Ministry of Foreign Affairs on 28 September 2011, in which he made no mention of Equatorial Guinea's wish to install its diplomatic mission at 42 avenue Foch in Paris, and that he was received, at his request, at the Ministry on 30 September 2011. France asserts that "the situation of 42 avenue Foch was discussed on several occasions during this period", as well as during a meeting between the two Parties at the French Ministry of Foreign Affairs on 16 February 2012.

102. Additionally, France submits that its position with respect to the status of the building has never varied. It communicated its refusal to recognize the building at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission on 11 October 2011 and maintained its position in subsequent diplomatic exchanges on 28 March 2012 and on 6 August 2012. France considers that the interim order of 22 October 2013 of the *Tribunal de grande instance* of Paris, on which Equatorial Guinea relies, is of limited value because it was issued in the context of urgent proceedings, without knowledge of the French Note Verbale of 11 October 2011; that it ought to be weighed against the assessment made by other French authorities repeatedly and consistently; and thus that no conclusions can be drawn from the fact that the French Ministry of Foreign Affairs did not protest following the transmission of the tribunal's order.

103. In general, France accepts that, while the resolution of the dispute is pending, it has "put practical arrangements in place to preserve its bilateral relations and at the same time ensure that Equatorial Guinea's mission in Paris can fulfil its functions, regardless of its exact location". According to France, it was essential for the French authorities to engage with the visa office located at 42 avenue Foch in Paris in order to enable visits and exchanges but, in doing so, France did not depart from its position **[333]** of principle. Similarly, according to France, the protection of the building when necessary has been a "pragmatic measure" implemented out of goodwill pending the resolution of the dispute and, since the Court's Order of 7 December 2016, mandated under that Order. France stresses that it took such measures after the dispute between the Parties had already arisen, and while consistently maintaining its position that it refuses to recognize the building as housing the premises of the diplomatic mission of Equatorial Guinea. France further submits that the four letters adduced by Equatorial Guinea originating from certain departments of the

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French Ministry of Foreign Affairs were addressed to "42 avenue Foch" by mistake and should not be relied on.

104. Finally, France submits that, in order to demonstrate discriminatory treatment, Equatorial Guinea bears the onus "to establish that, in response to a claim similar to the one made on 4 October 2011, the French authorities had reacted differently". France argues that Equatorial Guinea has failed to adduce evidence to demonstrate that France, in response to a claim comparable to that of Equatorial Guinea in the present case, has reacted differently. France considers that the exceptional circumstances of the present case render impossible any comparison and therefore prevent any finding of discrimination on the part of France.

* *

105. The Court will examine the complaints made by Equatorial Guinea in turn, with a view to ascertaining whether, in the particular circumstances of the case, the objection by France to Equatorial Guinea's designation of the building as premises of its diplomatic mission was arbitrary and discriminatory in character.

106. The Court recalls that the Note Verbale of 11 October 2011, which stated that the building at 42 avenue Foch in Paris "f[ell] within the private domain", was sent in response to a Note Verbale sent by Equatorial Guinea on 4 October 2011. In that Note Verbale, Equatorial Guinea made no reference to the ownership of the building. Instead, Equatorial Guinea claimed that it "ha[d] for a number of years had at its disposal" the building in question, which it "use[d] for the performance of the functions of its diplomatic mission". Seen as a response to that notification, the French Note Verbale cannot be interpreted as referring to the ownership status of the building: the object of the Note Verbale was to contest Equatorial Guinea's assertion that the building was used for diplomatic purposes, and hence that it fell within the "public domain".

107. The Court considers that France's conclusion that the building fell within the private domain was not without justification. In the context of the ongoing criminal investigation with respect to Mr Teodoro Nguema Obiang Mangue, which had been initiated some years earlier, the French authorities had visited the surroundings of the building on **[334]** 28 September 2011 and 3 October 2011, seizing private property belonging to Mr Teodoro Nguema Obiang Mangue (see paragraph 27 above). Equatorial Guinea has not furnished evidence that could have led the French authorities conducting the on-site inspection to conclude that the premises were being used, or were

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being prepared for use, as premises of Equatorial Guinea's diplomatic mission. In fact, Equatorial Guinea, despite now claiming that it had already intended to use, or was indeed already using the building as premises of its diplomatic mission at the time the investigations took place, did not state this in its protests of 28 September 2011 against the investigations, and did not indicate at that time that the building was being used, or was being prepared for use, as premises of its diplomatic mission.

108. Nor has Equatorial Guinea established that the building was being used, or was being prepared for use, as premises of its diplomatic mission during the period between 4 October 2011 and 27 July 2012. Equatorial Guinea acknowledges that none of the moveable property seized by the French authorities in the searches between 14 and 23 February 2012 belonged to the diplomatic mission, which strongly suggests that the use of the building as premises of the mission had not then commenced. Moreover, Equatorial Guinea's Note Verbale of 27 July 2012 stated that it was "*henceforth* using [the building at 42 avenue Foch in Paris] for the performance of the functions of its diplomatic mission in France" (see paragraph 32 above; emphasis added), which indicates that the building was not used for diplomatic purposes before that date. Equatorial Guinea has stated that as of 15 February 2012 two officials from Equatorial Guinea's Ministry of Foreign Affairs were supervising preparations for the effective occupation of the building by the mission, and that the relocation of the Embassy's offices was a gradual process, culminating in the final establishment of all Embassy offices in the building from 27 July 2012. However, in its Note Verbale of 4 October 2011 (see paragraph 27 above), Equatorial Guinea did not claim that the building was being prepared for use as the premises of its mission, but that it was actually being used as such. Equatorial Guinea has not submitted to the Court any documentation or other evidence of the preparation of the building for diplomatic use, nor of the process and timing of the relocation of the Embassy's offices.

109. The Court considers that, at the time it received Equatorial Guinea's notification on 4 October 2011, France possessed sufficient information to provide a reasonable basis for its conclusion with respect to the status of the building at 42 avenue Foch in Paris. As well as being in a position to conclude that the building was not being used, or being prepared for use, for diplomatic purposes at the time of Equatorial Guinea's notification, France had an obvious additional ground justifying its objection to the designation of the building as premises of the diplomatic mission as of 4 October 2011. The building had been

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searched only a few days earlier, on 28 September 2011 and 3 October 2011, in the context of **[335]** criminal proceedings which were still ongoing. Therefore, it was reasonable for France to assume that further searches in the building, or other measures of constraint, might be necessary before the criminal proceedings were terminated. If France had acceded to Equatorial Guinea's assignment of the building to its diplomatic mission, thereby assuming obligations to ensure the inviolability and immunity of the building under the Convention, it might have hindered the proper functioning of its criminal justice system. In this connection, the Court notes that Equatorial Guinea was aware of the ongoing criminal proceedings, as evidenced in a letter sent by its Embassy to the French Ministry of Foreign Affairs on 28 September 2011. In that letter, Equatorial Guinea complained of the "searches and attachments targeting the person of its Minister for Agriculture [Mr Teodoro Nguema Obiang Mangue]". Equatorial Guinea further submits that "the French police and judicial authorities entered the building ... to conduct searches on 28 September and 3 October 2011" as part of the criminal investigation. Accordingly, 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. The Court observes that this ground justifying France's objection on 11 October 2011 has persisted long after that date. Whether or not it was being prepared for use, or was being used, for the purposes of Equatorial Guinea's diplomatic mission at some point after 27 July 2012, the building at 42 avenue Foch in Paris was still a target in ongoing criminal proceedings which are pending to this date. When it reiterated its objection in its Note Verbale of 6 August 2012, France explicitly referred to the attachment ordered in the course of the ongoing criminal proceedings.

110. In these circumstances, the Court concludes that there existed reasonable grounds for France's objection to Equatorial Guinea's designation of the building as premises of Equatorial Guinea's diplomatic mission. These grounds were known, or should have been known, to Equatorial Guinea. In light of these grounds, the Court does not consider that the objection by France was arbitrary in character.

111. Furthermore, the Court is of the view that France was not required to co-ordinate with Equatorial Guinea before communicating its decision not to recognize the status of the building as premises of the mission on 11 October 2011. As the Court has already observed (see paragraph 72 above), the Vienna Convention establishes no obligation to co-ordinate with a sending State before a receiving State may object to the designation of a building as premises of a diplomatic mission.

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112. The Court turns to the question whether France's position with respect to the status of the building has been inconsistent. As the Court has already observed (see paragraph 109 above), France possessed sufficient information as to the status of the building when it reached its conclusion. In all of the diplomatic correspondence invoked by Equatorial **[336]** Guinea, France consistently asserted that acquiring the status of premises of the mission was contingent on two conditions: absence of objection of the receiving State and actual assignment of the premises for diplomatic use.

113. The Court observes that France has maintained its explicit objection to the designation of the building as premises of Equatorial Guinea's diplomatic mission, long after the Note Verbale of 6 August 2012. In a Note Verbale of 27 April 2016 concerning the otherwise unrelated topic of voting in France for the presidential elections in Equatorial Guinea, France "avail[ed] itself of this opportunity to recall that the Ministry of Foreign Affairs and International Development does not consider the building located at 42 avenue Foch in Paris (16th arr.) as forming part of the premises of Equatorial Guinea's diplomatic mission in France". Additionally, the Embassy of Equatorial Guinea sent a Note Verbale to the French Ministry of Foreign Affairs on 15 February 2017 citing the provisional measure adopted by the Court in its Order of 7 December 2016 and complaining that it had not yet received a Note by France recognizing the status of the mission located at 42 avenue Foch in Paris. In response, France sent a Note Verbale on 2 March 2017, which stated that

> [i]n keeping with its consistent position, France does not consider the building located at 42 avenue Foch in Paris (16th arr.) to form part of the premises of the diplomatic mission of the Republic of Equatorial Guinea in France.
>
> In accordance with the Order made by the International Court of Justice on 7 December 2016, and pending the Court's final decision in the case, France will ensure that the premises located at 42 avenue Foch receive treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability.

114. The instances adduced by Equatorial Guinea do not demonstrate that France tacitly recognized the building as "premises of the mission" under the Convention. The Court does not consider that the acquisition of visas at 42 avenue Foch in Paris leads to the conclusion that the premises were recognized as constituting the premises of a diplomatic mission. Similarly, the protection provided on the occasion of events that may foreseeably cause harm to persons or property within a State's territory, such as demonstrations or presidential elections, does

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not necessarily suggest tacit recognition of the building as "premises of the mission", within the meaning of the Convention. Moreover, the protection afforded by France since 7 December 2016 can be explained as offered in compliance with the Court's Order of the same date (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1171, para. 99(I)). The four letters adduced by Equatorial Guinea, which were addressed to 42 avenue Foch in Paris, while not irrelevant, are insufficient to displace the **[337]** otherwise consistent position of France. The same is true for the order of 22 October 2013 of the *Tribunal de grande instance* relied on by Equatorial Guinea (see paragraph 98 above), which was issued in the context of urgent proceedings without knowledge of France's position of principle and was contradicted both by previous and subsequent practice emanating from organs of France.

115. Additionally, the evidence does not establish that France has failed to object to the designation of a building by another sending State as premises of its diplomatic mission in circumstances comparable to those in the present case. In the circumstances, Equatorial Guinea has not demonstrated that France, in objecting to the designation of the building at 42 avenue Foch in Paris as the premises of Equatorial Guinea's diplomatic mission, has acted in a discriminatory manner.

116. Finally, the Court notes that the conduct by France did not deprive Equatorial Guinea of its diplomatic premises in France: Equatorial Guinea already had diplomatic premises in Paris (at 29 boulevard de Courcelles), which France still recognizes officially as the premises of Equatorial Guinea's diplomatic mission. Therefore, France's objection to the Embassy's move to 42 avenue Foch in Paris did not prevent Equatorial Guinea from maintaining a diplomatic mission in France, nor from retaining the diplomatic premises it already had elsewhere in Paris. This constitutes a further factor which tells against a finding of arbitrariness or discrimination.

117. On the basis of all of the above considerations, the Court considers that France objected to Equatorial Guinea's designation of the building as premises of its diplomatic mission in a timely manner, and that this objection was neither arbitrary nor discriminatory in character.

*

118. For these reasons, the Court concludes that the building at 42 avenue Foch in Paris has never acquired the status of "premises of the mission", within the meaning of Article 1*(i)* of the Convention.

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IV. CONSIDERATION OF EQUATORIAL GUINEA'S FINAL SUBMISSIONS

119. The Court now turns to Equatorial Guinea's final submissions (see paragraph 24 above).

120. Equatorial Guinea requests the Court to declare that France has breached its obligations under Article 22 of the Convention "by entering the building located at 42 avenue Foch in Paris [and] by searching, attaching and confiscating the said building, its furnishings and other property therein".

[338] 121. As the Court concluded that the building at 42 avenue Foch in Paris has never acquired the status of "premises of the mission" under the Vienna Convention, the acts complained of by Equatorial Guinea cannot constitute a breach by France of its obligations under that Convention. Accordingly, France has not breached its obligations under the Vienna Convention.

122. Equatorial Guinea further asks the Court to declare that the responsibility of France is engaged on account of the breach of its obligations under the Vienna Convention and that France has an obligation to make reparation for the harm suffered by Equatorial Guinea. As there has been no breach by France of its obligations under the Vienna Convention, these submissions of Equatorial Guinea cannot be upheld.

123. Equatorial Guinea also requests the Court to declare that

> the French Republic must recognize the status of the building located at 42 avenue Foch in Paris as the premises of the diplomatic mission of the Republic of Equatorial Guinea, and, accordingly, ensure its protection as required by the Vienna Convention on Diplomatic Relations.

124. The Court recalls that an objection by a receiving State to the designation of property as forming part of the premises of a foreign diplomatic mission prevents that property from acquiring the status of the "premises of the mission", within the meaning of Article 1*(i)* of the Vienna Convention, provided that this objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character (see paragraph 74 above). The Court has found that the objection by France in the present case meets these conditions.

125. In the light of the above conclusions, the Court cannot uphold the submission of Equatorial Guinea that it declare that France must recognize the status of the said building as premises of the diplomatic mission of Equatorial Guinea.

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126. For these reasons,
THE COURT,

(1) By nine votes to seven,
Finds that the building 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;

IN FAVOUR: *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Crawford, Gevorgian, Salam, Iwasawa;
[339] AGAINST: *President* Yusuf; *Vice-President* Xue; *Judges* Gaja, Sebutinde, Bhandari, Robinson; *Judge ad hoc* Kateka;

(2) By twelve votes to four,
Declares that the French Republic has not breached its obligations under the Vienna Convention on Diplomatic Relations;

IN FAVOUR: *President* Yusuf; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Crawford, Gevorgian, Salam, Iwasawa;
AGAINST: *Vice-President* Xue; *Judges* Bhandari, Robinson; *Judge ad hoc* Kateka;

(3) By twelve votes to four,
Rejects all other submissions of the Republic of Equatorial Guinea.

IN FAVOUR: *President* Yusuf; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Crawford, Gevorgian, Salam, Iwasawa;
AGAINST: *Vice-President* Xue; *Judges* Bhandari, Robinson; *Judge ad hoc* Kateka.

President YUSUF appends a separate opinion to the Judgment of the Court; Vice-President XUE appends a dissenting opinion to the Judgment of the Court; Judge GAJA appends a declaration to the Judgment of the Court; Judge SEBUTINDE appends a separate opinion to the Judgment of the Court; Judges BHANDARI and ROBINSON append dissenting opinions to the Judgment of the Court; Judge ad hoc KATEKA appends a dissenting opinion to the Judgment of the Court.

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[341] SEPARATE OPINION OF PRESIDENT YUSUF

I. Introduction

1. I voted against subparagraph (1) of paragraph 126 of the Judgment because I do not agree with the Court's decision on the status of the building at 42 avenue Foch, in Paris; nor do I agree with the analysis that led the majority to endorse that decision. My vote in favour of other subparagraphs of the *dispositif* does not also mean that I agree with the reasoning of the Court in reaching those conclusions. This reasoning is based on the erroneous proposition that the prior approval, or at least the absence of objection by the receiving State, is required for a property to be considered as "premises of the mission" under the Vienna Convention on Diplomatic Relations (hereinafter the "VCDR" or the "Vienna Convention").

2. Such a requirement is not to be found in any of the sources of international law. Nor does the Judgment identify a rule of treaty law or of customary law, or a general principle of international law, which prescribes such a requirement with regard to diplomatic premises. It is a concept that appears to have been plucked out of thin air.

3. Moreover, it is stated in subparagraph (1) of the *dispositif* that the building at 42 avenue Foch in Paris "has never acquired the status of 'premises of the mission' . . . within the meaning of Article 1*(i)* of the Vienna Convention". This conclusion is striking for a number of reasons. First, there is absolutely nothing in Article 1*(i)* of the VCDR which indicates that a building does not acquire the status of "premises of the mission" unless there is prior approval or lack of objection by the receiving State, contrary to the reasoning of the Judgment. Secondly, the Judgment itself states that the provisions of the Vienna Convention are "of little assistance" in appraising the circumstances in which a property acquires the status of "premises of the mission" and that Article 1*(i)* is "unhelpful" in determining how a building may come to be used for the purposes of a diplomatic mission. If Article 1*(i)* is unhelpful in making such determination, how can it serve as the basis of the conclusion that the building never acquired the status of "premises of the mission"? Thirdly, the Judgment offers no meaningful interpretation of the terms "buildings . . . used for the purposes of the mission" in Article 1*(i)*, nor does it make the slightest attempt to apply such interpretation to the particular circumstances of this case.

4. By ignoring the criterion of "use"—a criterion that has been recognized in the case law of both domestic and international courts over the past century as being at the heart of the characterization of a

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building as "diplomatic premises" under customary law and the VCDR—and by replacing it with a hitherto unknown requirement of prior approval or a power to object, the Judgment is likely to put a spanner into the works of the old law of diplomatic relations, and create difficulties where none existed before in the relations between sending and receiving States. This is another reason that led me to vote against subparagraph (1) of paragraph 126 of the Judgment.

[342] *II. Article 1*(i) *of the VCDR: Determination of what constitutes the "premises of the mission"*

5. Article 1*(i)* of the VCDR reads as follows:

For the purposes of the present Convention, the following expressions shall have the following meanings hereunder assigned to them:

(i) 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.

6. There is no doubt that Article 1*(i)* can help us determine what constitutes the "premises of the mission" under the VCDR. As a definitional provision, it provides the meaning of a term or expression used in other provisions of the treaty, and thereby determines the extent and manner in which such other provisions are to be applied (see also paragraphs 19-22 below). For example, in the case of the VCDR, it would not be possible to apply Article 22, and therefore determine the rights and obligations of the sending and receiving States with regard to the premises of the mission, without Article 1*(i)*, which defines what constitutes such premises. Article 1*(i)* cannot, however, be interpreted, under any rules of interpretation, and has never been interpreted before by a court of law, to establish a power to object or a requirement of prior approval by the receiving State for a property to be considered as "premises of the mission" (see paragraph 76 of the Judgment). Those words cannot be ascribed to it, nor to any other provision of the VCDR.

7. The text of Article 1*(i)*, interpreted in its ordinary meaning, provides, among others, two important indications with regard to the qualification of a property as "premises of the mission". First, the property must be "used for the purposes of the mission". In other words, the essential functions of the mission of the sending State must be carried out in such a building. The word "used" is the key here. It means that the building has already been put to the purpose it was intended for, which in this case is the performance of the functions of

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the mission. As stated in the preamble of the VCDR "the purpose of [diplomatic] privileges and immunities is . . . to ensure the efficient performance of the functions of diplomatic missions as representing States". It is therefore the place where such functions are performed that can be characterized as "premises of the mission", including the residence of the head of mission.

8. Secondly, Article 1*(i)* indicates that the ownership of the building is not relevant for the premises to be considered as "premises of the mission". Such premises may be rented or leased or placed free of charge at **[343]** the disposal of the mission by the receiving State or by a private party. The buildings may also be owned by the mission; however, such ownership does not determine their character as "premises of the mission".

9. The pre-eminence of the criterion of "use[] for the purposes of the mission" in the determination of what constitutes "premises of the mission" has been established in the case law of domestic courts in many countries, and also by international tribunals in more recent years. It is surprising that the Judgment of the Court does not refer to any of those authoritative judgments which have applied the rules of both customary international law and of the VCDR in order to determine whether a certain building constituted the premises of the mission and was, as a result, entitled to diplomatic privileges and immunities.

10. Among the judgments based on customary international law, the following examples may be mentioned. In 1929, the *Tribunal civil de la Seine* (France), in *Suède* v. *Petrocochino*, rejected Sweden's claim of diplomatic immunity over a building purchased by its embassy in Paris, noting that the mere acquisition of property does not, *ipso facto*, confer the privileges and immunities applicable to embassies; rather, such privileges are created "only [by] the assignment—once it has taken place—of the said property to the offices of the embassy of that State".[1]

11. Similarly, in 1947, in *Echref* v. *Fanner* (1947), an Egyptian court rejected the claim of diplomatic immunity over the real estate property purchased by the Yugoslavian Embassy in Cairo, on the basis that there had been no effective use of the said building by the legation. It stated:

[1] *Tribunal civil de la Seine (Chambre du Conseil)*, *Suède* v. *Petrocochino*, 30 October 1929, reported in *Journal du droit international (JDI)*, 1932, Vol. 59 (4), p. 945 *[translation by the Registry]*.

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Whereas, in order for the said prerogatives to receive in this instance the full diplomatic or judicial protection that they entail, there must *at least have been an impediment to the legitimate exercise thereof*;

But whereas the facts of the present case do not justify such claims, since there has been no interference with the Yugoslavian legation's peaceful possession of the premises *effectively occupied by it*.[2] (Emphasis added.)

The court then concluded that "it [was] legally insufficient for the State of Yugoslavia to assign such premises to its legation solely by its own will".[3]

[344] 12. Also, in 1959, the Supreme Restitution Court of Berlin (hereinafter the "SRCB"), in *Cassirer and Geheeb* v. *Japan*,[4] referred to the International Law Commission's (hereinafter the "ILC") revised Draft Articles on Diplomatic Intercourse and Immunities and its acceptance of the theory of functional necessity[5] and explained that:

[t]he *rationale of functional necessity makes it clear that the immunity of diplomatic premises exists because of their possession, coupled with their actual use*, for diplomatic purposes. Absent the elements of possession and of actual use, a mere intention to use such premises for diplomatic purposes in the future, prior to their actual use, is of no legal significance upon the question of resurrection of the privilege of immunity … Immunity is a shield, not a sword.[6] (Emphasis added, references omitted.)

The SRCB came also to the same conclusion in *Tietz and Others* v. *Bulgaria*,[7] *Weinmann* v. *Latvia*[8] and *Bennett and Ball* v. *Hungary*.[9]

13. After the conclusion of the VCDR in 1961, the case law of domestic tribunals interpreted the provisions of the Convention, which mostly reflected customary law, while sometimes referring to the work of the ILC. Thus, in 1962, in the *Jurisdiction over Yugoslav Military Mission (Germany) Case*, the Federal Constitutional Court of Germany recalled the previous jurisprudence relating to the criterion of "use" and noted:

[2] *Tribunal civil mixte du Caire (2e Chambre)*, *S.E. Echref Badnjević ès qualité de Ministre de Yougoslavie en Egypte* v. *W.R. Fanner*, 29 April 1947, reported by Maxime Pupikofer, "Bulletin de jurisprudence égyptienne", *JDI*, 1946-1949, Vols. 73-74, p. 117 *[translation by the Registry]*.

[3] *Ibid.*, p. 118.

[4] Supreme Restitution Court of Berlin (SRCB), *Cassirer and Geheeb* v. *Japan*, 10 July 1959, reported in *American Journal of International Law (AJIL)*, 1960, Vol. 54 (1), pp. 178-88.

[5] *Ibid.*, pp. 185-6.

[6] *Ibid.*, p. 187.

[7] SRCB, *Tietz and Others* v. *People's Republic of Bulgaria*, 10 July 1959, reported in *International Law Reports (ILR)*, 1963, Vol. 28, pp. 369, 381-2.

[8] SRCB, *Weinmann* v. *Republic of Latvia*, 10 July 1959, reported in *ibid.*, pp. 385, 391.

[9] SRCB, *Bennett and Ball* v. *People's Republic* of *Hungary*, 10 July 1959, reported in *ibid.*, pp. 392, 396.

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The courts, in determining the immunity of the foreign State from the jurisdiction of the local courts, regarded as relevant the circumstance *whether the premises were in fact being used for diplomatic purposes*. This permits the inference that according to the view of these courts foreign States are not granted unlimited immunity concerning their embassy premises but only to the extent required by the object and purpose of diplomatic privileges and immunities . . . The inviolability of the premises of the mission, as set out in the commentary of the Commission to the relevant provision of the draft, is not the necessary consequence of the inviolability of the chief of the mission but is a right attributable to the sending State, *by reason of the fact that the premises are used as the seat of the diplomatic mission* (*Year-book*, **[345]** 1958, Vol. II, p. 95). It may be assumed, therefore, that Article 22 of the Vienna Convention is also based on the view that the immunity of the mission premises is justified but *limited by the object of granting protection to the exercise of diplomatic functions*.[10] (Emphases added.)

14. In 1989, in the case of *R.* v. *Secretary of State for Foreign and Commonwealth Affairs (ex parte Samuel)*, the English Court of Appeal upheld a judgment of the High Court which accepted the opinion of the Secretary of State that the former Embassy of Cambodia in London did not qualify as "diplomatic premises" for the purposes of Article 22 of the VCDR, noting that

[t]he embassy premises are no longer "used for the purposes of the mission" within the meaning of Article 1*(i)* of the Vienna Convention and thus do not enjoy the special status, particularly inviolability, provided for by Article 22. That is correct, Article 22 is dealing with "the premises of a mission". That term is defined by Article 1 as buildings and land ancillary thereto "used for the purposes of the mission". The embassy premises were not "used" for the purposes of a mission at the date of the Order or at any subsequent time. There has not been a mission since 1975 or thereabouts.[11]

15. Also, in 1998, the Ontario Court of Justice, in *Croatia* v. *Ru-Ko Inc.*, rejected the argument of Croatia that a certain piece of property was immune from execution as "premises of the mission" within the meaning of Article 1*(i)* of the VCDR. It explained its reasoning as follows:

[17] In analyzing Article 1*(i)* it would appear that the operative words of that subsection are "used for the purposes of the mission including the residence of the head of mission".

[10] Federal Constitutional Court of the Republic of Germany, *Jurisdiction over Yugoslav Military Mission (Germany) Case*, 30 October 1962, reported in *ILR*, 1969, Vol. 38, pp. 162, 165-7.

[11] English Court of Appeal, *R.* v. *Secretary of State for Foreign and Commonwealth Affairs (ex parte Samuel)*, 28 July 1989, reported in *ILR*, 1990, Vol. 83, pp. 231, 239.

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[18] It follows therefore that if the lands are "premises of the mission" they must be used for the purposes of the mission. The verb used being in the past tense and/or present.

[19] There may be many buildings owned by foreign states in the City of Ottawa and in Canada, but it is clear that *the Vienna Convention would allow immunity to be granted to only such lands and buildings that are used for the purposes of the diplomatic mission of that foreign sovereign state*.[12] (Emphasis added.)

[346] 16. Turning now to the case law of international courts, the 2005 judgment of the European Court of Human Rights (hereinafter the "ECtHR") in the case of *Manoilescu and Dobrescu* v. *Romania and Russia* is instructive. In this case, the ECtHR dealt with the claims of two Romanian nationals under Article 6 of the European Convention on Human Rights that Romania had failed to enforce a judgment awarding to them a real estate property that had been unlawfully taken by them, and was currently used by the Russian Federation as its embassy. The ECtHR rejected the claims, and observed that the building was "used" for the purposes of the mission:

77. As regards the applicants' argument that the property in issue was transferred unlawfully to the Russian Federation, and hence to its embassy in Romania, the Court observes that no distinction is made in the relevant provisions of international law on immunity as regards the means, whether lawful or otherwise, by which the property in the forum State intended for use as "premises of the mission" passed into the ownership of the foreign State. *It is sufficient for the property to be "used for the purposes of the mission" of the foreign State for the above principles to apply, a condition that appears to have been satisfied in the instant case, seeing that the property in question is used by officials of the Russian Federation Embassy in Romania*.[13] (Emphasis added.)

17. The above case law clearly indicates that whenever the issue of what constitutes "premises of the mission" and whether a building should be considered to have the status of diplomatic premises has come before a domestic court or an international tribunal, it was always resolved on the basis of the criteria established under Article 1*(i)* of the VCDR, which also reflect customary international law. Similarly, in the present case, the Court should have resorted to the text of Article 1*(i)* of the VCDR, in order to determine whether the building at 42 avenue

[12] Ontario Court of Justice (General Division), *Croatia* v. *Ru-Ko Inc.*, 15 January 1998, reported in *Ontario Trial Cases* (1998), Vol. 52, p. 191, paras. 17-19.

[13] European Court of Human Rights (Third Section), *Manoilescu and Dobrescu* v. *Romania and Russia*, 3 March 2005, No 60861/00, para. 77.

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Foch in Paris could be considered to have the status of "premises of the mission".

18. A first step in that direction seems to have been made in paragraph 41 of the Judgment, but it has not been followed through. It is stated in that paragraph that "[t]he Court must first determine in which circumstances a property acquires the status of 'premises of the mission' within the meaning of Article 1*(i)* of the Vienna Convention". Unfortunately, this is not done anywhere in the Judgment. Instead, we find a statement in paragraph 62, according to which

> [t]he Court considers that the provisions of the Vienna Convention, in their ordinary meaning, are of little assistance in determining the circumstances in which a property acquires the status of "premises of **[347]** the mission". While Article 1*(i)* of the Vienna Convention provides a definition of this expression, it does not indicate how a building may be designated as premises of the mission. Article 1*(i)* describes the "premises of the mission" as buildings "used for the purposes of the mission". This provision, taken alone, is unhelpful in determining how a building may come to be used for the purposes of a diplomatic mission, whether there are any prerequisites to such use and how such use, if any, is to be ascertained.

This conclusion is neither supported by an examination of the provisions of the VCDR, nor by an analysis of the text of Article 1*(i)*. It is therefore difficult to understand how it was arrived at or the reasoning on which it is actually based, even less how, in light of the above statement, it is possible to declare afterwards in subparagraph (1) of the *dispositif* that the building at 42 avenue Foch in Paris "has never acquired the status of 'premises of the mission' . . . *within the meaning of Article 1*(i) *of the Vienna Convention*". (Emphasis added.)

19. Moreover, the role and significance of a definitional provision, such as Article 1*(i)*, appears to have been downplayed in the Judgment. Definitional provisions are central to the applicability and operation of the other provisions of the treaty. Their function is to assist in the interpretation and application of such other provisions. The Court has often applied them to interpret and apply "operative provisions" of treaties. It should have done the same here with regard to Article 22 of the VCDR.

20. For instance, in *Ukraine* v. *Russia*, the Court explained that the International Convention on the Suppression of the Financing of Terrorism (ICSFT) "imposes obligations on States parties with respect to offences committed by a person when 'that person [finances]' acts of terrorism as described in Article 2, paragraph 1*(a)* and *(b)*". Thus, the Court made a direct connection between the operative obligations set forth in the ICSFT and the definition of "financing acts of terrorism"

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under Article 2, paragraph 1(1)*(a)* and *(b)* of the ICSFT.[14] By contrast, in so far as the financing of terrorism by States fell outside the scope of the definitional provisions, it was not "addressed" by the ICSFT.[15] In the case concerning *Certain Iranian Assets*, the Court explained that Iran's claims with respect to Bank Markazi would fall under the 1955 Treaty of Amity only to the extent that Bank Markazi could fall within the definition of a "company" under Article III(1) of the Treaty.[16] Consequently, **[348]** the extent of the United States' obligations under Articles III, IV and V of the 1955 Treaty of Amity was intrinsically linked to the scope of "companies" under Article III.

21. Similarly, in several judgments relating to the law of the sea, the Court extensively analysed and interpreted definitional provisions, such as those defining islands or the continental shelf, in order to determine the scope and applicability of the other provisions of treaties, especially the United Nations Convention on the Law of the Sea (UNCLOS). In the *North Sea Continental Shelf* cases, for example, the Court took note of the various definitions suggested by the ILC on the concept of the continental shelf as a relevant factor for the determination of the applicable delimitation methodology.[17] The Court underlined the relevance of the definition of the continental shelf for the purposes of maritime delimitation in *Tunisia/Libya* and *Libya/Malta*.[18] In the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, the Court recalled its previous conclusion in *Qatar* v. *Bahrain* that "the legal definition of an island embodied in Article 121, paragraph 1 [of UNCLOS forms] part of customary international law", as a relevant

[14] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2019 (II)*, p. 585, para. 59.

[15] *Ibid.*

[16] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, ICJ Reports 2019 (I)*, pp. 36-7, paras. 84-7.

[17] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969*, p. 51, para. 95, referring to *Yearbook of the International Law Commission (YILC)*, 1956, Vol. I, p. 131, para. 46 (detailing the "Terminology and Definitions approved by the International Committee on the Nomenclature of Ocean Bottom Features" adopted by the International Committee of Scientific Experts at Monaco in 1952).

[18] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982*, p. 46, para. 42 ("The fact that the legal concept, while it derived from the natural phenomenon, pursued its own development, is implicit in the whole discussion by the Court in that case of the legal rules and principles applicable to it."); *ibid.*, pp. 48-9, para. 49 (concluding that "[t]he definition in Article 76, paragraph 1, therefore affords no criterion for delimitation in the present case"); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, p. 30, para. 27 ("[t]hat the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident"); *ibid.*, p. 32, para. 31 ("the definition given in paragraph 1 [of Article 76] cannot be ignored").

principle for delimitation purposes.[19] In the case concerning *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles*, the Court observed that Article 76 of UNCLOS, which contains the definition of the continental shelf, also "makes provision" for the establishment of the Commission on the Limits of the Continental Shelf (CLCS) for the delineation of the continental shelf beyond 200 nautical miles.[20] It follows that **[349]** the definitional provisions in UNCLOS are of direct import to the interpretation and application of other provisions of that Convention, such as those concerning maritime delimitation.

22. Definitional provisions, such as the one in Article 1*(i)* of the VCDR, frequently lie at the very heart of a treaty's regime,[21] and apply conjunctively with other provisions. By defining the scope of terms, they determine the precise extent of the rights, obligations and relations regulated by the treaty. Thus, when Article 1*(i)* of the VCDR defines the "diplomatic premises", the obligations set forth in Article 22 of the VCDR are circumscribed and clarified by reference to those buildings that may qualify as "premises of the mission". Consequently, the Court should have ascertained, as a threshold matter, whether a building qualifies as "premises of the mission" within the meaning of Article 1*(i)* of the Convention before being able to assess whether a State, in this case France, has breached its obligations under Article 22 of the VCDR. The Judgment should have followed such a logical approach in order to address the subject-matter of the dispute between the Parties in the present case. Instead, it pivots sometimes to a concept of prior approval and sometimes to that of the power to object of the receiving State. Unfortunately, the legal basis of neither of these requirements is indicated in the Judgment, which appears to borrow them from other provisions of the VCDR that have nothing to do with the "premises of the mission", or by reference to the practice of a few States (not including France) that require prior approval in their domestic legal systems.

[19] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, ICJ Reports 2012 (II)*, p. 674, para. 139; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, ICJ Reports 2001*, p. 99, para. 195 ("On these bases, the Court concludes that the maritime feature of Qit'at Jaradah satisfies the above-mentioned criteria and that it is an island which should as such be taken into consideration for the drawing of the equidistance line.").

[20] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, ICJ Reports 2016 (I)*, p. 137, para. 111.

[21] Cf. Florian Jeßberger, "The Definition and the Elements of the Crime of Genocide" in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary*, Oxford University Press, 2009, p. 88, noting that the definition of the crime of "genocide" forms the "heart" of the Convention's régime.

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III. Is the prior approval or the power to object of the receiving state required under the VCDR for a property to qualify as "premises of the mission"?

23. At paragraph 76, the Judgment states that

> [h]aving determined that the objection of the receiving State prevents a building from acquiring the status of the "premises of the mission" within the meaning of Article 1*(i)* of the Convention, the Court will now consider whether France objected to the designation of the building at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission.

24. The Judgment reaches this conclusion without adhering to the customary rules of treaty interpretation, which are identified in its paragraph 61. Neither the ordinary meaning to be given to Article 1*(i)*, which **[350]** is not properly analysed in the Judgment, nor the interpretation of its terms in their context, or in the light of the object and purpose of the Convention can lead to such a conclusion. It is also not clear how this conclusion was arrived at on the basis of the VCDR, when in paragraph 62 of the Judgment it is stated that "the provisions of the Vienna Convention, in their ordinary meaning, are of little assistance in determining the circumstances in which a property acquires the status of 'premises of the mission'". Moreover, the Judgment does not indicate whether the power to object is derived from a source outside the VCDR, such as customary international law, or the practice of the few States referred to in paragraph 69.

25. What the Judgment attempts to do, despite the above statement on the provisions of the VCDR, is to extrapolate a power for the receiving State to object to the designation of a property as "premises of the mission" from the object and purpose of the Vienna Convention, considered independently of Article 1*(i)*, and from the requirement of "mutual consent" under Article 2 of the Convention. Neither the preamble nor Article 2 of the VCDR makes any reference to premises of the mission, nor can their terms serve as the basis of a power to object. The VCDR clearly specifies those instances in which any type of consent is required. They relate, in particular, to the establishment of diplomatic relations, for which mutual consent is required (Art. 2), the prior consent for offices in localities other than those where the mission is established (Art. 12), and the *agrément* necessary for the head of mission (Art. 4). Nowhere in the VCDR is to be found a requirement of prior approval for a property to qualify as "premises of the mission" (as suggested in paragraphs 71 and 72 of the Judgment) or a power of receiving States to object to the designation of diplomatic premises by

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sending States (as indicated in paragraphs 68, 72, 73 and 76). Had the drafters of the VCDR intended to subject the acquisition of the status of "premises of the mission" to the prior or subsequent consent of the receiving State, they would have done that explicitly.

26. A rule which supposedly determines the circumstances in which a property can or cannot qualify as "premises of the mission" cannot be based solely on the object and purpose of the VCDR, or on the Convention's aim to "contribute to the development of friendly relations among nations". It has to be founded on a provision of the Convention. The only provision in the VCDR which provides a definition of what constitutes "premises of the mission" is Article 1*(i)* and, when it is interpreted "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 31, paragraph 1, of the Vienna Convention on the Law of Treaties), it does not yield any criterion or condition other than that of being "used for the purposes of the mission". Moreover, there is nothing unfriendly about a sending State choosing the building where its embassy **[351]** is to be housed in the receiving State as long as such building, in order to be eligible for diplomatic immunities and privileges, is effectively used to perform the functions of the mission.

27. In trying to find a basis in the preamble of the VCDR for the power to object or the requirement of prior approval, the Judgment portrays the old law of diplomatic relations among States, now codified in the VCDR, as being disadvantageous to the receiving State and imposing restrictions on its sovereignty (see paragraphs 66 and 67 of the Judgment) so that the "power to object" or the "prior approval" of the receiving State can be considered as a counterweight. No evidence, however, is provided of the disadvantages or restrictions on the sovereignty of the receiving State imposed by the VCDR. Nevertheless, two references are made in paragraphs 66, 67 and 68 to the significant "privileges and immunities" accorded to the representatives of sending States and the indication in the preamble of the VCDR that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". If what is being sought through such references is a remedy to the possible abuse or misuse of privileges and immunities (and that is indeed the impression given in paragraphs 66 and 67 of the Judgment), then the VCDR does not at all require such a new remedy in the form of prior approval or the power to object by the receiving State. As the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of*

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America v. *Iran)*, which is quoted at the end of paragraph 67 of the Judgment,

> [t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[22]

28. What is actually overlooked in the Judgment is that the self-contained and reciprocal régime, reflected in the VCDR, has withstood the test of time, and has served through the centuries the interests of both sending and receiving States without the power to object or the requirement of prior approval by the receiving State, that are being proposed here. It is a régime that is balanced, realistic and mutually beneficial. A régime that does not need a new requirement or a set of requirements for a property to qualify as the "premises of the mission" because it already defines it and because this definition, as interpreted by the courts of many countries, has over the years been applied throughout the world to the satisfaction of both sending and receiving States. A newly created requirement, **[352]** which is not based on any of the sources of international law, can only generate unnecessary misunderstandings and tensions where none had never existed before.

29. Furthermore, the VCDR provides for the respect of the laws and regulations of the receiving State by all persons enjoying diplomatic privileges and immunities (Art. 41, para. 1) and obligates the receiving State either to facilitate, in accordance with its laws, the acquisition by the sending State of premises for the latter's mission, or to otherwise assist the sending State's mission in obtaining accommodation in some other way (Art. 21, para. 1). Thus, the Convention appears to give a measure of discretion to the receiving State to regulate the matter under its national legislation, and some States have effectively done so. However, the Judgment does not analyse Articles 41 and 21 of the VCDR as relevant context to the interpretation of Article 1*(i)*, and selectively examines the legislation or diplomatic practices of a few States, without addressing the qualitative differences and nuances between them (see paragraph 69 of the Judgment). Apart from the fact that no customary rule of international law can be deduced from the existence of such legislation or diplomatic practices, the scope of these

[22] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, ICJ Reports 1980*, p. 40, para. 86.

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regulations varies considerably from one country to the other, and is mostly concerned with the acquisition of property, urban planning, local building laws or the security of the mission itself. Much less does the Judgment attempt to explain the significance of the practice of all other Contracting Parties to the Vienna Convention, which have no regulation in place to require their prior approval for the designation of premises by sending States, apart from the general application of their domestic legislation to such premises.

30. The existence of domestic legislation or diplomatic practices in a few States does not, therefore, warrant the conclusion that such a "power to object" (or requirement of prior approval) is based in the VCDR or in international law in general. As the ILC observed in 1964,

> the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement.[23]

31. Moreover, while the VCDR provides for the respect of all the laws and regulations of the receiving State, none of its provisions makes a *renvoi* to such laws and regulations with regard to the characterization of a property as "premises of the mission" in such a manner as to make compliance with internal law or the application of domestic procedures a condition for its application. Therefore, the fact that the domestic laws or diplomatic **[353]** practice of a few countries provide for prior approval in the designation of a building as the premises of the mission does not justify the transposition of such requirement to international law or its representation as a condition that has hitherto been well hidden, like a rare gem, in the nooks and crannies of the VCDR. After all, the Judgment itself acknowledges that the practice of those few States cannot establish the "agreement of the parties" within the meaning of Article 31, paragraph 3*(b)* of the Vienna Convention on the Law of Treaties (see paragraph 69 of the Judgment).

32. It should also be underlined that France is not one of the countries that have adopted such legislation or diplomatic practice, although counsel for France argued that the Ministry for Europe and Foreign Affairs had an old and constant practice of "no objection" or "implicit consent" with regard to the granting of diplomatic status to buildings which a sending State wishes to assign to its diplomatic

[23] *YILC*, 1964, Vol. II, p. 204, para. 13.

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mission (cf. CR 2020/2, p. 33, para. 23 (Bodeau-Livinec); Counter-Memorial of the French Republic, para. 3.44). No clear evidence of the existence of a general, well-known and transparent practice of such nature was, however, produced by France during the proceedings. All the documents submitted by France in support of this affirmation (namely, the four Notes Verbales of 6 May 2016, 24 June 2016, 12 January 2017 and 20 January 2017, the Note Verbale addressed to Equatorial Guinea on 28 March 2012, and the Note Verbale addressed to the investigating judges on 11 October 2011) post-date or are contemporaneous with the date when the dispute concerning the building at 42 avenue Foch in Paris, arose. They do not show the existence of an old and constant practice, nor of a general practice known to all diplomatic missions accredited to France.

33. Besides lacking a basis in the law, the "power to object" (or requirement of "prior approval") put forward in the Judgment is further complicated by *(a)* its all-encompassing and unqualified character, and *(b)* the equally unfounded custom-made criteria proposed for its exercise by the receiving State.

34. With regard to *(a)*, the Judgment does not distinguish between the acquisition of property, its lease or its temporary rental for the purposes of the receiving State's "power to object" or this newly minted requirement of "prior approval". These transactions reflect different needs and interests and are not treated equally in the domestic legislation or practices mentioned above. It does not also make a distinction between premises used for the chancery and those used for the residence of the head of mission. The application of such requirement by the receiving State might delay or impede the heads of mission from taking up their duties after having obtained the necessary *agrément* from the receiving State, since they would have to choose their residence (in the case of a new mission or an existing mission without an official residence) and have it approved by the receiving State. Similarly, an embassy would be unable to sign a lease or a rental agreement, even for a furnished apartment for the temporary residence of its head of mission, without first securing the approval of **[354]** the receiving State. Otherwise, the sending State would run the risk that such lease or rental agreement be frustrated by the subsequent objection of the receiving State. The need to obtain such authorizations and their accompanying complications for foreign missions do not exist today in international law nor in the domestic legislation of more than 180 Member States of the United Nations.

35. It is however with regard to *(b)* above that the creative development in the Judgment of these newly minted requirements runs into its

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most profound contradiction. In order to establish certain criteria for the application of its creative interpretation, the Judgment first uses the expression "power to object" (cf. paras. 72, 73, 74 and 76) as a synonym of the "prior approval of the receiving State before a building can acquire the status of 'premises of the mission'" (cf. paras. 69 and 72), and then characterizes this power as a discretionary one, which has to be exercised in a timely, reasonable, non-arbitrary and non-discriminatory manner (para. 73). Almost half of the Judgment is then devoted to an examination of whether France's discretionary "power to object" was exercised in accordance with those criteria. The question arises here whether this newly minted "power to object" developed in the Judgment for a property to qualify as "premises of the mission" is permissive or binding? Is it a right of the receiving State (as suggested in paragraph 73 of the Judgment) or a negative condition to the exercise of the sending State's right to designate its diplomatic premises (as suggested in paragraphs 67 and 68 of the Judgment)? Is it a requirement which has to be applied in all circumstances, or a discretionary power which may be exercised or not by the concerned authorities of the receiving State? Does the absence of a timely objection by the receiving State entail its implicit consent or tacit approval (or perhaps its acquiescence) to the designation of diplomatic premises by the sending State, or will the express approval of the receiving State be required at all times?

36. Similar questions arise with regard to the criteria developed in paragraphs 73 to 74 of the Judgment. Where in the VCDR or other sources of international law is such discretionary power of the authorities of the receiving State to be found? What is the origin or legal basis of the criteria proposed in the Judgment (except for the one on non-discrimination mentioned in Article 47 of the VCDR) to assess the exercise of the discretionary power of the authorities of the receiving State? At least an attempt ought to have been made to clarify or address these questions in the Judgment.

IV. The actions taken by French authorities: Is there a breach of the provisions of the VCDR?

37. The factual context and the unfolding of diplomatic exchanges between the two States with regard to the building at 42 avenue Foch in **[355]** Paris, in 2011 and 2012, are important for understanding the claims of Equatorial Guinea and the actions taken by French authorities with regard to the building. It is therefore worthwhile to go through those exchanges as well as the measures taken by France in a

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detailed manner, without, however, trying to cover each and every specific event that may be relevant to the case.

38. It is on 4 October 2011 that the Government of Equatorial Guinea claims for the first time, in a Note Verbale to the French Foreign Ministry, that the Embassy of Equatorial Guinea in Paris had at its disposal, for a number of years, a building located at 42 avenue Foch, Paris, which "it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to your [Protocol] department". This was done at a time when a judicial investigation, focused on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including Mr Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who at the time was his country's Minister of State for Agriculture and Forestry, was under way in Paris. On 15 September 2011, Mr Teodoro Nguema Obiang Mangue, as sole shareholder, transferred to the State of Equatorial Guinea all his shareholder rights in five Swiss companies that owned the building at 42 avenue Foch in Paris. According to Equatorial Guinea, this is how it acquired ownership of the building at 42 avenue Foch, Paris.

39. Following this transfer of ownership, Equatorial Guinea first claimed that the building formed part of the premises of its diplomatic mission (4 October 2011); it then asserted that the official residence of Ms Bindang Obiang, the Permanent Delegate of Equatorial Guinea to UNESCO, was on the premises of the diplomatic mission located at 42 avenue Foch, Paris, which "is at the disposal of the Republic of Equatorial Guinea" (17 October 2011).

40. On 14 February 2012, the President of Equatorial Guinea wrote to his French counterpart to inform him, *inter alia*, that his son

purchased a residence in Paris, however, due to the pressures on him as a result of the supposed unlawful purchase of property, he decided to resell the said building to the Government of the Republic of Equatorial Guinea.

At this time, the building in question is a property that was lawfully acquired by the Government of Equatorial Guinea and is currently used by the Representative to UNESCO.

41. On the same date, the Permanent Delegation of Equatorial Guinea to UNESCO sent a Note Verbale to the Protocol Department of UNESCO stating that "the official residence of the Permanent Delegate of Equatorial Guinea to UNESCO is located at 42 avenue Foch, 75016 Paris, property of the Republic of Equatorial Guinea".

42. On 9 March 2012, the Minister of Justice of Equatorial Guinea wrote to the French Minister of Justice, stating that "[s]ince 15 September 2011 the **[356]** Republic of Equatorial Guinea has been the owner of a property located at 40/42 avenue Foch in Paris, assigned to its diplomatic mission and declared as such . . . by Note Verbale No 365/11 of 4 October 2011". This was followed by a Note Verbale on 12 March 2012 in which the Embassy of Equatorial Guinea asserted that the premises of 42 avenue Foch in Paris were used for the purposes of its diplomatic mission in France.

43. On 27 July 2012, the Embassy of Equatorial Guinea stated in a Note Verbale to the Protocol Department of the French Ministry of Foreign and European Affairs that it had "the honour to inform [the French Ministry] 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".

44. This was the clearest statement made by Equatorial Guinea throughout this period with regard to the use of the property at 42 avenue Foch, as premises of its Embassy in Paris. Contrary to previous notifications and communications to the French Ministry of Foreign and European Affairs, some of which contradicted each other, and most of which also placed the emphasis on the ownership of the building by Equatorial Guinea, it is interesting to note that in the Note Verbale of 27 July 2012, Equatorial Guinea not only asserted that as from that date the offices of the Embassy were located at 42 avenue Foch, but also clearly indicated that the building would henceforth be used for the performance of the functions of the diplomatic mission in France.

45. Thus, the Note Verbale of 27 July 2012, together with that of 2 August 2012, which confirmed that the chancery of the Embassy of Equatorial Guinea was indeed located at 42 avenue Foch, Paris, "a building that it uses as the official offices of its diplomatic mission in France", appear to have finally clarified the issue of whether the property at 42 avenue Foch was actually being used as premises of the mission of Equatorial Guinea in France.

46. This issue, which was disputed at the time by the two States, and is indeed still at the heart of the dispute brought before the Court, led the French Foreign Ministry to take publicly the position (in a Note Verbale to the Embassy of Equatorial Guinea dated 11 October 2011) that "the . . . building [at 42 avenue Foch in Paris] does not form part of the premises of Equatorial Guinea's diplomatic mission. It falls within the private domain and is, as such, subject to ordinary law". Similarly, in

a reply to a request for information from the French Ministry of Justice, the French Foreign Ministry stated on 11 October 2011 that "[t]he above-mentioned building is not included among those covered by the Vienna Convention on Diplomatic Relations".

[357] 47. Following these statements by the French Foreign Ministry, French investigators entered the building at 42 avenue Foch on several occasions between 28 September 2011 and 23 February 2012 as part of a judicial investigation into the assets owned by Mr Obiang Mangue in France. They also seized luxury vehicles belonging to him which were parked in the premises. Subsequently, on 19 July 2012, the building at 42 avenue Foch was attached *(saisie pénale immobilière)* on the order of the French investigating judge. Finally, on 27 October 2017, the *Tribunal correctionnel* of the city of Paris delivered its judgment in the case involving Mr Obiang Mangue and ordered the confiscation of the assets seized, including the building located at 42 avenue Foch in Paris. This sentence was confirmed by the *Cour d'appel* on 10 February 2020.

48. The facts narrated above indicate, in my view, that the building at 42 avenue Foch in Paris may be considered to have become part of the premises of the Embassy of Equatorial Guinea in France as of 27 July 2012. The Note Verbale of the Embassy of Equatorial Guinea of 27 July 2012 is quite clear in this regard. Prior to that date, there might have been an intention on the part of Equatorial Guinea to use the building as diplomatic premises, but there was no clear indication that the building was actually being used for the performance of the functions of the Embassy. Rather, the Notes Verbales sent to the French Foreign Ministry prior to that date were characterized by equivocation and conflicting assertions. Moreover, the searches carried out by the French investigators in September 2011 and February 2012 found various private objects of considerable value, which allegedly belonged to Mr Obiang Mangue, while noting that there were no offices, as such, at that time in the building.

49. It indeed appears to me that, it is only as of 27 July 2012 onwards, that the building may be considered to meet the requirements laid down in Article 1*(i)* of the VCDR. In other words, this is the critical date with regard to the status of the building as "premises of the mission". The Note Verbale of that date may also be considered as an appropriate notification that, thenceforth, the building would be used for the performance of the functions of the mission. There is also some evidence that French authorities, despite formal denials during the pleadings before the Court, have to a certain extent acknowledged this reality.

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50. In this connection, Equatorial Guinea has produced a number of documents which clearly show not only the visits of French officials to the premises of the Embassy at 42 avenue Foch, but also several Notes Verbales addressed to the Embassy of Equatorial Guinea at that address by the French Ministry of Foreign and European Affairs, most of which were sent in 2019. While France has argued before the Court that these Notes Verbales were sent by mistake to 42 avenue Foch, it is difficult to overlook the visits by French officials to the Embassy at 42 avenue Foch, **[358]** and the protection afforded to the building by French authorities in 2015 (in response to a protest), and in 2016 on the occasion of the presidential elections in Equatorial Guinea. All these facts appear to support that the building at 42 avenue Foch was used at the time, with effect at least from 27 July 2012, by Equatorial Guinea for the performance of certain diplomatic functions in France.

51. Moreover, it should be noted that the building was never entered or searched again by the French authorities with effect from the end of July 2012. This cannot be solely attributed to the Order on provisional measures issued by the Court on 7 December 2016, which indicated that

> France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability.[24]

52. It appears from the case file that the building was effectively treated by the French authorities as "premises of the mission", and apparently never entered or inconvenienced in any way, for more than four years—from July 2012 to December 2016—before the Order of the Court was issued, despite the continued legal proceedings before French courts against Mr Obiang Mangue and on the ownership of the building.

53. In light of the above, the question arises whether the entries by French investigators in the building and the searches conducted therein by French officials between 28 September 2011 and 23 February 2012, as well as the attachment and confiscation ordered by the French courts, constitute a violation of Article 22 of the VCDR.

54. First, with regard to the entries and searches, as pointed out above, the building can be considered, in my view, to have acquired the

[24] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1171, para. 99.

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status of "premises of the mission" as of 27 July 2012. Therefore, the searches conducted by French officials in the premises before that date concerned a building that was not yet eligible for or entitled to diplomatic immunity and protection under Article 22 of the VCDR, although it was by then owned by the Government of Equatorial Guinea. Consequently, no violation of the provisions of the VCDR appears to have taken place as a result of those entries or searches.

55. Secondly, the next significant measure taken by the French authorities with regard to the building, namely the attachment ordered by the senior judge in charge of the investigation in the *Tribunal de grande* **[359]** *instance* on 19 July 2012, also took place prior to 27 July 2012, the critical date for the status of the building as premises of the mission under the VCDR, although it has not been rescinded ever since. It is therefore a measure, which might still produce its effects with respect to a building that must currently be considered as the diplomatic premises of the Embassy of Equatorial Guinea. It should, however, be stated that this measure, as well as the measure of confiscation ordered by the tribunal, affect, in particular, the ownership of the building. In this context, it is important to recall the terms of Article 22, paragraph 3, of the VCDR, which provides that "the premises of the mission, their furnishings, and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment, or execution". What is the scope of the immunity under this provision? Does it shield a building from jurisdiction with regard to the determination of the ownership of the premises or a suit concerning title to the property? Or does it cover only measures of execution or enforcement jurisdiction, which have an adverse effect on the use of the premises?

56. I am of the view that the latter interpretation is to be preferred. As pointed out earlier in this opinion, the ownership of the property is not relevant for its characterization as "premises of the mission" under the VCDR. A building used as "premises of the mission" may be rented or leased from a private person or a company, and local courts may decide to attach the building to ensure the payment of debts by the owner or as a result of transfer of ownership, without such decision necessarily affecting the use of the building by the diplomatic mission. It is true that in the instant case, the issue of the initial acquisition of the building by Mr Obiang Mangue and its current ownership are before the French courts, which have ordered, for that purpose, the attachment of the building. However, the order of attachment has not so far affected the use of the building by the Embassy of Equatorial Guinea and has had no adverse impact on the performance of the

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functions of the Embassy in that building. Thus, as long as there is no measure of execution that could impair the use of the building by the Embassy itself, in the sense of further searches or entries, or an eviction order or other action affecting the performance of its diplomatic functions within the premises, there is no violation of the immunity from attachment or confiscation prescribed by Article 22, paragraph 3, of the VCDR.

57. Thirdly, and lastly, the measure of confiscation is still under appeal to the *Cour de cassation* in France and has not therefore been executed so far. However, even if the ownership title of the property was to be transferred to the French Government or to some other entity as a result of the execution of the French court judgments, this would not necessarily have an impact on the immunity provided by Article 22, paragraph 3, unless the French Government decided to take measures that would directly **[360]** affect the actual use of the building by the Embassy of Equatorial Guinea for the performance of its diplomatic functions in France.

58. I am, therefore, of the view that the confiscation ordered by the French courts may not be considered to be violative of Article 22, paragraph 3, of the VCDR as long as the French authorities do not take measures that may have an adverse impact on the actual use of the building at 42 avenue Foch in Paris as premises of the mission by the Embassy of Equatorial Guinea. One can only hope that such measures will not be taken by the French authorities despite the present Judgment of the Court.

V. Conclusion

59. The building at 42 avenue Foch in Paris has been constantly used since at least 27 July 2012 as premises of the Embassy of Equatorial Guinea. It has not been disturbed, searched or otherwise inconvenienced by French authorities since that date. To the contrary, it has been protected, treated as embassy premises by French authorities and visited by officials of the Ministry of Foreign Affairs on various occasions even before the Order on provisional measures issued by the Court in December 2016. Whatever may be the differences of view on the history of the ownership of the building, on how it was acquired, and by whom it is currently owned, its use by the Embassy of Equatorial Guinea for the past eight years cannot be put in doubt, and the issue of ownership does not have much relevance for its characterization as "premises of the mission". It is the criterion of being "used for the purposes of the mission", clearly established in Article 1*(i)*

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of the VCDR, that qualifies a building as diplomatic premises. And that is clearly fulfilled in this case. A freshly minted requirement of "prior approval" or power to object of the receiving State, which is not based on any of the provisions of the VCDR or on any other source of international law, will not be of much help to resolve the differences between the two States with regard to the building. Nor will the contradictory conclusion reflected in the *dispositif*, which denies the status of "premises of the mission" to the building at 42 avenue Foch in Paris on the basis of Article 1*(i)* of the VCDR, while characterizing this provision as "unhelpful" in the determination of how a building becomes the "premises of the mission" (paragraph 62 of the Judgment), be of assistance to them or to other States in the future.

60. In its Order on provisional measures of 15 December 1979 in the case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court observed that

> the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an **[361]** instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.[25]

61. I have no doubt that the law on diplomatic relations can, likewise, withstand whatever spanner is thrown in its way. However, to ascribe to international law a concept which may be found in the domestic laws of a few countries and to treat it as a requirement applicable to the diplomatic relations among all States does not contribute to the development of harmonious diplomatic relations. Similarly, to try to found on the object and purpose of the Vienna Convention a requirement or power that is not prescribed by any of its provisions neither reflects the application of the customary rules of treaty interpretation nor does it promote friendly relations among States as stated in the preamble of the VCDR. To the contrary, it might work to the detriment of such relations and create undesirable complications, imbalances and tensions where none existed before.

[362] DISSENTING OPINION OF VICE-PRESIDENT XUE

1. Regrettably, I disagree with the decision rendered by the Court in this case. As a judicial duty, I shall explain the reasons for my position.

[25] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, ICJ Reports 1979*, p. 19, para. 39.

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1. The issue involved in the present case

2. My departure from the majority primarily derives from my position on the question of jurisdiction (see *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, ICJ Reports 2018 (I)*, joint dissenting opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge ad hoc Kateka, p. 340). This case, as an example, highlights the importance of the identification of the subject-matter of a dispute and its close relationship with the question of jurisdiction. As is illustrated in the factual background of the Judgment, the status of the building at 42 avenue Foch in Paris (also referred to as "the building") is one, and an inseparable, part of the dispute between Equatorial Guinea and France in relation to the immunities of the high-ranking official of Equatorial Guinea and its State property from the jurisdiction of the French courts. In narrowing down the scope of its jurisdiction to the interpretation and application of the Vienna Convention on Diplomatic Relations (also referred to as the "Vienna Convention" or the "Convention"), the Court has placed itself in a position where it is unable to give a thorough and sufficient examination of the evidence adduced before it and all the relevant issues in the case, and thus fails to provide a sound judicial resolution to the dispute.

3. In essence, the status of the building at 42 avenue Foch in Paris concerns immunities of State property from criminal jurisdiction of foreign courts. In this regard, two issues are relevant. One is the transaction of the building between Mr Teodoro Nguema Obiang Mangue, the Vice-President of Equatorial Guinea, and the Republic of Equatorial Guinea. The other is Equatorial Guinea's right to designate it as the premises of its diplomatic mission. On the first issue, evidence adduced by Equatorial Guinea shows that the transaction was legally carried out under the French law. Two pieces of evidence are pertinent and probative.

4. The first document, a form entitled "*Cession de droits sociaux non constatée par un acte à déclarer obligatoirement* (Uncertificated transfer of **[363]** shareholder rights subject to mandatory declaration)", dated 17 October 2011, demonstrates that on 15 September 2011, Mr Teodoro Nguema Obiang Mangue transferred to the Republic of Equatorial Guinea, at a price of €6,353,428, the shareholder rights in the five Swiss companies representing ownership in real property. For this registration, a *droit d'enregistrement* (registration duty) in the amount of €317,672 was collected by the French tax authority in Noisy-le-Grand (Annex 5 to the replies of Equatorial Guinea to the

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questions put by Judge Bennouna and Judge Donoghue, 26 October 2016).

5. The second document, entitled "*Déclaration de plus-value sur les cessions de biens meubles ou de parts de sociétés a prépondérance immobilière* (Declaration of capital gains on the transfer of movable assets or shares in companies investing primarily in real property)", dated 20 October 2011, records that an *impôt sur le revenu afférent à la plus-value* (tax on capital gains) in the amount of €1,145,740 was collected by the French tax authorities for the transfer—on 15 September 2011, between Mr Teodoro Nguema Obiang Mangue and the Republic of Equatorial Guinea—of the shares in the five Swiss companies that invested primarily in real property (Annex 6 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 October 2016).

6. Although France contends that these deeds did not suffice to transfer the title of the building to Equatorial Guinea, as the building was still registered under the name of the five Swiss companies, this position was not consistent with the finding of the French courts in respect of the ownership of the building. According to the latter's view, the building was owned by Mr Teodoro Nguema Obiang Mangue through the five Swiss companies since 20 December 2004 (see judgment rendered on 10 February 2020 by the Paris *Cour d'appel* in the case concerning Mr Teodoro Nguema Obiang Mangue, p. 62). Logically, if Equatorial Guinea could not own the building through the five Swiss companies, the building could not have belonged to Mr Teodoro Nguema Obiang Mangue, either.

7. Equatorial Guinea's representations with France in regard to the building were carried out not only at diplomatic level. On 14 February 2012, the President of Equatorial Guinea wrote to the French President a letter, in which it was stated that the building at 42 avenue Foch

> is a property that was lawfully acquired by the Government of Equatorial Guinea and is currently used by the Representative to UNESCO, who is in charge of the Embassy's property. The said property is afforded legal and diplomatic protection under the Vienna Convention and the bilateral agreements signed by the two States.

France did not accept any of Equatorial Guinea's representations.

8. These documents demonstrate that in the present case, the dispute between the Parties goes well beyond the designation of the premises of a **[364]** diplomatic mission. It is evident from the facts that France's persistent objection to Equatorial Guinea's request to designate the

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building at 42 avenue Foch in Paris has little to do with the circumstances and conditions under which a property may acquire diplomatic status. With the controversy between the Parties over the ongoing criminal investigation against Mr Teodoro Nguema Obiang Mangue, France, being the receiving State, has every means at its disposal to make sure that the said building would not acquire the legal status as desired by Equatorial Guinea; there is no way for Equatorial Guinea to obtain France's consent to the designation of the building as the premises of its diplomatic mission. Equatorial Guinea's relocation of its Embassy into the building, to a large extent, served as a means to prevent the building, which it deemed as its State property, from being confiscated. Both Parties were fully aware of these facts.

9. In respect of the second issue whether Equatorial Guinea has the right to use the building for its diplomatic mission, the public acts of the French authorities on the registration of the transfer of shareholder rights in relation to the building and the collection of capital gains tax gave rise to a reasonable belief by Equatorial Guinea that it has acquired the ownership of the building. If France wished to maintain the assets within the private domain, it should have stopped these deeds at the outset of the transaction so as to leave no doubt to Equatorial Guinea on the status of the building. In addition to these public acts of its authorities, France does not claim at any time during the proceedings that the transfer of the building between Mr Teodoro Nguema Obiang Mangue and Equatorial Guinea was not genuine.

10. The dispute between the Parties over the status of the building hinges on the ownership of the building. In the first place, the reason given by France for its objection to Equatorial Guinea's request directly relates to the ownership of the building. In the Note Verbale dated 11 October 2011 addressed to the Embassy of Equatorial Guinea, the Protocol Department of the French Ministry of Foreign Affairs stated that the building at 42 avenue Foch "does not form part of the premises of Equatorial Guinea's diplomatic mission. It falls within the private domain and is, accordingly, subject to ordinary law." This statement indicates that France would not recognize that the building had become the public property of Equatorial Guinea.

11. Secondly, the question of ownership has consequential effects on the conduct of France in handling the building. Although the ownership is irrelevant to the status of the premises of a diplomatic mission, if owned by the sending State, however, the premises would enjoy the protection of the Vienna Convention as well as customary rules on jurisdictional immunities of a State and its property. As is stated in the Preamble of the Convention, customary rules continue to

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govern matters that are not expressly provided in the Convention. In the present case, such rules may come into play in the examination of the lawfulness of the measures of search, **[365]** attachment and confiscation imposed on the building by the French courts, if the issue of the ownership of the building were duly considered.

12. In short, by narrowing down its jurisdictional basis in the present case, the Court eschewed some crucial aspects of the dispute between the Parties. Whether or not the building at 42 avenue Foch in Paris became the State property of Equatorial Guinea through the transfer of ownership is not a purely legal issue under the French law in the present case; it ultimately boils down to the issue of the rights and obligations of a State under international law in handling criminal cases concerning a foreign State and its property.

2. Interpretation of the Vienna Convention

13. I agree with the majority that the provisions of the Vienna Convention on Diplomatic Relations do not lay down at which point of time and under what conditions a property acquires the status of "premises of the mission" as defined in Article 1*(i)* of the Convention and starts to enjoy the privileges and immunities as provided for therein. In light of the object and purpose of the Convention, the sending State cannot unilaterally impose its choice of premises on the receiving State. I disagree, however, with the reasoning of the Court which implies that the receiving State, by its persistent objection to the sending State's designation, would unilaterally dictate the outcome of the matter. This interpretation, in my view, is neither in line with the object and purpose of the Vienna Convention, nor reflective of State practice in diplomacy.

14. According to the majority's view, a building cannot acquire the status of the premises of the mission on the basis of the unilateral designation by the sending State, if the receiving State objects to its choice. The receiving State, on the other hand, has the power to object to the sending State's assignment of a building to its diplomatic mission, thus preventing the building in question from acquiring the status of premises of the mission. Their rationale for this conclusion is threefold. First, by virtue of Article 2 of the Vienna Convention, the establishment of diplomatic relations between States and of permanent diplomatic missions is based on mutual consent. Unilateral designation by the sending State of a building for its diplomatic mission against the objection of the receiving State is contrary to this consensual basis. Secondly, to achieve the Convention's object to "contribute to the

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development of friendly relations among nations", the receiving State is obliged to afford significant privileges and immunities to the diplomatic mission of the sending State. Such weighty obligations, however, have to be balanced by the power of the receiving State to object to the sending State's choice of the premises of its mission. Thirdly, the Convention's immunity and inviolability régime for diplomatic missions imposes restrictions on the sovereignty of the receiving State, but without providing any mechanism to counterbalance **[366]** potential misuse or abuse of such treatment. To overcome this vulnerability of the receiving State, the régime should recognize its power to object (see Judgment, paras. 63-7).

15. I agree with the majority that international law of diplomacy, as a self-contained régime, does not provide a unilateral right for the sending State to designate the premises of its diplomatic mission, but to put the restriction on the sending State in such categorical terms, as if the matter can only be decided by the receiving State, is apparently not a correct interpretation of the Vienna Convention. The fundamental principle of international law contained in the Preamble of the Convention, i.e. the principle of sovereign equality, is the legal basis of international diplomacy law. Diplomatic privileges and immunities, "significant" or "weighty" as they may be, are not accorded unilaterally by the receiving State to the sending State. The diplomatic mission that the receiving State establishes in the sending State enjoys the same treatment in the latter's territory. That is to say, diplomatic privileges and immunities are mutually granted and mutually beneficial. This reciprocity is a pivotal element that keeps the stability of the diplomatic relations between States. The establishment of permanent diplomatic missions, if it is to serve the purposes of maintaining peace and security and fostering friendly relations among nations, must be based on mutual respect for sovereignty and equal treatment of States.

16. State practice relating to designation of the premises of diplomatic missions, as the Court finds in this case, varies greatly; the matter is left largely to the practice of States in light of the specific circumstances of each country. This state of affairs nevertheless does not mean that there exists no principle to follow in practice. The Parties in the present case both acknowledge that, as reflected in its object and purpose, the Convention is rooted in the need to promote friendly relations between two sovereign States. In order to achieve that aim, State parties must co-operate from the very beginning of their diplomatic relations. By virtue of the principle of sovereign equality, the sending State has the right to choose the location of its diplomatic mission in the capital city of the receiving State, while the latter

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maintains its discretion to accept, or oppose to, such designation. In accordance with Article 21 of the Vienna Convention, notwithstanding its right to object, the receiving State remains obliged to facilitate the sending State to acquire its diplomatic premises. Obviously, neither unilateral designation by the sending State nor persistent objection of the receiving State could be the end of the story in practice, because neither way could lead to the establishment of a diplomatic mission. Co-operation and consultation are the only way that can produce a mutually acceptable solution.

[367] 17. In the present case, what is relevant for the determination of the dispute between the Parties in relation to the status of the building is the consistent practice of France. The Court should first look at whether France has adopted any legislation or official guidance regulating the matter. If there exists no such regulation, France's established practice should govern. In refuting Equatorial Guinea's argument that it had followed the normal course of procedure, France did not produce convincing evidence to show that, in France's practice, prior consent is consistently required for a building to acquire diplomatic status. Moreover, its repeated refusal of Equatorial Guinea's assignment is related more to the disputed criminal proceedings than to the procedure itself.

18. As is pointed out above, Equatorial Guinea's designation of the building at 42 avenue Foch as the premises of its diplomatic mission is not a normal case. The building in question is not the first premises that Equatorial Guinea assigned for its Embassy; it is a relocation site for the mission. Its status is the very subject of the dispute relating to the immunities of State property between the Parties. Under any circumstances, so long as France maintains its position on the criminal proceedings in question, it would not recognize the status of the building as the premises of Equatorial Guinea's Embassy. Therefore, a general examination of the circumstances under which a property acquires the diplomatic status does not address the real issue in the present case. The key question in the present context is not whether France as the receiving State enjoys the sovereign right to object to Equatorial Guinea's choice of its diplomatic premises, but whether it has wrongfully exercised jurisdiction by imposing measures of constraint on the State property of Equatorial Guinea.

3. The criteria applied by the Court

19. In the Judgment, the Court recognizes that the power of the receiving State to object to a sending State's designation of its

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diplomatic premises is not unlimited. To exercise such a power reasonably and in good faith, the Court considers that the receiving State must raise its objection in a timely, non-arbitrary and non-discriminatory manner. It states that

> where the receiving State objects to the designation by the sending State of certain property as forming part of the premises of its diplomatic mission, and this objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character, that property does not acquire the status of "premises of the mission" within the meaning of Article 1*(i)* of the Vienna Convention, and therefore does not benefit from protection under Article 22 of the Convention. Whether or not the aforementioned criteria have been met is a matter to be assessed in the circumstances of each case. (Judgment, para. 74.)

[368] These three criteria for the manner in which the receiving State raises its objection, i.e. timely, non-arbitrary and non-discriminatory, in principle do not give rise to any questions. What should be examined is how to apply them in practice.

20. On the first criterion of timely objection, there is no doubt that each time when Equatorial Guinea notified the Protocol Department of the French Ministry of Foreign Affairs of its designation or use of the building as the premises of its diplomatic mission, the latter objected without delay. Given the factual background of the case, the timely replies from France to Equatorial Guinea's requests are self-explanatory; the Parties were holding opposing views on the status of the building. Silence or a delayed reply on the part of France might have been perceived or taken as France's acquiescence to Equatorial Guinea's position.

21. In assessing whether France's objection to Equatorial Guinea's designation of the building as its diplomatic premises was arbitrary, the Court unavoidably refers to the criminal proceedings in question. Its reasoning, however, is predicated on the assumption that the criminal proceedings against Mr Teodoro Nguema Obiang Mangue and measures of constraint on the building were not in dispute between the Parties. Apparently, that is wrong.

22. First of all, with regard to the Note Verbale of 11 October 2011, which stated that the building at 42 avenue Foch in Paris "falls within the private domain", the Court states that,

> [s]een as a response to that notification, the French Note Verbale cannot be interpreted as referring to the ownership status of the building: the object of the Note Verbale was to contest Equatorial Guinea's assertion that the building was used for diplomatic purposes, and hence that it fell within the "public domain". (Judgment, para. 106.)

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In the Court's view, France's position was justified by the fact that the French authorities, in the context of the ongoing criminal investigation, had conducted on-site inspections and searches of the building and found that it was not used and not being prepared for use as premises of Equatorial Guinea's diplomatic mission.

23. Moreover, the Court considers that France's objection is further supported by the reason that the French authorities, for the purposes of the criminal proceedings, may need to conduct more searches of the building, or impose other measures of constraint on it, and therefore, to accede to Equatorial Guinea's assignment of the building to its diplomatic mission, "might have hindered the proper functioning of its criminal justice system" (*ibid.*, para. 109).

24. Regarding Equatorial Guinea's argument that France should have sought to co-ordinate with it before refusing its claim that the building **[369]** enjoyed the status of premises of the mission, the Court takes the view that France was not obliged under the Vienna Convention to consult with Equatorial Guinea before communicating its decision of objection to it.

25. This line of reasoning is totally one-sided. It reveals that the issue of France's objection to Equatorial Guinea's designation of the building as the premises of its diplomatic mission cannot be separated from the question of immunities of State property in the criminal proceedings. At the time when Equatorial Guinea first requested to assign the building for its diplomatic mission, whether the building was used or being prepared for use for its diplomatic mission was an irrelevant factor for France's objection, because that condition of the building did not in any way affect Equatorial Guinea's designation. To maintain the building under measures of constraint for the purpose of the criminal proceedings is the very reason for France's objection.

26. As the Court observes, the dispute between the Parties over the criminal proceedings against Mr Teodoro Nguema Obiang Mangue had been going on for a number of years before the transfer of the building took place. When Equatorial Guinea decided to designate the building for its diplomatic premises, to say that there is no obligation under the Vienna Convention for France to consult with Equatorial Guinea is contrary to the object and purpose of the Convention to "contribute to the development of friendly relations among nations". The dispute involves not only the high-ranking official of Equatorial Guinea, but also a substantial amount of its State assets. The fact that Equatorial Guinea took over the building and used it as the premises of its diplomatic mission cannot be considered "to benefit individuals".

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27. On the criterion of non-discrimination, the Court's reasoning is rather simple: there are no comparable circumstances as those in the present case to determine whether France has acted in a discriminatory manner. In assessing France's conduct, one does not have to rely on any comparable case in France's practice, but just to inquire whether, under the same circumstances, France would have treated any other State, or whether any other State would have accepted to be treated, in the same way.

28. Evidence shows that Equatorial Guinea had made several notifications or statements to the French Ministry of Foreign Affairs, informing it that it designated or used the building for its diplomatic mission (among which the Note Verbale dated 4 October 2011 (Memorial of Equatorial Guinea, Ann. 33), and the Notes Verbales dated 17 October 2011 (Ann. 36), 14 February 2012 (Ann. 37), 12 March 2012 (Ann. 44), 27 July 2012 (Ann. 47)). Even after the official communications of Equatorial Guinea to that effect, the French authorities nevertheless conducted several searches of the building, in the course of which various items were seized and removed and personal belongings of Mr Teodoro Nguema Obiang Mangue were taken away and auctioned. Official protests of Equatorial Guinea against such actions were to no avail. For almost four **[370]** years, i.e. from 27 July 2012, the date when Equatorial Guinea actually moved its mission into the building, until it instituted proceedings against France before this Court on 13 June 2016, the Embassy of Equatorial Guinea used the building for the performance of the official functions of its diplomatic mission, but without proper status and protection. Meanwhile, measures of constraint such as attachment and confiscation were imposed on the building. This kind of situation cannot be deemed normal in diplomatic relations; nor does it resemble the relationship between two sovereign equals. These facts, per se, demonstrate that undue emphasis on the power of the receiving State to object would upset the delicate balance established by the Vienna Convention between the sending State and the receiving State.

[371] DECLARATION OF JUDGE GAJA

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

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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 **[372]** 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

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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 **[373]** 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, Anns. 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

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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, Ann. 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 (*ibid.*, Anns. 34 and 45). Only on 6 August 2012 did the **[374]** 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, Ann. 49).

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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 (*ibid.*, Ann. 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.

[375] SEPARATE OPINION OF JUDGE SEBUTINDE

I. Scope of the dispute, jurisdiction and admissibility

1. I have voted against paragraph 126(1) of the Judgment because I disagree with the finding of the majority that the building at 42 avenue Foch in Paris (hereinafter the "disputed building") has never acquired the status of "premises of the mission" of Equatorial Guinea within the meaning of Article 1*(i)* of the Vienna Convention on Diplomatic Relations, 1961 (hereinafter the "VCDR" or the "Convention"). As I explain in this opinion, the disputed building did acquire that status on 27 July 2012. Furthermore, although I have voted in favour of paragraph 126(2) along with the majority, I do so for reasons other than those expressed by **[376]** the majority in the Judgment. I express those reasons later on in this separate opinion. Lastly, while France argued at length about Equatorial Guinea's alleged "abuse of rights" in the present case, the Judgment says little on the issue, simply alluding in paragraph 66 to the fact that the purpose of the diplomatic privileges and immunities under the VCDR are not meant to benefit individuals, without explaining how this statement relates to Equatorial Guinea's claims or conduct. I offer a few thoughts on this issue in this separate opinion. But first I wish to remind the

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reader of what the Court found, in 2018, to be the dispute between the Parties in the present case.

2. In paragraph 70 of its Judgment of 6 June 2018,[1] the Court described the dispute between the Parties as follows:

(a) First, as a disagreement regarding whether the building at 42 avenue Foch in Paris constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment provided for under Article 22 of the VCDR.
(b) Secondly, as a disagreement regarding whether France, by the actions of its authorities in relation to the building, breached its obligation under Article 22 of the VCDR.[2]

3. The Court also stated that it has jurisdiction, on the basis of the Optional Protocol to the VCDR concerning the Compulsory Settlement of Disputes, to entertain Equatorial Guinea's Application only in so far as it concerns the status of the building located at 42 avenue Foch in Paris as premises of the mission, and that this part of the Application is admissible.[3]

4. It is clear from the facts of this case that France's refusal or reluctance to recognize the disputed building as part of the diplomatic mission of Equatorial Guinea is, in large part, due to the fact that in its view, the building is privately owned by Mr Teodoro Nguema Obiang Mangue and is subject to ongoing criminal processes in France, including an order of attachment and confiscation. On the other hand, France also agrees that, for purposes of implementing the régime of inviolability under the VCDR, ownership of a building per se is to be distinguished from assignment and use of that building as premises of a diplomatic mission.

5. In my view, the Court should have distinguished the question of ownership of the disputed building from its assignment and use as premises of the mission and should have entertained Equatorial Guinea's Application only in so far as it concerns the status of the disputed building **[377]** as "premises of the mission". This is because under Article 1*(i)* of the VCDR, ownership is not a prerequisite for determining whether a building qualifies for protection under Article 22 of the VCDR as "premises of the mission". The only prerequisite thereunder is that the building, or parts thereof and the land ancillary thereto, are "used for the purposes of the mission including the

[1] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, ICJ Reports 2018 (I)*, p. 292.
[2] *Ibid.*, p. 315, para. 70, and p. 328, para. 120.
[3] *Ibid.*, pp. 337-8, para. 154(4).

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residence of the head of mission". In that regard, I do not agree with the Court's interpretation of Article 1*(i)* of the VCDR in paragraph 62. In my view, that provision is more than a mere definition. In the ordinary meaning of that paragraph, the "premises of the mission" comprise:

— buildings or parts of buildings and land ancillary thereto;
— that are used for the purposes of the mission including the residence of the head of the mission; and
— it is irrelevant who actually owns the building or land upon which the mission is situated.

6. However, the VCDR sheds no light as to whether before using a building as "premises of its mission" the sending State needs to obtain the prior consent (or non-objection) of the receiving State to such use. I examine this aspect later on in this opinion.

II. Status of the building at 42 avenue Foch in Paris

A. Criteria for qualifying a building as "premises of the mission"

7. In determining whether the disputed building qualifies as "premises of the mission" of Equatorial Guinea within the meaning of Article 1*(i)* of the VCDR, the Court has to determine, first, if and when Equatorial Guinea started using the building for purposes of its mission and, secondly, whether such use is subject to the consent of France as the receiving State as a necessary prerequisite for extending the régime of inviolability in respect of that building under Article 22 of the VCDR.

8. In determining if and when the disputed building qualifies as "premises of the mission", I have examined three possible dates on which Equatorial Guinea claims the building was assigned for use as the premises of its mission, namely *4 October 2011*, *17 October 2011* and *27 July 2012*.

(i) Assignment of the building as premises of the mission on 4 October 2011

9. Equatorial Guinea refers to 4 October 2011, the day following the search of the disputed building and seizure by French authorities of several luxury vehicles belonging to Mr Teodoro Nguema Obiang Mangue **[378]** from parking lots located near the disputed building on 3 October 2011, as the date when it first assigned the disputed building for use as its diplomatic mission. On that date, Equatorial Guinea officially notified the French Ministry of Foreign Affairs, for the first time, that

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Equatorial Guinea . . . 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 its diplomatic functions, a fact which it has hitherto not formally notified to your [Protocol] Department.

Since the building forms part of the premises of the mission, pursuant to Article 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Republic of Equatorial Guinea wishes to give you official notification so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention.[4]

10. In my view, however, Equatorial Guinea has not adduced sufficient proof that the disputed building was, prior to or with effect from 4 October 2011, actually used as premises of its mission within the meaning of Article 1*(i)* of the VCDR. It is not sufficient that Equatorial Guinea merely "had the disputed building at its disposal". In that regard, I have taken the following factors into account:

(a) First, according to Equatorial Guinea itself, the disputed building belonged to Mr Teodoro Nguema Obiang Mangue in his private capacity until 15 September 2011 (one month before the above official notification) when he allegedly transferred his shares in the five Swiss companies to the Government of Equatorial Guinea. In those circumstances, it is unlikely that the State of Equatorial Guinea had "had the building at its disposal for a number of years" or that it used the privately owned building "for the performance of its diplomatic functions" prior to 4 October 2011, as alleged in their official notification.

(b) Secondly, Equatorial Guinea did not specify what diplomatic functions were being carried out at the disputed building prior to or as at 4 October 2011. In paragraph 22 of its reply to a question put by a Member of the Court, Equatorial Guinea asserted that "[p]rior to 4 October 2011, the building had been used to accommodate Equatorial Guinea's diplomatic staff or other officials on special missions", but adduced no evidence to prove this claim, nor did the Applicant consider it necessary to request from the receiving State diplomatic **[379]** status or tax exemptions in respect of the disputed building during that period.[5]

(c) Thirdly, during several searches of the disputed building conducted by French investigators prior to 4 October 2011, the Applicant did not even once complain or assert diplomatic immunity of the

[4] Memorial of Equatorial Guinea (MEG), para. 2.30; see also written replies of Equatorial Guinea to questions put by two Members of the Court, 26 October 2016, para. 21.

[5] Rejoinder of France (RF), para. 1.7.

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building. In the Note Verbale of 28 September 2011 delivered personally to Mr Alain Juppé, Minister of State for Foreign Affairs, Equatorial Guinea bitterly complained about the investigations and criminal charges levelled against Mr Teodoro Obiang Mangue and against the interference of France in the internal affairs of Equatorial Guinea. However, the Note Verbale was silent about the status of the building at 42 avenue Foch, Paris, the ownership of which had by then, allegedly, been transferred to the Government of Equatorial Guinea. The first time a complaint was ever raised in this regard was by Ms Mariola Bindang Obiang (UNESCO Representative) in respect of the searches and seizures of 14-23 February 2012.[6]

(d) Fourthly, on-site inspections of the disputed building carried out by French authorities on 5 October 2011 and in February 2012 found no evidence that it was either occupied by the Embassy of Equatorial Guinea, or used as a residence by Ms Bindang Obiang, UNESCO Representative.[7] All they found was a signpost at the entrance reading: "Republic of Equatorial Guinea—Embassy Premises". Equatorial Guinea itself recognizes that the items seized by the French Authorities on those occasions did not belong to its mission.[8]

11. For all the above reasons, I am not convinced that the disputed building acquired the status of "premises of the mission" within the meaning of Article 1*(i)* of the VCDR on or about 4 October 2011.

(ii) Move of the UNESCO delegate's residence to the building on 17 October 2011

12. On 17 October 2011, Equatorial Guinea officially notified the French Ministry of Foreign Affairs of the end of the mission of H.E. Mr Frederico Edjo Ovono, the Ambassador Extraordinary and Plenipotentiary of the Republic of Equatorial Guinea, and that, pending his replacement, Ms Mariola Bindang Obiang, Permanent Delegate to UNESCO, would head the Embassy as Chargée d'affaires *ad interim*. The Applicant's Note Verbale further indicated that "the official residence of Ms Bindang Obiang was located on the premises of the diplomatic mission **[380]** located at 42 avenue Foch, 75016

[6] MEG, Ann. 42.

[7] Additional documents communicated by France, No 33, Record of on-site inspection and attachment of vehicles of Mr Teodoro OBIANG NGUEMA located at 42 avenue Foch, 75016 Paris, 28 September 2011 *[translation]*.

[8] Reply of Equatorial Guinea (REG), para. 4.12.

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Paris, which is at the disposal of the Republic of Equatorial Guinea".[9] France responded on 31 October 2011, rejecting the appointment of Ms Bindang Obiang as Chargée d'affaires *ad interim* as being contrary to Article 19 of the VCDR;[10] insisting that France had never recognized the disputed building as part of the premises of Equatorial Guinea's mission; and indicating that any change in address of Ms Obiang's residence from 46 rue des Belles Feuilles, Paris (16th arr.) to the disputed building should be officially notified by UNESCO's protocol department and not by the Applicant's Embassy.[11]

13. It was four months later, on 15 February 2012, that the Permanent Delegation of Equatorial Guinea to UNESCO transmitted to the French Ministry of Foreign Affairs a Note Verbale stating that "the official residence of the Permanent Delegate of Equatorial Guinea to UNESCO is located at 42 avenue Foch, 75016 Paris, property of the Republic of Equatorial Guinea".[12] On 16 February 2012 the Applicant sought the *agrément* of French authorities pursuant to Article 4 of the VCDR regarding the appointment of Ms Bindang Obiang as Ambassador of Equatorial Guinea to France, stating that she resided at the disputed building.[13]

14. In March 2012, Equatorial Guinea issued several Notes Verbales to the French Ministry of Foreign Affairs in which it asserted the immunity of the building, not as "premises of its mission" but as "Government property".[14]

15. In my view, Equatorial Guinea has not adduced convincing and consistent evidence that as from 17 October 2011, the disputed building was actually used as "premises of the mission" within the meaning of Article 1*(i)* of the VCDR, including as the "residence of its head of mission". In that regard, I have taken the following factors into account:

(a) First, in nominating Ms Mariola Bindang Obiang, the UNESCO Permanent Delegate, as Chargée d'affaires *ad interim* and head of **[381]** mission of Equatorial Guinea on 17 October 2011, the

[9] MEG, Ann. 36.

[10] According to France's Note Verbale of 31 October 2011, only a member of the mission's diplomatic, administrative or technical staff may under Article 19 of the VCDR be designated chargé d'affaires *ad interim* by the sending State.

[11] MEG, Ann. 40.

[12] *Ibid.*, Ann. 41.

[13] Article 4 of the VCDR provides: "1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of mission to that State. 2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*."

[14] MEG, Anns. 43, 44 and 45.

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Applicant did not secure the *agrément* of the receiving State as required by Article 4 of the VCDR, since France subsequently rejected the appointment of Ms Mariola Bindang Obiang as being contrary to Article 19 of the VCDR.

(b) Secondly, even if the official residence of Equatorial Guinea's Permanent Representative to UNESCO had shifted from 46 rue des Belles Feuilles, Paris (16th arr.) to the disputed building, Article 20 of the Host Agreement between France and UNESCO requires that the notification of such change of address should have been sent by the protocol department of UNESCO to the French Ministry of Foreign Affairs and not by the Embassy of Equatorial Guinea. In any event that notification only took place four months later on 15 February 2012.[15]

(c) Thirdly, approximately four months after Ms Mariola Bindang Obiang had allegedly moved into the disputed building, French authorities carried out several searches of the disputed building between 14 and 23 February 2012 and seized various items comprising the personal effects, furniture and documents of Mr Teodoro Obiang Mangue.[16] Based on those searches and the testimony of employees of Mr Teodoro Obiang Mangue, there were neither diplomatic documents nor property or items belonging to a female resident found in the disputed building, despite a formal protest by Equatorial Guinea and Ms Bindang Obiang against the searches.[17]

16. For all the above reasons, Equatorial Guinea has not proved that the disputed building acquired the status of "premises of the mission" within the meaning of Article 1*(i)* of the VCDR on or about 17 October 2011.

(iii) Move of Equatorial Guinea's Embassy offices to the disputed building on 27 July 2012

17. On 19 July 2012, the Paris *Tribunal de grande instance* issued an order *(saisie pénale immobilière)* attaching the disputed building with a view to its confiscation.[18] On 27 July 2012, the Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that "as from

[15] Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory.

[16] Order of attachment of the Paris *Tribunal de grande instance*, MEG, Ann. 25.

[17] *Ibid.*, Anns. 37 and 38.

[18] *Ibid.*, Ann. 25.

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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".[19] On **[382]** 2 August 2012, Equatorial Guinea sent another notification to the French Ministry of Foreign Affairs to the effect that "further to its preceding Notes Verbales, it hereby confirms that its chancellery is indeed located at the following address: 42 avenue Foch, Paris (16th arr.), a building that it uses as the official offices of its diplomatic mission in France".[20]

18. In response, the French Ministry of Foreign Affairs wrote to the Applicant on 6 August 2012 indicating its refusal to recognize the disputed building as the new premises of Equatorial Guinea's diplomatic mission, pointing out that the building was the subject of an order of attachment and stating that the seat of the Chancellery remains at 29 boulevard de Courcelles, Paris (8th arr.).[21] France reiterated its position in a subsequent communication.[22]

19. On 12 May 2016, Equatorial Guinea responded reiterating the fact that its Embassy offices were located at the disputed building since it was so assigned on 11 October 2011 and pointing out the mixed messages that the French Government and its Ministry of Foreign Affairs were sending. In that regard Equatorial Guinea noted that

(a) 42 avenue Foch, Paris (16th arr.) is the address at which requests for visas to enter Equatorial Guinea are submitted by members of the French Government, such as the State Secretary for Development and Francophone Affairs, who made an official visit to Equatorial Guinea from 8 to 9 February 2015;
(b) a law enforcement unit went to the same address on 13 October 2015 to provide protection for the diplomatic mission during protests by members of the Equatorial Guinean opposition in France.

20. The Applicant observed that this contradiction should not be to the detriment of the Republic of Equatorial Guinea.[23]

21. It is clear from the above narrative of events that Equatorial Guinea effectively moved the offices of its diplomatic mission in France into the building at 42 avenue Foch in Paris on or about 27 July 2012,

[19] *Ibid.*, Ann. 47 (emphasis added).
[20] MEG, Ann. 48.
[21] *Ibid.*, Ann. 49.
[22] See Note Verbale of 27 April 2016 (*ibid.*, Ann. 50).
[23] *Ibid.*, Ann. 51.

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eight days after the order of attachment *(saisie pénale immobilière)* was issued by the Paris *Tribunal de grande instance*. Thereafter Equatorial Guinea used every opportunity to reiterate its position to the French authorities despite the consistent refusal of the French Ministry of Foreign Affairs to recognize the disputed building as the Applicant's diplomatic mission or Chancellery. France's refusal to recognize the building as premises of Equatorial Guinea's mission was clearly based on the fact **[383]** that the disputed building was privately owned and has been placed under an order of attachment and confiscation. Each Party is thus entrenched in its position, except in 2015 when on a few occasions French authorities obtained their visas to Equatorial Guinea and gave protection to diplomatic staff at that building.

22. In my view, there is sufficient evidence to show that the disputed building has since 27 July 2012 been effectively used as premises of Equatorial Guinea's mission. In my view, although the orders of attachment and confiscation could ultimately affect ownership of the disputed building, they should not, at this stage, prevent Equatorial Guinea from effectively using the building as premises of its mission. As earlier pointed out, France itself admits that the ownership of the disputed building is immaterial in determining whether the property is capable of forming part of the premises of Equatorial Guinea's mission.[24]

B. Is prior consent of the receiving state a necessary prerequisite?

23. The VCDR is silent on whether the consent of the receiving State is required before a building can qualify as "premises of a mission". By contrast for example, Article 11 speaks of agreement between the sending and receiving States as to the size of the mission; while Article 12 forbids a sending State from establishing additional offices of its mission "in localities other than those in which the mission itself is established". The *travaux préparatoires* of the VCDR does not shed light on this issue. The answer may lie in the practice of France, as receiving State, towards all sending States that establish diplomatic relations with it.

24. The Parties are agreed that France has no written laws or guidelines requiring prior consent. However, its practice appears to indicate the existence of a practice of a "no-objection" régime. In other words, for purposes of establishing premises of a diplomatic mission, it is enough for the sending State to notify France as the receiving State of

[24] Counter-Memorial of France (CMF), paras. 2.1-2.21; RF, paras. 0.11-0.15 and 2.1-2.4.

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the location of the mission premises and for the latter to raise no objection thereto. It is also expected that the receiving State will not unreasonably object, on grounds other than that the building is not being used for the purpose of the mission. This approach has been adopted by commentators of the Convention:

> In States where no specific domestic legal framework controls the acquisition or disposal of mission premises, the definition of Article **[384]** 1*(i)* falls to be applied by agreement between sending and receiving State. Generally speaking, a receiving State is likely to be notified of mission premises for the purpose of ensuring that it carries out its duties under Article 22 to protect those premises and ensure their inviolability. Challenge to such notification will usually take place only where there are grounds to suspect that the premises are not being used for purposes of the mission. Article 3, which describes the functions of the mission, may be relevant in this context.[25]

25. In the present case, France's persistent refusal to recognize the disputed building as premises of Equatorial Guinea's mission was not based on the fact that it is being used for purposes or functions *other than* those stipulated in Article 3 of the VCDR. Rather, France's objection to the disputed building being used by Equatorial Guinea as diplomatic premises is persistently based on the fact that the building is "privately owned" and is "subject to orders of attachment and confiscation". Ironically, France has consistently also maintained that the question of ownership of the building does not affect its potential use as diplomatic premises. In particular, France has argued that the order of attachment affects only "the free disposal of the title to the building" not its use.[26] In this regard I agree with France's interpretation of Article 1*(i)* of the VCDR.

26. Consequently, I am of the considered view that once it was established that Equatorial Guinea had effectively moved its mission offices into the disputed building on 27 July 2012, that was sufficient for the building to acquire the status of "premises of Equatorial Guinea's mission" and for France as the receiving State to accord the building the protection provided under Article 22 of the VCDR, regardless of who owns the building or the fact that it is under orders of attachment and confiscation. This brings me to the question whether France in fact breached its obligations under the VCDR.

[25] See E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, 4th edition, 2016, p. 17.
[26] RF, paras. 4.5-4.6.

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III. Whether France violated its obligations under the VCDR

27. The obligation imposed upon the receiving State and its agents by Article 22 of the VCDR is twofold. First, the receiving State has a duty to ensure that its authorities do not enter the premises of the mission of a sending State without the consent of the head of mission. Secondly, it has a duty to protect such mission against intrusion, damage, disturbance of **[385]** the peace or impairment of dignity, and against measures of constraint including search, requisition, attachment or execution.

28. Given my conclusions reached above that the disputed building only attained the status of "premises of Equatorial Guinea's mission" on 27 July 2012, the building could not enjoy diplomatic protection under Article 22 of the VCDR before that date. It follows that the searches and seizures carried out by the French authorities in relation to the building before that date cannot be considered as violations of the VCDR. The same is true regarding the order of attachment of the building *(saisie pénale immobilière)* issued on 19 July 2012.

29. However, the question is what consequences should arise from the *order of confiscation* of the disputed building issued by the Paris *Tribunal de grande instance* on 27 October 2017, a decision confirmed by the Paris *Cour d'appel* on 10 February 2020. As both these decisions were issued in relation to the building after it became the premises of Equatorial Guinea's diplomatic mission, could they be interpreted as tantamount to a violation of Article 22 of the VCDR?

30. As Equatorial Guinea itself pointed out during the oral hearings on the preliminary objections raised by France, "in French criminal law, confiscation is a penalty which involves transfer of the ownership of the asset in question, to the benefit of the French State".[27] As such, an order of confiscation per se does not imply a violation of the mission premises, in the sense that it essentially impedes the free disposal of the title to the building but need not necessarily affect its use as premises of the mission. Equatorial Guinea expressed concern that confiscation carries "an ever-present risk of expulsion" of its mission from the building.[28] However, my view is that the Court would be engaging in speculation if it took that approach, given that confiscation does not automatically lead to eviction. Considering that the Court should steer clear of issues to do with the ownership of the disputed building, it is not up to the Court to speculate about what measures the French

[27] CR 2018/3, p. 21, para. 43 (Tchikaya).
[28] REG, para. 2.54.

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authorities may adopt following the confiscation, particularly if the Court were to find that the building did enjoy diplomatic status from 27 July 2012 and is therefore immune from execution. In other words, it is possible for the disputed building to have changed ownership in any number of ways and for Equatorial Guinea to choose to continue housing its mission there, subject to negotiation with the new owners. As long as Equatorial Guinea's mission continued to be housed there, the receiving State would be obligated to extend to that mission the régime of inviolability guaranteed under Article 22 of the VCDR, regardless of the new owners.

[386] 31. For all the above reasons, I am of the view that France is not in violation of Article 22 of the VCDR, as the building did not enjoy the inviolability régime when searches and seizures were carried out or when the order of attachment was issued. Furthermore, there was no violation under Article 22 of the VCDR since the order of confiscation does not automatically lead to eviction. This brings me to the last issue in the case, namely whether by bringing its claim to the Court, the Applicant abused its rights, as claimed by the Respondent.

IV. Whether Equatorial Guinea committed abuse of rights

32. In its third preliminary objection to the jurisdiction of the Court in the present case, France argued that Equatorial Guinea "suddenly and unexpectedly" transformed a private residence into premises of its mission and appointed Mr Teodoro Nguema Obiang Mangue to increasingly eminent positions. It further alleges that Equatorial Guinea's objective in bringing the case before the Court was to shield both Mr Teodoro Nguema Obiang Mangue and the building at 42 avenue Foch from pending criminal proceedings that were under way in France. France concludes that Equatorial Guinea's Application constitutes an abuse of process because it was submitted in the manifest absence of any legal remedy and with the aim of covering up abuses of rights committed in other respects.

33. In its 2018 Judgment on preliminary objections, the Court characterized France's third preliminary objection as an objection to admissibility.[29] The Court also overruled the objection in relation to the alleged abuse of process.[30] In relation to the alleged abuse of rights, the Court stated:

[29] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, ICJ Reports 2018 (I)*, p. 335, para. 145.
[30] *Ibid.*, p. 336, para. 150.

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As to the abuse of rights invoked by France, it will be for each Party to establish both the facts and the law on which it seeks to rely at the merits phase of the case. The Court considers that abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits. Any argument in relation to abuse of rights will be considered at the stage of the merits of this case.[31]

34. Abuse of rights is a controversial claim, which should only be made in exceptional and compelling circumstances. Judge Hersch Lauterpacht observed that abuse of rights is said to occur when "a State avails itself of **[387]** its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage".[32] The Court has in its jurisprudence[33] recognized abuse of rights as a necessary corollary to the principle of good faith.[34] However, as France rightly observes, the threshold for a finding of abuse of rights is high, as a court or tribunal will obviously not presume an abuse and will affirm the evidence of an abuse only in very exceptional circumstances.[35] In this case the Court is called upon to determine whether by claiming diplomatic protection under Article 22 of the VCDR for the disputed building as "premises of its mission", Equatorial Guinea abused its rights under the VCDR to the detriment of the rights of France as receiving State.

35. There is little doubt that in seeking to divest himself of the ownership of the disputed building and transferring the shares in the five Swiss companies to the State of Equatorial Guinea in mid-September 2011, Mr Teodoro Nguema Obiang Mangue acted under pressure of the criminal proceedings that were already under way against him in France. His father, the President of Equatorial

[31] *Ibid.*, p. 337, para. 151.

[32] L. Oppenheim, *International Law: A Treatise*, Vol. 1: Peace, ed. by H. Lauterpacht, London, New York, Toronto: Longmans, Green and Co., 8th edition, p. 354.

[33] See *Nuclear Tests (New Zealand* v. *France), Judgment, ICJ Reports 1974*, p. 473, para. 49; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, ICJ Reports 1992*, p. 255, paras. 37-8; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, ICJ Reports 1996 (II)*, p. 622, para. 46.

[34] Other authors have observed: "Good faith in the exercise of rights ... means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must reasonably be exercised. The reasonable and bonafide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State." (See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 1953, reprinted in 1987, pp. 131-2.)

[35] CMF, para. 4.9.

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Guinea, disclosed as much to President Sarkozy of France in an official communication in February 2012.[36]

36. I have expressed the view that in my opinion the Applicant effectively moved the offices of its mission into the disputed building on 27 July 2012 and that, with effect from that date, the building was entitled to the protection guaranteed by Article 22 of the VCDR. Can it be said that when Equatorial Guinea availed itself of its right to bring this case before the Court, it did so "in an arbitrary manner in such a way as to inflict upon France an injury which cannot be justified by a legitimate consideration of the Applicant's own advantage"? The answer must be in the negative. In moving the offices of the mission to the disputed building, the Applicant genuinely believed (rightly or mistakenly) that they were **[388]** moving into a building then owned by the State of Equatorial Guinea. The fact that the President of Equatorial Guinea did not hide the reason behind the "transfer" of the building from the French authorities, coupled with the Applicant's various attempts to settle the dispute regarding the status of the building diplomatically, are, in my view, indicative of the Applicant's desire to maintain a transparent and fraternal relationship with the Respondent, rather than an indication of bad faith.

37. At France's own admission, its refusal to recognize the disputed building as premises of the Applicant's mission is not based on the Applicant's misuse of the building for purposes other than the mission, but rather because the building was "privately owned" and "under orders of attachment and confiscation". In my view, France's right to proceed with the criminal processes against Mr Teodoro Obiang Mangue or the disputed building is not prejudiced by Equatorial Guinea's Application before the Court as the orders of attachment and confiscation concern ownership of the building and not its use as premises of the Applicant's mission.

38. Furthermore, when ruling on allegations of violations of provisions of the VCDR in the *United States Diplomatic and Consular Staff in Tehran* case,[37] the Court held that the VCDR, as a self-contained régime, provides to States parties the means to address what they could consider as abuses of the rights and privileges conferred by the Convention. The Court in its *obiter dictum* stated as follows:

[36] MEG, Ann. 39.

[37] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, ICJ Reports 1980*, p. 39, para. 84.

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84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide

> Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

39. In the long run, a finding by this Court of abuse of rights against the Applicant may not be useful and may only serve to further undermine the strained relations between the two States. In line with the object and **[389]** purpose of the VCDR, which is to "contribute to the development of friendly relations amongst nations", the Court should have made an express finding that France has not proved the Applicant's alleged abuse of rights.

[390] DISSENTING OPINION OF JUDGE BHANDARI

A. Introduction

1. I regret that I am unable to concur with the conclusion reached by the majority that the building at 42 avenue Foch in Paris has never acquired the status of "premises of the mission", and consequently that the French Republic (hereinafter "France") has not breached its obligations under the Vienna Convention on Diplomatic Relations, 1961 (hereinafter the "Vienna Convention" or the "Convention"). I am of the opinion that the building at 42 avenue Foch in Paris acquired the status of premises of the mission, as of 27 July 2012, and was thereafter entitled to benefit from the régime of inviolability guaranteed under the Vienna Convention. I endeavour to explain my hesitations regarding what appears to be the Court's conclusion, in paragraph 74 of the Judgment, that an objection by the receiving State, which is timely and neither arbitrary nor discriminatory, would prevent certain property from acquiring the status of "premises of the mission" within the meaning of Article 1*(i)* of the Vienna Convention. This test inexorably leads to the conclusion that a property may never acquire diplomatic status without the consent of the receiving State. Such a test or any implication thereof is not to be found in the *travaux*

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préparatoires, the work of the International Law Commission (hereinafter the "ILC"), the text of the Vienna Convention, or its very object and purpose.

2. In my view, the Vienna Convention, interpreted pursuant to customary rules of treaty interpretation, does not yield the conclusion reached in paragraph 118 of the Judgment. I write to offer some insights on how a body of law governing the establishment and maintenance of friendly relations between equal sovereign States should be interpreted with the objective of balancing the interests of the Parties.

[391] 3. The gravamen of the case is whether the building at 42 avenue Foch in Paris acquired the legal status of premises of the mission, and, as such, was inviolable under the Vienna Convention at the time of France's actions. I also wish to take the present opportunity to present my opinion with respect to "how and when" a property may be characterized as "premises of the mission" under Article 1*(i)* of the Vienna Convention and benefit from the protections provided for in Article 22.

4. It is recalled that, while Article 2 of the Vienna Convention provides that the establishment of diplomatic relations takes place by mutual consent, the Convention contains no express requirement for the consent of the receiving State for the establishment of "premises of the mission". Article 3(1)*(e)* of the Vienna Convention further provides that "[t]he functions of a diplomatic mission consist . . . in: promoting friendly relations between the sending State and the receiving State". The foregoing provisions, coupled with the object and purpose of the Vienna Convention, as evident from the preamble and the text of the treaty as a whole, lead to the inference that the Vienna Convention contains no implication that an objection to designation could denude a property from being characterized as mission premises, regardless of whether such objection is timely, non-arbitrary and non-discriminatory.

5. As I shall discuss in greater detail below, Article 1*(i)* of the Vienna Convention should be interpreted to mean that the "premises of the mission" are defined by reference to the sending State's notification that they are to be used for the purposes of the mission and by their actual use.

B. Historical background of the Vienna Convention

6. Diplomatic intercourse and immunities have a firm establishment in history and have been at the core of international relations long

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before the establishment of the United Nations or even the League of Nations.

Privileges and diplomatic intercourse prior to the Vienna Convention

7. The sanctity of ambassadors was recognized in early practice and writings. In Roman times, respect for the inviolability of priests of the College of Fetiales who conducted diplomatic negotiations was demanded and obtained by the Republic.[1] Hugo Grotius, in *De jure belli ac pacis*, **[392]** stated that "[t]here are two maxims in the law of nations relating to ambassadors which are generally accepted as established rules: the first is that ambassadors must be received and the second that they must suffer no harm".[2] Oppenheim and Sir Lauterpacht termed the privileges enjoyed by ambassadors as "sacrosanct".[3] To effectuate such privileges, after the Peace of Westphalia of 1648, establishment of permanent diplomatic missions became the common practice.[4] Subsequently, the Congress of Vienna in 1815[5] and the Protocol of the Conference of 21 November 1818 (Aix-la-Chapelle)[6] codified certain practices concerning diplomatic agents.

8. The Institut de droit international issued its *Règlement sur les immunités diplomatiques* in 1895 and a resolution on *Les immunités diplomatiques* in 1929. The 1895 *Règlement sur les immunités diplomatiques* used the term "inviolability" to denote the duty "to protect, by unusually severe penalties, from all offence, injury, or violence on the part of the inhabitants of the country". "Exterritoriality" was used in the same draft to cover the duty to abstain from measures of law enforcement.[7] This led to the conclusion of several bilateral treaties which accorded privileges on the basis of reciprocity.[8] The Sixth

[1] Codification of the international law relating to diplomatic intercourse and immunities: Memorandum prepared by the Secretariat, in *Yearbook of the International Law Commission (YILC)*, 1956, Vol. II, p. 132, para. 18.

[2] H. Grotius, *De jure belli ac pacis*, Book II, Chap. XVIII.

[3] L. Oppenheim, *International Law: A Treatise*, Vol. I, Peace, 7th edition, H. Lauterpacht (ed.), New York, Toronto: Longmans, Green and Co., 1948, pp. 687-8.

[4] Codification of the international law relating to diplomatic intercourse and immunities: Memorandum prepared by the Secretariat, *YILC*, 1956, Vol. II, p. 132, para. 19.

[5] *Ibid.*, p. 133, para. 22: Ann. XVII, Regulation concerning the relative ranks of diplomatic agents, Congress of Vienna, 19 March 1815.

[6] The text of the Protocol is available in C. Calvo, *Le droit international théorique et pratique*, 5th ed., Paris: Arthur Rousseau, 1896, Vol. III, p. 184.

[7] E. Denza, "Diplomatic Privileges and Immunities", J. P. Grant and J. C. Barker (eds.), *The Harvard Research in International Law: Contemporary Analysis and Appraisal*, W. S. Hein & Co., Buffalo, New York, 2007, pp. 162-3.

[8] Codification of the international law relating to diplomatic intercourse and immunities: Memorandum prepared by the Secretariat, *YILC*, 1956, Vol. II, p. 132, para. 19.

International American Conference in 1928 adopted the Havana Convention regarding Diplomatic Officers, which dealt with diplomatic privileges and immunities.[9] In 1932, the Harvard Research School published a Draft Convention on Diplomatic Privileges and Immunities.[10] It is significant that these early practices and instruments did not reference a requirement of consent or objection to the designation of mission premises by the receiving State, and instead they appear to prefer the notion of mutual consent and reciprocal privileges in diplomatic intercourse and privileges. It follows that an objection to **[393]** designation by the receiving State is not in consonance with a régime which provides for mutual consent and reciprocal privileges.

9. In 1952, as a result of the political backdrop of discontent arising from incidents of violations of diplomatic custom by the Soviet Union, Yugoslavia submitted a draft resolution requesting the United Nations General Assembly (hereinafter the "UNGA") to recommend that the ILC give priority to the codification of diplomatic intercourse and immunities.[11] Diplomatic law was among the first 14 topics selected for codification, and the work of the ILC eventually resulted in the adoption of the Vienna Convention.[12]

The basis of the diplomatic function and the theory of functional necessity in the work of the ILC in 1957

10. During the discussions of the ILC in 1957, the view was expressed that it would be useful to incorporate into the Draft Articles the "basis of the diplomatic function".[13] Even though members of the ILC expressed diverging views on the relative merits of the theoretical aspects of the diplomatic function,[14] the Draft Articles and commentary in 1958 incorporated them. According to the "exterritoriality" theory, the "premises of the mission represent a sort of extension of the territory of the sending State . . . [T]he 'representative character' theory . . . bases such privileges and immunities on

[9] Adopted 20 February 1928; League of Nations, *Treaty Series (LNTS)*, Vol. 155, p. 259.

[10] *American Journal of International Law (AJIL)*, Vol. 26, No 1, 1932, Supp.: Research in International Law, pp. 15-192.

[11] Request to the International Law Commission to give priority to the codification of the topic "Diplomatic intercourse and immunities" (1952); General Assembly resolution 685 (VII).

[12] R. van Alebeek, "Diplomatic Immunity", *Max Planck Encyclopedia of Public International Law*, Vol. 5, 2012, p. 98.

[13] *AJIL*, Vol. 26, No 1, 1932, Supp.: Research in International Law, pp. 15-192, Vol. I, p. 2, para. 10 (Fitzmaurice).

[14] *Ibid.*, pp. 2-3, paras. 10-13.

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the idea that the diplomatic mission personifies the sending State"; and the "functional necessity" theory justifies privileges and immunities as being necessary to enable the mission to perform its functions.[15] The ILC further stated that it was guided by the third theory of functional necessity in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself.[16] Sir Gerald Fitzmaurice, in particular, in his commentary, seemed to lean in favour of the functional theory on the premise that "it was impossible **[394]** for a diplomatic agent to carry out duties unless accorded immunities and privileges".[17]

11. Recapitulating the theory of functional necessity, at the United Nations Conference on Diplomatic Intercourse and Immunities, 1961, the preamble was based on a proposal which had the merit of stating that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions".[18] In my view, the basis of the diplomatic function, as these theories explicate, offers important guidance on the interpretation of the Vienna Convention.

12. The historical backdrop elucidated above emphasizes that no previously established rule of customary international law required or appears to permit an objection to designation of "premises of the mission". Rather, the very purpose of the régime of privileges and immunities places at its forefront the efficient performance of the functions of diplomatic missions. Therefore, in my view, the régime for the establishment of "premises of the mission" under the Vienna Convention should be interpreted in such a manner that it provides significant leeway to the facilitation of the efficient performance of the functions of diplomatic missions. Such facilitation may be hindered if the Convention is read to permit objections to designation.

C. Object and purpose of the Vienna Convention

13. On 18 April 1961, the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna

[15] Draft articles on diplomatic intercourse and immunities with commentaries, *YILC*, 1958, Vol. II, pp. 94-5.
[16] *Ibid.*
[17] International Law Commission, *Summary Records of the Ninth Session, 383rd Meeting*, *YILC*, 1957, Vol. I, p. 2, para. 10 (Fitzmaurice).
[18] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, Vol. II, doc. A/CONF.20/C.1/L.1 to L.332.

Convention on Diplomatic Relations, which became effective on 24 April 1964.[19] In the Convention's preamble, the signatory parties indicated "that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems", and "that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States".

14. The objectives of the Vienna Convention mirror the very ethos of the United Nations. The Convention benefits from an increased emphasis, at the time of its drafting, on the principles of international co-operation, equality of States, peaceful coexistence, and the establishment of friendly relations.[20] A proposal put forward by Hungary at the Vienna **[395]** Conference in 1961 for the preamble of the Convention highlighted that, "differences in constitutional, legal and social systems by themselves shall not prevent the establishment and maintenance of diplomatic relations".[21] These intentions are laid down in the preamble in clear terms. In the context of its drafting, the Convention also crystalizes the principles of sovereignty, non-interference and territorial jurisdiction.[22] It thereby presents two thematic considerations that, together, aim to facilitate the efficient performance of the functions of diplomatic missions.[23] In order to emphasize these principles, the second recital of the preamble of the Vienna Convention postulates, "[h]aving in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations". I will examine each in turn.

15. The principle of sovereign equality, in conformity with Article 5 of the ILC's Draft Declaration on Rights and Duties of States, 1949,

[19] United Nations, *Treaty Series (UNTS)*, Vol. 500, p. 95.

[20] S. Duquet and J. Wouters, "Diplomatic and Consular Relations", S. Chesterman, D. M. Malone and S. Villalpando (eds.), *The Oxford Handbook of United Nations Treaties*, Oxford University Press, 2019, p. 567.

[21] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, Vol. II, doc. A/CONF.20/C.1/L.148.

[22] S. Duquet and J. Wouters, "Diplomatic and Consular Relations", S. Chesterman, D. M. Malone and S. Villalpando (eds.), *The Oxford Handbook of United Nations Treaties*, Oxford University Press, 2019, p. 568.

[23] Reiterated in the five-power proposal by Burma, Ceylon, India, Indonesia and the United Arab Republic which formed the basis for the preamble. See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, Vol. II, p. 48, doc. A/CONF.20/C.1/L.329.

is primarily understood as assuring States a right to equality in law.[24] In present international law, sovereign equality denotes the exclusion of the notion of the legal superiority of one State over the other, while accounting for a greater role to be played by the international community in relation to all of its members. All States thus have equal rights and duties and are equal members of the international community regardless of any economic, social, political or other differences.[25]

16. The commitment to promote friendly relations was reinforced by the United Nations General Assembly in 1970 when it adopted UNGA resolution 2625 (XXV), titled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in **[396]** accordance with the Charter of the United Nations".[26] This resolution is reflective of customary international law and has been relied upon by the Court time and again.[27] The text of the resolution highlights the principles of good faith, sovereign equality of States, the duty to co-operate, non-intervention and peaceful settlement of international disputes in a manner that international peace and security and justice are not endangered. This intention is further evidenced from the *travaux préparatoires* of the resolution.[28]

17. In interpreting the object and purpose of the Vienna Convention, I am obliged to give special consideration to the preventive and corrective elements of diplomatic intercourse. The "maintenance of international peace and security", as the preamble provides, may be achieved through the prevention of conflict and the peaceful settlement

[24] Article 5 of the Draft Declaration on Rights and Duties of States with commentaries, 1949 reads: "Every State has the right to equality in law with every other State. This text was derived from article 6 of the Panamanian draft. It expresses, in the view of the majority of the Commission, the meaning of the phrase 'sovereign quality' employed in Article 2.1 of the Charter of the United Nations as interpreted at the San Francisco Conference, 1945."

[25] B. Fassbender, "Purposes and Principles, Article 2(1)", B. Simma, D.-E. Khan, G. Nolte, A. Paulus and N. Wessendorf (eds.), *The Charter of the United Nations: A Commentary*, Vol. I (3rd edition), Oxford University Press, 2012, pp. 149 and 153-4.

[26] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), General Assembly resolution 2625 (XXV).

[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, ICJ Reports 1986*, pp. 99, 101, 102-3, 106-7 and 133, paras. 188, 191, 193, 202 and 264; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, ICJ Reports 2005*, pp. 226 and 268, paras. 162 and 300; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 (I)*, p. 171, para. 87; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I)*, p. 264, para. 102.

[28] United Nations, *Official Records of the General Assembly, 19th Session*, doc. A/5746; *21st Session*, doc. A/6230; *22nd Session*, doc. A/6799; *23rd Session*, doc. A/7326; *24th Session*, Suppl. No 19, doc. A/7619; *25th Session*, Suppl. No 18, doc. A/8018.

of disputes.[29] This was confirmed by the Court in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, ICJ Reports 1979*, p. 19, para. 39, where it stated that

> the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.

18. Apart from the object and purpose described so far, diplomatic intercourse also requires the promotion of a more dynamic co-operation between States.[30] In a field dominated by reciprocal exchanges, the Vienna Convention provides a framework for States to act as equals on a level playing field. The Convention provides a means for States to protect their interests, the interests of their citizens and businesses abroad, and **[397]** thereby reap the benefits arising out of the exchange of representatives. Mutual benefits facilitate mutual respect for conceptions such as immunities, inviolability and the privileges of diplomats under diplomatic law. These interests and mutual benefits were called for by Member States of the United Nations and are reflected in the Vienna Convention.[31]

19. The Court, in the settlement of disputes between States concerning the interpretation of diplomatic law, must therefore give due regard to these crucial preambular tenets of sovereign equality, peaceful coexistence, and the development of friendly relations for the purpose of ensuring the efficient performance of the functions of diplomatic missions. Such an approach would create greater coherence in the field of diplomatic privileges and immunities. In my opinion, a reading of the Convention, which permits a unilateral objection to the designation of "premises of the mission", would impinge upon its foundational principles, thereby disrupting the fine balance enshrined in the object and purpose of the treaty. Furthermore, an objection, whether it is timely and adjudged on the parameter of not being arbitrary, would not

[29] S. Duquet and J. Wouters, "Diplomatic and Consular Relations", S. Chesterman, D. M. Malone and S. Villalpando (eds.), *The Oxford Handbook of United Nations Treaties*, Oxford University Press, 2019, p. 567.

[30] The League of Nations Covenant (Paris, 28 June 1919) only promoted "the prescription of open, just and honourable relations between nations".

[31] S. Duquet and J. Wouters, "Diplomatic and Consular Relations", S. Chesterman, D. M. Malone and S. Villalpando (eds.), *The Oxford Handbook of United Nations Treaties*, Oxford University Press, 2019, p. 568.

further the enabling of friendly relations, and would rather be an impingement on sovereignty. In such circumstances, the result of the discretionary power that the receiving State possesses would not appear capable of being characterized as an exercise of power in good faith, rather, it would further the notion of the legal superiority of one State over the other.

D. Mutual consent under Article 2 of the Vienna Convention

20. An issue that lies at the very centre of my opinion is that the Vienna Convention in clear terms provides for the establishment of diplomatic relations between States to take place by mutual consent. When speaking of diplomatic intercourse in general and the establishment of diplomatic relations and missions, Article 2 of the Vienna Convention states that, "[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent".

21. The ordinary meaning of Article 2 thus suggests a requirement of mutual consent for the establishment of diplomatic relations. The ILC in 1957 in its commentary to Draft Article 1 (which became Article 2) stated that "[t]he Commission here confirms the general practice of **[398]** States".[32] Further, in reference to Article 2, the ILC in 1958 elaborated that

> [t]here is frequent reference in doctrine to a "right of legation" said to be enjoyed by every sovereign State. The interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, necessitate the establishment of diplomatic relations between them. However, since no right of legation can be exercised without agreement between the parties, the Commission did not consider that it should mention it in the text of the draft.[33]

The ILC further opined that

> [t]he most efficient way of maintaining diplomatic relations between two States is for each to establish a permanent diplomatic mission (i.e. an embassy or a legation) in the territory of the other; but there is nothing to prevent two States from agreeing on other methods of conducting their diplomatic relations, for example, through their missions in a third State.[34]

[32] Draft articles on diplomatic intercourse and immunities with commentaries, *YILC*, 1957, Vol. II, p. 133.
[33] *Ibid.*, 1958, Vol. II, p. 90.
[34] *Ibid.*

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22. Apart from this provision for mutual consent, there is nothing in the Vienna Convention which requires the consent of the receiving State for the designation of property as the premises of the mission. A test that permits a unilateral objection to designation of premises of the mission, regardless of whether it is considered reasonable, would not evince the requirement for mutual consent or agreement between the parties, in the establishment of diplomatic relations, that the Convention and ILC assert. It is therefore reasonable to suggest that the inevitable consequence of permitting an objection to designation is that the consent of the receiving State would begin to play an important role in the establishment of "premises of the mission" which is not reflective of the view that the right of legation cannot be exercised without the agreement of both parties.

E. Arguments of the parties

23. Equatorial Guinea's main contention is that, by the search, seizure and attachment of 42 avenue Foch in Paris, France breached the inviolability of Equatorial Guinea's diplomatic premises. Equatorial Guinea stated that, under the rule on inviolability,

> **[399]** police, process servers, safety inspectors, etc. may not enter the premises without the consent of the head of the mission. The premises of the mission may not be searched or inspected in any way. Writs cannot be served within the premises of the mission but only through diplomatic channels.[35]

24. According to Equatorial Guinea, Article 22 of the Vienna Convention entails an absolute obligation not allowing any exceptions.[36] Equatorial Guinea argued that, "[e]ven when it is suspected that the premises of a mission are being used in a manner incompatible with the functions of the mission, the premises are still not subject to intrusion by officials of the receiving State".[37] Equatorial Guinea points to the various instances on which the French authorities entered 42 avenue Foch in Paris without the consent of the head of the mission in order to conduct searches.[38]

25. Equatorial Guinea submitted that "[a] building which has very recently been acquired by the sending State—when, as in the present case, that State intends it to be used as premises of its diplomatic

[35] Memorial of Equatorial Guinea (MEG), para. 8.7.
[36] *Ibid.*, para. 8.8. See also CR 2020/1, p. 15, para. 2 (Wood); CR 2020/3, p. 10, para. 6 (Wood).
[37] MEG, para. 8.10.
[38] *Ibid.*, paras. 8.14 and 8.17-8.19.

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mission—enjoys inviolability on the same basis as a building effectively used for that purpose".[39] The receiving State's consent is immaterial to identify the moment when certain premises start to enjoy inviolability,[40] which is also argued to be the correct interpretation of Article 1*(i)* of the Vienna Convention.[41] Equatorial Guinea also states that the Vienna Convention creates a presumption of validity of the sending State's claims that certain premises have diplomatic status,[42] and is of the view that its interpretation emerges from the plain language of the Vienna Convention, its drafting history and widespread State practice.[43] According to Equatorial Guinea, there is also a long-standing practice between itself and France, under which notification of intention to use certain premises as a diplomatic mission suffices for the acquisition by those premises of diplomatic status.[44]

26. According to Equatorial Guinea, 42 avenue Foch in Paris became its "premises of the mission" on 4 October 2011, when France was notified in the following terms:

[400] [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, a fact which it has hitherto not formally notified to your Department. Since the building forms part of the premises of the diplomatic mission, pursuant to Article 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Republic of Equatorial Guinea wishes to give you official notification so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention.[45]

27. Equatorial Guinea also stated that, on that date, Mr Teodoro Nguema Obiang Mangue did not own 42 avenue Foch in Paris as, on 15 September 2011, Equatorial Guinea had become the majority shareholder of the companies which owned the building.[46] It also stated that it had decided to relocate the Embassy even before acquiring ownership of the premises.[47] Equatorial Guinea concluded that the

[39] *Ibid.*, paras. 8.15-8.16. See also CR 2020/1, p. 35, para. 21 (Kamto).
[40] MEG, para. 8.26 and 8.34. See also CR 2020/1, pp. 36-9, paras. 24-35 (Kamto).
[41] Reply of Equatorial Guinea (REG), para. 2.47.
[42] *Ibid.*, para. 2.14.
[43] *Ibid.*, para. 2.3; MEG, paras. 8.42-8.45.
[44] REG, para. 2.32.
[45] See MEG, Ann. 33. See also *ibid.*, para. 8.46; REG, para. 1.41; CR 2020/1, p. 43, para. 47 (Kamto). In any event, Equatorial Guinea states that Mr Obiang, as the owner of 42 avenue Foch in Paris, used to permit the use of the building for diplomatic purposes even in the years before 2011. See REG, para. 1.2.
[46] MEG, para. 8.31.
[47] REG, para. 1.25.

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searches of 42 avenue Foch in Paris carried out on 14 to 23 February 2012 and 19 July 2012 were unlawful[48] as they breached the inviolability to which Equatorial Guinea's "premises of the mission" were entitled.[49]

28. Yet, it was on 27 July 2012 that Equatorial Guinea claimed that its Embassy offices had been "effectively moved" to 42 avenue Foch in Paris and that it was using the building "for the performance of the functions of its diplomatic mission".[50] France was notified in the following terms:

> The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs, Protocol Department, Diplomatic Privileges and Immunities Sub-division and has the honour to inform it 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.[51]

29. France's main contention is that, on the dates of the searches of which Equatorial Guinea complains, 42 avenue Foch in Paris was not "premises of the mission" within the meaning of the Vienna Convention, **[401]** and, as a result, was not inviolable under Article 22 of the Vienna Convention. According to France, "[a] building can have the status of diplomatic premises only if, first, France, as the receiving State, has not expressly objected to its being considered part of the diplomatic mission, and, second, it is actually used for diplomatic purposes".[52]

30. France acknowledges that the Vienna Convention does not provide details concerning the procedure for recognizing the inviolability of "premises of the mission".[53] However, France disagrees with Equatorial Guinea's argument based on Article 12 of the Vienna Convention:[54] France argues that the mere requirement of express consent under Article 12 cannot mean that such consent is not necessary to establish the diplomatic mission in a capital city.[55] France also stated that ownership of 42 avenue Foch in Paris is unrelated to the

[48] MEG, para. 8.20; REG, para. 2.51.
[49] MEG, paras. 8.22-8.25.
[50] *Ibid.*, para. 8.48. See also CR 2020/1, p. 12, para. 6 (Nvono Nca); GEF 2020/33, p. 6.
[51] See MEG, Ann. 47.
[52] Counter-Memorial of France (CMF), para. 3.3.
[53] CMF, para. 3.8.
[54] Article 12 requires the express consent of the receiving State to establish parts of the mission in localities other than the capital city of that State.
[55] CMF, para. 3.15.

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enjoyment by those premises of inviolability under the Vienna Convention,[56] as supported by the language of Articles 1*(i)* and 22.[57] France further submits that Equatorial Guinea's declaratory theory is not supported by State practice.[58]

31. France argues that a building is the "premises of the mission" if it is actually used as such,[59] supporting its argument by reference to the drafting history of the Vienna Convention[60] and to the practice of Germany, Canada, the United States and the United Kingdom.[61] France emphasized that 42 avenue Foch in Paris had not been "assigned to any actual diplomatic activity when it was searched between 28 September 2011 and 23 February 2012, nor when the attachment took place on 19 July 2012".[62] France also points to Equatorial Guinea's admission that 42 avenue Foch in Paris acquired diplomatic status on 4 October 2011, and that, as a result, the searches which had taken place before that date could not engage the responsibility of France.[63] France suggested that 27 July 2012 should be the earliest date from which Equatorial Guinea's "premises of the mission" could be considered to have been **[402]** effectively moved to 42 avenue Foch in Paris.[64] Therefore, there was no breach of the inviolability of those premises on the dates on which 42 avenue Foch in Paris was attached and thus France did not incur international responsibility.

32. The arguments made by Equatorial Guinea and France present interpretations on the application of the régime of inviolability under the Vienna Convention along a broad spectrum that ranges from "intention to use" to "express consent". In my view, the ordinary meaning of the text of Article 1*(i)* in the light of the object and purpose of the Convention, offers a clear test for the designation of "premises of the mission".

[56] Rejoinder of France (RF), para. 2.5.
[57] *Ibid.*, para. 2.17.
[58] CMF, paras. 3.16-3.23. See also RF, paras. 2.25-2.26; CR 2020/2, pp. 31-2, paras. 19-21 (Bodeau-Livinec). France relies on the rules and practice in South Africa, Germany, Australia, Brazil, Canada, Spain, Norway, the Netherlands, the Czech Republic, Switzerland and Turkey.
[59] CMF, para. 3.24. See also CR 2020/2, p. 35, para. 29 (Bodeau-Livinec).
[60] CMF, paras. 3.26-3.31.
[61] *Ibid.*, paras. 3.32-3.42.
[62] *Ibid.*, para. 3.54.
[63] RF, para. 2.39. See also CR 2020/2, p. 39, para. 4 (Grange).
[64] CMF, para. 3.57 (France referred to MEG, Ann. 47). See also CR 2020/2, p. 43, para. 22 (Grange).

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F. Interpreting Article 1(i) *of the Vienna Convention*

33. Article 1*(i)* of the Vienna Convention states:

> For the purposes of the present Convention, the following expressions shall have the meaning hereunder assigned to them:
>
> *(i)* 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.

Under Article 22 of the Vienna Convention,

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

34. The text of Article 22 does not define "premises of the mission"; it however makes implicit reference to the definition under Article 1*(i)*. Article 22 therefore creates a régime of inviolability for premises which fall within the definition of "premises of the mission" under Article 1*(i)*.

[403] 35. The provisions of the Vienna Convention have to be interpreted pursuant to rules of customary international law on treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter the "VCLT").[65] Under Article 31(1) of the VCLT, "[a] treaty shall be interpreted 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".

36. If interpretation under Article 31 leaves the meaning ambiguous or obscure, or leads to manifestly absurd or unreasonable results, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion", in accordance with Article 32 of the VCLT.

[65] *UNTS*, Vol. 1155, p. 331. See *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, ICJ Reports 2016 (I)*, p. 116, para. 33.

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37. The ordinary meaning of the terms of Articles 1*(i)* and 22 do not specify when certain premises become "premises of the mission", and, as a consequence, begin to benefit from the régime of inviolability. However, Article 1*(i)* appears to provide some useful indications. First, pursuant to Article 1*(i)* classifying certain premises as "premises of the mission" is independent of ownership, which suggests that the Parties' arguments relating to the effect of ownership of 42 avenue Foch in Paris are not relevant for the Court to dispose of the present case. In certain instances, a sending State may acquire premises as its diplomatic mission by renting or by other means, and the acquisition of ownership of property may not be a possibility for all States.[66] Thus ownership of the premises is irrelevant in determining the status of the building. Second, Article 1*(i)* identifies "premises of the mission" as premises which are "used for the purposes of the mission". Notably, that provision employs the word "used", which suggests a criterion of actual use in order to identify the "premises of the mission"; if the Vienna Convention's drafters had wished to identify the "premises of the mission" by means of a criterion of intended use, they could have employed the expression "intended to be used" in Article 1*(i)*.

38. It is further use of the premises "for the purposes of the mission" that determines their diplomatic status. The phrase "used for the purposes of the mission" must be interpreted in the context of the "non-exhaustive" list of diplomatic functions found under Article 3(1) of the Vienna Convention. During the work of the ILC it was noted that a definition of diplomatic functions would be "illustrative and [intended to] **[404]** provide guidance for States on the nature of diplomatic functions at the present day".[67] It follows that practice in relation to what has been regarded as "used for the purposes of the premises of the mission" would become relevant to assess the point at which premises may be considered a diplomatic mission. Such practice may provide valuable insights on ascertaining the parameters of the term "used for the purposes of the mission" since the preamble of the Vienna Convention affirms that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions" of the Convention.

39. The ordinary meaning of Article 1*(i)* therefore suggests that the "premises of the mission" should be identified by reference to a

[66] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edition, Oxford University Press, 2016, p. 16.

[67] International Law Commission, *Summary Records of the Ninth Session, 393rd Meeting*, *YILC*, 1957, Vol. I, p. 50, para. 64.

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criterion of "actual use" and that such use is "for the purposes of the mission".

40. On the question whether an objection to designation is permissible under the Vienna Convention, the ordinary meaning of the terms of Article 1*(i)* do not allude to such a criterion, they also do not clarify whether any other form of consent by the receiving State is necessary for the designation of "premises of the mission". In my view the context of the provision, along with the object and purpose of the Vienna Convention offer more guidance in this regard.

41. The context of Article 1*(i)* is helpful in identifying the time within which, under the Vienna Convention, premises acquire diplomatic status.

42. Under Article 4(1), "[t]he sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State"; Article 4(2) adds that "[t]he receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*". Moreover, Article 5(1) provides that the sending State must give "due notification to the receiving State[]" if it wishes to accredit a head of mission or assign any member of the diplomatic staff to more than one receiving State. Such accreditation or assignment is subject to the "express objection by any of the receiving States". The provision for the accreditation of the same person by two or more States as head of mission under Article 6 is also subject to the "express objection" of the receiving State.

43. A contextual reading of Article 1*(i)* would indicate that there are no similar requirements of express consent or objection by the receiving State to the establishment of "premises of the mission". It follows that, such a requirement cannot be considered to exist on the basis of a contextual reading of Article 1*(i)*. If the drafters wanted to include an objection **[405]** by the receiving State to the establishment of diplomatic premises, they would have done so expressly, as they did in relation to the accreditation of heads of missions. In the absence of an express requirement, while giving due regard to the need to balance the interests of the sending and receiving States, one could infer that, the definition of "premises of the mission" should at the very least, in addition to actual use, require a sending State to notify the receiving State of the use of a certain building for diplomatic purposes.

44. The object and purpose of the Vienna Convention can be inferred from the preamble and the text of the treaty as a whole. The second recital of the preamble to the Vienna Convention refers to

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"the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations". The third recital of the preamble to the Vienna Convention states that "an international convention on diplomatic intercourse, privileges and immunities" is to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems". The fourth recital of the preamble to the Vienna Convention states that "the purpose of [diplomatic] privileges is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States".

45. Article 3 of the Vienna Convention sets out the functions of the diplomatic mission, which include, *inter alia*, representing the sending State in the receiving State, protecting the interests of the nationals of the sending State in the receiving State and negotiating with the receiving State's Government.

46. Articles 4 to 19 of the Vienna Convention govern issues relating to the personnel of the diplomatic mission, such as the appointment of the head of the mission, the receiving State's *agrément*, accreditation with the receiving State and precedence. Articles 20 to 25 concern the rights and obligations of the sending and receiving States in relation to the premises of the diplomatic mission. Articles 26 to 47 relate to the privileges and immunities of diplomatic agents and their families and diplomatic archives and correspondence.

47. The preamble, the structure of the Vienna Convention and the functions of diplomatic missions set out in Article 3 thereunder suggest that the Vienna Convention aims to facilitate the establishment and maintenance of diplomatic relations between States, the promotion of friendly relations, and ensuring due respect for the sovereign equality of States.

48. In the light of the foregoing, a criterion of intended use for classifying certain premises as diplomatic could be excessively nebulous from the perspective of a receiving State. While the Vienna Convention's provisions on the establishment of a diplomatic mission appear not to restrict sending States in their choice as to the location and time of establishment, it seems reasonable that the Vienna Convention would provide the receiving State with the means to achieve an appreciable degree of certainty as **[406]** to whether certain premises enjoy diplomatic status or not. Such means could be provided by the criterion of actual use, rather than by the criterion of intended use.

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49. The object and purpose of the Vienna Convention also seems to entail an additional consequence. In my view it would appear to be contrary to the object and purpose of the Vienna Convention if a sending State could establish their "premises of the mission" in the receiving State without receiving States being certain, to an appreciable degree, as to which premises are diplomatic in character, and therefore enjoy inviolability under Article 22 of the Vienna Convention. The receiving States' uncertainty as to where the "premises of the mission" are located seems not to be conducive to the establishment and maintenance of diplomatic relations with the sending States. The object and purpose of the Vienna Convention therefore suggests that, in the interest of certainty, a receiving State should be at least notified that certain premises are to be used for the purposes of a sending State's diplomatic mission.

50. In support of their respective arguments, the Parties referred to a number of instances of State practice in the application of the Vienna Convention. Since the Court's task is primarily an interpretive one, the relevance and weight of that State practice should be assessed within the framework of the rules on treaty interpretation. Article 31(3) of the VCLT states that "[t]here shall be taken into account, together with the context: . . . *(b)* [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". However, for subsequent practice to amount to "authentic interpretation", it must be such as to indicate that the interpretation has received the tacit assent of the parties to a treaty generally; the ILC adopted this approach in its works on the law of treaties[68] and on subsequent practice in relation to the interpretation of treaties.[69]

51. However, State practice falling short of "subsequent practice" could be a supplementary means of interpretation within the meaning of Article 32 of the VCLT, as confirmed by the ILC in its 2018 Draft Conclusions on subsequent practice.[70] According to the ILC, "subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty, but only of one or more parties, may be used as a supplementary means of interpretation".[71]

[68] "Sixth Report on the Law of Treaties", by Sir Humphrey Waldock, Special Rapporteur, *YILC*, 1966, Vol. II, p. 99, para. 18.

[69] "Draft Conclusions on Subsequent Agreement and Subsequent Practice in relation to the Interpretation of Treaties with Commentaries", *Report of the International Law Commission on the Work of Its Seventieth Session*, UN doc. A/73/10 (17 August 2018), p. 13.

[70] *Ibid.*, p. 20, para. 8.

[71] *Ibid.*, para. 9.

If applying the means of interpretation under Article 31 of the VCLT leaves the meaning of Article 1*(i)* of the Vienna Convention "ambiguous or **[407]** obscure" or leads to "a result which is manifestly absurd or unreasonable", the practice to which the Parties referred could be used as a supplementary means of interpretation alongside the *travaux préparatoires*.

52. While both Parties referred to subsequent State practice in the application of the Vienna Convention, in my view, it does not seem to be sufficiently uniform to point to any particular interpretation of Article 1*(i)*. I would reach the same conclusion with respect to the practice of Equatorial Guinea and France between themselves; I would also suggest that it is inappropriate to rely on the practice of the Parties *inter se* in the interpretation of a multilateral treaty. The Court in *North Sea Continental Shelf* (*(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969*, p. 43, para. 74) has also stated that "State practice, including that of States whose interests are specially affected[] should have been both extensive and virtually uniform in the sense of the provision invoked".

53. In my view, the application of the means of interpretation under Article 31 of the VCLT neither leaves the meaning of Article 1*(i)* of the Vienna Convention ambiguous or obscure, nor does it lead to a result which is manifestly absurd or unreasonable. Therefore, there is no need to resort to supplementary means of interpretation under Article 32 of the VCLT.[72] Nonetheless, I will proceed to the *travaux préparatoires* of the Vienna Convention which confirms and strengthens the interpretation resulting from the application of the general rule of interpretation under Article 31 of the VCLT.

54. In the lead-up to the Vienna Convention being adopted in 1961, the view was expressed at the ILC that the issue of the time from which certain premises would enjoy inviolability was a "thorny one".[73] Comments by ILC members indicated a variety of views, including that "[t]he inviolability of the premises . . . began from the time they were put at the disposal of the mission" and, similarly, that "[t]here could be no doubt that [inviolability] dated from the time that the premises were at the disposal of the mission".[74] It was further stated that

[72] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2019 (II)*, p. 600, para. 112.

[73] International Law Commission, *Summary Records of the Ninth Session, 394th Meeting*, *YILC*, Vol. I, pp. 52-3, para. 17 (Bartos).

[74] *Ibid.*, p. 53, para. 19 (Fitzmaurice). See also *ibid.*, para. 24 (Spiropoulos).

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[a]s for the time from which that inviolability commenced ... it was the practice of the sending State to notify the receiving State that certain premises had been acquired for use as the headquarters of its mission. The beginning of inviolability could, therefore, date from the **[408]** time such notification reached the receiving State, even though the head of the mission might arrive much later.[75]

55. No member expressed the view that prior State consent or any other form thereof was a requirement for the inviolability of diplomatic mission premises.

56. In its Commentary to the Draft Articles in 1958, the ILC did not elaborate on the definition of "premises of the mission",[76] beyond stating, in relation to Draft Article 20 (which became Article 22), that "[t]he expression 'premises of the mission' includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented".[77]

57. The ILC seems to have implicitly alluded to a criterion of actual use by employing the terms "used for the purposes of the mission", which confirms the interpretation of the ordinary meaning of Article 1*(i)* that this opinion suggests.

58. Although the *travaux préparatoires* do not seem to offer particular assistance in the identification of the time when certain premises acquire diplomatic status, the comment concerning the practice of notifying the receiving State seems to suggest that the ILC's members understood notification to be the extent to which communication with a receiving State was necessary to acquire the status of "premises of the mission". This may also be helpful to show that the Commission's members may have understood that such notification was required under international law or as a matter of diplomatic practice. Consequently, such a reading of the preparatory work for the Vienna Convention confirms the interpretation that I have suggested through the application of Article 31 of the VCLT.

G. Conclusion on the interpretation of Article 1(i)

59. *First*, the ordinary meaning of Article 1*(i)* indicates that the "premises of the mission" are defined by reference to their actual use,

[75] See *supra* note 73, p. 53, para. 25 (Ago).
[76] Draft articles on diplomatic intercourse and immunities with commentaries, *YILC*, 1958, Vol. II, p. 89.
[77] See *supra* note 73, p. 95, para. 2.

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not their intended use, by the sending State. This interpretation appears to be supported by the object and purpose of the Vienna Convention.

Second, although the text of the Vienna Convention is silent on the means by which a receiving State obtains knowledge that certain premises are to be classified as "premises of the mission" within the meaning of Article 1*(i)*, the object and purpose of the Convention and the context **[409]** of Article 1*(i)* suggest that the sending State should notify the receiving State, in whatever form, of the use or intention to use certain premises for diplomatic purposes.

60. It follows that the premises chosen by the sending State acquire the status of "premises of the mission", therefore enjoying the régime of inviolability under Article 22 of the Vienna Convention, provided that two cumulative conditions are satisfied: first, notification is given to the receiving State of the use or intention to use such premises for diplomatic purposes; second, such premises are actually used for diplomatic purposes by the sending State. The first condition seems to be insufficient, in and by itself, to determine the acquisition of diplomatic status by certain premises. If notification by the sending State were the only requirement for certain premises to become "premises of the mission", the possibility of abuse by sending States is apparent. Consequently, I most respectfully cannot agree with the Judgment of the Court which appears to gloss over the requirement for mutual consent and the principles enshrined in the preamble of the Vienna Convention.

H. Application of the Vienna Convention to the facts of the case

61. The Parties do not disagree on the facts of the present case, including the timeline of events relevant to Equatorial Guinea's claim in relation to 42 avenue Foch in Paris.

Acts of France up to 27 July 2012

62. Equatorial Guinea first notified France that 42 avenue Foch in Paris was to be used as "premises of the mission" by the Note Verbale of 4 October 2011.[78] On this basis, it would appear that any act carried out by France in respect of 42 avenue Foch in Paris before 4 October 2011 could not constitute a breach of its obligations under the Vienna Convention vis-à-vis Equatorial Guinea.

63. However, it is my position that Equatorial Guinea's notification of the intended use of 42 avenue Foch in Paris, by way of its Note

[78] MEG, Ann. 33.

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Verbale dated 4 October 2011, as its Embassy was not sufficient in order for that building to acquire the status of "premises of the mission". In addition to notifying France, Equatorial Guinea also has to show the actual use of 42 avenue Foch in Paris as its Embassy. In its written submission, Equatorial Guinea has not claimed that its diplomatic offices were moved to 42 avenue Foch in Paris prior to 27 July 2012, when Equatorial Guinea **[410]** sent France a Note Verbale stating 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".[79] The timeline therefore does not indicate that diplomatic offices were moved to 42 avenue Foch in Paris before 27 July 2012.[80] Consequently, 42 avenue Foch in Paris had not been in actual use as Equatorial Guinea's Embassy before 27 July 2012.

64. I therefore suggest that 27 July 2012 is the date on which both conditions for 42 avenue Foch in Paris to be identified as "premises of the mission" were satisfied. It would follow that 42 avenue Foch in Paris could be considered to be the "premises of the mission" of Equatorial Guinea from that date, and, as a consequence, to enjoy the régime of inviolability under Article 22 of the Vienna Convention.

65. After 27 July 2012, the French authorities have neither entered or searched 42 avenue Foch in Paris, nor attached moveable property found therein. It follows, in my view, that any act by France in respect of 42 avenue Foch in Paris carried out before 27 July 2012 could not amount to a breach of its obligations owed to Equatorial Guinea under the Vienna Convention.

66. However, France appears not to recognize, as of yet, that 42 avenue Foch in Paris constitutes the "premises of the mission" of Equatorial Guinea. This emerges from a statement made at the oral proceedings of 18 February 2020, by which counsel for France stated that "[t]he building at 42 avenue Foch in Paris is not covered by the régime of inviolability under Article 22 of the Vienna Convention as it never possessed diplomatic status".[81]

I. Used for the purposes of the mission

67. Equatorial Guinea states in its Memorial that all the Embassy offices were effectively moved to 42 avenue Foch in Paris in 2012.[82]

[79] MEG, Ann. 47.
[80] *Ibid.*, Timeline (pp. 125-33 of the English version).
[81] CR 2020/2, p. 34, para. 25 (Bodeau-Livinec).
[82] MEG, para. 8.48.

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The building at 42 avenue Foch in Paris has since been officially used, without interruption as Equatorial Guinea's Embassy in France. It is noteworthy that French officials have visited the building at 42 avenue Foch in Paris to obtain visas to enter Equatorial Guinea.[83] **[411]**

68. In a Note Verbale dated 12 May 2016, Equatorial Guinea reasserted its rights in the following terms:[84]

> The Embassy avails itself of this opportunity to recall that the building located at 42 avenue Foch in Paris (16th arr.) has effectively been occupied by the diplomatic mission of the Republic of Equatorial Guinea in France since October 2011; that this is, moreover, the address at which requests for visas to enter Equatorial Guinea are submitted by members of the French Government, such as the State Secretary for Development and Francophone Affairs, who made an official visit to Equatorial Guinea from 8 to 9 February 2015; that a law enforcement unit went to that same address on 13 October 2015 to provide protection for the diplomatic mission during a protest by members of the Equatorial Guinean opposition in France.
>
> The Embassy observes that this contradiction, between the Ministry's position and the French Government's conduct in relation to the legal nature of the building located at 42 avenue Foch in Paris (16th arr.), should not be to the detriment of the Republic of Equatorial Guinea.[85]

69. As premises of the mission are to be considered "the buildings . . . irrespective of ownership, used for the purposes of the mission . . ." premises in actual use, as they clearly are in the present circumstances and as evidenced by paragraphs 65 and 66 above, should be accorded diplomatic status. Consequently, France's refusal to recognize the building at 42 avenue Foch in Paris as Equatorial Guinea's diplomatic mission even after 27 July 2012 may appear unjustifiable.

J. Observations on the Judgment of the Court

70. In light of the foregoing, I respectfully differ from the conclusions reached by the majority in the Judgment. I wish to take the present opportunity to note the following observations on the Judgment of the Court.

71. First, notification alone by the sending State for the designation of certain property as premises of the mission makes the possibility of abuse apparent (Judgment, para. 67). However, a unilateral objection by the receiving State to the choice of mission premises, regardless of

[83] *Ibid.*, para. 2.13.
[84] MEG, Ann. 51.
[85] *Ibid.*

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whether it is adjudged against parameters of timeliness and non-arbitrariness, does not reflect the balancing of interests required by the Vienna Convention. In interpreting relations between equal sovereign States, it appears erroneous that the sending State would have no option but to accede to the desires of the receiving State. A unilateral objection to designation of **[412]** "premises of the mission" by the receiving State which has the effect of instantaneously denuding the acquisition of diplomatic status may result in an imbalance to the detriment of the sending State. It follows that the logical consequence of the majority view is that the building at 42 avenue Foch in Paris would never acquire the status of premises of the mission. However, it remains clear that the premises were in fact in use for the purposes of the mission within the meaning of Article 1*(i)* of the Vienna Convention, from 27 July 2012. Therefore, the implication which arises out of this Judgment—that the outcome of a régime which lays down conditions for the establishment of friendly relations between equal sovereign States, was for certain property to never acquire diplomatic status on the basis of an objection—appears to be a flawed premise.

72. Equatorial Guinea asserts that between 4 October 2011 and 27 July 2012 it was engaged in organizing the transfer of the offices of its Embassy to the building at 42 avenue Foch in Paris. While Equatorial Guinea has not claimed that all of its diplomatic offices were moved prior to 27 July 2012, the Note Verbale of 27 July 2012 indicates that designated use was consistent with actual use by this date. Requests for visas were made from this address by members of the French Government, and a law enforcement unit was sent to protect the diplomatic mission during a protest. In these circumstances, the conclusion that the property has never acquired diplomatic status is akin to a state of affairs whereby, three steps arising out of a task of five having been completed, no reconsideration was considered permissible on the completion of the remainder of the steps, despite there being no prescriptive limits. It appears that the French authorities subsequently make no attempt to confirm actual use and do not evaluate the steps taken that evidence such use. In my view, it would appear inconsistent with the purposes of the Vienna Convention for receiving States to possess the power to determine unilaterally which premises each sending State is entitled to use, to allocate premises to one sending State over another or, as in the present case, to refuse diplomatic recognition of premises in actual use by a sending State as its diplomatic mission.

73. The objection to designation permits the receiving State to possess discretionary power under the Vienna Convention. The

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receiving State may at any moment refuse to grant diplomatic status, and even if its decision is neither arbitrary nor discriminatory, it is likely to lead to disputes between sending and receiving States over objections to designation, which could be detrimental to the maintenance of diplomatic relations between States. Further, such an interpretation which favours the receiving State by allowing for discretion in its hands in the designation of mission premises would hardly be consistent with the principle of sovereign equality of States. It is also notable that the Vienna Convention does not appear to envisage any redressal **[413]** mechanism in the event that a dispute in this regard arises. Moreover, even if one is to take the view that disputes could be submitted to arbitration or another form of dispute resolution, this does not alter the fact that they are not conducive to the existence of friendly relations between the States concerned. The Court should not shrink away from its duty to pronounce on a régime that requires the balancing of interest.

74. Admittedly, the Vienna Convention imposes certain obligations upon receiving States; however, it does so in order to protect the interest of the nationals of the sending State in the receiving State and to provide for instances where a sending State would need to negotiate with the receiving State's Government. Considering the importance attached to the latter rights and the facilitation thereof from the purview of sovereign equality and the balancing of interests, it appears inappropriate that the Judgment would interpret it as the imposition of weighty obligations upon the receiving State. I am therefore unable to concur with the reasoning in paragraph 66 of the Judgment.

75. Paragraphs 64 and 65 of the Judgment analogize the immunities accorded to "diplomatic personnel and staff of the mission" to that of "premises of the mission", and assert that under Article 9 of the Vienna Convention, a receiving State is not obliged to grant diplomatic privileges and immunities to an individual indefinitely without its consent. The use of such an analogy to draw conclusions that permit a receiving State to unilaterally object to the establishment of mission premises would be unreasonable. The contrast between the two régimes is evident in the very nature of functions of a diplomatic mission and that of the diplomatic personnel and staff.

76. The ongoing criminal proceedings should not affect the crux of the dispute and should not drive the Court's reasoning. In determining the question whether the objection by France to Equatorial Guinea's designation of the building as premises of the mission was arbitrary and discriminatory in nature, the Court heavily relies on the ongoing

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criminal proceedings, pending to this date, with respect to Mr Teodoro Nguema Obiang Mangue, to reason that the searches and seizures carried out were justified and that the objection to designation was reasonable and not arbitrary (paras. 107-10). The Judgment in paragraph 107 reasons that "France's conclusion that the building fell within the private domain was not without justification". In my view, to attach great weight to information derived out of the ongoing criminal proceedings may appear convoluted and should not drive the reasoning behind a question which purely relates to the interpretation and application of the inviolability guarantees under the Vienna Convention.

77. Before concluding, I am compelled—albeit with utmost respect to the Court's Judgment—to underscore the "objection" and "timely manner" standards, which perhaps the Court tries to evolve through its jurisprudence. My opinion upon a perusal of the entire Judgment is that the **[414]** sources relied upon by the Court, specifically the decided case laws of this Court in paragraph 73 of the Judgment, would only have a persuasive value, when applied in the appropriate context of this case. With regret I opine that these cases, admittedly as per the Judgment, at best rely upon the principle of good faith, like a catena of others rendered by this Court, and offer no distinct assistance to evaluate the "objection" and "timely manner" standards, which the Court purports to establish. While the Court attempts to read good faith in conjunction with the aforementioned standards, I respectfully disagree with such an interpretation. In fact, if at all a good faith argument as made in this paragraph was to sustain in the context of an objection, it would be to the effect that an objection to the acknowledgment of the existence of the premises of a mission would result in bad faith, leading to an impingement of sovereignty of a member State to the Vienna Convention, thus clearly not in consonance with its object and purpose, for the reasons stated above in my dissent.

K. Conclusion

78. The building at 42 avenue Foch in Paris acquired the status of the premises of the diplomatic mission of Equatorial Guinea from 27 July 2012, which is the date of its actual use. I therefore consider the régime of inviolability under Article 22 of the Vienna Convention to apply to the premises from this date onwards. The issue before the Court is of fundamental importance, having far-reaching implications on the law of diplomatic privileges and immunities—a body of law based on promoting the maintenance and development of friendly

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relations among nations, regardless of differing constitutional and social systems. In the absence of an express stipulation to the effect, I opine that the parameters of notification and actual use, rather than permitting an objection to designation of certain property as "premises of the mission", would evince mutual consent. I conclude by recalling the Convention's purpose: "to ensure the efficient performance of the functions of diplomatic missions as representing States".

[415] DISSENTING OPINION OF JUDGE ROBINSON

1. I am in disagreement with all the findings in paragraph 126 of the Judgment. 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 (hereinafter the "Vienna Convention" or the "Convention"). 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. In Part I of this opinion, I address the majority's interpretation of the Convention as allowing a receiving State unilaterally to object to, and negate, the designation by Equatorial Guinea of the building at 42 avenue Foch as "premises of the mission". In Part II, I describe how, in my view, the Convention should be interpreted. In Part III, I examine the alleged violations of the Convention as well as remedies for the violations. Part IV is devoted to general conclusions.

Part I: The majority's interpretation of the Convention

3. 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.

4. The reasoning of the majority is that the Convention empowers the receiving State to object to a designation by the sending State of a building as "premises of the mission"; since, in this case, there is evidence that **[416]** France objected on several occasions to that designation by Equatorial Guinea, the majority contends that the building did not acquire that status.

5. Article 22 of the Convention provides that "[t]he premises of the mission shall be inviolable". Article 1*(i)* defines the premises of the

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mission as "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". It would seem to follow from the reasoning of the majority that, even if there is unambiguous evidence of diplomatic activities at 42 avenue Foch, thereby indicating its use for the purposes of the mission, it cannot acquire the status of premises of the mission if France, as the receiving State, objects to Equatorial Guinea's designation of the building as its diplomatic mission. That proposition runs counter to the ordinary meaning of the term "used for the purposes of the mission". A building that is "used for the purposes of the mission" within the meaning of Article 1*(i)* should not be denied the status of "premises of the mission", and thus inviolability, on account of the objection of the receiving State. To interpret the Convention in that way is to misunderstand it. The definition of premises of the mission is not subject to a "no objection" clause, that is, there is nothing in the definition that makes its application dependent on the lack of an objection from the receiving State.

6. France is correct in what it describes as the "essentially consensual letter and spirit" of the Vienna Convention; it cites in that regard Article 2, which provides that "[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent". France is also right in its statement that the sending State is obliged to exercise its rights under the Convention in good faith. Especially commendable is France's view that the application of the Convention calls for what it describes as a "bond of trust" between the sending and the receiving States. Mutuality and balance are at the core of the Convention. Regrettably, the majority's approach does not reflect a sufficient awareness of this feature of the Convention.

The problem with the finding in paragraph 67

7. In paragraph 67, the majority holds that "[i]n 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".

8. 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

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designate a building as **[417]** premises of the mission, the majority has not established that the Convention vests the receiving State with the power to object to that designation.

9. The majority, in paragraph 52 of its Judgment, cites France's position—to be found in paragraph 3.3 and 3.5 of its Counter-Memorial—that

> the applicability of the Vienna Convention's régime of protection to a particular building is subject to compliance with "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.

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. For example, in paragraph 3.3 of its Counter-Memorial, the very same paragraph from which the previous citation is taken, it is stated:

> France has never consented to granting the status of diplomatic premises to the building at 42 avenue Foch, which could in no way have been considered as being used for diplomatic purposes when it was searched and attached by the French judicial authorities. Consequently, the building at 42 avenue Foch never acquired the status of diplomatic premises and France could not have been in breach of its obligations under the VCDR.

Moreover, in paragraph 3.9 of its Counter-Memorial, France expressly states that its consent is required for the designation of "premises of the mission" as follows:

> Thus, in accordance with the essentially consensual letter and spirit of the VCDR, the premises that the sending State wishes to use for its diplomatic mission can be used as such only when the receiving State gives its consent and, above all, does not expressly object to that choice, after notification has been given by the sending State.

10. 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. For example, in paragraph 47 of the Judgment, reference is made to an acknowledgment by Equatorial Guinea that "several States **[418]** make the designation of the premises of diplomatic missions on their territory subject to some form of

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consent"; in paragraph 44, in relation to the question whether the granting of the status of diplomatic premises is subject to any explicit or implicit consent of the receiving State, there is a reference to Equatorial Guinea's argument that, whenever the "drafters of the Vienna Convention considered it necessary for an act of the sending State to be made subject to the consent of the receiving State, they ensured that the Convention was explicit in this regard"; in the same paragraph of the Judgment, the majority cites Equatorial Guinea's argument that there are several provisions of the Convention that do not require the consent of the receiving State.

11. 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". According to the majority, Germany requires prior agreement of the Federal Foreign Office, and Brazil requires prior authorization by its Ministry of Foreign Affairs; a requirement for prior agreement or prior authorization is a requirement for the consent of the receiving State. Moreover, many of the States referred to by France in its Counter-Memorial explicitly require their consent for the designation of a building as premises of the mission; see for example, the reference to United Kingdom, Canada, Czech Republic and Turkey in paragraph 3.18 of France's Counter-Memorial. 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. The last two sentences read as follows:

> Some receiving States may, through legislation or official guidelines, set out in advance the modalities pursuant to which their approval may be granted, while others may choose to respond on a case-by-case basis. This choice itself has no bearing on 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.

12. The various references by France, by Equatorial Guinea, and in the Judgment itself to the requirement of the receiving State's consent for **[419]** the designation of a building as the premises of the mission

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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".

13. 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.

14. The Convention uses the two concepts separately, not interchangeably. For example, under Article 4(1) of the Convention, "the sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State". Thus, the sending State is totally disabled from proceeding with the identification of a person as head of its mission before the receiving State has given its consent. On the other hand, under Article 6 of the Convention, "two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State". Thus, two or more States may go ahead and accredit the same person as head of mission to another State, with the result that that action will remain undisturbed unless and until the receiving State objects. These two Articles illustrate the difference between the two régimes and the care that the drafters of the Convention take to ensure that they are used in the appropriate context. 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. Obviously, the Convention

regards accreditation of the head of mission to the receiving State as a matter that more seriously affects the interests of the receiving State in its relationship with the sending State than two States accrediting the same person as head of mission to another State. Therefore, while the receiving State's consent is required for the first matter, in respect of the second it has the power to object.

[420] 15. In the Convention there are seven provisions in which the consent of the receiving State is required in relation to action by the sending State: Articles 4(1), second sentence of 7, 8(2), 12, 19(2), 27(1) and 46 of the Convention; there are two provisions in which the receiving State is empowered to object to action taken by the sending State: Articles 5(1) and 6 of the Convention. Article 22(1) of the Convention is a very good example of the care that the Convention takes in distinguishing between the two separate concepts of consent and objection. It provides that "the premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission". Here, in light of the very serious matter of the inviolability of the premises of the mission—the very subject of this case—the Convention uses the more rigorous concept of consent of the sending State. The interests of the sending State would not have been met, had the provision stated that the agents of the receiving State may not enter the premises if the head of mission of the sending State objects.

16. 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 (see analysis below from paragraphs 30 to 37 of this opinion).

The flaws in the majority's interpretation of the Convention

17. The majority has presented three bases for its conclusion in paragraph 67 of the Judgment that "the Vienna Convention cannot be

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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".

18. The first basis is set out in paragraph 63 of the Judgment. Article 2 of the Convention provides that "[t]he 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 **[421]** 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.

19. 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.

20. The third basis is set out in paragraph 66 of the Judgment, which addresses the Convention's preamble.

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21. 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.

22. 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 **[422]** 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.

23. 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.

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24. 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 (paragraph 66 of the Judgment). 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.

25. 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.

[423] 26. 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

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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.

27. 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.

28. 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.

29. In short, the majority's reasoning does not substantiate its conclusion in paragraph 67 of the Judgment.

[424] *The majority's consideration of State practice*

30. Perhaps the most surprising aspect of the majority's reasoning is to be found in paragraph 69 of the Judgment. Reference is made to the practice whereby "a number of receiving States, all of which are party to the Vienna Convention, expressly require sending States to obtain their prior approval to acquire and use premises for diplomatic purposes". This practice is cited to support the conclusion that the receiving State has the power to object to the designation of the mission premises by the sending State. The following comments may be made about this practice:

31. First, there is an obvious conflict between the first sentence in paragraph 69 of the Judgment—"State practice further supports this

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conclusion"—and the last sentence in paragraph 68 of the Judgment: "However, this does not indicate that the receiving State cannot object to the sending State's assignment of a building to its diplomatic mission, thus preventing the building in question from acquiring the status of 'premises of the mission'." The conflict arises because the State practice that is relied on does not address whether the receiving State can or cannot object to the sending State's assignment of a building as premises of the mission; on the contrary, it supports the conclusion that the prior approval, or the prior agreement, or the prior authorization, in other words, the consent of the receiving State is required for the designation of mission premises. Here again the majority has conflated the régime whereby the receiving State has the power to object to the designation of mission premises with the régime whereby the consent of the receiving State is required for the designation of mission premises. The majority appears to proceed on the basis that if the designation of a building as mission premises is subject to the consent of the receiving State, logically it can object to that designation. However, this reasoning would not be correct because the choice between the régime of consent and the régime of objection does not depend on logic; rather, it depends on what the Convention requires in light of the particular context and the distinction that the Convention itself makes between these two very discrete régimes—for this distinction, see the analysis above in paragraphs 13 to 16. (In passing, it may be noted that the reference to the South African Diplomatic Immunities and Privileges Act of 2001 is unhelpful since the citation does not indicate that the Act requires the prior consent of South Africa as the receiving State for a relocation.)

32. Second, the State practice cited does not amount to a rule of customary international law; if it did, that certainly would have been stated. Therefore, the majority does not argue that the practice is general and sufficiently widespread, and that the States that engage in it, whether sending or receiving, do so on the basis of a conviction that they are required as a matter of law to follow it.

33. Third, at the highest, perhaps the practice could be taken as meaning that sending States that comply with it have acquiesced in the receiving States' requirement for consent; as such, it would only be legally **[425]** relevant for those States that have so acquiesced; in other words, since the practice does not reflect customary international law it would have no relevance to States other than those that participate in it.

34. Fourth, in so far as some receiving States enact legislation requiring consent, it is notable that France is not one of those States. In the absence of legislation requiring consent, there must be merit in

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Equatorial Guinea's argument that France was under an obligation to notify it of what France calls its "practice of general tacit consent"; otherwise, how would Equatorial Guinea or any sending State become aware of this régime of tacit consent? Since the State practice requiring consent by the receiving State for the designation of mission premises does not reflect a rule of customary international law and does not constitute subsequent practice within the meaning of Article 31(3)*(b)* of the Vienna Convention on the Law of Treaties (VCLT), it is difficult to understand how a sending State that has neither been notified nor consulted can be bound by that practice. The majority argues that since France has a right to object, it has the right to determine the modalities for making that objection. However, the majority has not established that the Convention gives the receiving State this power to object.

35. Fifth, it is not merely, as stated by the majority, that the practice does not *necessarily* establish the agreement of the parties within the meaning of Article 31(3)*(b)* of the VCLT; rather, the true position is that the practice does not come close to satisfying the requirements of Article 31(3)*(b)*.

36. Sixth, the most remarkable feature of the majority's reasoning in relation to this State practice is its conclusion that the practice of requiring the receiving State's consent for a building to acquire the status of premises of the mission and the lack of any objection thereto constitute "factors which weigh against finding a right belonging to the sending State under the Vienna Convention unilaterally to designate the premises of its diplomatic mission". A practice that has little or no legal value cannot be relied on to negate a right that the sending State may have under the Convention to designate a building as premises of the mission in circumstances where the building meets the requirement of the Convention that it must be "used for the purposes of the mission". In any event it is not clear who the majority expects to object to this practice. As already indicated, at its highest, the practice would perhaps signify acquiescence on the part of those States who participate in it, that is, the receiving State and a particular sending State. This limited and questionable effect of the practice could not affect a State that is neither a receiving State nor a sending State participating in the practice. Why would the majority expect a State that is not a participant in the practice and, quite likely, is not aware of it, to object?

[426] 37. According to Equatorial Guinea, when the receiving State's consent is required, as it is in Article 12 of the Convention, the Convention expressly says so; consequently it follows that when this is not done, as is the case with the designation of mission premises,

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the receiving State's consent is not required. The majority rejects this *a contrario* interpretation. There is regrettably, a certain reluctance to rely on *a contrario* reasoning in the interpretation of treaties. This is unfortunate because interpretative tools such as the principle of *effet utile* or *ut res magis valeat quam pereat* and *a contrario* reasoning are accepted as useful aids in treaty interpretation. In the circumstances of this case, Equatorial Guinea's *a contrario* reasoning is consistent with the object and purpose of the Convention, which is to promote friendly relations between States on a basis that respects the principle of the sovereign equality of States and the purpose of maintaining international peace and security. Interpreting the treaty as allowing the receiving State unilaterally to object to, and negate, the sending State's designation of a building as mission premises would not be consistent with the achievement of that purpose, since it would be inimical to the balance that the Convention seeks to establish in the relations between the sending and the receiving States.

Part II: How the Convention should be interpreted

38. 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.

39. 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". 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

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the context in [**427**] which it is used and in light of the object and purpose of the Vienna Convention.

40. 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".

41. 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. 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.

42. 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:

(i) Note Verbale of 4 October 2011 in which Equatorial Guinea asserts that it "has for a number of years had at its disposal a building located at 42 avenue Foch ... which it uses for the performance of the functions of its diplomatic mission".
(ii) On 4 October 2011, having notified France of the building's assignment for the purposes of its diplomatic mission, Equatorial Guinea had placed signs marked, "République de Guinée équatoriale—locaux de l'ambassade" (Republic of Equatorial Guinea—Embassy premises). France reports that its officials saw these signs on 5 October 2011.
(iii) On 17 October 2011, Equatorial Guinea housed its Permanent Delegate to UNESCO and Chargée d'affaires in the building.
(iv) The relocation of the Embassy's offices was gradual. Several sections, such as the consulate and the accounting and administration offices, began operating out of the building immediately upon being relocated.
(v) Since 27 July 2012, all of the Embassy's offices have been housed in the building[1] (Note Verbale of that date from Equatorial Guinea to France).
(vi) French officials, especially from the Ministry of Foreign and European Affairs, have addressed mail to 42 avenue Foch in Paris. The most recent correspondence dates from 9 October

[1] Reply of Equatorial Guinea, p. 15, para. 1.42.

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> 2019. In that regard, Equatorial Guinea relies on a letter from the Ministry of Foreign and European Affairs of 9 October 2019, requesting the support **[428]** of Equatorial Guinea for the election of a representative of France to the International Maritime Organization at the 31st session of the Assembly between 25 November and 5 December 2019. Equatorial Guinea also relies on applications submitted at 42 avenue Foch by French officials for visas to visit Equatorial Guinea between 8 and 9 February 2015.

43. 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.

44. Prior to the passage of legislation in 1987, practice in the United Kingdom showed that buildings were treated as "premises of the mission" "from the time they were at the disposal of the mission"[2] as long as prior planning consent had been secured under local laws and "it was the intention to use the building 'for the purposes of the mission' as soon as building and decorating had been completed".[3] This practice shows that the United Kingdom considered that a building attracted immunity under Article 22 of the Convention even before it was actually used for diplomatic purposes. Even when buildings were no longer used for the purposes of the mission, the United Kingdom allowed the expiry of a "reasonable time" before its law enforcement agencies entered them to carry out investigations. For instance, in 1984 a shooting from the premises of the Libyan People's Bureau diplomatic mission in London resulted in the United Kingdom's decision to break off diplomatic ties between Libya and itself. Despite the break of diplomatic ties by the United Kingdom, the premises were treated as inviolable until the lapse of seven days after the severance of diplomatic relations. In fact, the premises had been vacated two days before the lapse of the seven days, but the United Kingdom still waited until the end of the full seven days before entering the premises to search for evidence in relation to the shooting. Notwithstanding that

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

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there was no actual use of the building during those two days, the United Kingdom still respected the immunity of the mission. It is acknowledged that this practice in the United Kingdom has changed and that the legal status of mission premises is now acquired upon receiving the consent of the Secretary of State.[4] However this practice by the United Kingdom prior to the 1987 legislation becomes **[429]** relevant as evidence of State practice in relation to a State that neither requires consent of the receiving State for the designation of a building as premises of the mission, nor gives the receiving State the power to object to that designation.

45. In *Democratic Republic of the Congo* v. *Segrim NV*, a judgment was obtained in the Brussels *Cour d'appel* against the Democratic Republic of the Congo (DRC); both Belgium and the DRC are parties to the Convention. This judgment remained unsatisfied. The claimant, Segrim, sought to attach a villa owned by the DRC. The villa was a former residence of a diplomatic agent of the DRC but was in need of repairs and at the time was no longer inhabited. Under Article 30 of the Vienna Convention the private residence of a diplomatic agent enjoys the same inviolability and protection as the premises of the mission. The DRC challenged the attachment on the basis that the villa enjoyed immunity from execution under the Vienna Convention. Segrim argued that although the villa was used as a residence in the past to house the Congolese diplomats, its abandonment for several years caused it to lose its immunity under the Vienna Convention and therefore it could be attached. The issue before the Brussels *Cour d'appel* was whether a private residence of a diplomatic agent (premises which enjoy the same inviolability as the premises of the mission), and which was uninhabited, but was intended to be used as a diplomatic residence, enjoyed immunity under the Vienna Convention.

46. The Brussels *Cour d'appel* found that the villa was still entitled to protection under the Vienna Convention because the DRC, which was renovating the villa, when faced with a measure of execution expressed its intention to use the villa for its diplomatic activities. The Brussels *Cour d'appel* held that

[4] Under Section 1(1) of the Diplomatic and Consular Premises Act 1987, in the United Kingdom, the Secretary of State for Foreign and Commonwealth Affairs requires diplomatic missions to obtain express consent before office premises acquired by them could be regarded as premises "used for the purposes of the mission" and therefore entitled to enjoy inviolability. However, such consent may only be given or withdrawn if the Secretary of State "is satisfied that to do so is permissible under international law".

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this decision as to its use is sufficient for assuming that the legal principle concerned must be applied. For the period preceding its standing empty, it must therefore be decided that the building was being used by the sending State for diplomatic activities, a function that belongs to national sovereignty and is for that reason not subject to seizure.

47. The Brussels *Cour d'appel* also stated that

> [i]t is sufficient that the foreign State's sovereign decision as to use is not contradicted by actual practice. The parties Segrim . . . adduce no facts in this connection from which it must be inferred that the designated use is not supported in practice. On the contrary, it is clear from the documents submitted by the appellant that appreciable contract works were carried out most recently in 1998 and 1999 in order **[430]** to remedy the condition of the building, which confirms the designated use as indicated by the Congolese State.

48. The court found that by virtue of Article 22(3) of the Vienna Convention and customary international law, the property seized continued to enjoy immunity from execution.[5] This judgment makes three important points. First, the court took note of the work that was being done to make the building ready for the performance of diplomatic functions. Second, the court placed emphasis on the consistency between the designated use and the actual use of the villa. Third, if the receiving State argues that actual use is inconsistent with designated use, it bears the burden of adducing evidence to support that contention.

49. Notably, the Brussels *Cour d'appel* made its finding of immunity in relation to an abandoned villa that was being renovated but was intended to be used as a diplomatic residence. The facts in this case are far more compelling: the building designated by Equatorial Guinea as the premises of the mission was not abandoned; the evidence is that Equatorial Guinea completed its move into the building by 27 July 2012; during the oral proceedings, Equatorial Guinea submitted that between 4 October 2011 and 27 July 2012, it was engaged in organizing the transfer of the Embassy and the actual move of its offices from the premises located at 29 boulevard des Courcelles, to the new premises at 42 avenue Foch. Although France has submitted that it found no evidence of the carrying out of diplomatic functions in the building, this particular evidence of organizing and preparing the move to establish the building as its premises for the mission does show an intention to use the building as premises of the mission, and it has

[5] Brussels *Cour d'appel*, *Democratic Republic of the Congo* v. *Segrim NV*, judgment of the 8th Chamber, 11 September 2001, RW 2002 03, 1509, *International Law in Domestic Courts (ILDC)* 41 (BE 2001), paras. 19-23.

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neither been contradicted by France nor by any argument advanced by the majority. The difficulty faced by France in establishing that the building had no signs of diplomatic activity is that, on the basis of the evidence before the Court, it carried out its last set of searches between 14 and 23 February 2012. That still leaves a period of about six months before Equatorial Guinea's notification of full use of 27 July 2012. That is precisely the period in which there would be preparatory activity for the establishment of the building as the premises of the mission. The designated use was consistent with the actual use as indicated by Equatorial Guinea in a Note Verbale of 27 July 2012. In that Note Verbale, Equatorial Guinea confirmed that the building at 42 avenue Foch would henceforth serve as its diplomatic premises.

50. In Germany (a party to the Vienna Convention), it appears that the intention to use the building as the premises of the mission would be **[431]** accepted as "use for the purposes of the mission" provided this intention was not too remote. In four related cases—*Tietz and Others* v. *People's Republic of Bulgaria*; *Weinmann* v. *Republic of Latvia*; *Bennet and Ball* v. *People's Republic of Hungary* and *Cassirer and Geheeb* v. *Japan*,[6] which can readily be distinguished—the Supreme Restitution Court for Berlin (hereinafter the "SRCB") considered diplomatic protection in the context of the intended use of the premises and found that there was no diplomatic activity whatsoever in terms of the conduct of diplomatic relations between a sending State and a receiving State. The SRCB emphasized that a remote intention on the part of a State to use property owned by it for mission premises was not sufficient to give rise to immunity from local jurisdiction. In each case, property in West Berlin was sold by Jewish emigrants to a foreign State which had used it as mission premises until 1945. Fourteen years later, three of the States—Latvia, Bulgaria, and Hungary—maintained no diplomatic relations with the Federal Republic of Germany, while the fourth, Japan, maintained its Embassy in Bonn. The SRCB found on the facts of the case that the immunity of diplomatic premises could be suspended in special circumstances:

"no diplomatic activity whatever, in the sense of the conduct of diplomatic relations between a sending sovereign and a receiving sovereign, exists in West Berlin" and the immunity in respect of the premises had come to an end. Immunity could not depend on intention to use the buildings for mission purposes if Berlin should again become capital of a united Germany, but "only upon an actual and present use of the premises."[7]

[6] *International Law Reports (ILR)*, Vol. 28, pp. 369, 385, 392 and 396.
[7] *Ibid.*

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51. The exceptional circumstances that characterize those cases are not present in this case. The intention to use the premises for diplomatic purposes if Berlin again became the capital of a United Germany was simply too remote a foundation for diplomatic immunity; in the instant case, the intention to use the building at 42 avenue Foch as "premises of the mission" was translated into actual use only nine months later, and therefore that intention could hardly be described as too remote a foundation for diplomatic immunity.

52. Further, in the case of *Greece* v. *B*, in Germany, the Higher Regional Court (Bavaria, Munich), held that

> [w]hile undeveloped and unused premises did not automatically qualify as serving state functions, as they might be held for commercial **[432]** purposes, they could do so in the individual case. To distinguish one case from the other, the intentions present when the property was acquired could be decisive, especially when these intentions were put into practice later.[8]

53. What this practice in the United Kingdom (a party to the Vienna Convention) prior to its legislation of 1987 and the cases cited show is that the term "used for the purposes of the mission" must be interpreted not exclusively on the basis of its ordinary meaning, but on the basis of its ordinary meaning in its context and in light of the object and purpose of the Convention. It is true, as the majority contends, that the ordinary meaning of the term "used for the purpose of the mission" connotes an actual use for those purposes. However, the ordinary meaning of that term must be interpreted in the context in which it is used and in light of the Convention's object and purpose. An embassy or mission normally takes some time to be established; this goes to the context in which the term is used. The practice and these cases show that in determining whether a building has acquired the status of mission premises, it is appropriate to take account of a reasonable period of time for preparatory work prior to the actual use of the mission when that intended use is followed by actual use. In considering the value of this practice, the Court should give due weight to the fact that it includes judicial decisions that were obviously very carefully considered by the courts of States parties to the Convention, including an appellate court that is the highest court for the judicial district of Brussels, Belgium. The situation faced by Equatorial Guinea presents an even stronger case than any of those that has been cited, since Equatorial Guinea was merely relocating its diplomatic premises

[8] *Greece* v. *B*, Appeal order, Case No 34 Wx 269/14, 12 September 2014, *ILDC* 2386 (DE 2014), paras. 20-1.

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from one location in Paris to another location in the same city. There is nothing in the object and purpose of the Convention that would operate to discount intended use; on the contrary, the Convention must be interpreted as seeking to ensure that the movement of a diplomatic mission from one location to another does not prejudice the diplomatic status of the building to which the mission is being relocated. In light of the foregoing, it is proper to interpret the Convention as entitling premises to protection under Article 22 of the Convention when the intended use of those premises for diplomatic purposes is followed by actual use for those purposes.

54. Another possible interpretation of the practice in the United Kingdom prior to its legislation of 1987 and the cases cited is that they might constitute subsequent practice within the meaning of Article 31(3)*(b)* of the VCLT. Frankly, in my view, that would not be a proper interpretation since there is nothing to suggest that the practice reflects the agreement of the parties to the Convention as a whole. Nonetheless it would **[433]** have been for the Court to decide what weight it wished to attach to that practice.

55. 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.

56. Equatorial Guinea bears the burden of establishing that the building at 42 avenue Foch qualified as premises of the mission within

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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.

57. Interpreting the Convention in this way 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.

[434] *Part III: Alleged violations of the Vienna Convention*

Alleged violations of the Vienna Convention

(a) The searches from 14 to 23 February 2012

58. The French authorities entered and searched the premises at 42 avenue Foch without the consent of the head of the mission on a number of occasions between 14 and 23 February 2012. According to Equatorial Guinea, several valuable objects and furnishings were seized during this search.

59. Since the building had acquired the status of premises of the mission on 4 October 2011, the searches from 14 to 23 February 2012 breached the inviolability of the premises afforded by Article 22 of the Convention.

(b) The attachment of the building on 19 July 2012

60. Given that the building had acquired the legal status as premises of the mission as at 4 October 2011, it falls to be considered whether the attachment of the building on the 19 July 2012 violated France's obligations under Article 22(3) of the Vienna Convention, which provides that "[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution".

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61. France has disputed that the attachment affects the inviolability of the building. France argues that the attachment only affects the right of ownership of the building and therefore does not breach the inviolability of the building.

62. In determining whether building and land constitute premises of the mission, the definition in Article 1*(i)* makes it clear that their ownership is irrelevant. However, that does not mean that the Vienna Convention allows the receiving State to take action by way of measures of constraint that affects the sending State's ownership of the building. The attachment order of 19 July 2012 states that its effect is to render the building inalienable.[9] It is illogical to contend that ownership cannot have an impact on the inviolability of premises afforded by Article 22. The concept of inviolability under Article 22 imposes a duty on the receiving State to refrain from acts that affect the functioning of the premises as the sending State's diplomatic mission. It also includes the duty to refrain from acts that affect the dignity of the mission in the exercise of its sovereign functions. The functioning of the mission and its dignity are elements of the mission's inviolability. Attachment, which affects the ownership of **[435]** the building, has financial and economic implications that may impact negatively on the functioning and dignity of the embassy in the exercise of its sovereign functions. At a minimum, the mission must be able to function, and inability to sell the building, resulting from attachment, can affect its functioning; for example, there may be circumstances in which in order to continue functioning as a diplomatic mission a sending State may need to sell a building housing its diplomatic mission, so as to acquire less expensive premises.

63. In sum, the attachment breaches Article 22(3) of the Vienna Convention.

It also violates the dignity of the mission under Article 22(2).

(c) The confiscation of the building by the Paris Tribunal correctionnel *dated 27 October 2017 which was upheld by the Paris* Cour d'appel *dated 10 February 2020*

64. Since the building at 42 avenue Foch acquired the status of premises of the mission on 4 October 2011, the order made by the French tribunal on 27 October 2017 for its confiscation breaches Article 22 of the Vienna Convention.

[9] Counter-Memorial of France, p. 13, paras. 1.38-1.39.

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Remedies

(a) Cessation

65. There are two conditions for an order of cessation. First it must be established that "the wrongful act has a continuing character" and secondly "that the violated rule is still in force" at the time of the order.[10] The 2001 International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the "2001 Draft Articles") in its Commentary on Article 30 states that it also applies to "situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions".[11]

[436] 66. Following the designation of the building as premises of the mission on 4 October 2011, France carried out searches in the building between 14 and 23 February 2012, subsequently attached it on 19 July 2012 and finally issued a confiscation order. France's failure to recognize the building as "premises of the mission" is a breach that is of a continuing character. The searches between 14 and 23 February 2012, the subsequent attachment and confiscation order constitute violations of Article 22 of the Vienna Convention; these acts are violations of an obligation "on a series of occasions" implying the possibility of further repetition.[12] France's refusal to recognize the building as Equatorial Guinea's Embassy has continued; it has repeatedly rejected the status of the building as "premises of the mission". Therefore, the conditions for the issuance of an order of cessation have been satisfied.

(b) Assurances and guarantees of non-repetition

67. Assurances and guarantees of non-repetition are "most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily".[13] In the present case, France refuses to accept the building as Equatorial Guinea's diplomatic mission. On the basis of that conduct, which indicates that the restoration of the pre-existing situation will not

[10] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, Decision of 30 April 1990, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XX, Part III, p. 270, para. 114.

[11] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 89, para. 3.

[12] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 89, para. 3.

[13] *Ibid.*, p. 95, para. 9.

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by itself provide sufficient protection for Equatorial Guinea, the Court should order France to offer appropriate assurances and guarantees of non-repetition.

(c) Satisfaction

68. According to Article 37(1) of the 2001 Draft Articles, satisfaction for injuries caused by an internationally wrongful act is only required "insofar as it cannot be made good by restitution or compensation". Satisfaction may take the form of acknowledgement of the breach, an expression of regret or a formal apology.[14]

69. The facts of this case support the making of an order for satisfaction.

(d) Compensation

70. According to Article 36 of the 2001 Draft Articles a State is entitled to compensation in respect of any financially assessable damage that it suffers as a result of a wrongful act. There may be some damage that is assessable resulting from the various searches. Moreover, if Equatorial **[437]** Guinea loses ownership of the building as a result of the confiscation order, it is entitled to compensation for that loss.

(e) Contribution of Equatorial Guinea

71. France's argument that account should be taken of Equatorial Guinea's contribution to its injuries should be dismissed, because there is no evidence that Equatorial Guinea was wilful or negligent in the sense of exhibiting a lack of due care.

Abuse of rights

72. France has alleged that several acts of Equatorial Guinea constitute an abuse of rights, including the admission by the President of Equatorial Guinea that the building at 42 avenue Foch was sold to the State so that diplomatic privilege could be claimed to protect his son from criminal proceedings. However, in light of the finding of the Court in *United States Diplomatic and Consular Staff in Tehran* it may not be necessary to determine the claim of abuse of rights.[15]

73. In that case, the Court held that the Convention sets up a "self-contained régime" with special provisions that may be used to address

[14] *Ibid.*, pp. 105-7.

[15] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, ICJ Reports 1980*, p. 40, para. 86.

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an alleged abuse of rights.[16] In that regard the Court pointed to the receiving State's right to break off diplomatic relations with a sending State and to call for the closure of the offending mission. The Court held that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions"[17] and that a receiving State could utilize this "more radical remedy if abuses of their functions by members of a mission reached serious proportions".[18]

74. Consequently, even if the alleged abuse by Equatorial Guinea was established, the Vienna Convention provides a remedy by way of the expulsion of the mission and the termination of diplomatic relations.

75. The claim for abuse of rights should therefore be dismissed on the basis that France should use the remedies provided under the Vienna Convention to address that conduct.

[438] *Part IV: Conclusions*

76. One may arrive at the following conclusions:

(i) France is correct in what it calls the "essentially consensual letter and spirit of the Vienna Convention" and that what is called for is a "bond of trust" between the sending and the receiving States. These are critically important elements for the proper interpretation and application of the Convention, since mutuality and balance go to the core of the Convention.

(ii) The majority's conflation of the requirement of the receiving State's consent for the designation by the sending State of a building as premises of the mission with the power of the receiving State to object to that designation robs its conclusion in paragraph 67 of the Judgment of any legal effect. The conclusion is irrational and, therefore, invalid because the reasoning of the majority does not reveal any discrimination between the two distinct concepts of the requirement of the receiving State's consent for the designation of mission premises and the power of the receiving State to object to this designation. Moreover, while the conclusion is framed in terms of the power of the receiving State to object to the designation by the sending State of a building as premises of the mission, France's case includes references to the concept of consent and the separate concept of

[16] *Ibid.*
[17] *Ibid.*, p. 38, para. 83.
[18] *Ibid.*, p. 40, para. 85.

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objection, and the Applicant's case is built on a response to the argument that the consent of France as the receiving State is required for this designation; also, notably the Judgment itself cites State practice that shows the requirement of the receiving State's consent for this designation, and not practice evidencing the power of the receiving State to object to such designation. In this melee of mixed reasoning, the majority's conclusion is without any legal effect.

(iii) Although this dissenting opinion takes the position that the majority has not established that the Convention empowers the receiving State to object to the sending State's designation of a building as premises of the mission, and that consequently, there is no need to examine whether the discretionary power has been exercised reasonably (per *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)*),[19] it pinpoints an example of unreasonable exercise of that power. At certain times, France alludes to its power to object to Equatorial Guinea's designation of a building as premises of the mission, while at other times it argues that such a designation is subject to its consent. This inconsistency amounts to an unreasonable and arbitrary exercise by France of its discretionary power, thereby depriving the objection of **[439]** any legal effect. Therefore, the objections by France on which the majority relies for its conclusion in paragraph 67 were invalid, and thus, the conclusion itself is robbed of any validity.

(iv) There is a strong case to be made that France recognized the diplomatic status of the building at 42 avenue Foch when French officials, including the State Secretary for Development and Francophone Affairs, attended at the building at 42 avenue Foch in order to acquire visas for visits to Equatorial Guinea. This conduct qualifies as tacit recognition. Although Article 5 of the Vienna Convention on Consular Relations lists the issuance of visas as a consular function, Article 3(2) of the Vienna Convention provides that "nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission". Thus, even though the non-exhaustive list of the functions of a diplomatic mission set out in Article 3(1) does not include the issuance of visas, the Convention allows a diplomatic mission to issue visas. The

[19] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, ICJ Reports 1952*, p. 212.

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majority's approach to this question is to proceed by way of assertion. It simply states in paragraph 114 of the Judgment: "The Court does not consider that the acquisition of visas at 42 avenue Foch in Paris leads to the conclusion that the premises were recognized as constituting the premises of a diplomatic mission." In the circumstances of this case that conclusion is wrong. Consequently, the majority's conclusion in paragraph 67 is invalid since, far from objecting to Equatorial Guinea's designation of the building as premises of the mission, France's conduct shows that it tacitly recognized that designation.

(v) The majority has substantially relied on the preamble as the foundation for its very consequential conclusion in paragraph 67 of the Judgment. However, the preamble does not support such a conclusion. It is indeed unusual for the principal finding in a Judgment of the Court to be based substantially on the Court's interpretation of the preamble of a treaty.

(vi) The State practice cited in paragraphs 43 to 56 of this opinion indicates that a building acquires the status of premises of the mission when its intended use for the purposes of the mission is followed by actual use for those purposes. Based on that practice, the building at 42 avenue Foch acquired the status of premises of the mission on 4 October 2011 because its intended use for the purposes of the mission from that date was followed by actual use for the same purpose at the latest by 27 July 2012.

(vii) In light of the balance that the Convention seeks to strike between the interests of the sending and the receiving States, and having regard to the aim of the Convention of promoting friendly relations **[440]** among nations on the basis of respect for the principle of sovereign equality of States, and the purpose of the maintenance of international peace and security, it should not be interpreted as empowering either the sending or the receiving State to impose its will on the other State in determining whether a building has acquired the status of "premises of the mission".

(viii) What the Convention does is to establish an objective criterion for determining the status of a building as "premises of the mission". The criterion is that the building must be "used for the purposes of the mission". This is a pragmatic yardstick that does not include as one of its elements the power of the receiving State to object to the sending State's designation of a building as premises of the mission; the determination whether the criterion has been met is to be made free from the subjective views of either the sending State or the receiving State as to whether a

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building constitutes premises of the mission. Thus, in light of this objective criterion, it is not surprising that the Convention remains silent on the roles of sending and receiving States in the designation of mission premises.

(ix) How then is a controversy to be resolved when there is disagreement, as there is in this case, between the Parties on this important question? In light of the Convention's relationship with the three fundamental purposes and principles of the United Nations Charter that are set out in its preamble, if there is disagreement, it is to be resolved, by consultation between the Parties carried out in good faith, and if there is no resolution, then on the basis of third-party settlement. In this case Equatorial Guinea has sought judicial settlement on the basis of the compromissory clause in the Optional Protocol to the Convention concerning the Compulsory Settlement of Disputes. The Court is to resolve the dispute on the basis of the objective criterion set out in Article 1*(i)*, and it is to arrive at its decision on the basis of that objective criterion, but having regard to the three fundamental principles and purposes set out in the preamble. In the circumstances of this case, the Court had sufficient evidence to conclude that the building at 42 avenue Foch was at the relevant time used for the purposes of the mission of Equatorial Guinea. Consequently, I am unable to agree with the conclusion of the majority that the building at 42 avenue Foch has never acquired the status of "premises of the mission".

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This opinion reflects the views of the author on the merits of this case, which has been brought by Equatorial Guinea against France. It is not to be seen as in any way reflecting the author's views on the merits of the **[441]** case instituted by the French authorities in the French courts against Mr Teodoro Nguema Obiang Mangue.

[442] DISSENTING OPINION OF JUDGE AD HOC KATEKA

I. Introduction

1. Regrettably I disagree with the Court's finding that the building at 42 avenue Foch has never acquired the status of "premises of the

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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 (hereinafter the "VCDR" or the "Vienna Convention"). I also disagree with the Judgment's declaration that France has not breached its obligations under the VCDR. I have thus voted against the operative paragraph 126 of the Judgment, including the subparagraph where the majority rejects all other submissions of the Republic of Equatorial Guinea. I am of the view that the building at 42 avenue Foch acquired the status of diplomatic mission of Equatorial Guinea and that France breached its obligations under the VCDR by its measures of constraint against the building. I disagree with the Court's reasoning on procedural and substantive grounds. Procedurally I do not share the Court's reading into the VCDR of the consent requirement on which the Convention is silent and the putting aside of the "use" requirement which is mentioned in the instrument. In this connection, I disagree with the Court's over-reliance on the preamble under the guise of interpreting the object and purpose of the VCDR. I shall deal with the substantive issues of the conditions (referred to as "circumstances" in the Judgment) and the status of the building after considering some relevant preliminary issues.

[443] *II. Preliminary issues*

2. The majority concludes that—where the receiving State objects to the designation by the sending State of certain property as forming part of the premises of its diplomatic mission, and this objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character—that property does not acquire the status of "premises of the mission" within the meaning of Article 1*(i)* of the Vienna Convention, and therefore does not benefit from protection under Article 22 of the Convention (paragraph 74 of the Judgment). The majority is of the view that the dispute between the Parties can be resolved by reliance on the consent or non-objection condition. This is because the Judgment merely adds (para. 75) that "[i]f necessary, the Court will then examine the second condition which, according to France, must be met for a property to acquire the status of 'premises of the mission', namely the requirement of actual assignment". This conclusion is rather surprising because of several reasons. First, before reaching this conclusion, the Court analyses considerably the two conditions for designating diplomatic premises (paragraphs 61 to 73 of the Judgment). Secondly, it is surprising because the condition of consent or non-objection is not provided for in the VCDR. The

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Convention is silent on this condition. Thirdly, the majority uses reasoning—of treaty interpretation under the Vienna Convention on the Law of Treaties (hereinafter the "VCLT")—which I do not share to reach its position of relying on the consent or non-objection condition and conveniently ignoring the "use" condition. The majority avoids the "use" condition which is provided for in the Vienna Convention. The "use" condition is referred to in paragraphs 107, 108 and 109 of the Judgment as actual assignment. These are passing references in the context of justifying the majority's consent or non-objection argument and the criminal proceedings in France against Mr Teodoro Nguema Obiang Mangue. I thus regret the selective invocation of a non-existing criterion of consent or non-objection including its coupling to the test or standard of "timely, non-arbitrary and non-discriminatory character". I shall explain further when I consider the conditions for designation of a diplomatic mission.

3. The Judgment rightly invokes the rule of treaty interpretation in paragraph 61. However, the Judgment does not do justice to the interpretation rule in Article 31 of the VCLT. First, the majority considers the VCDR provisions in their ordinary meaning to be of little assistance in determining the circumstances in which a property acquires the status of "premises of the mission". Without attempting to interpret Article 1*(i)* of the VCDR, the majority merely concludes that the provision is unhelpful in determining how a building may come to be used for the purposes of a diplomatic mission (paragraph 62 of the Judgment). Secondly, the Judgment uses the Convention's object and purpose by invoking the preamble, in particular, the third preambular paragraph on contributing to **[444]** the development of friendly relations among nations. Unfortunately, this creates an element of confusion as to which object and purpose to take. For the Judgment also invokes the purpose of ensuring the efficient performance of the functions of diplomatic missions as representing States (fourth preambular paragraph of the VCDR cited at paragraph 66 of the Judgment). In the process, the majority agrees with the respondent State that diplomatic privileges and immunities impose weighty obligations on the receiving State. I do not share this view. It may be recalled that reciprocity permeates diplomatic practice. It is misleading for the majority to state that the receiving States have weighty or onerous obligations. As rightly stated by Denza,[1] "[e]very State is both a sending and a receiving State".

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

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4. The view of weighty obligations leads the majority to state that there is an imbalance in the obligations of the receiving State (paragraph 65 of the Judgment) in relation to the sending State concerning privileges and immunities of diplomats and diplomatic missions. This is a misconceived view. The VCDR in Article 2 provides for the establishment of diplomatic relations by mutual consent. The benefits for diplomatic missions are counterbalanced by the sanctions provided for in the VCDR. The Judgment (para. 67) refers to the well-known passage in the *Hostages* case:[2]

> The rules of diplomatic law . . . constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.

This Court's view reaffirms the well-established rule of reciprocity in diplomatic law as a sanction against non-compliance.

5. I am of the view that the drawbacks referred to above would have been avoided if the majority had not placed too much reliance on the preamble of the VCDR in the present case. Although the Court has given legal significance to preambles in its jurisprudence,[3] the legal weight given to the VCDR's preamble is, in my opinion, rather excessive. It is true that preambles are part of a treaty and that tribunals refer to them in the context of the interpretive provisions of the VCLT. However, by **[445]** using the preamble to interpret the VCDR, the Court makes far-reaching pronouncements which are not in the Convention. I have already referred to the alleged imbalance against the receiving States and their so-called weighty obligations. Of concern is the use of the object and purpose mechanism by the majority to read into the Convention what is not provided for, while ignoring the condition set out in the VCDR, as I explain below.

6. In view of the fact that the majority has given an eminent role to the preamble of the VCDR in the context of treaty interpretation, it bears recalling some canons of treaty interpretation laid down in Article 31 of the VCLT. They show that the drafters of the VCDR intended to

[2] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, ICJ Reports 1980*, p. 40, para. 86.

[3] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, ICJ Reports 1952*, p. 196; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, ICJ Reports 2012 (II)*, p. 624.

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emphasize the process of interpretation as a unity.[4] This unity applies not only in the textual-contextual object and purpose circumstances but also by not considering an isolated treaty provision but reading the treaty as a whole.

7. While preambles have normative influence on the understanding of a treaty's meaning,[5] this influence is limited. Preambles on their own, not supported by specific operative provisions of a treaty, do not create substantive obligations to the parties to a treaty. As stated by Judge ad hoc Mensah:[6]

> Specifically, I do not subscribe to the view that the "object and purpose of UNCLOS, as stipulated in its Preamble", in and by themselves, impose on parties to the Convention obligations vis-à-vis other States which have taken a conscious decision not to agree to be bound by that Convention.

This was stated by Judge Mensah in response to the Court's statement that "[g]iven the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention".[7]

8. The conclusion I draw from the above analysis is that while preambles are of assistance in treaty interpretation, they should not be elevated to play a role that would change the meaning of a treaty to the detriment of what the drafters intended. For example, the Court has been against a construction that would involve radical changes and additions to the**[446]** provisions of the 1880 Madrid Convention by invoking the purposes and objects of the Convention. Doing so would not be to interpret but to revise the treaty.[8]

III. Circumstances in which a property acquires the status of "premises of the mission" under the Convention

9. The two conditions that were argued by the Parties in their pleadings are consent or non-objection and use of a property as requirements for the status of premises of the mission. The respondent State argued for two cumulative conditions of consent and actual

[4] Commentary to Article 27 (now Article 31), International Law Commission (ILC), *Yearbook of the International Law Commission (YILC)*, 1966, Vol. II, p. 220.

[5] O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg: Springer-Verlag, p. 10.

[6] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, ICJ Reports 2012 (II)*, declaration of Judge ad hoc Mensah, p. 765.

[7] *Ibid.*, p. 669, para. 126.

[8] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, ICJ Reports 1952*, p. 196.

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assignment, i.e. effective use for the purposes of the mission. The applicant State contended that the VCDR did not make the granting of diplomatic status subject to the consent of the receiving State. As for the use condition, Equatorial Guinea was of the view that this criterion was met where a building was designated by the sending State. I shall consider the two conditions in turn.

10. I start with the condition that the majority has preferred, namely, consent/non-objection. The Judgment states that—if France's objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character—the property does not acquire the status of "premises of the mission" within the meaning of Article 1*(i)* of the Vienna Convention and thus does not benefit from protection under Article 22 of the Convention (paragraph 74 of the Judgment). This conclusion is reached after considering the object and purpose of the Convention. In addition to the use of the preamble, the majority has formulated the standard or test of "timeliness, non-arbitrariness and non-discriminatory character".

11. I disagree with the majority when it states that the consent or non-objection of the receiving State is required for the designation of a building as diplomatic mission. First, as already observed, the Convention is silent as to this requirement. It does not make the granting of diplomatic status subject to the consent or non-objection of the receiving State. Secondly, where the consent of the receiving State is required it is so stated in the Convention. There are numerous provisions such as Articles 5(1), 6, 7, 8(2), 12, 19(2), 27(1) and 46 of the VCDR which spell out the requirement of the consent or non-objection of the receiving State.

12. Here one may use a few of these provisions to illustrate when consent or non-objection is needed. Article 4 requires that the *agrément* of the receiving State is obtained for the accreditation of a head of mission; so does Article 10, which requires notification for the appointment of members of the mission. The logic of these provisions is reinforced by Article 4 of the 1963 Vienna Convention on Consular Relations which **[447]** requires consent for the establishment of a consular post. Thus, when the drafters of the VCDR considered it necessary to have the consent of the receiving State, they provided so explicitly in the Vienna Convention.

13. A further illustration is that the majority claims not to be persuaded by Equatorial Guinea's *a contrario* reading of Article 12—the provision for consent to open a branch office by the sending State. The majority does not consider such *a contrario* reading to be consistent with the object and purpose of the Vienna Convention. The reason

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given for this rejection is not convincing. It is said that the receiving State would have to make special arrangements for the security of that branch office. In my view, the receiving State is obligated to provide security for all diplomatic missions, whether in the capital or other cities. Furthermore, this argument is based on the false premise of weighty obligations on the receiving State. I have already dealt with this matter above (paragraphs 3 and 4 of this opinion). The same logic applies to the majority's argument in paragraph 67 of the Judgment about the sending State unilaterally imposing its choice of mission premises upon the receiving State.

14. The majority also states that it is difficult to reconcile an interpretation of the Convention that would allow the sending State to use property for diplomatic missions despite express objection of the receiving State. The majority invokes Article 2 of the VCDR on the establishment of diplomatic relations taking place by mutual consent. In my view, this is mixing up two different concepts. While the establishment of diplomatic relations is by mutual consent, it does not follow automatically that two States with diplomatic relations will open diplomatic missions in their respective capitals. Relations can be promoted from the respective capitals. However, once a diplomatic mission is opened the reciprocal responsibilities between the sending and receiving States apply under the VCDR.

15. The analogy (paragraph 65 of the Judgment) between the *persona non grata* provision in Article 9 of the VCDR and lack of an equivalent mechanism for mission premises is misplaced. As I stated in paragraph 4 above, the Convention is a self-contained régime that concerns persons, premises and property. It must not be read in isolation. It must be read as an integrated régime. Thus, the sanctions available to a receiving State in respect of persons can also be used for solving disputes concerning premises or property. A receiving State can break off diplomatic relations with a sending State that disregards the rules in the VCDR. It can also use the *persona non grata* provision to expel diplomats of a State that offends against the VCDR régime.

[448] 16. With respect to consent or non-objection, the majority takes issue with Equatorial Guinea's contentions concerning advance notification and consultation (referred to as "co-ordination" in paragraphs 71 and 72 of the Judgment). The advance notification is required in the context of domestic law in the receiving State. In my view, it is not uncommon that where a State does not have national legislation in respect of diplomatic law, it issues circulars through the Foreign Office to diplomatic missions. Such circulars are guidelines to

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enable diplomatic missions to be aware of the practice in a particular State.

17. The issue of consultation (co-ordination) is not far-fetched either. The Applicant argues that in the absence of legislation or established practice, the receiving State may only object to the designation by the sending State of its diplomatic premises in consultation with the sending State. The majority (para. 71) is of the view that this condition among others does not exist under the VCDR or in general international law. And yet the majority has acknowledged the fact that the receiving State's power to object to a sending State's designation of its diplomatic mission is not unlimited. Such a power must be exercised reasonably and in good faith. France itself refers to the consensual letter and spirit of the Vienna Convention (paragraph 54 of the Judgment). It adds that the significant restrictions on the receiving State's territorial sovereignty through the inviolability régime calls for the sending State to use the rights conferred on it in good faith. France also refers to a "bond of trust" between the sending State and the receiving State. In my view, this is a clear acknowledgment of the need for consultation. The mutuality régime in Article 2 of the VCDR carries the same spirit of the need for consultation.

18. As for the State practice of France, the Respondent claims to have a practice of general tacit consent. This is called non-objection coupled with effective assignment i.e. actual use. The majority (para. 69), like France, cites the practice of a dozen States[9] which have legislated on the requirement of obtaining prior consent. It is not clear how the practice of a handful of States can be construed. Is it customary law? It cannot be. The majority does not consider that this practice necessarily establishes the agreement of the parties within the meaning of Article 31(3)*(b)* of the VCLT. In my view, there is no constant and consistent practice of France. This is because the Respondent's explanation varies. When it denied recognition to the request of the Embassy of Equatorial Guinea, France invoked the use condition in its Note Verbale of 11 October 2011. France stated that the premises fell within the private domain and were subject to ordinary law. Subsequently France used the attachment of the building on 19 July 2012 as the reason.

[449] 19. It is this lack of consistent practice that leads Equatorial Guinea to accuse the Respondent of arbitrariness and discrimination. I share this view, as explained below, concerning the status of the building and the test of reasonableness and non-discrimination to deny

[9] Out of the 192 States parties to the VCDR.

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recognition to the building as the premises of Equatorial Guinea's diplomatic mission.

20. I now turn to the second condition of "use" of the premises. As already indicated (paragraph 2 above), the majority does not consider it necessary to rule on the alleged "actual assignment" requirement for a building to benefit from the protections provided for in Article 22. The "if necessary" phraseology in paragraph 75 of the Judgment is not utilized in any meaningful way. In the majority's view, the dispute between the Parties can be resolved through an analysis of whether France's objection to the designation of the building at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission was "communicated in a timely manner, and was neither arbitrary nor discriminatory in character". As already stated, I disagree with this approach which ignores the condition of "use" which is mentioned in the VCDR and instead the majority adopts the consent or non-objection condition on which the Convention is silent. I am also not persuaded by the non-arbitrary and non-discriminatory test. It is adopted by the majority to rationalize the invocation of the consent or non-objection condition which is not provided for in the VCDR.

21. The majority finds itself in the situation of having to put aside the "use" condition and adopting a condition on which the Convention is silent. They also face the awkward situation of using arguments based on the "use" condition in order to justify the consent or non-objection condition (paragraphs 108 and 109 of the Judgment). In my view, the majority has erred in taking this approach.

22. The Judgment states that Article 1*(i)* of the VCDR has a definition of what constitutes "premises of the mission" which does not expressly establish how and when a building may come to be diplomatic premises (paragraph 62 of the Judgment). Nevertheless, the majority does not interpret the provision in detail. Article 1*(i)* defines "premises of the mission" as buildings and the land used for the purposes of the mission. I am of the view that this circular definition is more than descriptive. The term "used" indicates one of the conditions for establishing premises of the mission. Disagreement may be on what is meant by the term "used". France interprets the term to mean effective or actual use (where a diplomatic mission has completely moved into the premises in question), while Equatorial Guinea is of the view that the term encompasses premises assigned for diplomatic purposes, i.e. intended use. I share the latter view.

23. The term "use" can be interpreted differently. For "use" includes planning for the mission premises and their refurbishment. It is a gradual **[450]** process. Once a sending State gives notification of

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its opening a diplomatic mission and assigns a building for this purpose, it takes time to complete the moving-in process. Diplomatic missions are not established overnight. For example, the movement of diplomatic missions from Bonn to Berlin in the 1990s lasted for several years for some diplomatic missions.

24. In this regard, I share the Applicant's view in rejecting the notion that "actual" or "effective" assignment occurs only when a diplomatic mission has completely moved into the premises in question. The intended use must be included by accepting the situation where the sending State has assigned premises for diplomatic purposes. From the time of assignment and notification to the receiving State to the final move in the premises have to be accorded immunity and inviolability. Otherwise the expression "used for the purposes of the mission" in Article 1*(i)* of the VCDR would be deprived of *effet utile* in this context. The agents of the receiving State can enter the premises—as they did in the present case—under the guise of there not being "actual or effective assignment" of the property. In this connection, I share the view Judge Robinson expressed in paragraph 43 of his dissenting opinion that a building is entitled to immunity on the basis of the intended use as diplomatic premises when that "use" is followed by the actual use of the building as diplomatic premises.

25. I conclude this section by stating that the Judgment should have considered both conditions of "consent" and "use" thoroughly. The consent or non-objection condition is not found in the VCDR and it does not apply in the present case. As described by President Yusuf in his separate opinion, it is a "freshly minted" condition (para. 59). The condition of use which is mentioned in Article 1*(i)* of the Vienna Convention can be interpreted to include the intended use of a diplomatic mission in which the actions of Equatorial Guinea fall for the period from 4 October 2011 to 27 July 2012.

IV. Status of the building at 42 avenue Foch in Paris

26. The Parties exchanged numerous diplomatic Notes between 4 October 2011 and 27 July 2012. These two dates are crucial in determining the status of the building at 42 avenue Foch. It should be noted that, because the Court ruled against jurisdiction of the building at 42 avenue Foch as property of a foreign State under the United Nations Convention against Transnational Organized Crime (or Palermo Convention), the claims of Equatorial Guinea prior to 4 October 2011 fall outside the Court's jurisdiction (paragraph 77 of the Judgment). Equatorial Guinea accepts that events before 4 October

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2011 are inapplicable to the present case. Hence it is surprising that the majority invokes the "use" criterion **[451]** to cite the events of the searches of 28 September and 3 October 2011 as proof that the building at 42 avenue Foch was not being used or being prepared for use for diplomatic purposes. The events of the period prior to 4 October 2011 are irrelevant and should not have been invoked by the majority.

27. France claims to have objected consistently to each of the diplomatic Notes of Equatorial Guinea. The majority agrees with the Respondent that French authorities conducting the on-site inspection did not find that the premises were being used or being prepared for use as Equatorial Guinea's diplomatic mission. The majority dismisses the evidence of signs at the premises ("Embassy of Equatorial Guinea") and residence of the Permanent Delegate to UNESCO as inconsequential. It also dismisses evidence of tacit consent and recognition by France (paragraph 32 below). This is a regrettable position.

28. As noted in paragraph 20 above, the majority has established a standard or test of whether the objection of France was timely, non-arbitrary and non-discriminatory. This is a standard that is difficult to justify. Whether the actions of France were timely is debatable. It may have responded to the Note Verbale of Equatorial Guinea of 4 October 2011 within a week. However, considering the lengthy period of the conflict, one wonders whether events were dealt with in a timely manner. The stalemate between the Parties lasted from October 2011 to 13 June 2016 when Equatorial Guinea instituted proceedings before the Court. The period of nine months, from 4 October 2011 to 27 July 2012, was the apex of the stalemate between the Parties. And yet France as the receiving State, in spite of the sanctions available under the VCDR did not act because it did not want to jeopardize its bilateral relations with Equatorial Guinea. While this is understandable, it adds to the complication of this unique case.

29. In any case, to establish the reasonableness of France's conduct will depend on the particular circumstances. The majority concludes that Equatorial Guinea was aware on 4 October 2011 of the searches of 28 September and 3 October 2011 in the context of criminal proceedings. Hence there were reasonable grounds for France's objection to Equatorial Guinea's designation of the building as diplomatic premises. Unfortunately, this argument—as already indicated above—involves the irrelevant period prior to 4 October 2011. It is surprising that this temporal element is ignored by the majority. Furthermore, the circumstances of the present case point to Equatorial Guinea being a victim of unjust treatment. Accusations of abuse of rights were made although

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they have not been commented upon by the majority. This is another regrettable matter.

[452] 30. Hence the respondent State cannot be absolved from accusations of arbitrariness and discrimination. For example, French authorities accepted a capital gains tax for the property at 42 avenue Foch when they had no intention to pass on title of the building to Equatorial Guinea. Moreover, France tries to refute accusations of arbitrariness and discrimination by citing a single case of State X. It is not persuasive. Nor is the contention that no other sending State has ever conducted itself in France as Equatorial Guinea did in the present case. One may observe here that no other country has ever found itself in the situation Equatorial Guinea found itself in as a sending State. The linkage of France's actions to the criminal proceedings in French courts completes the unusual nature of the present case. Unfortunately, the majority agrees with France that if the respondent State had acceded to Equatorial Guinea's assignment of the building, it might have hindered the proper functioning of the French criminal justice system (paragraph 109 of the Judgment). This is in my view, a rather speculative and unnecessary comment which is not persuasive to justify further French searches of the building as reasonable.

31. As for the commencement date of the designation of the building at 42 avenue Foch as diplomatic premises of Equatorial Guinea, I am of the view that the notification by the Applicant on 4 October 2011 should be accepted. The period between this date and 27 July 2012 was used for planning the transfer of the premises from 29 boulevard de Courcelles to 42 avenue Foch in Paris.

32. In this connection, I observe that the French authorities, by their actions, have repeatedly recognized the building at 42 avenue Foch as the premises of the diplomatic mission of Equatorial Guinea. French officials have visited the building to obtain visas; the building was granted protection in 2015 and 2016; four letters were addressed to 42 avenue Foch by French officials in 2019. The majority (paragraph 114 of the Judgment) attempts to counter these recognition factors by advancing arguments that are not convincing. To argue that the acquisition of visas at 42 avenue Foch in Paris does not lead to the conclusion that the premises were recognized (by France) as constituting the premises of the mission—without giving reasons—is not convincing. France, rather unconvincingly, tries to explain that the four letters were sent by mistake (at different times)!

33. If the date of 4 October 2011 proves problematic, surely 27 July 2012 cannot be in doubt as the commencement date of the diplomatic status of Equatorial Guinea's mission at 42 avenue Foch. Several judges

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have recognized and voted in favour of the status of 42 avenue Foch as premises of the diplomatic mission of Equatorial Guinea even though they found no breach of obligations. France concedes that its non-recognition of the building and the seizures of assets were done before 27 July 2012. It further states that since that date, Equatorial Guinea has never reported any incidents that could have affected the peace of the **[453]** building. I am of the view that this is tacit consent and recognition of the diplomatic status of the premises.

34. In light of the above, I am of the view that the building at 42 avenue Foch acquired the status of premises of the mission of Equatorial Guinea in France as of 4 October 2011 and that France is in breach of its obligations under the VCDR.

V. Fate of the premises of Equatorial Guinea in France

35. The Court (para. 116) notes that the conduct of France did not deprive Equatorial Guinea of its premises in France and the Applicant already had diplomatic premises at 29 boulevard de Courcelles which France still recognizes. However, the premises at 42 avenue Foch have been recognized by the Court under the Order for provisional measures of December 2016. That recognition/protection will end with the present Judgment on the merits. The fate of these premises will be more uncertain when the appeal against the judgment of the *Cour d'appel* of 10 February 2020 comes to an end. Confiscation of the building will definitely affect the functioning of the Embassy of Equatorial Guinea in France. It is regrettable that the Court has left this matter unresolved. The issue is more than the question of ownership of the premises. It is the issue of the dignity and inviolability of the premises of the mission of Equatorial Guinea under Article 22 of the VCDR. The stability of the rules of diplomatic law will not be helped by this omission on the part of the Court.

[Report: *ICJ Reports 2020*, p. 300]

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