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Press Release

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Immunities and Criminal Proceedings (Equatorial Guinea v. France)

History of the proceedings (paras. 1-24)

The Court begins by recalling that, on 13 June 2016, Equatorial Guinea filed an Application instituting proceedings against France with regard to a dispute concerning

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

In its Application, Equatorial Guinea sought to found the Court’s jurisdiction, first, on Article 35 of the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter the “Palermo Convention”), and, second, on Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, of 18 April 1961.

Following the filing of a Request for the indication of provisional measures by Equatorial Guinea on 29 September 2016, the Court instructed France, in an Order dated 7 December 2016, “pending a final decision in the case”, to

“take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations¹, in order to ensure their inviolability”.

¹ Art. 22 reads as follows:

“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.

On 31 March 2017, France raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. By its Judgment of 6 June 2018, the Court upheld the first preliminary objection that the Court lacks jurisdiction on the basis of Article 35 of the Palermo Convention. However, it rejected the second and third preliminary objections and declared that it has jurisdiction, on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations, to entertain the Application filed by Equatorial Guinea, in so far as it concerns the status of the building located at 42 avenue Foch in Paris as premises of the mission, and that this part of the Application is admissible.

I. FACTUAL BACKGROUND (PARAS. 25-38)

The Court explains that, on 2 December 2008, the association Transparency International France filed a complaint with the Paris Public Prosecutor against certain African Heads of State and members of their families in respect of allegations of misappropriation of public funds in their country of origin, the proceeds of which had allegedly been invested in France. This complaint was declared admissible by the French courts, and a judicial investigation was opened in 2010. The investigation focused, in particular, on the methods used to finance the acquisition of movable and immovable assets in France by Mr. Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who was at the time Minister of State for Agriculture and Forestry of Equatorial Guinea and who became Second Vice-President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012.

The investigation more specifically concerned the way in which Mr. Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 avenue Foch in Paris. On 28 September and 3 October 2011, investigators conducted searches at that address and seized luxury vehicles which belonged to Mr. Teodoro Nguema Obiang Mangue. On 4 October 2011, Equatorial Guinea addressed a Note Verbale to France, stating that it had for a number of years had at its disposal a building located at 42 avenue Foch in Paris, which it used for the performance of the functions of its diplomatic mission. By a Note Verbale of 11 October 2011, France replied that the building in question did not form part of the premises of Equatorial Guinea's diplomatic mission, that it fell within the private domain and was, accordingly, subject to ordinary law. By a Note Verbale dated 17 October 2011, Equatorial Guinea informed France that the official residence of its Permanent Delegate to UNESCO was on the premises of the diplomatic mission located at 42 avenue Foch in Paris. By a Note Verbale to Equatorial Guinea dated 31 October 2011, France reiterated that the building in question was not part of the mission's premises, had never been recognized as such, and accordingly was subject to ordinary law.

From 14 to 23 February 2012, further searches of the building at 42 avenue Foch in Paris were conducted, during which additional items were seized and removed. By Notes Verbales dated 14 and 15 February 2012, which described the building as the official residence of Equatorial Guinea's Permanent Delegate to UNESCO and asserted that the searches violated the Vienna Convention, Equatorial Guinea invoked the protection afforded by the said Convention for such a residence.

On 19 July 2012, having found, *inter alia*, that the building at 42 avenue Foch in Paris had been wholly or partly paid for out of the proceeds of the alleged offences under investigation and that its real owner was Mr. Teodoro Nguema Obiang Mangue, one of the investigating judges of the Paris *Tribunal de grande instance* ordered the "attachment of the building" (*saisie pénale immobilière*). This decision was upheld on 13 June 2013 by the *Chambre de l'instruction* of the Paris *Cour d'appel*, before which Mr. Teodoro Nguema Obiang Mangue had lodged an appeal.

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."

By a Note Verbale of 27 July 2012, Equatorial Guinea informed France that, as from that date, the Embassy's offices were located at 42 avenue Foch in Paris. By a Note Verbale of 6 August 2012, France drew Equatorial Guinea's attention to the fact that the building in question was the subject of an attachment order under the Code of Criminal Procedure, dated 19 July 2012, and that it was thus unable officially to recognize the building as being the seat of the chancellery as from 27 July 2012.

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

The *Tribunal correctionnel* delivered its judgment on 27 October 2017, in which it found Mr. Teodoro Nguema Obiang Mangue guilty of money laundering offences. The tribunal ordered, *inter alia*, the confiscation of all the movable assets seized during the judicial investigation and of the attached building at 42 avenue Foch in Paris. Regarding the confiscation of this building, the tribunal, referring to the Court's Order of 7 December 2016 indicating provisional measures, stated that “the . . . proceedings [pending before the International Court of Justice] make the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty”. Following the delivery of the judgment, Mr. Teodoro Nguema Obiang Mangue lodged an appeal against his conviction with the Paris *Cour d'appel*. This appeal having a suspensive effect, no steps were taken to enforce the sentences handed down to Mr. Teodoro Nguema Obiang Mangue. The Paris *Cour d'appel* rendered its judgment on 10 February 2020. It upheld, *inter alia*, the confiscation of the “property located in the municipality of Paris, 16th arrondissement, 40-42 avenue Foch, attached by order of 19 July 2012”. Mr. Teodoro Nguema Obiang Mangue lodged a further appeal (*pourvoi en cassation*) against this judgment. This appeal having a suspensive effect, no steps have been taken to enforce the sentences handed down to Mr. Teodoro Nguema Obiang Mangue.

II. CIRCUMSTANCES IN WHICH A PROPERTY ACQUIRES THE STATUS OF “PREMISES OF THE MISSION” UNDER THE VIENNA CONVENTION (PARAS. 39-75)

The Court notes that the Parties disagree on whether the building at 42 avenue Foch in Paris constitutes part of the premises of Equatorial Guinea's diplomatic mission in France and is thus entitled to the treatment afforded to such premises under Article 22 of the Vienna Convention on Diplomatic Relations (hereinafter the “Vienna Convention”). The Parties also disagree on whether France, by the actions of its authorities in relation to the building, is in breach of its obligations under Article 22.

The Court begins by examining the circumstances in which a property acquires the status of “premises of the mission” within the meaning of Article 1 (i) of the Vienna Convention. That Article provides that the “premises of the mission” are “the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission”. To this end, the Court looks to the Vienna Convention, stating that it will interpret it according to customary rules of treaty interpretation which are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

The Court considers that the provisions of the Vienna Convention, in their ordinary meaning, are of little assistance in determining the circumstances in which a property acquires the status of “premises of the mission”. Although Article 1 (i) of the Convention describes the “premises of the mission” as buildings “used for the purposes of the mission”, this provision, taken alone, is

unhelpful in determining how a building may come to be used for the purposes of a diplomatic mission, whether there are any prerequisites to such use and how such use, if any, is to be ascertained. Moreover, it is silent as to the respective roles of the sending and receiving States in the designation of mission premises. Article 22 of the Vienna Convention provides no further guidance on this point. The Court therefore turns to the context of these provisions as well as the Vienna Convention's object and purpose.

Turning first to context, Article 2 of the Vienna Convention provides that “[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent”. In the Court's view, it is difficult to reconcile such a provision with an interpretation of the Convention that a building may acquire the status of the premises of the mission on the basis of the unilateral designation by the sending State despite the express objection of the receiving State.

Moreover, the provisions of the Convention dealing with the appointment and immunities of diplomatic personnel and staff of the mission illustrate the balance that the Convention attempts to strike between the interests of the sending and receiving States. Article 4 provides that the sending State's choice of head of mission is subject to the *agrément* of the receiving State. It further provides that the receiving State does not need to provide reasons for any refusal. On the other hand, the receiving State's prior approval is not generally required for the appointment of members of the mission's staff under Article 7. Pursuant to Article 39, those individuals who enjoy privileges and immunities enjoy them from the moment they arrive on the territory of the receiving State, or if they are already on the territory of the receiving State, from the moment their appointment is notified to the receiving State. However, these broad immunities are counterbalanced by the power of the receiving State, under Article 9, to declare members of a diplomatic mission *personae non gratae*. In contrast, the Vienna Convention establishes no equivalent mechanism for mission premises. If it were possible for a sending State unilaterally to designate the premises of its mission, despite objection by the receiving State, the latter would effectively be faced with the choice of either according protection to the property in question against its will, or taking the radical step of breaking off diplomatic relations with the sending State. Even in the latter situation, Article 45 of the Vienna Convention requires the receiving State to continue to respect and protect the premises of the mission together with its property and archives, prolonging the effects of the sending State's unilateral choice. In the Court's view, this situation would place the receiving State in a position of imbalance, to its detriment, and would go far beyond what is required to achieve the Vienna Convention's goal of ensuring the efficient performance of the functions of diplomatic missions.

As to the Vienna Convention's object and purpose, the preamble specifies the Convention's aim to “contribute to the development of friendly relations among nations”. This is to be achieved by according sending States and their representatives significant privileges and immunities. The preamble indicates that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”. It thus reflects the fact that diplomatic privileges and immunities impose upon receiving States weighty obligations, which however find their *raison d'être* in the objective of fostering friendly relations among nations.

In light of the foregoing, the Court considers that the Vienna Convention cannot be interpreted so as to allow a sending State unilaterally to impose its choice of mission premises upon the receiving State where the latter has objected to this choice. In such an event, the receiving State would, against its will, be required to take on the “special duty” referred to in Article 22, paragraph 2, of the Convention to protect the chosen premises. A unilateral imposition of a sending State's choice of premises would thus clearly not be consistent with the object of developing friendly relations among nations. Moreover, it would leave the receiving State vulnerable to a potential misuse of diplomatic privileges and immunities, which the drafters of the Vienna Convention intended to avoid by specifying, in the preamble, that the purpose of such privileges

and immunities is not “to benefit individuals”. The practice of several States, which clearly requires the prior approval of the receiving State before a building can acquire the status of “premises of the mission” — and the lack of any objection to such practice — are factors which weigh against finding a right belonging to the sending State under the Vienna Convention unilaterally to designate the premises of its diplomatic mission.

The Court considers that if the receiving State may object to the sending State’s choice of premises, it follows that it may choose the modality of such objection. To hold otherwise would be to impose a restriction on the sovereignty of receiving States that finds no basis in the Vienna Convention or in general international law. Some receiving States may, through legislation or official guidelines, set out in advance the modalities pursuant to which their approval may be granted, while others may choose to respond on a case-by-case basis. This choice itself has no bearing on the power of the receiving State to object.

The Court emphasizes, however, that the receiving State’s power to object to a sending State’s designation of the premises of its diplomatic mission is not unlimited. In light of the above-mentioned requirements, and the Vienna Convention’s object and purpose of enabling the development of friendly relations among nations, the Court considers that an objection of a receiving State must be timely and not be arbitrary. Further, in accordance with Article 47 of the Vienna Convention, this objection must not be discriminatory in character. In any event, the receiving State remains obliged under Article 21 of the Vienna Convention to facilitate the acquisition on its territory, in accordance with its laws, by the sending State of the premises necessary for its diplomatic mission, or otherwise assist the latter in obtaining accommodation in some other way.

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

In view of these conclusions, the Court proceeds to examine whether, on the facts before the Court, France objected to the designation of the building at 42 avenue Foch in Paris as premises of Equatorial Guinea’s diplomatic mission and whether any such objection was communicated in a timely manner, and was neither arbitrary nor discriminatory in character.

III. STATUS OF THE BUILDING AT 42 AVENUE FOCH IN PARIS (PARAS. 76-118)

1. Whether France objected through diplomatic exchanges between the Parties from 4 October 2011 to 6 August 2012 (paras. 76-89)

The Court begins by examining the diplomatic exchanges of the Parties in the period between 4 October 2011, when Equatorial Guinea first notified France that the property “form[ed] part of the premises of the diplomatic mission”, and 6 August 2012, shortly after the “attachment of the building” (*saisie pénale immobilière*) on 19 July 2012.

The Court recalls that the initial searches at the property by the French investigative authorities took place on 28 September 2011 and 3 October 2011, during the course of which luxury vehicles belonging to Mr. Teodoro Nguema Obiang Mangue were seized. On 4 October 2011, Equatorial Guinea addressed a Note Verbale to France, in which it stated that it “has for a number of years had at its disposal” a building located at 42 avenue Foch in Paris, which it “uses for the performance of the functions of its diplomatic mission”. On the same date, paper signs were

put up at the building marked “République de Guinée équatoriale — locaux de l’ambassade” (Republic of Equatorial Guinea — Embassy premises). On 11 October 2011, France addressed a Note Verbale to Equatorial Guinea, which stated that “the . . . building [in question] does not form part of the premises of Equatorial Guinea’s diplomatic mission. It falls within the private domain and is, accordingly, subject to ordinary law.”

On 17 October 2011, Equatorial Guinea addressed a Note Verbale to France, informing it that its diplomatic mission would be headed (as Chargée d’affaires *ad interim*) by its Permanent Delegate to UNESCO. The Note stated that the latter’s “official residence” was “on the premises of [Equatorial Guinea’s] diplomatic mission located at 40-42 avenue Foch [in] Paris”. In a Note Verbale addressed to Equatorial Guinea on 31 October 2011, France reiterated that the building in question “is not a part of the mission’s premises, has never been recognized as such, and accordingly is subject to ordinary law”.

Between 14 and 23 February 2012, the French authorities conducted further searches of the building at 42 avenue Foch in Paris, in the course of which various items were seized and removed. During this period, presenting the building as the residence of its Chargée d’affaires and Permanent Representative to UNESCO, and asserting that the searches and seizures violated the Vienna Convention, Equatorial Guinea invoked the protection afforded by that Convention for such a residence. France, for its part, reiterated that it did not recognize the building as the official residence of the representative in question. On 9 and 12 March 2012, Equatorial Guinea addressed two Notes Verbales to France, in which it reiterated that the building formed part of the premises of its diplomatic mission in France. In its reply of 28 March 2012, France, for its part, again asserted that the building “cannot be considered as part of the premises of the diplomatic mission, since it has not been recognized as such by the French authorities, given that it has not been assigned for the purposes of the mission or as the residence of the head of the mission in accordance with . . . Article 1, paragraph (i), of the Vienna Convention”.

By Notes Verbales of 25 April and 2 May 2012, Equatorial Guinea and France reiterated their positions.

On 19 July 2012, an investigating judge of the Paris *Tribunal de grande instance* ordered the “attachment of the building” (*saisie pénale immobilière*). On 27 July and 2 August 2012, Equatorial Guinea addressed two Notes Verbales to France, informing it that, as from that date, the offices of its Embassy were located at 42 avenue Foch in Paris, a building which it was henceforth using for the performance of the functions of its diplomatic mission. In a Note Verbale of 6 August 2012, France replied that since the building in question was the subject of an attachment order (*ordonnance de saisie pénale immobilière*) of 19 July 2012, it was unable officially to recognize it as being the seat of the chancellery as from 27 July 2012, and that the latter thus remained at 29 boulevard de Courcelles in Paris, the only address recognized as such.

The Court considers that the facts recounted demonstrate that, between 11 October 2011 and 6 August 2012, France consistently expressed its objection to the designation of the building at 42 avenue Foch in Paris as part of the premises of Equatorial Guinea’s diplomatic mission.

2. Whether the objection of France was timely (paras. 90-92)

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

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

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

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

3. Whether the objection of France was non-arbitrary and non-discriminatory (paras. 93-117)

The Court next turns to the question whether France's objection to the designation by Equatorial Guinea of the building at 42 avenue Foch in Paris as premises of its diplomatic mission was non-arbitrary and non-discriminatory in character.

The Court considers that, at the time it received Equatorial Guinea's notification on 4 October 2011, France possessed sufficient information to provide a reasonable basis for its conclusion with respect to the status of the building at 42 avenue Foch in Paris. As well as being in a position to conclude that the building was not being used, or being prepared for use, for diplomatic purposes at the time of Equatorial Guinea's notification, France had an obvious additional ground justifying its objection to the designation of the building as premises of the diplomatic mission as of 4 October 2011. The building had been searched only a few days earlier, in the context of criminal proceedings which were still ongoing. Therefore, it was reasonable for France to assume that further searches in the building, or other measures of constraint, might be necessary before the criminal proceedings were terminated. If France had acceded to Equatorial Guinea's assignment of the building to its diplomatic mission, thereby assuming obligations to ensure the inviolability and immunity of the building under the Convention, it might have hindered the proper functioning of its criminal justice system. In this connection, the Court notes that Equatorial Guinea was aware of the ongoing criminal proceedings. Accordingly, Equatorial Guinea was aware, or could not have been unaware, on 4 October 2011 that the building had been searched in the context of the ongoing criminal proceedings. The Court observes that this ground justifying France's objection on 11 October 2011 has persisted long after that date. Whether or not it was being prepared for use, or was being used, for the purposes of Equatorial Guinea's diplomatic mission at some point after 27 July 2012, the building at 42 avenue Foch in Paris was still a target in ongoing criminal proceedings which are pending to this date. When it reiterated its objection in

its Note Verbale of 6 August 2012, France explicitly referred to the attachment ordered in the course of the ongoing criminal proceedings.

In these circumstances, the Court concludes that there existed reasonable grounds for France's objection to Equatorial Guinea's designation of the building as premises of Equatorial Guinea's diplomatic mission. These grounds were known, or should have been known, to Equatorial Guinea. In light of these grounds, the Court does not consider that the objection by France was arbitrary in character. Furthermore, the Court is of the view that France was not required to co-ordinate with Equatorial Guinea before communicating its decision not to recognize the status of the building as premises of the mission on 11 October 2011. Indeed, the Vienna Convention establishes no obligation to co-ordinate with a sending State before a receiving State may object to the designation of a building as premises of a diplomatic mission.

The Court turns to the question whether France's position with respect to the status of the building has been inconsistent. It notes that in all of the diplomatic correspondence invoked by Equatorial Guinea, France consistently asserted that acquiring the status of premises of the mission was contingent on two conditions: absence of objection of the receiving State and actual assignment of the premises for diplomatic use.

The Court observes that France has maintained its explicit objection to the designation of the building as premises of Equatorial Guinea's diplomatic mission, long after the Note Verbale of 6 August 2012. It refers, in particular, to a Note Verbale of 2 March 2017 in which France stated that "[i]n keeping with its consistent position, France does not consider the building located at 42 avenue Foch in Paris (16th arr.) to form part of the premises of the diplomatic mission of the Republic of Equatorial Guinea in France".

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

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

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

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

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

IV. CONSIDERATION OF EQUATORIAL GUINEA'S FINAL SUBMISSIONS (PARAS. 119-125)

As the Court concluded that the building at 42 avenue Foch in Paris has never acquired the status of "premises of the mission" under the Vienna Convention, the acts complained of by Equatorial Guinea cannot constitute a breach by France of its obligations under that Convention. Consequently, the Court cannot uphold Equatorial Guinea's submission that the Court declare that France has an obligation to make reparation for the harm suffered by Equatorial Guinea.

The Court recalls that an objection by a receiving State to the designation of property as forming part of the premises of a foreign diplomatic mission prevents that property from acquiring the status of the "premises of the mission", within the meaning of Article 1 (*i*) of the Vienna Convention, provided that this objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character. The Court has found that the objection by France in the present case meets these conditions. In the light of the above conclusions, the Court cannot uphold the submission of Equatorial Guinea that it declare that France must recognize the status of the said building as premises of the diplomatic mission of Equatorial Guinea.

V. OPERATIVE CLAUSE (PARA. 126)

For these reasons,

THE COURT,

(1) By nine votes to seven,

Finds that the building at 42 avenue Foch in Paris has never acquired the status of "premises of the mission" of the Republic of Equatorial Guinea in the French Republic within the meaning of Article 1 (*i*) of the Vienna Convention on Diplomatic Relations;

IN FAVOUR: *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *President* Yusuf; *Vice-President* Xue; *Judges* Gaja, Sebutinde, Bhandari, Robinson; *Judge ad hoc* Kateka;

(2) By twelve votes to four,

Declares that the French Republic has not breached its obligations under the Vienna Convention on Diplomatic Relations;

IN FAVOUR: *President* Yusuf; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Vice-President* Xue; *Judges* Bhandari, Robinson; *Judge ad hoc* Kateka;

(3) By twelve votes to four,

Rejects all other submissions of the Republic of Equatorial Guinea.

IN FAVOUR: *President* Yusuf; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Crawford, Gevorgian, Salam, Iwasawa;

AGAINST: *Vice-President* Xue; *Judges* Bhandari, Robinson; *Judge ad hoc* Kateka.

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

Separate opinion of President Yusuf

Whilst agreeing with the second and third operative clauses of the Judgment, President Yusuf voted against the first operative clause, which finds that the building at 42 avenue Foch in Paris has never acquired the status of “‘premises of the mission’ . . . within the meaning of Article 1 (i) of the Vienna Convention” on Diplomatic Relations (hereinafter the “VCDR” or the “Vienna Convention”). In his view, this conclusion is erroneous. It is not based on a proper interpretation and application of Article 1 (i) nor of any other provision of the VCDR. It does not even derive from the legal reasoning of the Judgment. The provisions of the VCDR are described in the Judgment as being “of little assistance” in appraising the circumstances in which a property acquires the status of “premises of the mission”, while Article 1 (i) is considered “unhelpful” in determining how a building may come to be used for the purposes of a diplomatic mission. He therefore raises the question: if Article 1 (i) is unhelpful in making such determination, how can it serve as the basis of the conclusion in the *dispositif* that the building has never acquired the status of “premises of the mission”?

According to him, the Judgment offers no meaningful interpretation of the terms “buildings . . . used for the purposes of the mission” in Article 1 (i), nor does it make the slightest attempt to apply such interpretation to the particular circumstances of this case. For President Yusuf, the Court should have interpreted, in accordance with the customary rules of treaty interpretation, the definitional provision in Article 1 (i) in its context and in the light of its object and purpose in order to determine, as a threshold matter, whether the building at 42 avenue Foch in Paris was “used for the purposes of the mission”. This approach is supported by the previous practice of domestic and international courts and tribunals which have addressed the status of diplomatic premises in the past. Instead, the Judgment pivots to a hitherto unknown requirement of “prior approval” or “power to object” of the receiving State, which has no basis in the text of the Convention. These newly minted conditions are not supported by the subsequent practice of the parties to the Vienna Convention nor by customary law or any other source of international law. They are also likely to generate in the future unnecessary misunderstandings and tensions in the application to diplomatic premises of the centuries-old law on diplomatic relations. Furthermore, the criteria propounded by the Court for the exercise of such “power to object” are unclear and unqualified.

In President Yusuf’s view, a proper assessment of the facts should have led to the conclusion that the building at 42 avenue Foch in Paris acquired the status of “premises of the mission” as of 27 July 2012, after the various entries and searches of the premises by French officials had taken place. Therefore, these measures could not amount to a violation of Article 22, paragraph 1, of the Convention. Nor could the subsequent measures of attachment and confiscation be in violation of Article 22, paragraph 3, of the Convention, in so far as they would only affect the ownership of the building, which, according to Article 1 (i), is not relevant to the status of “premises of the mission”.

Dissenting opinion of Vice-President Xue

1. Vice-President Xue disagrees with the decision rendered by the Court primarily on the basis of her position on the question of jurisdiction. In her view, the status of the building at 42 avenue Foch in Paris is one, and an inseparable, part of the dispute between Equatorial Guinea and France in relation to the immunities of the high-ranking official of Equatorial Guinea and its State property from the jurisdiction of the French courts. She regrets that, by narrowing down its jurisdictional basis in the present case, the Court eschewed some crucial aspects of the dispute between the Parties. She is of the view that whether or not the building at 42 avenue Foch in Paris became the State property of Equatorial Guinea through the transfer of ownership is not a purely legal issue under the French law in the present case; it ultimately boils down to the issue of the

rights and obligations of a State under international law in handling criminal cases concerning a foreign State and its property.

2. In this regard, Vice-President Xue considers two issues to be relevant: the transaction of the building between Mr. Teodoro Nguema Obiang Mangue and the Republic of Equatorial Guinea, and Equatorial Guinea's right to designate it as the premises of its diplomatic mission. On the first issue, she observes that evidence adduced by Equatorial Guinea shows that the transaction was legally carried out under the French law. It is evident from the facts that France's persistent objection to Equatorial Guinea's request to designate the building at 42 avenue Foch in Paris has little to do with the circumstances and conditions under which a property may acquire diplomatic status, but is related to the controversy between the Parties over the ongoing criminal investigation against Mr. Teodoro Nguema Obiang Mangue.

3. In respect of the second issue, she observes that the public acts of the French authorities on the registration of the transfer of shareholder rights in relation to the building and the collection of a capital gains tax gave rise to a reasonable belief by Equatorial Guinea that it has acquired the ownership of the building. If France wished to maintain the assets within the private domain, it should have stopped these deeds at the outset of the transaction so as to leave no doubt to Equatorial Guinea on the status of the building. In addition to these public acts of its authorities, France does not claim at any time during the proceedings that the transfer of the building between Mr. Teodoro Nguema Obiang Mangue and Equatorial Guinea was not genuine. In her opinion, the dispute between the Parties over the status of the building hinges on the ownership of the building. First, the reason given by France for its objection to Equatorial Guinea's request directly relates to the ownership of the building, as it explicitly mentioned that the building "falls within the private domain". Secondly, the question of ownership has consequential effects on the conduct of France in handling the building. Although the ownership is irrelevant to the status of the premises of a diplomatic mission, if owned by the sending State, however, the premises would enjoy the protection of the Vienna Convention on Diplomatic Relations (hereinafter the "Vienna Convention" or the "Convention") as well as of customary rules on jurisdictional immunities of a State and its property. In the present case, such rules may come into play in the examination of the lawfulness of the measures of constraint imposed on the building by the French courts, if the issue of the ownership of the building were duly considered.

4. As regards the interpretation of the Vienna Convention, Vice-President Xue agrees with the majority that the provisions of the Convention do not lay down at which point of time and under what conditions a property acquires the status of "premises of the mission" as defined in Article 1 (*i*) of the Convention and starts to enjoy the privileges and immunities as provided for therein. In light of the object and purpose of the Convention, the sending State cannot unilaterally impose its choice of premises on the receiving State. She disagrees, however, with the reasoning of the Court which implies that the receiving State, by its persistent objection to the sending State's designation, would unilaterally dictate the outcome of the matter.

5. She emphasizes that the fundamental principle of international law contained in the preamble of the Convention, i.e. the principle of sovereign equality, is the legal basis of international diplomacy law. Diplomatic privileges and immunities, "significant" or "weighty" as they may be, are mutually granted and mutually beneficial. The establishment of permanent diplomatic missions — if it is to serve the purposes of maintaining peace and security and fostering friendly relations among nations — must be based on mutual respect for sovereignty and equal treatment of States. While the designation of the premises of diplomatic missions is left largely to the practice of States in light of the specific circumstances of each country, by virtue of the

principle of sovereign equality, co-operation and consultation are the only way that can produce a mutually acceptable solution.

6. Vice-President Xue observes that, in the present case, France did not produce convincing evidence to show that, in its practice, prior consent is consistently required for a building to acquire diplomatic status. Moreover, its repeated refusal of Equatorial Guinea's assignment is related more to the disputed criminal proceedings than to the procedure itself.

7. In her opinion, as the status of the building in question is the very subject of the dispute relating to the immunities of State property between the Parties, a general examination of the circumstances under which a property acquires diplomatic status does not address the real issue in the present case. The key question in the present context is not whether France as the receiving State enjoys the sovereign right to object to Equatorial Guinea's choice of its diplomatic premises, but whether it has wrongfully exercised jurisdiction by imposing measures of constraint on the State property of Equatorial Guinea.

8. Vice-President Xue notes that the Court recognizes three criteria for the manner in which the receiving State raises its objection to a sending State's designation of its diplomatic premises, i.e. timely, non-arbitrary and non-discriminatory. On the first criterion of timely objection, she has no doubt that each time when Equatorial Guinea notified the Protocol Department of the French Ministry of Foreign Affairs of its designation or use of the building as the premises of its diplomatic mission, the latter objected without delay.

9. However, she points out that, in assessing whether France's objection was arbitrary, the Court's reasoning is predicated on a wrongful assumption that the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue and measures of constraint on the building were not in dispute between the Parties. In her view, this line of reasoning is totally one-sided. It reveals that the issue of France's objection to Equatorial Guinea's designation of the building as the premises of its diplomatic mission cannot be separated from the question of immunities of State property in the criminal proceedings. At the time when Equatorial Guinea first requested to assign the building for its diplomatic mission, the very reason for France's objection was to maintain the building under measures of constraint for the purpose of the criminal proceedings. She also considers that it is contrary to the object and purpose of the Convention for the Court to state that France was under no obligation under the Convention to consult with Equatorial Guinea, when it decided to refuse the latter's designation of the building as its diplomatic premises.

10. Vice-President Xue considers that, in assessing whether France's conduct was discriminatory, one does not have to rely on any comparable case in France's practice, but just to inquire whether, under the same circumstances, France would have treated any other State, or whether any other State would have accepted to be treated, in the same way. In this regard, she notes that, for almost four years, i.e. from 27 July 2012, the date when Equatorial Guinea actually moved its mission into the building, until it instituted proceedings against France before this Court on 13 June 2016, the Embassy of Equatorial Guinea used the building for the performance of the official functions of its diplomatic mission, but without proper status and protection. Meanwhile, measures of constraint such as attachment and confiscation were imposed on the building. In her opinion, this kind of situation cannot be deemed normal in diplomatic relations; nor does it resemble the relationship between two sovereign equals. These facts per se demonstrate that undue emphasis on the power of the receiving State to object would upset the delicate balance established by the Vienna Convention between the sending State and the receiving State.

Declaration of Judge Gaja

Judge Gaja considers that, notwithstanding France's objection, the building at 42 avenue Foch in Paris acquired the status of premises of Equatorial Guinea's diplomatic mission. For that purpose, consent—express or implied—of the receiving State is not required by the Vienna Convention on Diplomatic Relations. There is no reference to such consent in the definition of premises of the mission given in Article 1 (*i*) of the Convention. Article 12 requires the "prior express consent" of the receiving State when the building is located outside the State's capital city. This reinforces the interpretation that consent is not necessary in the much more frequent case of buildings situated in the capital city.

While the sending State needs to comply with the laws and regulations of the receiving State, no issue of town planning or zoning for security reasons was raised in the present case. France is not among the States which have adopted legislation or sent circular notes to diplomatic missions asserting a receiving State's right to refuse its consent to a sending State's future choice of a building as premises of its diplomatic mission.

Thus France was bound to respect the obligations under Article 22 of the Convention once the building was used for Equatorial Guinea's diplomatic mission. However, Equatorial Guinea failed to substantiate any claim that these obligations have been violated by France.

Separate opinion of Judge Sebutinde

Judge Sebutinde has voted against paragraph 126 (1) of the Judgment. In her opinion, the building located at 42 avenue Foch in Paris acquired the status of "premises of the mission" of Equatorial Guinea within the meaning of Article 1 (*i*) of the Vienna Convention on Diplomatic Relations (hereinafter the "VCDR") on 27 July 2012, when Equatorial Guinea effectively moved its mission into that building. With effect from that date, France had an obligation to extend to Equatorial Guinea's mission at the disputed building, the protection guaranteed under Article 22 of the VCDR.

Under the VCDR, ownership of a building is immaterial in determining whether it is capable of forming part of the premises of a mission. Judge Sebutinde is of the view that France's refusal to recognize the disputed building as premises of Equatorial Guinea's mission after 27 July 2012 was based on factors to do with the ownership or transfer of ownership of the disputed building rather than its use by the Applicant for purposes other than its mission. The evidence regarding the prerequisite for consent of a receiving State, before a building can be recognized as premises of a mission, points to France's practice of non-objection, whereby the receiving State will not unreasonably object on grounds other than that the building is not being used for the purposes of the mission stipulated in Article 3 of the VCDR.

Since the building only attained the status of "premises of the mission" on 27 July 2012, Judge Sebutinde opines that the actions of French authorities in relation to that building before that date, including searches, seizures and order of attachment (*saisie pénale immobilière*), cannot be considered as being in violation of Article 22 of the VCDR. The order of confiscation of the disputed building issued on 27 October 2017 and confirmed on 10 February 2020, does not violate Article 22 of the VCDR since it concerns the transfer of ownership of the building and does not necessarily implicate its use as premises of Equatorial Guinea's mission. In this regard, Judge Sebutinde has voted with the majority in favour of paragraph 126 (2) of the Judgment.

Lastly, the Judgment says little on the issue of Equatorial Guinea's alleged abuse of rights in the present case, simply alluding in paragraph 66 to the fact that the purpose of the diplomatic privileges and immunities under the VCDR are not meant to benefit individuals, without explaining how this statement relates to Equatorial Guinea's claims or conduct. Judge Sebutinde is of the

considered opinion that there being no exceptional and compelling circumstances pointing to abuse of rights by Equatorial Guinea, the Court should have expressly said so in the Judgment.

Dissenting opinion of Judge Bhandari

1. In his dissenting opinion, Judge Bhandari submits that he is unable to concur with the conclusion reached by the majority in paragraph 126 of the Judgment. His hesitations are based on the insufficiency of the test that an objection by the receiving State, which is timely and neither arbitrary nor discriminatory, could prevent certain property from acquiring the status of mission premises. Such a test inexorably leads to the conclusion that a property may never acquire diplomatic status without the consent of the receiving State. Notably, neither the Vienna Convention on Diplomatic Relations, 1961 (hereinafter the “Vienna Convention”) nor customary law provides for such a requirement. Judge Bhandari takes this position on the basis of the following four areas of consideration.

2. First, he examines the concept of mutual consent and reciprocal privileges in diplomatic intercourse and privileges, as signified by early practices and instruments prior to the codification of the Vienna Convention. He then examines the work of the International Law Commission (hereinafter the “ILC”) in 1957 in the codification of the topic of diplomatic intercourse and immunities, and the theory of functional necessity in the work of the ILC as a basis of the diplomatic function. He also notes the work of the United Nations Conference on Diplomatic Intercourse and Immunities in 1961 in this context. The preamble of the Vienna Convention was based on a proposal which had the merit of stating that the purpose of diplomatic privileges and immunities was “to ensure the efficient performance of the functions of diplomatic missions”, thereby placing functional necessity at the forefront of the purpose of the régime of privileges and immunities under the Vienna Convention. According to him, this historical backdrop emphasizes that no previously established rule of customary international law required or appears to permit an objection to designation of mission premises by the receiving State. His analysis will be guided by the purpose of ensuring the efficient performance of the functions of diplomatic missions.

3. Second, he examines the object and purpose of the Vienna Convention. In doing so, he specifically addresses the principles of the sovereign equality of States, the promotion of friendly relations among nations, and the maintenance of international peace and security. The principle of sovereign equality emphasizes the right of all States to equality in law, to the exclusion of the notion of the legal superiority of one State over the other. He further examines the commitment to promote friendly relations, as reinforced by the adoption of General Assembly resolution 2625 (XXV), which itself is reflective of customary international law. He further states that in interpreting the object and purpose of the Vienna Convention, he is obliged to give special consideration to the prevention of conflict and the peaceful settlement of disputes. He emphasizes that the test in paragraph 74 of the Judgment would disrupt the fine balancing of interests that the object and purpose establishes, and may further the notion of the legal superiority of one State over the other by placing discretionary power in the hands of one.

4. Third, he highlights the provision for mutual consent in the establishment of diplomatic relations between States under Article 2 of the Vienna Convention, and notes that there is nothing in the Vienna Convention which requires the consent of the receiving State for the establishment of premises of the mission. Consequently, the test in paragraph 74 would not evince mutual consent. 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.

5. Fourth, by applying the customary rules on treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, he concludes that, in the circumstances of the case, and on the basis of the facts advanced, Article 1 (*i*) read in conjunction with Article 22 of the Vienna Convention may be helpful in determining “how and when” certain property acquires diplomatic status within the meaning of the Vienna Convention. He relies on distinctions to be found in the provisions relating to the accreditation of heads of missions in Article 4, paragraphs 1 and 2, Article 5, paragraph 1, and Article 6 of the Vienna Convention which expressly provide for *agrément* and objection by the receiving State. He therefore concludes that the two cumulative conditions of notification by the sending State followed by actual use as such may be an appropriate standard to determine how and when property acquires diplomatic status. Consequently, from 27 July 2012, the building at 42 avenue Foch in Paris acquired the status of premises of Equatorial Guinea’s diplomatic mission.

6. Finally, he concludes that an 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. It is also not reflective of good faith, as an objection to the acknowledgment of the existence of the premises of a mission would result in bad faith, and an impingement upon the sovereignty of a member of the Vienna Convention. In interpreting relations between equal sovereign States, it appears an erroneous proposition that the sending State would have no option but to accede to the desires of the receiving State. A unilateral objection 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 Equatorial Guinea’s diplomatic mission. On the basis of the considerations examined in this opinion, this could not have been a consequence envisaged by the régime for immunities and privileges for the establishment of “premises of the mission”, and the promotion of friendly relations among all nations under the Vienna Convention.

Dissenting opinion of Judge Robinson

In his dissenting opinion, Judge Robinson states his disagreement with all the findings in operative paragraph 126 of the Judgment. In his view, 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 VCDR or the Convention”). Consequently, he argues that the actions taken by France— of entering, searching, attaching, and ordering the confiscation of the building— breached its inviolability under Article 22 of the VCDR as “premises of the mission”.

Judge Robinson addresses the majority’s interpretation of the VCDR 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”. He also describes how, in his view, the Convention should be interpreted and the alleged violations of the Convention as well as remedies for the violations.

According to Judge Robinson, 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 VCDR. He argues that the reasoning of the majority is as follows: (i) the VCDR empowers the receiving State to object to a designation by the sending State of a building as “premises of the mission”; (ii) since, in this case, there is evidence that France objected on several occasions to that designation by Equatorial Guinea, the building did not acquire the status of “premises of the mission”. However, he disagrees, because it would seem to follow from that reasoning 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. In his view, that proposition runs counter to the ordinary meaning of the term “used for the purposes of the mission”. He asserts that a building that is “used for the purposes of the mission” within the meaning of Article 1 (i) of the VCDR should not be denied the status of “premises of the mission”, and thus inviolability, on account of the objection of the receiving State. For him, to interpret the Convention in that way is to misunderstand it. He argues that 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.

He asserts that 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. According to him, 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. However, in his view, 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. He opines that 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. According to him, 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. He comments that, 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 his view, in this melee of mixed reasoning, the majority’s conclusion is without any legal effect.

According to Judge Robinson — although his dissenting opinion takes the position that the majority has not established that the VCDR 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 — this case 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 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.

He also argues that 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 VCDR, 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) of the VCDR does not include the issuance of visas, the Convention allows a diplomatic mission to issue visas. Judge Robinson is of the view that the majority’s approach to this question is to proceed by way of assertion as 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”. However, in

Judge Robinson's view, in the circumstances of this case that conclusion is wrong because 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.

Judge Robinson also argues that the majority has substantially relied on the preamble as the foundation for its very consequential conclusion in paragraph 67 of the Judgment. However, in his view, the preamble does not support such a conclusion, and he adds that 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. Further, also relevant in his view is that, State practice 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. According to him, 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.

Judge Robinson asserts that in light of the balance that the VCDR seeks to strike between the interests of the sending and the receiving States, and having regard to its aim 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, the VCDR 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".

In Judge Robinson's view, the VCDR establishes an objective criterion for determining the status of a building as "premises of the mission". This criterion is that the building must be "used for the purposes of the mission", which 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. He argues that 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. In his view, in light of this objective criterion, it is therefore not surprising that the VCDR remains silent on the roles of sending and receiving States in the designation of mission premises.

Judge Robinson poses the following question: "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?" He responds that in light of the VCDR'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. He notes that in this case Equatorial Guinea has sought judicial settlement on the basis of the compellatory clause in the Optional Protocol to the Convention concerning the Compulsory Settlement of Disputes. In his view, the Court is to resolve the dispute on the basis of the objective criterion set out in Article 1 (*i*) of the VCDR, 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. He asserts that 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, he is 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".

Finally, he concludes that 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 VCDR on 4 October 2011 and that 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 VCDR as "premises of the mission".

Judge Robinson ends by stressing that his opinion reflects his views on the merits of this case, which has been brought by Equatorial Guinea against France and is not to be seen as in any way reflecting his views on the merits of the case instituted by the French authorities in the French courts against Mr. Teodoro Nguema Obiang Mangue.

Dissenting opinion of Judge *ad hoc* Kateka

In his dissenting opinion, Judge *ad hoc* Kateka indicates his disagreement with the Court's finding that the building at 42 avenue Foch has never acquired the status of "premises of the mission" of the Republic of Equatorial Guinea in the French Republic within the meaning of Article 1 (*i*) of the Vienna Convention on Diplomatic Relations (hereinafter "VCDR" or "the Convention"). He also disagrees with the Court's declaration that France has not breached its obligations under the VCDR. Consequently, he has voted against the operative paragraph 126 of the Judgment, including the subparagraph where the majority rejects all other submissions of the Republic of Equatorial Guinea. Judge *ad hoc* Kateka is of the view that the building at 42 avenue Foch acquired the status of the diplomatic mission of Equatorial Guinea and that France breached its obligations under the VCDR by its measures of constraint against the building.

Judge *ad hoc* Kateka disagrees with the majority's reasoning on procedural and substantive grounds. He does not share the majority's reading into the VCDR of the consent requirement on which the Convention is silent and what he refers to as their putting aside of the "use" requirement which is mentioned in Article 1 (*i*) of the VCDR. In this connection, he argues that the Court has placed over-reliance on the preamble under the guise of interpreting the object and purpose of the VCDR. Substantively, he examines the circumstances for a property to acquire the status of "premises of the mission" within the meaning of Article 1 (*i*) of the VCDR. In that regard, he argues that the Judgment ignores the "use" condition which is found in Article 1 (*i*) of the VCDR and prefers the consent or non-objection condition, which he argues does not have a basis in the VCDR in relation to the condition for property to acquire the status of "premises of the mission". He discusses the test of timeliness, non-arbitrariness and non-discriminatory character advanced by the majority. In his view, the building meets the use requirement in Article 1 (*i*) of the VCDR and acquired the status of premises of the mission of Equatorial Guinea on 4 October 2011, but in any event, surely by 27 July 2012. Finally, he comments on the fate of the diplomatic premises of Equatorial Guinea once the Court has issued its Judgment on the merits.

More particularly, firstly, according to Judge *ad hoc* Kateka, it is regrettable that the majority placed so much emphasis on the preamble given that, while preambles have normative influence on the understanding of a treaty's meaning, this influence is limited. He argues that use of preambles on their own in treaty interpretation, which are not supported by specific, operative provisions of a treaty, do not create substantive obligations for the parties to a treaty. He therefore concludes that, while preambles are of assistance in treaty interpretation, they should not be elevated to play a role that would change the meaning of a treaty to the detriment of what the drafters intended. Secondly, he examines the requirements under the VCDR for a property to acquire the status of "premises of the mission". He disagrees with the majority when it states that the consent or non-objection of the receiving State is required for the designation of a building as diplomatic mission, for two main reasons. First, the Convention is silent as to this requirement. It does not make the granting of diplomatic status subject to the consent or non-objection of the receiving State. Second, where the consent of the receiving State is required, it is so stated in the Convention. There are numerous provisions such as Articles 5 (1), 6, 7, 8 (2), 12, 19 (2), 27 (1) and 46 of the VCDR, which spell out the requirement of the consent or non-objection of the receiving State. Further, according to Judge *ad hoc* Kateka, the majority avoids the "use" condition which is provided for in the Convention. This "use" condition is referred to in paragraphs 107, 108 and 109 of the Judgment as actual assignment. According to Judge *ad hoc* Kateka, these are passing references in the context of justifying the majority's consent or non-objection argument and the criminal proceedings in France against Mr. Teodoro Nguema Obiang Mangue. Consequently, he regrets the selective invocation of

a non-existing criterion of consent or non-objection, including its coupling to the test or standard of “timely, non-arbitrary and non-discriminatory character”. Judge *ad hoc* Kateka also disagrees with the view of the majority that diplomatic privileges and immunities impose weighty obligations on the receiving State. In his view, reciprocity permeates diplomatic practice. Consequently, for Judge *ad hoc* Kateka, it is misleading for the majority to state that the receiving States have weighty or onerous obligations given that every State is both a sending and a receiving State. In his view, benefits for diplomatic missions are counterbalanced by the sanctions provided for in the VCDR.

Judge *ad hoc* Kateka also comments that the majority’s use of the analogy between the *persona non grata* provision in Article 9 of the VCDR and lack of an equivalent mechanism for mission premises is misplaced. He argues that the Convention is a self-contained régime that concerns persons, premises and property, which must not be read in isolation. It must be read as an integrated régime. Thus, the sanctions available to a receiving State in respect of persons can also be used for solving disputes concerning premises or property. A receiving State can break off diplomatic relations with a sending State that disregards the rules in the VCDR. It can also use the *persona non grata* provision to expel diplomats of a State that offends against the VCDR régime.

Turning to the condition of “use” of the premises, he states that the majority does not consider it necessary to rule on the alleged “actual assignment” requirement for a building to benefit from the protections provided for in Article 22. According to him, in the majority’s view, the dispute between the Parties can be resolved through an analysis of whether France’s objection to the designation of the building at 42 avenue Foch as premises of Equatorial Guinea’s diplomatic mission was “communicated in a timely manner, and was neither arbitrary nor discriminatory in character”. He disagrees with this approach which ignores the condition of “use” mentioned in the VCDR, and with the adoption by the majority of the consent or non-objection condition on which the Convention is silent. He observes that the majority adopts the non-arbitrary, non-discriminatory test to rationalize the invocation of the consent condition which is not provided for in the VCDR.

Judge *ad hoc* Kateka points out that the majority does not interpret Article 1 (i) of the VCDR in detail. For Judge *ad hoc* Kateka, the definition in Article 1 (i) of the VCDR is more than descriptive. The term “used” in that provision indicates one of the conditions for establishing premises of the mission. He agrees with Equatorial Guinea that the term encompasses premises assigned for diplomatic purposes, that is, intended use. For him, given that planning for mission premises and their refurbishment can take time, he rejects the view that “actual” or “effective” assignment occurs only when a diplomatic mission has completely moved into the premises in question. He is of the view that a building is entitled to immunity on the basis of the intended use as diplomatic premises, when that use is followed by the actual use of the building as diplomatic premises. He asserts that the condition of use which is mentioned in Article 1 (i) of the Vienna Convention can be interpreted to include the intended use of a diplomatic mission in which the actions of Equatorial Guinea fall for the period from 4 October 2011 to 27 July 2012.

With respect to the status of the building at 42 avenue Foch in Paris, Judge *ad hoc* Kateka discusses exchanges between the Parties between 4 October 2011 and 27 July 2012. He considers that these two dates are crucial in determining the status of the building at 42 avenue Foch. He argues that, since the Court ruled against jurisdiction of the building at 42 avenue Foch as property of a foreign State under the Palermo Convention, the claims of Equatorial Guinea prior to 4 October 2011 fall outside the Court’s jurisdiction and that the events of the period prior to 4 October 2011 are irrelevant and should not have been invoked by the majority.

He then examines the actions of France to determine whether the objection of France was timely, non-arbitrary and non-discriminatory. He opines that this is a standard that is difficult to justify. He further notes that the question whether the actions of France were timely is debatable. In relation to reasonableness, he concludes that the circumstances of the present case point to Equatorial Guinea being a victim of unjust treatment. He further observes that accusations of abuse

of rights were made, although they have not been commented upon by the majority. Additionally, he notes that France cannot be absolved from accusations of arbitrariness and discrimination. For example, French authorities accepted a capital gains tax for the property at 42 avenue Foch when they had no intention to pass on title to the building to Equatorial Guinea.

Further, he opines that the commencement date of the designation of the building at 42 avenue Foch as diplomatic premises of Equatorial Guinea of 4 October 2011 should be accepted. The period between this date and 27 July 2012 was used for planning the transfer of the premises from 29 boulevard de Courcelles to 42 avenue Foch in Paris. He observes that the French authorities, by their actions, have repeatedly recognized the building at 42 avenue Foch as the diplomatic mission of Equatorial Guinea. Several actions are cited by him in that regard. He argues that, in any event, even if the date of 4 October 2011 proves problematic, 27 July 2012 cannot be in doubt as the commencement date of the diplomatic status of Equatorial Guinea's mission at 42 avenue Foch. France concedes that its non-recognition of the building and the seizures of assets were done before 27 July 2012. It further states that, since that date, Equatorial Guinea has never reported any incidents that could have affected the peace of the building. In his view, this is tacit consent and recognition of the diplomatic status of the premises. In light of the above, he concludes that the building at 42 avenue Foch acquired the status of premises of the mission of Equatorial Guinea in France as of 4 October 2011 and that France is in breach of its obligations under the VCDR.

Finally, in considering the fate of the premises of the mission of Equatorial Guinea at 42 avenue Foch, Judge *ad hoc* Kateka observes that the premises at 42 avenue Foch have been recognized by the Court under the Order for provisional measures of December 2016 and that recognition/protection will end with the present Judgment on the merits. For him, the fate of these premises will be more uncertain when the appeal against the judgment of the *Cour d'appel* of 10 February 2020 comes to an end. Consequently, he opines that it is regrettable that the Court has left this matter unresolved.
