DISSENTING OPINION OF JUDGE ROBINSON

Interpretation of the term "premises of the mission" in Article 1 (i) *of the Vienna Convention on Diplomatic Relations — The majority's conflation of the receiving State's power to object to the designation of mission premises with a requirement for the receiving State's consent for that designation — The finding that the receiving State has a power to object has no foundation in the Vienna Convention on Diplomatic Relations — The definition of the term "premises of the mission" establishes an objective criterion — France's breach of its obligations under the Vienna Convention on Diplomatic Relations.*

1. I am in disagreement with all the findings in paragraph 126 of the Judgment. The evidence before the Court establishes that the building at 42 avenue Foch acquired the status of "premises of the mission" within the meaning of Article 1 *(i)* of the Vienna Convention on Diplomatic Relations (hereinafter the "Vienna Convention" or the "Convention"). Therefore, the action taken by France of entering, searching, attaching, and ordering the confiscation of, the building breached its inviolability under Article 22 of the Convention as "premises of the mission".

2. In Part I of this opinion, I address the majority's interpretation of the Convention as allowing a receiving State unilaterally to object to, and negate, the designation by Equatorial Guinea of the building at 42 avenue Foch as "premises of the mission". In Part II, I describe how, in my view, the Convention should be interpreted. In Part III, I examine the alleged violations of the Convention as well as remedies for the violations. Part IV is devoted to general conclusions.

Part I: The Majority's Interpretation of the Convention

3. The decisive issue in this case is whether the building at 42 avenue Foch acquired the status of "premises of the mission" within the meaning of Article 1 *(i)* of the Convention. If it acquired that status before the action taken by France, there is a breach of the building's inviolability under Article 22 of the Convention.

4. The reasoning of the majority is that the Convention empowers the receiving State to object to a designation by the sending State of a building as "premises of the mission"; since, in this case, there is evidence that

France objected on several occasions to that designation by Equatorial Guinea, the majority contends that the building did not acquire that status.

5. Article 22 of the Convention provides that "[t]he premises of the mission shall be inviolable". Article 1 *(i)* defines the premises of the mission as "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission". It would seem to follow from the reasoning of the majority that, even if there is unambiguous evidence of diplomatic activities at 42 avenue Foch, thereby indicating its use for the purposes of the mission, it cannot acquire the status of premises of the mission if France, as the receiving State, objects to Equatorial Guinea's designation of the building as its diplomatic mission. That proposition runs counter to the ordinary meaning of the term "used for the purposes of the mission". A building that is "used for the purposes of the mission" within the meaning of Article 1 *(i)* should not be denied the status of "premises of the mission", and thus inviolability, on account of the objection of the receiving State. To interpret the Convention in that way is to misunderstand it. The definition of premises of the mission is not subject to a "no objection" clause, that is, there is nothing in the definition that makes its application dependent on the lack of an objection from the receiving State.

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

The Problem with the Finding in Paragraph 67

7. In paragraph 67, the majority holds that "[i]n light of the foregoing, the Court considers that the Vienna Convention cannot be interpreted so as to allow a sending State unilaterally to impose its choice of mission premises upon the receiving State where the latter has objected to this choice".

8. The legal basis for this finding is not clear in light of the contradictory positions advanced by France and by the majority itself. This finding is only valid if the majority establishes that the receiving State has the power to object to the sending State's designation of a building as premises of the mission, a test that the majority has not met. This opinion argues that if the sending State has a right to designate a building as

premises of the mission, the majority has not established that the Convention vests the receiving State with the power to object to that designation.

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

> "the applicability of the Vienna Convention's régime of protection to a particular building is subject to compliance with 'two cumulative conditions': first, that the receiving State does not expressly object to the granting of 'diplomatic status' to the building in question, and secondly, that the building is 'actually assigned' for the purposes of the diplomatic mission".

However, on several occasions France not only argues that as the receiving State it has a right to object to the granting of diplomatic status to the building, but also that the granting of that status is subject to its consent. For example, in paragraph 3.3 of its Counter-Memorial, the very same paragraph from which the previous citation is taken, it is stated:

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

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

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

10. There are two other factors that go to the legal basis, and therefore, the validity, of the majority's finding in paragraph 67. First, it is obvious that Equatorial Guinea's case is presented as a response to a claim by France, not that it has a right to object to the designation of the building as mission premises, but rather, that such a designation is subject to its consent. For example, in paragraph 47 of the Judgment, reference is made to an acknowledgment by Equatorial Guinea that "several States

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

11. Second, it is equally clear that the Judgment itself is substantially built on the argument that the receiving State's consent is required for the designation of a building as premises of the mission. Thus, all the examples of the State practice set out in paragraph 69 are instances in which, as the Judgment itself states, the "prior approval" of the receiving State is required for the designation of a building as premises of the mission. Patently, "approval" is another word for "consent". According to the majority, Germany requires prior agreement of the Federal Foreign Office, and Brazil requires prior authorization by its Ministry of Foreign Affairs; a requirement for prior agreement or prior authorization is a requirement for the consent of the receiving State. Moreover, many of the States referred to by France in its Counter-Memorial explicitly require their consent for the designation of a building as premises of the mission; see for example, the reference to United Kingdom, Canada, Czech Republic and Turkey in paragraph 3.18 of France's Counter-Memorial. Paragraph 72 of the Judgment presents an emblematic illustration of the majority's confusion of the requirement for consent and the power of the receiving State to object. The last two sentences read as follows:

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

"Approval" has the same meaning as "consent". Here the majority has wrongly conflated a requirement for the receiving State's consent with the power of the receiving State to object, two wholly distinct régimes; in other words it has been indiscriminate in its use of the two different concepts of consent and objection.

12. The various references by France, by Equatorial Guinea, and in the Judgment itself to the requirement of the receiving State's consent for

the designation of a building as the premises of the mission and to the right of the receiving State to object to the sending State's designation of a building as premises of the mission make it impossible to ascertain the rationale for the majority's focus in paragraph 67 on the receiving State's right to object to the sending State's designation of a building as premises of the mission. The majority does not explain why it has not chosen to embrace the argument advanced by France on several occasions that the applicable criterion is that the designation by a sending State of a building as premises of the mission is subject to its consent. In fact, in the oral proceedings France stated that it "certainly has a practice of general tacit consent".

13. There is an important legal distinction between a régime in which the designation of a building as premises of the mission is subject to the consent of the receiving State and one in which the receiving State has a power to object to that designation. Equating the receiving State's power to object with a requirement for its consent is wrong. If the receiving State has the power to object to a sending State's designation of a building as premises of the mission, the sending State may go ahead with the designation provided that the receiving State has not exercised its power to object; on the other hand, if the sending State's designation of a building as premises of the mission is subject to the consent of the receiving State, the sending State is totally disabled from so designating the building before the receiving State's consent is given.

14. The Convention uses the two concepts separately, not interchangeably. For example, under Article 4 (1) of the Convention, "the sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State". Thus, the sending State is totally disabled from proceeding with the identification of a person as head of its mission before the receiving State has given its consent. On the other hand, under Article 6 of the Convention, "two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State". Thus, two or more States may go ahead and accredit the same person as head of mission to another State, with the result that that action will remain undisturbed unless and until the receiving State objects. These two Articles illustrate the difference between the two régimes and the care that the drafters of the Convention take to ensure that they are used in the appropriate context. The régime whereby consent of the receiving State is required is more rigorous in its protection of the interests of the receiving State than the régime in which the receiving State is given the power to object to action taken by the sending State. Obviously, the Convention regards accreditation of the head of mission to the receiving State as a matter that more seriously affects the interests of the receiving State in its relationship with the sending State than two States accrediting the same person as head of mission to another State. Therefore, while the receiving State's consent is required for the first matter, in respect of the second it has the power to object.

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

16. In light of the foregoing analysis, the majority's conflation of the two concepts — the requirement of the consent of the receiving State for the sending State's designation of a building as premises of the mission and the power of the receiving State to object to such a designation — is a grave error of law. The failure of the majority to explain why in paragraph 67 of the Judgment it has concentrated on a régime in which the receiving State has the power to object to the designation by the sending State of a building as premises of the mission is irrational; what renders this approach even more confusing is that, in its reasoning, the majority relies on State practice requiring the receiving State's consent for the designation of a building as premises of the mission, and not on State practice in which the receiving State has the power to object to that designation (see analysis below from paragraphs 30 to 37 of this opinion).

The Flaws in the Majority's Interpretation of the Convention

17. The majority has presented three bases for its conclusion in paragraph 67 of the Judgment that "the Vienna Convention cannot be interpreted so as to allow a sending State unilaterally to impose its choice of mission premises upon the receiving State where the latter has objected to this choice".

18. The first basis is set out in paragraph 63 of the Judgment. Article 2 of the Convention provides that "[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent". The majority concludes that Article 2 is inconsistent with "an interpretation of the Convention that a building may acquire the status of the premises of the mission on the basis of the unilateral desig-

nation by the sending State despite the express objection of the receiving State". This conclusion calls for an explanation because, notwithstanding the existence of Article 2, the Convention enables the sending State and the receiving State to act unilaterally in relation to certain matters, even if there is an objection by the receiving State. To give just two examples, under Article 20 of the Convention, the sending State's mission and its head have the right to use that State's flag and emblem on the premises of the mission; under Article 9 the receiving State has the power to declare a member of the mission *persona non grata*. In these two articles therefore the requirement for the mutual consent of the sending and receiving States in respect of the establishment of diplomatic relations and the right of the sending or receiving State to act unilaterally in certain situations are not mutually exclusive.

19. The second basis is set out in paragraphs 64 and 65 of the Judgment. The majority argues that whereas the receiving State has the power under Article 9 of the Convention to declare members of a diplomatic mission *personae non gratae*, there is no similar mechanism for mission premises; consequently, it is contended that, if the receiving State does not have the power to object to the sending State's designation of premises of the mission, it would have to make a radical choice of granting protection to the premises or breaking off diplomatic relations with the sending State. There is no corresponding provision to the receiving State's power to declare a member of a mission *persona non grata* in relation to premises of the mission for the reason that the concept of *persona non grata* relates to persons and not things. However, it would be perfectly feasible for a receiving State, without breaking off diplomatic relations, to declare some members of the sending State's mission *personae non gratae*, thereby effectively disabling the mission.

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

21. In this case the majority has embarked on an extraordinary interpretation of the preamble of the Convention. The preamble is part of the context for the purposes of the interpretation of a treaty, and is often a valuable guide in its interpretation and application. In this case, however, the majority has carried out a strained interpretation of the preamble in order to shoehorn it into its desired conclusion.

22. The second preambular paragraph refers to three purposes and principles of the Charter of the United Nations as motivational factors in the conclusion of the Convention: sovereign equality of States, the maintenance of international peace and security and the promotion of friendly relations among nations. All three reflect not only rules of customary international law but norms of *jus cogens*. All three are fundamentally significant in the interpretation and application of the Convention. Yet throughout its analysis the majority only refers to the promotion of friendly relations among nations. The Convention was adopted in 1961, a

time when many colonies were becoming independent. For that reason, it is surprising that the majority did not consider it appropriate to allude to the principle of sovereign equality of States in their interpretation of the Convention. That principle is as influential in the interpretation of the Convention as the purpose of the promotion of friendly relations among nations. It is a principle that can operate to censure conduct of the sending or receiving State that may compromise the right of the other party to equal treatment on the basis of its sovereignty. Also, not to be overlooked is the reference to the purpose of the maintenance of international peace and security, because a fractured diplomatic relationship between a sending State and a receiving State may have an adverse impact on international peace and security.

23. According to the majority, the preamble specifies that the Convention's aim is to "contribute to the development of friendly relations among nations". However, the preamble must also be construed as meaning that, in developing friendly relations among nations the Convention must be interpreted and applied having regard to the principle of the sovereign equality of States and the purpose of the maintenance of international peace and security. The majority then construes the preamble as meaning that the promotion of friendly relations "is to be achieved by according sending States and their representatives significant privileges and immunities". But that is not a proper interpretation of the preamble, which simply reflects the belief that the adoption of the Convention would contribute to the development of friendly relations among nations. The majority's interpretation is overblown.

24. The majority employs the preamble improperly as a basis for the distinction that it makes between the "significant privileges" of sending States and the "weighty obligations" imposed by the Convention on receiving States (paragraph 66 of the Judgment). Here the majority's purpose is transparent: it is intent on painting a picture of the Convention in which the receiving State is portrayed as overburdened with obligations, and for that reason it is understandable that the Convention would vest it with the power to object to the sending State's designation of mission premises. This interpretation is artificial and a figment that has no basis whatsoever in a reading of the 53 articles of the Vienna Convention.

25. The majority has overlooked a very important element in the balance that the Convention seeks to strike between the interests of the sending State and those of the receiving State. Article 47 (1) of the Convention provides that "the receiving State shall not discriminate as between States". However, Article 47 (2) *(a)* of the Convention exempts from conduct that would otherwise be discriminatory an application by the receiving State of "any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State". This retaliatory capacity — one that the Convention does not give to the sending State — significantly lightens what the majority refers to as the "weighty obligations" imposed by the Convention on receiving States.

26. More astounding is the majority's suggestion that the preamble's recognition of the principle that privileges and immunities must serve a functional, and not a personal and private purpose, is rendered understandable by the "weighty obligations" imposed on receiving States by the Convention's inviolability régime. That principle is better explained by the grounding of the Convention in the three fundamental purposes and principles of the Charter set out in the second preambular paragraph. A better reading of the preamble is that it envisages a Convention with a coverage that extends beyond the bilateral relationship between the sending and the receiving State to a wider, global and communitarian purpose that is driven by the three aforementioned purposes and principles. In stark terms, the majority's argument comes down to this: on the basis of the preamble, the cost of the "significant privileges" accorded to the sending State is the "weighty obligations" imposed on the receiving State. While it is undeniable that the Convention seeks to balance the rights and interests of the sending and receiving States, the majority's interpretation of the preamble would seem to reduce the Convention to a wholly transactional arrangement in which everything is determined by a tit for a tat and a quid for a quo. By such an interpretation the Convention is stripped of any ideal beyond the narrow interests of the sending and receiving States.

27. The majority's very consequential conclusion, which goes to the very heart of the case, is substantially based on its analysis of the preamble, since, as noted before, the majority derives no help from its analysis of Articles 2, 4, 7, 9, and 39 of the Convention. However, if that conclusion is correct, it is also arguable that, in light of the balance that the Convention sets out to achieve between the interests of the sending State and those of the receiving State, it cannot be interpreted as allowing the receiving State unilaterally to decide that a building that has been used for the purposes of the mission and has been so designated by the sending State, does not have the status of premises of the mission. This conclusion is strengthened by the preambular requirement to have regard to the object and purpose of developing friendly relations on a basis that respects the principle of the sovereign equality of States and the purpose of maintaining international peace and security.

28. While the majority cites provisions of the Convention showing how it seeks to strike a balance between the interests of the sending State and those of the receiving State, it fails to recognize that interpreting the Convention as empowering the receiving State to unilaterally negate the sending States' choice of a building as premises of the mission seriously compromises that balance. That is so because that balance is meant to reflect the due recognition that is to be given in the interpretation and application of the Convention to the three purposes and principles set out in the preamble.

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

The Majority's Consideration of State Practice

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

31. First, there is an obvious conflict between the first sentence in paragraph 69 of the Judgment — "State practice further supports this conclusion" — and the last sentence in paragraph 68 of the Judgment: "However, this does not indicate that the receiving State cannot object to the sending State's assignment of a building to its diplomatic mission, thus preventing the building in question from acquiring the status of 'premises of the mission'." The conflict arises because the State practice that is relied on does not address whether the receiving State can or cannot object to the sending State's assignment of a building as premises of the mission; on the contrary, it supports the conclusion that the prior approval, or the prior agreement, or the prior authorization, in other words, the consent of the receiving State is required for the designation of mission premises. Here again the majority has conflated the régime whereby the receiving State has the power to object to the designation of mission premises with the régime whereby the consent of the receiving State is required for the designation of mission premises. The majority appears to proceed on the basis that if the designation of a building as mission premises is subject to the consent of the receiving State, logically it can object to that designation. However, this reasoning would not be correct because the choice between the régime of consent and the régime of objection does not depend on logic; rather, it depends on what the Convention requires in light of the particular context and the distinction that the Convention itself makes between these two very discrete régimes — for this distinction, see the analysis above in paragraphs 13 to 16. (In passing, it may be noted that the reference to the South African Diplomatic Immunities and Privileges Act of 2001 is unhelpful since the citation does not indicate that the Act requires the prior consent of South Africa as the receiving State for a relocation.)

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

33. Third, at the highest, perhaps the practice could be taken as meaning that sending States that comply with it have acquiesced in the receiving States' requirement for consent; as such, it would only be legally

relevant for those States that have so acquiesced; in other words, since the practice does not reflect customary international law it would have no relevance to States other than those that participate in it.

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

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

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

37. According to Equatorial Guinea, when the receiving State's consent is required, as it is in Article 12 of the Convention, the Convention expressly says so; consequently it follows that when this is not done, as is the case with the designation of mission premises, the receiving State's consent is not required. The majority rejects this *a contrario* interpretation. There is regrettably, a certain reluctance to rely on *a contrario* reasoning in the interpretation of treaties. This is unfortunate because interpretative tools such as the principle of *effet utile* or *ut res magis valeat quam pereat* and *a contrario* reasoning are accepted as useful aids in treaty interpretation. In the circumstances of this case, Equatorial Guinea's *a contrario* reasoning is consistent with the object and purpose of the Convention, which is to promote friendly relations between States on a basis that respects the principle of the sovereign equality of States and the purpose of maintaining international peace and security. Interpreting the treaty as allowing the receiving State unilaterally to object to, and negate, the sending State's designation of a building as mission premises would not be consistent with the achievement of that purpose, since it would be inimical to the balance that the Convention seeks to establish in the relations between the sending and the receiving States.

PART II: HOW THE CONVENTION SHOULD BE INTERPRETED

38. Although the majority has examined the meaning of the term "premises of the mission" in Article 1 *(i)* of the Convention, the conclusion that it has arrived at in paragraph 67 of the Judgment is principally driven, not by the definition of premises of the mission in Article 1 *(i)* of the Convention, but by its view that the Convention does not enable Equatorial Guinea to designate the building as "premises of the mission" if France as the receiving State objects to that designation. By this approach the majority treats the definition of "premises of the mission" as virtually otiose. What is required by the VCLT is an interpretation of the term "used for purposes of the mission" in accordance with the ordinary meaning to be given to this term in its context and in light of the object and purpose of the Vienna Convention.

39. For the ordinary meaning of the term "used for the purposes of the mission", one can go to the *Concise Oxford Dictionary* (7th edition) which gives the meaning of the word "use" as "cause to act or serve a purpose". It would seem therefore that for a building to qualify as "premises of the mission" one needs to have evidence that the building has served the purpose of a mission. We are therefore looking for evidence that the functions of a diplomatic mission were carried out at the building; these functions are non-exhaustively described in Article 3 of the Convention. Further, the ordinary meaning of the phrase "used for the purposes of the mission" must be interpreted in the context in

which it is used and in light of the object and purpose of the Vienna Convention.

40. On 4 October 2011, Equatorial Guinea sent a Note Verbale to France stating that it "has for a number of years had at its disposal a building located at 42 avenue Foch, Paris, (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to your Department".

41. France argues that the building would only qualify as premises of the mission after an actual assignment, which takes place after the sending State has completely moved into the premises. There is merit in the response of Equatorial Guinea that on the basis of France's approach, France as the receiving State would be able to enter the building without the permission of Equatorial Guinea as the sending State at any time up to the point at which the move was completed.

42. Equatorial Guinea cites the following evidence supporting its claim that the building at 42 avenue Foch was used for the purposes of the mission from 4 October 2011:

(i) Note Verbale of 4 October 2011 in which Equatorial Guinea asserts that it "has for a number of years had at its disposal a building located at 42 avenue Foch . . . which it uses for the performance of the functions of its diplomatic mission".
(ii) On 4 October 2011, having notified France of the building's assignment for the purposes of its diplomatic mission, Equatorial Guinea had placed signs marked, "République de Guinée équatoriale — locaux de l'ambassade" (Republic of Equatorial Guinea — Embassy premises). France reports that its officials saw these signs on 5 October 2011.
(iii) On 17 October 2011, Equatorial Guinea housed its Permanent Delegate to UNESCO and Chargée d'affaires in the building.
(iv) The relocation of the Embassy's offices was gradual. Several sections, such as the consulate and the accounting and administration offices, began operating out of the building immediately upon being relocated.
(v) Since 27 July 2012, all of the Embassy's offices have been housed in the building[1] (Note Verbale of that date from Equatorial Guinea to France).
(vi) French officials, especially from the Ministry of Foreign and European Affairs, have addressed mail to 42 avenue Foch in Paris. The most recent correspondence dates from 9 October 2019. In that regard, Equatorial Guinea relies on a letter from the Ministry of Foreign and European Affairs of 9 October 2019, requesting the support

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

of Equatorial Guinea for the election of a representative of France to the International Maritime Organization at the 31st session of the Assembly between 25 November and 5 December 2019. Equatorial Guinea also relies on applications submitted at 42 avenue Foch by French officials for visas to visit Equatorial Guinea between 8 and 9 February 2015.

43. France has argued that the building was not actually used for the purposes of the mission from 4 October 2011 to 27 July 2012. However, even if that is factually correct, the practice of some States, including judicial decisions, supports the view that an intended use of premises for the purposes of the mission will suffice for those premises to be entitled to diplomatic protection when it is followed by actual use.

44. Prior to the passage of legislation in 1987, practice in the United Kingdom showed that buildings were treated as "premises of the mission" "from the time they were at the disposal of the mission"[2] as long as prior planning consent had been secured under local laws and "it was the intention to use the building 'for the purposes of the mission' as soon as building and decorating had been completed"[3]. This practice shows that the United Kingdom considered that a building attracted immunity under Article 22 of the Convention even before it was actually used for diplomatic purposes. Even when buildings were no longer used for the purposes of the mission, the United Kingdom allowed the expiry of a "reasonable time" before its law enforcement agencies entered them to carry out investigations. For instance, in 1984 a shooting from the premises of the Libyan People's Bureau diplomatic mission in London resulted in the United Kingdom's decision to break off diplomatic ties between Libya and itself. Despite the break of diplomatic ties by the United Kingdom, the premises were treated as inviolable until the lapse of seven days after the severance of diplomatic relations. In fact, the premises had been vacated two days before the lapse of the seven days, but the United Kingdom still waited until the end of the full seven days before entering the premises to search for evidence in relation to the shooting. Notwithstanding that there was no actual use of the building during those two days, the United Kingdom still respected the immunity of the mission. It is acknowledged that this practice in the United Kingdom has changed and that the legal status of mission premises is now acquired upon receiving the consent of the Secretary of State[4]. However this practice by the United Kingdom prior to the 1987 legislation becomes

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

[3] *Ibid.*

[4] Under Section 1 (1) of the Diplomatic and Consular Premises Act 1987, in the United Kingdom, the Secretary of State for Foreign and Commonwealth Affairs requires diplomatic missions to obtain express consent before office premises acquired by them could be regarded as premises "used for the purposes of the mission" and therefore entitled to enjoy

relevant as evidence of State practice in relation to a State that neither requires consent of the receiving State for the designation of a building as premises of the mission, nor gives the receiving State the power to object to that designation.

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

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

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

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

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

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inviolability. However, such consent may only be given or withdrawn if the Secretary of State "is satisfied that to do so is permissible under international law".

to remedy the condition of the building, which confirms the designated use as indicated by the Congolese State."

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

49. Notably, the Brussels *Cour d'appel* made its finding of immunity in relation to an abandoned villa that was being renovated but was intended to be used as a diplomatic residence. The facts in this case are far more compelling: the building designated by Equatorial Guinea as the premises of the mission was not abandoned; the evidence is that Equatorial Guinea completed its move into the building by 27 July 2012; during the oral proceedings, Equatorial Guinea submitted that between 4 October 2011 and 27 July 2012, it was engaged in organizing the transfer of the Embassy and the actual move of its offices from the premises located at 29 boulevard des Courcelles, to the new premises at 42 avenue Foch. Although France has submitted that it found no evidence of the carrying out of diplomatic functions in the building, this particular evidence of organizing and preparing the move to establish the building as its premises for the mission does show an intention to use the building as premises of the mission, and it has neither been contradicted by France nor by any argument advanced by the majority. The difficulty faced by France in establishing that the building had no signs of diplomatic activity is that, on the basis of the evidence before the Court, it carried out its last set of searches between 14 and 23 February 2012. That still leaves a period of about six months before Equatorial Guinea's notification of full use of 27 July 2012. That is precisely the period in which there would be preparatory activity for the establishment of the building as the premises of the mission. The designated use was consistent with the actual use as indicated by Equatorial Guinea in a Note Verbale of 27 July 2012. In that Note Verbale, Equatorial Guinea confirmed that the building at 42 avenue Foch would henceforth serve as its diplomatic premises.

50. In Germany (a party to the Vienna Convention), it appears that the intention to use the building as the premises of the mission would be

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

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

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

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

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

> "[w]hile undeveloped and unused premises did not automatically qualify as serving state functions, as they might be held for commer-

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

> cial purposes, they could do so in the individual case. To distinguish one case from the other, the intentions present when the property was acquired could be decisive, especially when these intentions were put into practice later."[8]

53. What this practice in the United Kingdom (a party to the Vienna Convention) prior to its legislation of 1987 and the cases cited show is that the term "used for the purposes of the mission" must be interpreted not exclusively on the basis of its ordinary meaning, but on the basis of its ordinary meaning in its context and in light of the object and purpose of the Convention. It is true, as the majority contends, that the ordinary meaning of the term "used for the purpose of the mission" connotes an actual use for those purposes. However, the ordinary meaning of that term must be interpreted in the context in which it is used and in light of the Convention's object and purpose. An embassy or mission normally takes some time to be established; this goes to the context in which the term is used. The practice and these cases show that in determining whether a building has acquired the status of mission premises, it is appropriate to take account of a reasonable period of time for preparatory work prior to the actual use of the mission when that intended use is followed by actual use. In considering the value of this practice, the Court should give due weight to the fact that it includes judicial decisions that were obviously very carefully considered by the courts of States parties to the Convention, including an appellate court that is the highest court for the judicial district of Brussels, Belgium. The situation faced by Equatorial Guinea presents an even stronger case than any of those that has been cited, since Equatorial Guinea was merely relocating its diplomatic premises from one location in Paris to another location in the same city. There is nothing in the object and purpose of the Convention that would operate to discount intended use; on the contrary, the Convention must be interpreted as seeking to ensure that the movement of a diplomatic mission from one location to another does not prejudice the diplomatic status of the building to which the mission is being relocated. In light of the foregoing, it is proper to interpret the Convention as entitling premises to protection under Article 22 of the Convention when the intended use of those premises for diplomatic purposes is followed by actual use for those purposes.

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

[8] *Greece* v. *B*, Appeal order, Case No. 34 Wx 269/14, 12 September 2014, *ILDC* 2386 (DE 2014), paras. 20-21.

have been for the Court to decide what weight it wished to attach to that practice.

55. The practice examined indicates that an intended use of the building is a relevant factor in determining its entitlement to immunity. Evidence of the intended use comes from Equatorial Guinea's uncontradicted statement that in the period from 4 October 2011 to 27 July 2012 it was involved in organizing the transfer and actual move of the Embassy from one location to the building at 42 avenue Foch. Equatorial Guinea also sent a Note Verbale on 27 July 2012, informing the French authorities that actual use of the premises at 42 avenue Foch as its diplomatic mission commenced from that date. This actual use of the building as diplomatic premises would satisfy even France's test of "actual assignment and effective use". However, the examination of the practice of some States (paragraphs 43 to 54 of this opinion shows that a building is entitled to immunity on the basis of its intended use as diplomatic premises when that use is followed by actual use of the building as diplomatic premises). Thus, intended use and actual use may be seen as the beginning and the end of a continuum, every inch of which attracts immunity. Accordingly, the building at 42 avenue Foch acquired immunity on 4 October 2011 on the basis that that was the date of the commencement of its intended use for the purposes of the mission. This status was confirmed by the subsequent actual use of the premises for diplomatic purposes after 27 July 2012.

56. Equatorial Guinea bears the burden of establishing that the building at 42 avenue Foch qualified as premises of the mission within the meaning of Article 1 *(i)* of the Vienna Convention. Equatorial Guinea has discharged this burden because the Court has before it evidence showing an intention to use the building as premises of the mission from 4 October 2011, followed by actual use of the building as premises of the mission from 27 July 2012. If the Court does not accept that Equatorial Guinea discharged its burden on the basis of evidence that the building qualified for diplomatic protection from 4 October 2011, it certainly has evidence that from 27 July 2012 the building was effectively used for the purposes of the mission. However, this opinion argues that the building at 42 avenue Foch acquired the status of premises of the mission of Equatorial Guinea as at 4 October 2011.

57. Interpreting the Convention in this way is consistent with its object and purpose of promoting the achievement of friendly relations among nations on a basis that respects the principle of the sovereign equality of States and promotes the maintenance of international peace and security because it balances the interests of the sending and the receiving States.

PART III: ALLEGED VIOLATIONS OF THE VIENNA CONVENTION

Alleged Violations of the Vienna Convention

(a) *The Searches from 14 to 23 February 2012*

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

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

(b) *The Attachment of the Building on 19 July 2012*

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

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

62. In determining whether building and land constitute premises of the mission, the definition in Article 1 *(i)* makes it clear that their ownership is irrelevant. However, that does not mean that the Vienna Convention allows the receiving State to take action by way of measures of constraint that affects the sending State's ownership of the building. The attachment order of 19 July 2012 states that its effect is to render the building inalienable[9]. It is illogical to contend that ownership cannot have an impact on the inviolability of premises afforded by Article 22. The concept of inviolability under Article 22 imposes a duty on the receiving State to refrain from acts that affect the functioning of the premises as the sending State's diplomatic mission. It also includes the duty to refrain from acts that affect the dignity of the mission in the exercise of its sovereign functions. The functioning of the mission and its dignity are elements of the mission's inviolability. Attachment, which affects the ownership of

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

the building, has financial and economic implications that may impact negatively on the functioning and dignity of the embassy in the exercise of its sovereign functions. At a minimum, the mission must be able to function, and inability to sell the building, resulting from attachment, can affect its functioning; for example, there may be circumstances in which in order to continue functioning as a diplomatic mission a sending State may need to sell a building housing its diplomatic mission, so as to acquire less expensive premises.

63. In sum, the attachment breaches Article 22 (3) of the Vienna Convention. It also violates the dignity of the mission under Article 22 (2).

(c) *The Confiscation of the Building by the Paris Tribunal Correctionnel Dated 27 October 2017 which Was Upheld by the Paris Cour d'appel Dated 10 February 2020*

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

Remedies

(a) *Cessation*

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

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

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

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

(b) *Assurances and guarantees of non-repetition*

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

(c) *Satisfaction*

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

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

(d) *Compensation*

70. According to Article 36 of the 2001 Draft Articles a State is entitled to compensation in respect of any financially assessable damage that it suffers as a result of a wrongful act. There may be some damage that is assessable resulting from the various searches. Moreover, if Equatorial

[12] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 89, para. 3.
[13] *Ibid.*, p. 95, para. 9.
[14] *Ibid.*, pp. 105-107.

Guinea loses ownership of the building as a result of the confiscation order, it is entitled to compensation for that loss.

(e) *Contribution of Equatorial Guinea*

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

Abuse of Rights

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

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

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

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

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

[16] *Ibid.*

[17] *Ibid.*, p. 38, para. 83.

[18] *Ibid.*, p. 40, para. 85.

PART IV: CONCLUSIONS

76. One may arrive at the following conclusions:

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

(ii) The majority's conflation of the requirement of the receiving State's consent for the designation by the sending State of a building as premises of the mission with the power of the receiving State to object to that designation robs its conclusion in paragraph 67 of the Judgment of any legal effect. The conclusion is irrational and, therefore, invalid because the reasoning of the majority does not reveal any discrimination between the two distinct concepts of the requirement of the receiving State's consent for the designation of mission premises and the power of the receiving State to object to this designation. Moreover, while the conclusion is framed in terms of the power of the receiving State to object to the designation by the sending State of a building as premises of the mission, France's case includes references to the concept of consent and the separate concept of objection, and the Applicant's case is built on a response to the argument that the consent of France as the receiving State is required for this designation; also, notably the Judgment itself cites State practice that shows the requirement of the receiving State's consent for this designation, and not practice evidencing the power of the receiving State to object to such designation. In this melee of mixed reasoning, the majority's conclusion is without any legal effect.

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

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

any legal effect. Therefore, the objections by France on which the majority relies for its conclusion in paragraph 67 were invalid, and thus, the conclusion itself is robbed of any validity.

(iv) There is a strong case to be made that France recognized the diplomatic status of the building at 42 avenue Foch when French officials, including the State Secretary for Development and Francophone Affairs, attended at the building at 42 avenue Foch in order to acquire visas for visits to Equatorial Guinea. This conduct qualifies as tacit recognition. Although Article 5 of the Vienna Convention on Consular Relations lists the issuance of visas as a consular function, Article 3 (2) of the Vienna Convention, provides that "nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission". Thus, even though the non-exhaustive list of the functions of a diplomatic mission set out in Article 3 (1) does not include the issuance of visas, the Convention allows a diplomatic mission to issue visas. The majority's approach to this question is to proceed by way of assertion. It simply states in paragraph 114 of the Judgment: "The Court does not consider that the acquisition of visas at 42 avenue Foch in Paris leads to the conclusion that the premises were recognized as constituting the premises of a diplomatic mission." In the circumstances of this case that conclusion is wrong. Consequently, the majority's conclusion in paragraph 67 is invalid since, far from objecting to Equatorial Guinea's designation of the building as premises of the mission, France's conduct shows that it tacitly recognized that designation.

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

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

(vii) In light of the balance that the Convention seeks to strike between the interests of the sending and the receiving States, and having regard to the aim of the Convention of promoting friendly relations

among nations on the basis of respect for the principle of sovereign equality of States, and the purpose of the maintenance of international peace and security, it should not be interpreted as empowering either the sending or the receiving State to impose its will on the other State in determining whether a building has acquired the status of "premises of the mission".

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

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

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This opinion reflects the views of the author on the merits of this case, which has been brought by Equatorial Guinea against France. It is not to be seen as in any way reflecting the author's views on the merits of the

case instituted by the French authorities in the French courts against Mr. Teodoro Nguema Obiang Mangue.

(Signed) Patrick L. ROBINSON.