DISSENTING OPINION OF JUDGE BHANDARI

The object and purpose of the Vienna Convention on Diplomatic Relations, 1961 and its application in the present case — The insufficiency of the test that an objection to designation by the receiving State could denude a property from acquiring diplomatic status — The importance of relying upon the provision for mutual consent under Article 2 of the Vienna Convention on Diplomatic Relations — Necessity to balance the interests of the receiving and sending States and duly account for functional necessity — The relevance of the crucial preambular tenets of sovereign equality, the promotion of friendly relations, and the maintenance of international peace and security — Once a property is in actual use, for the purposes of the mission, the guarantees of inviolability should apply.

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 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.

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 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 College of Fetiales who conducted diplomatic negotiations was demanded and obtained by the Republic[1]. Hugo Grotius, in *De jure belli ac pacis*,

[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.

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 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 des-

[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. 687-688.

[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. 162-163.

[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.

[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.

ignation 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 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 impos-

[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.

[15] Draft articles on diplomatic intercourse and immunities with commentaries, *YILC*, 1958, Vol. II, pp. 94-95.

[16] *Ibid.*

sible 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 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

[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.

[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.

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, 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

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[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.

[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.
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> 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 equality' 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 153-154.

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 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, I.C.J. 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

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[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, I.C.J. Reports 1986*, pp. 99, 101, 102-103, 106-107 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, I.C.J. 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, I.C.J. Reports 2004 (I)*, p. 171, para. 87; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. 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.

[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".

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 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

[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.

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].

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,

[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.*

> "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 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:

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[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.

[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. 36-39, 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.

> "[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 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 Subdivision 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,

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[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.
[48] MEG, para. 8.20; REG, para. 2.51.
[49] MEG, para. 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.

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 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 effec-

[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.
[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. 31-32, 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).

tively 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".

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)*.

[64] CMF, para. 3.57 (France referred to MEG, Ann. 47). See also CR 2020/2, p. 43, para. 22 (Grange).

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.

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]

[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, I.C.J. Reports 2016 (I)*, p. 116, para. 33.

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

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 a premise 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 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 objec-

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

tion 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 "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

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.

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]. 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

[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.

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, I.C.J. 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

> "[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

[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, I.C.J. Reports 2019 (II)*, p. 600, para. 112.

[73] International Law Commission, *Summary Records of the Ninth Session, 394th Meeting*, *YILC*, Vol. I, pp. 52-53, para. 17 (Bartos).

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

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, 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

[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.

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 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

[78] MEG, Ann. 33.

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]. 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].

[79] MEG, Ann. 47.
[80] *Ibid.*, Timeline (pp. 125-133 of the English version).
[81] CR 2020/2, p. 34, para. 25 (Bodeau-Livinec).
[82] MEG, para. 8.48.
[83] *Ibid.*, para. 2.13.

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 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

[84] MEG, Ann. 51.
[85] *Ibid.*

"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 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 redres-

sal 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 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. 107-110). 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

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 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".

(Signed) Dalveer Bhandari.