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CASE REVIEW
EQUATORIAL GUINEA v FRANCE - HOW THE ICJ CREATED LAW OUT OF THIN AIR*

1. Introduction

On 13 June 2016, the Republic of Equatorial Guinea instituted proceedings against the French Republic at the International Court of Justice (ICJ) with regard to a dispute concerning primarily, the legal status of the building which houses the Embassy of Equatorial Guinea in France. After some interlocutory proceedings and provisional measures, public hearings on the merits of the case were held in February 2020. The Court issued its Judgment on the merits of the case on 11 December 2020.[1] The Court held that the building at 42 avenue Foch in Paris ("the building") had never acquired the status of "premises of the mission" within the meaning of Article 1 *(i)* of the Vienna Convention on Diplomatic Relations (VCDR) and that France had not breached its obligations under that Convention.[2] In coming to its decision, the Court conceded that it must first determine in which circumstances a property acquires the status of *"premises of the mission"* within the meaning of article 1*(i)* of VCDR.[3] The Court considered that the provisions of VCDR, in their ordinary meaning, were of little assistance in determining the circumstances in which a property acquires the status of *"premises of the mission"*. While Article 1 *(i)* of VCDR 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

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[1] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, ICJ Reports 2020, 300

[2] https://www.icj-cij.org/case/163

[3] (Ibid.) para. 41

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.[4] The court found that article 2 of VCDR provides that *"[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent"*, but held that it was of the view that it is difficult to reconcile such a provision with an interpretation of the Convention that a building may acquire the status of premises of the mission on the basis of unilateral designation by the sending State despite express objection of the receiving State.[5] The Court then held that VCDR 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.[6] Having acknowledged that the existence of a requirement of prior approval, or the modalities through which a receiving State may communicate its objection to the sending State's designation of a building as forming part of the premises of its diplomatic mission does not establish *"the agreement of the*

[4] (Ibid.) para 62

[5] (Ibid.) para 63; Applicant argued (para 44) that VCDR does not make granting of status of diplomatic premises subject to any explicit or implicit consent by the receiving State, as evidenced by the Convention's silence on this point. It argued that, when drafters of VCDR 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. The Applicant had also contended that while article 2 of VCDR provides that diplomatic relations can only be established by mutual consent, this does not imply that every aspect of those relations, once established, depended on such consent. In this regard, it noted several provisions of the VCDR which require no consent on the part of the receiving State. The Applicant (para 45) pointed to the text of article 12 of VCDR, which requires that prior express consent of the receiving State be obtained before the sending State may establish offices forming part of its diplomatic mission in localities other than those in which the mission itself is established. In Applicant's view, an *a contrario* reading of this provision confirms that designation of premises within the locality in which the mission is established is not subject to the consent of the receiving State.

[6] (Ibid.) paras 65 & 67

parties" within the meaning of the rule codified in article 31(3)*(b)* of VCDR[7] the Court in order to ensure that the receiving State's power to object to a sending State's designation of the premises of its diplomatic mission is not unlimited, formulated a three-step reasonableness test[8].

It is perplexing that other than a cursory reference to the principle that exercise of discretionary powers by States must be reasonable and in good faith, the Court did not explain the origin of its proposed three-step reasonableness test.[9] It is the opinion of this review that disposition of the case before the court could have been effectively made upon resolution of the question of whether the building at 42 avenue Foch in Paris was *"used for the purposes of the mission".* Consequently, creation and introduction of a new-fangled requirement of "*prior approval*" or "*power to object*" of the receiving State are not only unclear and unqualified, but are not supported by customary law or any other source of international law, and are likely to generate unnecessary misunderstandings and tensions in its application to diplomatic relations.[10] Part 2 of this case review will briefly examine the facts of the case, while part 3 will set out the history of the proceedings. Part 4 will in greater detail, deal with the legal arguments of the parties and the reasoning behind the court's decision. Part 5 will analyse the logic of the judgment, and disclose from the perspective of the dissenting opinions, why the judgement of the court is unsound. The review will then conclude.

[7] (Ibid.) para 69
[8] (Ibid.) para 73
[9] Başak Etkin, 'An Analysis of the ICJ's Judgment on the Merits of the Immunities and Criminal Proceedings *(Equatorial Guinea v. France)* Case: All for nothing? <https://www.ejiltalk.org/author/betkin/> Accessed March 2, 2023
[10] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France),* ICJ Reports 2020, 300, separate opinion of President Yusuf

2. Facts of the Case

Based on an NGO complaint, a judicial investigation was opened in France in 2010, on the methods used to finance the acquisition of movable and immovable assets in France by Mr. Teodoro Nguema Obiang Mangue, ("Mr. Teodoro") 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 assets under investigation included a building located at 42 avenue Foch in Paris. On 28 September and 3 October 2011, investigators conducted searches at that address and seized movable assets which belonged to Mr. Teodoro. On 4 October 2011, Equatorial Guinea addressed a Note Verbale to France, stating that it had for a number of years had the building at its disposal, and used it for performance of the functions of its diplomatic mission. By a Note Verbale of 11 October 2011, France replied that the building was not part of the premises of Equatorial Guinea's diplomatic mission, and was, thus, subject to ordinary law. By a Note Verbale dated 17 October 2011, Equatorial Guinea informed France that the building was the official residence of its Permanent Delegate to UNESCO. By a Note Verbale dated 31 October 2011, France reiterated that the building had never been recognized as part of the mission's premises, and accordingly was subject to ordinary law. From 14 to 23 February 2012, further searches of the building were conducted, and further items were seized and removed. Notes Verbales dated 14 and 15 February 2012, which described the building as the official residence of Equatorial Guinea's Permanent Delegate to UNESCO asserted that the searches violated the Vienna Convention; Equatorial Guinea invoked the protection afforded by the Convention for such a residence. On 19 July 2012, a local French Tribunal having found, *inter alia*, that the building 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, one of the investigating judges of the French

court ordered the *"attachment of the building"*. This decision was upheld on 13 June 2013 by an appellate French tribunal before which Mr. Teodoro had lodged an appeal. By a Note Verbale of 27 July 2012, Equatorial Guinea informed France that, as from that date, the building was the location of the Embassy's offices. By a Note Verbale of 6 August 2012, France informed Equatorial Guinea that the building was the subject of an attachment order dated 19 July 2012 by a local tribunal, and that it was thus unable officially to recognize the building as being the seat of the chancellery as from 27 July 2012.[11]

3. Procedural History of the Case

On 13 June 2016, Equatorial Guinea filed an Application at the ICJ instituting proceedings against France with regard to a dispute concerning *inter alia*, "*.... 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 UN Convention against Transnational Organized Crime of 15 November 2000 (the "Palermo Convention"), and, second, on Article I of the Optional Protocol to VCDR concerning the Compulsory Settlement of Disputes, of 18 April 1961. 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 had jurisdiction, on the basis of the Optional Protocol to the VCDR, 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. After public hearings which were held in February 2020, the

[11] (n 1) paras 25-38

Court issued its Judgment on the merits of the case on 11 December 2020. The Court found that the building at 42 avenue Foch in Paris never acquired the status of "*premises of the mission*" within the meaning of article 1 *(i)* of VCDR and that France had not breached its obligations under that Convention.[12]

4. The Argument of the Parties and Decision of the Court

As the Court observed, the basic disagreement between the Parties was on whether the building at 42 avenue Foch in Paris constituted part of the premises of Equatorial Guinea's diplomatic mission in France and was thus entitled to the treatment afforded to such premises under article 22 of VCDR. This led to the question of whether France, by the actions of its authorities in relation to the building, breached of its obligations under article 22.[13] Under the provisions of VCDR the premises of a mission shall be inviolable. Agents of the receiving State may not enter them, except with the consent of the head of the mission. 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. 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.[14]

The Applicant argued that for a building to acquire diplomatic status and benefit from the protections afforded by VCDR, it was generally sufficient for the sending State to assign the building for the purposes of its diplomatic mission and notify the receiving State accordingly. Although the definition of "*premises of the mission*" in

[12] (Ibid.) paras 1-24
[13] (Ibid.) para 39
[14] Article 22 (1) -(3) of VCDR, 1961

article 1*(i)* of VCDR is silent as to the respective roles of the sending and receiving States in the designation of diplomatic premises, the Applicant maintained that the text, context, and object and purpose of the Convention indicate that this role belongs to the sending State.[15] The Applicant pointed to the text of article 12 of VCDR, which requires that prior express consent of the receiving State be obtained before the sending State may establish offices forming part of its diplomatic mission in localities other than those in which the mission itself is established. In Applicant's view, an *a contrario* reading of this provision confirms that designation of premises within the locality in which the mission is established is not subject to the consent of the receiving State.[16]

The Respondent acknowledged that VCDR does not provide details on the procedure for the granting of diplomatic status to the premises in which a sending State wishes to establish a diplomatic mission. It argued, however, that the ordinary meaning to be given to the definition of "*premises of the mission*" in article 1 *(i)*, interpreted in light of the Convention's object and purpose, ran counter to Equatorial Guinea's argument that a sending State has complete freedom in designating or changing the premises of its mission.[17] In this regard, Respondent referred to what it characterized as the "*essentially consensual letter and spirit*" of VCDR. It noted that article 2 of VCDR provides that *"[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual*

[15] (n 1) para 42
[16] (Ibid.) para 45
[17] (Ibid.) para 53; at para 52, Respondent asserted that Applicant incorrectly argued that a sending State can unilaterally impose its choice of premises for its diplomatic mission upon the receiving State. In France's view, applicability of VCDR régime of protection to a particular building is subject to compliance with two cumulative conditions: first, the receiving State does not expressly object to the granting of diplomatic status to the building in question, and, second, the building is actually assigned for the purposes of the diplomatic mission.

consent". It further observed that while the receiving State must accept significant restrictions on its territorial sovereignty through application of the VCDR's inviolability régime, the sending State must use the rights conferred on it in good faith. In keeping with this *ratio legis*, Respondent contended that designation of buildings as premises of the mission is not left to the sending State's sole discretion.[18] Respondent invoked the practice of several States which it argued *"make the establishment of premises of foreign diplomatic missions on their territory explicitly subject to some form of consent".* In Respondent's view, the fact that such practice exists, and is not considered to be contrary to VCDR, shows that the Convention does not confer upon the sending State any unilateral right to designate the buildings that are to house its mission. To the contrary, Respondent maintained that nothing in VCDR prevents the receiving State from exercising some control over the designation of buildings that the sending State intends to use for its diplomatic mission. The fact that several States adopted national practices to this effect corroborates, the *"existence of a régime based on agreement between the parties, in accordance with the object and purpose of the Vienna Convention"*.[19]

In response to this submission, Applicant acknowledged that several States make the designation of the premises of diplomatic missions on their territory subject to some form of consent, and that this practice is not forbidden by VCDR. However, it contends that these States, by means of national legislation or clearly established practice,

[18] (Ibid.) para 54; at para 55, Respondent disputed Applicant's *a contrario* reading of article 12 of VCDR, noting that this provision referred only to the express consent of the receiving State being required for establishment of mission offices in localities other than that in which the mission is located. In France's view, this provision did not indicate that the consent of the receiving State is not required for the designation of the premises of a diplomatic mission in the capital, but rather that consent in that case may be implicit.

[19] (Ibid.) para 56

have explained their positions clearly and transparently to States which intend to establish or relocate diplomatic missions in their territory. Thus, any control measure the receiving State seeks to impose upon the designation of diplomatic premises by a sending State must be notified in advance to all diplomatic missions, must serve an appropriate objective that is consistent with the object and purpose of VCDR, and must be exercised in a reasonable and non-discriminatory manner. In the absence of such legislation or clearly established practice, the sending State's designation of the premises of the mission is conclusive, and the receiving State may only object to this designation in co-ordination with the sending State *("en concertation avec l'Etat accreditant")*[20] Applicant also took issue with Respondent's interpretation of article 12 of CVDR according to which the receiving State's implicit — if not express — consent must still be obtained even when opening new offices of a diplomatic mission in the same locality or transferring premises of the mission within this locality. In Applicant's view, such a concept of implicit consent would place the sending State in an uncertain and vulnerable position, as it would not know whether and when the premises of its mission would benefit from diplomatic status.[21] Beyond the issue of consent, Applicant argued that, even if there existed a requirement that property must be "*effectively used for the purposes of the mission*" in order to benefit from the status of premises of the mission, this requirement is met where a building purchased or rented by a State is designated by that State as serving the purposes of its diplomatic mission

[20] (Ibid.) para 47; at para 48, Applicant asserted that France had no legislation or established practice that required a sending State to obtain France's consent prior to designating property as premises of its diplomatic mission. In such circumstances, Equatorial Guinea considered that it was entitled to rely upon a long-standing bilateral and reciprocal practice between itself and France, whereby the sending State's notification of the assignment of a building for purposes of a diplomatic mission was sufficient for the building to acquire diplomatic status.

[21] (Ibid.) para 46

and undergoes the necessary planning and refurbishment works to enable it to house the mission. Applicant rejected the notion that actual or effective assignment occurs only when a diplomatic mission has completely moved into the premises in question. In its view, such a position would not only be inconsistent with Respondent's own practice but would constitute an extremely restrictive interpretation of the term "*used for the purposes of the mission*" in article 1 *(i)* of VCDR. Applicant further asserted that this interpretation would be unreasonable and would deprive the provision in article 22 of VCDR on the inviolability of mission premises of *effet utile*, as the receiving State would be able to enter the premises of the sending State's diplomatic mission until the point at which the move was fully completed. Applicant on reviewing Respondent's judicial practice and a number of other States, contended that there was no evidence of a requirement that a mission fully move into a building before that building can be deemed used for the purposes of the mission. Applicant thus concluded that the notion of premises "*used for the purposes of the mission*" must encompass not only premises where a diplomatic mission is fully moved in, but also those which the sending State has assigned for diplomatic purposes.[22]

In response to this argument, Respondent contended that a building constitutes diplomatic premises only if it is effectively used for purposes of the sending State's diplomatic mission. In Respondent's view, this results from the fact that article 1 *(i)* defines the premises of the diplomatic mission as the buildings and lands "*used for the purposes of the mission*". The plain meaning of this definition, Respondent contended was that it was insufficient for the building in question to have been chosen and designated by the sending State, but rather it is necessary

[22] (Ibid.) paras 49 & 50

for it to be actually assigned for purposes of the functions of the mission as defined in article 3, paragraph 1, of VCDR.[23]

The Court considered that the provisions of VCDR, in their ordinary meaning, were of little assistance in determining the circumstances in which a property acquired the status of premises of the mission.[24] In the Court's view, the preparatory work of VCDR provided no clear indication of the circumstances in which a property may acquire the status of premises of the mission within the meaning of article 1 *(i)*.[25] Turning first to context, article 2 of VCDR 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.[26] In light of the foregoing, the Court considered that VCDR 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

[23] (Ibid.) para 59

[24] (Ibid.) para 62, while article 1 *(i)* of VCDR provides a definition of this expression, it does not indicate how a building may be designated as premises of the mission. article 1 *(i)* describes the "*premises of the mission*" as buildings "*used for the purposes of the mission*". This provision, taken alone, is unhelpful in determining how a building may come to be used for the purposes of a diplomatic mission, whether there are any prerequisites to such use and how such use, if any, is to be ascertained. Both parties acknowledged that article 1 *(i)* was silent as to the respective roles of the sending and receiving States in designation of mission premises. Article 22 of VCDR provided no guidance on this point. The Court therefore turned to the context of these provisions as well as the Convention's object and purpose.

[25] (Ibid.) para 70

[26] (Ibid) para 63

required to take on the duty referred to in article 22, paragraph 2, of VCDR to protect the chosen premises.[27]

In rejecting Applicant's argument that VCDR expressly stated when receiving State's consent was required, notably in article 12, and that lack of such a provision regarding designation of the premises of the mission indicated that the receiving State's consent was not required in that context, the Court held such a reading would allow for unilateral imposition of a sending State's choice of premises upon the receiving State. The Court then read into article 12 what it did not contain and interpreted its contents as not precluding the receiving State in any event from objecting 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.[28] From this point on, the ICJ entered a full law-making mode. It held that the receiving State had a right to object to the sending State's choice of premises, and had a right to choose the modality of such objection.[29] The Court then held 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 VCDR, and therefore does not benefit from protection under article 22 of VCDR.[30] Having determined that the objection of the receiving State prevents a building from acquiring the status of premises of the mission within the meaning of article 1 *(i)* of VCDR,[31] and having

[27] (Ibid.) para 67
[28] (Ibid.) para 68
[29] (Ibid.) para 72
[30] (Ibid.) para 74
[31] (Ibid.) para 76

found 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,[32] the Court concluded that the building at 42 avenue Foch in Paris never acquired the status of premises of the mission, within the meaning of article 1 *(i)* of VCDR.[33]

5 Critical Analysis of the Decision

The Court's first operative clause was a finding that the building never acquired the status of Applicant's premises of the mission within the meaning of article 1 *(i)* of VCDR.[34] This decision was carried by nine votes to seven. The closeness of the voting was the greatest indicator that the new-fangled jurisprudence invented by the majority to justify the decision was neither convincing nor popular. Judge Gaja who voted against operative clause 1 declared that consent – express or implied – of the receiving State is not required by VCDR. His declaration accords with sound legal reasoning. He explains that there is no reference to such consent in the definition of premises of the mission in article 1 *(i)* of VCDR, and the article 12 requirement for prior express consent of the receiving State when the building is located outside the State's capital city, reinforces the interpretation that consent is not necessary in the much more frequent case of buildings situated in the capital city.[35]

Judge Sebutinde who also voted against operative clause 1 asserted that a building acquires the status of premises of the mission of a sending state within the meaning of article 1 *(i)* of VCDR when the

[32] (Ibid.) para 117
[33] (Ibid.) para 118
[34] (Ibid.) para 126
[35] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France),* ICJ Reports 2020, 300, Judge Gaja's declaration

sending state effectively moves its mission into that building. With effect from that date, the receiving state has an obligation to extend to the sending state's mission at the building, the protection guaranteed under article 22 of the VCDR.[36]

Judge Bhandari who voted against operative cause 1, wrote a dissenting opinion. He observed that historically, no previously established rule of customary international law required or appears to permit an objection to designation of mission premises by the receiving State. He stated that the three-step test invented by the court inexorably leads to the conclusion that a property may never acquire diplomatic status without the consent of the receiving State. He noted that neither VCDR nor customary law provides for such a requirement. He argues that 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. Any test that reserves to the receiving state, a right to approve the premises to be used as mission premises within the capital city as proposed by the Judgment would further the notion of the legal superiority of one State over the other by placing discretionary power in the hands of one. He found nothing in the Convention that required the consent of the receiving State for the establishment of premises of the mission. A receiving State's objection 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 Convention. 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. 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

[36] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France),* ICJ Reports 2020, 300, Judge Sebutinde's separate opinion

the mission which is not reflective of the view that the right of legation cannot be exercised without the agreement of both parties. 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.[37]

Judge Robinson who also voted against operative clause 1 disagreed with the holding that, VCDR empowers the receiving State to object to a designation by the sending State of a building as premises of the mission; and that such objection of the receiving state would preclude the building from acquiring the status of premises of the mission. He stated that it would seem to follow from that reasoning that − even if there is unambiguous evidence of diplomatic activities at such building, thereby indicating its use for the purposes of the mission − it cannot acquire the status of premises of the mission if the receiving State, objects to the sending state's designation of the building as its diplomatic mission. He asserts that a building that is used for the purposes of the mission within the meaning of article 1 *(i)* of VCDR should not be denied the status of premises of the mission, and thus inviolability, on account of the objection of the receiving State. 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. In his 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

[37] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France),* ICJ Reports 2020, 300, Judge Bhandari's dissenting opinion

mission. Further 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. 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.[38] Flowing from Judge Robinson's opinion, it may be emphasised that the mistake of the tribunal in inventing a needless and erroneous three-step test is made more apparent from the fact that the general consensus of *opino juris* is that once the receiving State has notified the sending State of the acquisition of the premises to be used as an embassy and the necessary paperwork is completed, then the premises will be regarded as inviolable.[39] The consent or non-objection of the receiving state is not a factor in the process.

Ad hoc Judge Kateka who also disagreed with operative clause 1, in his dissenting opinion, examined the circumstances for a property to acquire the status of premises of the mission within the meaning of article 1 *(i)* of VCDR. He argues that the Judgment ignores the "*use*" condition found in article 1 *(i)* of 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 disagreed with the majority when it stated that the consent or non-objection of the receiving State is required for the designation of

[38] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France),* ICJ Reports 2020, 300, Judge Robinson's dissenting opinion
[39] Lord Gore-Booth (ed) *Satow's Guide to Diplomatic Practice* (Longman: London, 5th ed. 1979) 112

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 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 VCDR, which spell out the requirement of the consent or non-objection of the receiving State. 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*". He observes that the majority adopted the test to rationalize the invocation of the consent condition which is not provided for in the VCDR.[40]

6. Conclusion

The decision of the Court that the building never acquired the status of premises of the mission was based on its finding 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. According to the court, since the 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 in an appropriate manner objected to this choice, any such objection precludes the property from acquiring the status of premises of the mission. The entire process of formulating the three-step test and deciding the case based on France's compliance with the test was neither necessary nor appropriate. The Court President, Yusuf was also of this same opinion when he held that the Court should have interpreted, article 1 *(i)* in its context and in the light of its object

[40] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France),* ICJ Reports 2020, 300, *Ad hoc* Judge Kateka's dissenting opinion

and purpose in order to determine, as a threshold matter, whether the building was used for the purposes of the mission. Instead, the Judgment pivoted to a hitherto unknown requirement of prior approval or power to object of the receiving State, which had no basis in the text of the Convention. These newly minted conditions are not supported by the subsequent practice of the parties to the 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. President Yusuf went further to emphasise that the requirement of consent '*appears to have been plucked out of thin air'*. He established, through national and international case law, that the provisions have never been interpreted to include a requirement of consent from the receiving state.[41] Judge Robinson's view was much more forceful in holding that in this melee of mixed reasoning, the majority's conclusion is without any legal effect.[42] It is disturbing that aside a bald assertion of the jurisprudence that States must exercise discretionary powers reasonably and in good faith, the Court failed to, or was unable to sufficiently clarify the origins of the three-step test. Though in paragraph 73 of the Judgment, it made a cursory reference to article 47 of VCDR as regards non-discrimination, that hardly answered the question. The court's decision has beclouded an area of law that was hitherto clear. To deny a property that is *factually* being used as the premises of the mission the legal status of premises of the mission does violence to both the spirit and letters of VCDR as well as state practice and customary international law. The consent requirement and reasonableness test are unsatisfactory, especially because as President Yusuf puts it, paragraph 59 of his separate opinion, *'it is the criterion of being "used for the purposes of the mission" […] that qualifies a building as diplomatic premises.'* The

[41] (n 10)
[42] (n 38)

decision of the court created an irresolvable discrepancy between the fact that Equatorial Guinea's mission *factually* operates from 42 avenue Foch, and the law that 42 avenue Foch never *legally* obtained premises of the mission status. What the court attempted to do was a disturbing detachment of law from reality.[43]

[43] Başak Etkin, (n 9)