SEPARATE OPINION OF PRESIDENT YUSUF

Disagree with the contradictory conclusion of the Court on Article 1 (i) *of the Vienna Convention on Diplomatic Relations — Provision characterized as "unhelpful" in reasoning and set aside — Later, used in* dispositif *to deny status of "premises of the mission" to building at 42 avenue Foch — Court should have ascertained as threshold matter whether building at 42 avenue Foch was "used" as "premises of the mission" within meaning of Article 1* (i) *— Criterion of effective use is the key — Jurisprudence of domestic courts and international tribunals confirm that conclusion — Relevance of definitional provisions to applicability and operation of other provisions should have been analysed — It is illogical to dismiss relevance of "use" criterion in Article 1* (i) *but deny status of "premises of the mission" to building on the basis of the same article.*

Requirement of "prior approval" or "power to object" has no basis in the Convention — Object and purpose of the Convention insufficient to establish these requirements — Vienna Convention is a self-contained and reciprocal régime that specifies the means at disposal of receiving State to counter possible abuses — Requirement of "prior approval" or "power to object" will generate unnecessary misunderstandings and tensions in diplomatic relations — Court should have analysed Articles 41 and 21 of the Vienna Convention as relevant context to Article 1 (i) *— Practice of few States on a different plane from concordant practice embracing all parties to treaty — Convention does not make compliance with domestic laws and regulations of receiving State condition to the application of Article 1* (i) *— France did not have general, well-known and transparent practice at the relevant time — Requirement of "prior approval" or "power to object" is unqualified and unclear — Criteria for exercise of this power have no basis in the Convention.*

Actions taken by the French authorities and diplomatic exchanges — Building at 42 avenue Foch became part of Applicant's diplomatic premises as of 27 July 2012 — Entries and searches by French officials prior to that date not a violation of Article 22, paragraph 1, of the Convention — Attachment and confiscation of building did not affect actual use of premises and effective performance of diplomatic functions therein — They do not amount to violations of Article 22, paragraph 3, of the Convention — Ownership of building not relevant for characterization as "premises of the mission" under Article 1 (i).

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 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.

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 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

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:

> "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].

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[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]*.

[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.

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:

> "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-*

[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. 178-188.

[5] *Ibid.*, pp. 185-186.

[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, 381-382.

[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.

book, 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'.
>
> [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.
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> [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.)

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[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, and 165-167.

[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.

[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.

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 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

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

> 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" 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,

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[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, I.C.J. 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, I.C.J. Reports 2019 (I)*, pp. 36-37, paras. 84-87.

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 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

[17] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. 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, I.C.J. 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. 48-49, 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, I.C.J. 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").

[19] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 139; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. 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, I.C.J. Reports 2016 (I)*, p. 137, para. 111.

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 régime[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.

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

[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.

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 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

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 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 require-

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

ment, 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 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

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

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 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 the head of mission, without first securing the approval of

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 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

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 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 underway 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

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".

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.

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,

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 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*

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

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 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

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)* 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

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.

(Signed) Abdulqawi Ahmed YUSUF.

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