

**TELDERS INTERNATIONAL LAW MOOT COURT  
COMPETITION**

2017

**The Twigan Cultural Centre Dispute**

(Twiga v. Pundamilia)

Written Memorial on behalf of Pundamilia

(Respondent)

Registration-Number:

24B

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**(b) List of Abbreviations**

AALCC	Asian-African Legal Consultative Committee
AJIL	American Journal of International Law
Art.	Article
Arts.	Articles
BGR	Bulgaria
BYIL	British Yearbook of International Law
CH	China
CUB	Cuba
CZE	Czechoslovakia
DADII	Draft Articles on Diplomatic Intercourse and Immunities
DARS	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
DCDPI	Draft Convention on Diplomatic Privileges and Immunities
DCPA	Diplomatic and Consular Premises Act
DPA	Diplomatic Privileges Act
EC	European Council
ESP	Spain
EU	European Union
EJIL	European Journal of International Law
FMA	Foreign Missions Act
FRA	France
GAOR	General Assembly Official Records

### III

GC	Geneva Convention
ICJ	International Court of Justice
ICLQ	International Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ILC	International Law Commission
ILO	International Labour Organization
Inc.	Incorporation
ISR	Israel
JI	Juridica International
KOR	Korea
lit.	Littera
MAA	Military Assistance Agreement between the Republic of Twiga and the Republic of Pundamilia
MOU	Memorandum of Understanding on Establishing the Asean-Korea Centre between the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea
NIOC	National Iranian Oil Company
No.	Number
p.	Page
para.	Paragraph
paras.	Paragraphs
PCIJ	Permanent Court of International Justice

## IV

pp.	Pages
RdC	Recueil de Cours de l'Académie de la Haye
Sec.	Section
sent.	Sentence
SDCM	Statute on Diplomatic and Consular Missions
TCC	Twigan Cultural Centre
UK	United Kingdom
UKMIL	United Kingdom Materials of International Law
UN	United Nations
UNCJISP	United Nations Convention on Jurisdictional Immunities of States and Their Property
UNTC	United Nations Treaty Collection
US	United States
USSR	Union of Soviet Socialist Republic
v.	Versus
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
VJTL	Vanderbilt Journal of Transnational Law
Vol.	Volume
WLR	Washington Law Review
ZaöRV	Zeitschrift für ausländisches öffentliches Recht

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**(d) Statement of Relevant Facts**

*Twiga* is a small state with a dynamic economy. Besides being rich in natural resources, the state has many industries that are active in the aerospace, defence and security sectors. *Twiga* has been a member of the UN since 1961. *Pundamilia*, also a member of the UN, is a large but sparsely populated country. Its economy relies mostly on farming and trade of agricultural products and on tourism.

Both states have filed a declaration accepting the jurisdiction of the ICJ under Art. 36 para. 2 ICJ Statute. Neither of these declarations contain any reservation. *Pundamilia* and *Twiga* are also parties to the 1969 VCLT.

In an attempt to foster international peace and security and to strengthen their economic relations, *Pundamilia* and *Twiga* concluded a military assistance agreement called MAA in June 1992.

The two states have long-standing diplomatic relations. Both are parties to the 1961 VCDR. Upon signing the Convention in December 1961, *Pundamilia* submitted a reservation in relation to Art. 31 VCDR; this reservation was confirmed on ratification. The reservation reads as follows: “The Government of the Republic of *Pundamilia* considers that Articles 31 and 37 are to be interpreted as granting a diplomatic agent and the members of his family immunity from the criminal jurisdiction of the receiving State except in relation to professional or commercial activities.” *Twiga* ratified the VCDR on 2 February 1962 without reservation.

The diplomatic mission of *Twiga* in *Pundamilia* is located at 20 *Baobab* Street, a quiet neighbourhood of *Savannah*, the capital city of *Pundamilia*.

In 2014, the government of *Twiga* appointed Mr *Fisi* as ambassador to *Pundamilia*. The ambassador’s wife, Mrs *Fisi*, a *Twigan* national, is very fond of art, and owns a large private collection of *Twigan* paintings and sculptures. In September 2014, Mrs *Fisi*, after consulting her husband but using her own money, bought the premises located at 22 *Baobab* Street in *Savannah* adjacent to the diplomatic mission of *Twiga* which is located at 20 *Baobab* Street.

In *Baobab* Street this building has its own independent entrance located 20 metres away from the embassy's entrance. Mrs *Fisi*'s own project was to set up a cultural centre in this building to display her private art collection. At first, her stated intention was to contribute to the promotion of cultural exchange between *Twiga* and *Pundamilia*.

Once Mrs *Fisi* took possession of the building, she used the front room for an exhibition of her private paintings and sculptures. One of the back rooms served as a space to host workshops on the traditional *Twigan* painting technique; she used the back room of the building as an office space. On the wall next to the building's front door, she installed a plaque saying "Twigan Cultural Centre". Mrs *Fisi* also asked the security guards stationed outside the embassy to keep an eye on the front door of the TCC.

Approximately three months after the opening of the TCC, Mrs *Fisi* put some of the most beautiful paintings and sculptures in the TCC on sale to purchase a sculpture for her private country house in *Pundamilia*. When she sold the items, she transferred 30% of the proceeds from the sale to the embassy's bank account, since she was using some of the embassy's services, including for security.

Thereafter, Mrs *Fisi* gradually but steadily increased the sale of artwork from the TCC. Within six months of the opening of the TCC, half of the artworks displayed there, comprising 100 items in total, were for sale. The art collection included two sculptures by an artist from third country *Kima* and some paintings by *Van Tembo*, a 19<sup>th</sup> century painter from *Kima*, who was famous for his landscape paintings. These paintings sold very well and the volume of sales in the TCC increased considerably. Mrs *Fisi* kept transferring 30% of the proceeds to the embassy's bank account and did not pay taxes on the property hosting the TCC, which she owned, or on the income resulting from the sales.

On 15 June 2015, *Twiga* bought the premises of the TCC from Mrs *Fisi* with the stated intention of expanding the premises of the diplomatic mission. Nonetheless, visitors continued to come in the TCC to look at the artwork and to purchase items from Mrs *Fisi*. The *Twigan*

embassy in *Pundamilia* did not communicate to the authorities of the receiving state that it was using the premises located at 22 *Baobab* Street for the purposes of the diplomatic mission, nor did it send a formal request for protection of the new premises to *Pundamilian* authorities.

On September and October 2015, three *Pundamilian* citizens filed separate complaints with the *Pundamilian* Public Prosecutor against Mrs *Fisi*, alleging that she sold them a fake *Van Tembo* painting for 10,000 *Pundamilian* dollars each. They also initiated a civil action against Mrs *Fisi* to recover the money. The investigation uncovered that fake *Van Tembo* paintings were traded from a small atelier in Mrs *Fisi*'s hometown in *Twiga* to various countries, including *Pundamilia*.

On 13 January 2016, *Pundamilian* police searched the premises of the *Twigan* Cultural Centre as part of the investigation into Mrs *Fisi*'s conduct. There they found and seized a *Van Tembo* painting which *Pundamilian* investigating authorities claimed to be a fake. On 14 January 2016, the *Twigan* embassy in *Pundamilia* sent a Note Verbale to the Ministry of Foreign Affairs of *Pundamilia* to protest against *Pundamilia*'s breaches of the inviolability and immunity of the premises of the *Twigan* embassy in *Pundamilia*. Two days later, the *Savannah* investigating judge issued a summons for Mrs *Fisi* to appear for a preliminary examination. The judge also ordered the attachment of the premises of the TCC under the *Pundamilian* Code of Criminal Procedure. Mrs *Fisi* did not appear before the investigating judge, claiming she had immunity from the jurisdiction of *Pundamilia*.

On 19 January 2016, *Pundamilia*'s Ministry of Foreign Affairs replied to the Note Verbale of 14 January 2016 informing the *Twigan* diplomatic mission that it was unable to grant the diplomatic mission's request because the building located at 22 *Baobab* Street did not form part of the premises of the diplomatic mission of the Republic of *Twiga*. On 3 February 2016, the *Twigan* embassy in *Pundamilia* sent another Note Verbale to *Pundamilia*'s Ministry of For-

Foreign Affairs, suggesting a negotiated solution to the dispute. In March 2016, Mrs *Fisi* was indicted on criminal charges.

In June 2012, the Minister of Defence of *Pundamilia* had concluded a contract with *Twiga Helicopters Inc.*, a *Twigan* firm, for the delivery of twelve military helicopters to *Pundamilia*. Specifically, *Twiga Helicopters Inc.* had undertaken to deliver to *Pundamilia* two military helicopters within a year of the signing of the contract, and the remaining ten helicopters within four years of the said date. In June 2013, two helicopters were delivered to *Pundamilia* as per the contract.

In a joint press statement in May 2016, the *Twigan* Minister of Defence and the Minister of Foreign Affairs announced that the delivery of military helicopters was suspended in reaction to *Pundamilia*'s conduct. To this date, the delivery is still suspended.

On 3 July 2016, *Twiga* filed an application against *Pundamilia* before the ICJ. *Pundamilia* did not contest the jurisdiction of the ICJ or the admissibility of *Twiga*'s claims, but requested the ICJ to dismiss them on the merits. In addition, it made a counter-claim due to the suspension of the helicopter delivery. *Twiga* did not contest the admissibility of the counter-claim, but requested the ICJ to dismiss it on the merits.

**(e) Issues****A. By instituting proceedings against Mrs *Fisi*, did *Pundamilia* breach the immunity from jurisdiction and the inviolability enjoyed by her under international law, notably the VCDR and customary international law?**

- I. Did *Pundamilia* breach Mrs *Fisi*'s immunity from civil jurisdiction under international law?
  1. Does Mrs *Fisi* enjoy immunity from civil jurisdiction under Arts. 31 para. 1 sent. 2, 37 para. 1 VCDR?
    - a. Is the management of the TCC a commercial activity?
    - b. Does the management of the TCC fall outside Mrs *Fisi*'s official functions?
  2. Does Mrs *Fisi* enjoy immunity from civil jurisdiction under customary international law?
- II. Did *Pundamilia* breach Mrs *Fisi*'s immunity from criminal jurisdiction under international law?
  1. Does Mrs *Fisi* enjoy immunity from criminal jurisdiction under Arts. 31 para. 1 sent. 1, 37 para. 1 VCDR?
    - a. Does Mrs *Fisi*'s management of the TCC fall within the scope of application of *Pundamilia*'s reservation?
    - b. Is the reservation in relation to Art. 31 VCDR submitted by *Pundamilia* valid?
      - aa. Did the reservation submitted by *Pundamilia* require unanimous consent?
      - bb. Is the reservation submitted by *Pundamilia* compatible with the object and purpose of the VCDR?
  2. Does Mrs *Fisi* enjoy immunity from criminal jurisdiction under customary international law?
- III. Did *Pundamilia* breach Mrs *Fisi*'s inviolability under international law?
  1. Did *Pundamilia* breach Mrs *Fisi*'s inviolability under Arts. 29, 37 para. 1 VCDR?

2. Did *Pundamilia* breach Mrs *Fisi*'s inviolability under customary international law?

**B. By searching and attaching the premises of the TCC, did *Pundamilia* breach its obligations under international law, notably the VCDR and customary international law?**

I. Did *Pundamilia* breach the inviolability and immunity of the TCC under Art. 22 VCDR?

1. Does the TCC form part of the premises of the *Twigan* diplomatic mission?

2. Was *Twiga* further required to notify *Pundamilia* in order to invest the TCC with inviolability and immunity?

II. Did *Pundamilia* breach its obligations under customary international law?

1. Did *Pundamilia* breach the diplomatic inviolability and immunity of the TCC under customary international law?

2. Did *Pundamilia* breach *Twiga*'s state immunity from measures of constraint under customary international law?

**C. Is *Pundamilia* obliged to put an end to the proceedings against Mrs *Fisi*, to recognise the status of the building located at 22 *Baobab* Street in *Savannah* as part of the premises of the *Twigan* diplomatic mission in *Pundamilia* and to ensure its protection?**

I. Is *Pundamilia* obliged to put an end to the proceedings against Mrs *Fisi*?

II. Is *Pundamilia* obliged to recognise the status of the TCC?

III. Is *Pundamilia* obliged to ensure the protection of the TCC?



**D. By suspending delivery of ten military helicopters, did *Twiga* breach its obligations under Art. I para. 1 MAA? Is that breach justified?**

- I. Did *Twiga* breach its obligations under the MAA?
  1. Did *Twiga* fulfil its obligations under Art. I para. 1 MAA?
  2. Was *Twiga* permitted to suspend delivery?
  3. Did *Twiga* fail to fulfil the procedural requirements under Art. 67 para. 2 VCLT?
- II. Can *Twiga*'s breach of the MAA be justified?
  1. May *Twiga* invoke the deterioration of diplomatic relations?
  2. Did *Twiga* meet the requirements for countermeasures?
    - a. Must *Twiga* suspend its countermeasures during legal proceedings?
    - b. Was *Twiga* required to notify *Pundamilia* prior to suspension of delivery?
    - c. Did *Twiga* fail to comply with the principle of proportionality?

**(f) Summary of Arguments****A. By instituting proceedings against Mrs *Fisi*, *Pundamilia* did not breach the immunity from jurisdiction and the inviolability enjoyed by her under international law, notably the VCDR and customary international law.**

- I. *Pundamilia* did not breach Mrs *Fisi*'s immunity from civil jurisdiction under international law.
  1. Mrs *Fisi* does not enjoy immunity from civil jurisdiction under Arts. 31 para. 1 sent. 2, 37 para. 1 VCDR.
    - a. The management of the TCC is a commercial activity.
    - b. The management of the TCC is outside Mrs *Fisi*'s official functions.
  2. Mrs *Fisi* does not enjoy immunity from civil jurisdiction under customary international law.
- II. *Pundamilia* did not breach Mrs *Fisi*'s immunity from criminal jurisdiction under international law.
  1. Mrs *Fisi* does not enjoy immunity from criminal jurisdiction under Arts. 31 para. 1 sent. 1, 37 para. 1 VCDR.
    - a. Mrs *Fisi*'s management of the TCC falls within the scope of application of *Pundamilia*'s reservation.
    - b. The reservation in relation to Art. 31 para. 1 sent. 1 VCDR submitted by *Pundamilia* is valid.
      - aa. The reservation submitted by *Pundamilia* required unanimous consent.
      - bb. *Pundamilia*'s reservation is compatible with the object and purpose of the VCDR.
  2. Mrs *Fisi* does not enjoy immunity from criminal jurisdiction under customary international law.

III. *Pundamilia* did not breach Mrs *Fisi*'s inviolability under international law.

1. *Pundamilia* did not breach Mrs *Fisi*'s inviolability under Art. 29, 37 para. 1 VCDR.
2. *Pundamilia* did not breach Mrs *Fisi*'s inviolability under customary international law.

**B. By searching and attaching the premises of the TCC, *Pundamilia* did not breach its obligations under international law, notably the VCDR and customary international law.**

I. *Pundamilia* did not breach the inviolability and immunity of the TCC under Art. 22 VCDR.

1. The TCC does not form part of the premises of the *Twigan* diplomatic mission.
2. *Twiga* was further required to notify *Pundamilia* in order to invest the TCC with inviolability and immunity.

II. *Pundamilia* did not breach the inviolability and immunity of the TCC under customary international law.

1. *Pundamilia* did not breach the diplomatic inviolability and immunity of the TCC under customary international law.
2. *Pundamilia* did not breach the state immunity from measures of constraint of the TCC under customary international law.

**C. *Pundamilia* requests the ICJ to refrain from ordering it to put an end to the on-going proceedings against Mrs *Fisi*, to recognise the status of the building located at 22 *Baobab* Street in *Savannah* as part of the premises of the *Twigan* diplomatic mission in *Pundamilia* and to ensure its protection.**

- I. *Pundamilia* is not obliged to put an end to the proceedings against Mrs *Fisi*.
- II. *Pundamilia* is not obliged to recognise the status of the TCC.
- III. *Pundamilia* is not obliged to ensure the protection of the TCC.

**D. *Twiga* breached its obligations under Art. I para. 1 MAA. This breach is not justified.**

- I. *Twiga* breached its obligations under the MAA.
  1. *Twiga* did not fulfil its obligations under Art. I para. 1 MAA.
  2. *Twiga* was not permitted to suspend delivery.
  3. *Twiga* failed to fulfil the procedural requirements under Art. 67 para. 2 VCLT.
- II. *Twiga*'s breach of the MAA cannot be justified.
  1. *Twiga* may not invoke the deterioration of diplomatic relations.
  2. *Twiga* did not meet the requirements for countermeasures.
    - a. *Twiga* must suspend its countermeasures during legal proceedings.
    - b. *Twiga* was required to notify *Pundamilia* prior to suspension of delivery.
    - c. *Twiga* failed to comply with the principle of proportionality.

**(g) Jurisdiction of the Court**

Both *Twiga* and *Pundamilia* are parties to the UN-Charter without reservations. Both recognise the compulsory jurisdiction of the Court pursuant to Art. 36 para. 2 ICJ Statute without reservations. On 3 July 2016, *Twiga* brought proceedings before the ICJ.

## **(h) Argument**

### **A. By instituting proceedings against Mrs *Fisi*, *Pundamilia* did not breach the immunity from jurisdiction and the inviolability enjoyed by her under international law, notably the VCDR and customary international law**

In the present case, Mrs *Fisi* does not enjoy immunity or inviolability under international law. It follows that *Pundamilia* was permitted to institute civil (I.) and criminal proceedings (II.) against her and to issue a summons for her (III.).

#### I. *Pundamilia* did not breach Mrs *Fisi*'s immunity from civil jurisdiction under international law

In the present case, Mrs *Fisi* does not enjoy immunity from civil jurisdiction under Arts. 31 para. 1 sent. 2, 37 para. 1 VCDR (1.) or customary international law (2.).

#### 1. Mrs *Fisi* does not enjoy immunity from civil jurisdiction under Arts. 31 para. 1 sent. 2, 37 para. 1 VCDR

Although Mrs *Fisi* is married to Mr *Fisi*, the *Twigan* ambassador to *Pundamilia*,<sup>1</sup> and generally enjoys immunity as per Art. 37 para. 1 VCDR, she does not enjoy immunity from civil jurisdiction in the present case.

By selling private artwork in the TCC, Mrs *Fisi* engaged in a commercial activity (a.) outside her official functions as per Art. 31 para. 1 sent. 2 lit. c VCDR (b.).

#### a. The management of the TCC is a commercial activity

The VCDR itself does not define as to what 'commercial activity' means.<sup>2</sup> In such a case, subsequent state practice can be used as a reference.<sup>3</sup> Mrs *Fisi*'s management of the TCC constitutes a commercial activity under numerous definitions: Firstly, national courts refer to the

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<sup>1</sup> Case, para. 8.

<sup>2</sup> *Bergmar*, VJTL (2014), p. 505; *O'Keefe*, ICLQ (1976), p. 346.

<sup>3</sup> *Competence of the ILO*, p. 39; *Corfu Channel Case*, p. 25.

ordinary meaning of ‘commercial’,<sup>4</sup> which is known as “the exchange of goods and services”<sup>5</sup>. Mrs *Fisi*’s sale of artwork in exchange for money accordingly embodies commerce in its ordinary meaning. Secondly, the term is characterised as a business or trade activity with the intent to realise a profit, making reference to Art. 42 VCDR<sup>6</sup> and Art. 34 lit. d VCDR<sup>7</sup>, which both contain the element of personal profit. Mrs *Fisi* kept most of the proceeds of the sold artwork to herself<sup>8</sup> and used them to purchase a sculpture for the garden of her private country house in *Pundamilia*<sup>9</sup>. The *Van Tembo* paintings considerably increased the proceeds.<sup>10</sup> All of this provides sufficient proof of her intent to generate personal profits. In particular, it is not apparent why a *Twigan* cultural centre would display and sell popular *Kiman* art<sup>11</sup> if not for commercial interests.

Additionally, a commercial activity is continuous rather than a single act of commerce.<sup>12</sup> Over the course of one year, Mrs *Fisi* steadily increased the sale of private artwork and put half of the exhibition, at least 50 pieces, on sale.<sup>13</sup> This goes to show that she repeatedly used the TCC as a trading place for artwork.

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<sup>4</sup> *De Andrade v. De Andrade*, p. 306.

<sup>5</sup> *Black’s Law Dictionary*, p. 304.

<sup>6</sup> *Propend Finance Pty Limited v. Sing*, p. 635; *Tabion v. Mufti*, p. 454.

<sup>7</sup> *Reyes v. Al-Malki*, p. 694.

<sup>8</sup> Case, paras. 12-13.

<sup>9</sup> Case, para. 12.

<sup>10</sup> Case, para 13.

<sup>11</sup> Case, para. 13.

<sup>12</sup> Conclusions of the Special Rapporteur, p. 56.

<sup>13</sup> Case, para. 13.

Mrs *Fisi*'s management of the TCC for personal profit qualifies as a commercial activity as per Art. 31 para. 1 sent. 2 lit. c VCDR.

b. The management of the TCC falls outside Mrs *Fisi*'s official functions

The term 'outside his official functions' in Art. 31 para. 1 sent. 2 lit. c VCDR must be interpreted in reference to Art. 3 para. 1 VCDR and its definition of the functions of a diplomatic mission.<sup>14</sup> Engaging in a commercial activity is not to be found amongst them. Therefore, pursuing a profit-oriented business such as the TCC<sup>15</sup> does not fall under its scope. State practice confirms that such an activity is considered incompatible with the purposes of a diplomatic mission and is therefore not accorded diplomatic immunities and privileges.<sup>16</sup>

Should *Twiga* claim that Mrs *Fisi* promoted the cultural relations between *Twiga* and *Pundamilia* as per Art. 3 para. 1 lit. e VCDR, thus fulfilling official functions, this would clearly be refutable. Mrs *Fisi* managed the TCC under the pretence of promoting cultural exchange but in fact generated private profits.<sup>17</sup> In particular, selling paintings from third states could not have possibly contributed to the promotion of cultural exchange between *Twiga* and *Pundamilia*. Therefore, Mrs *Fisi*'s management of the TCC does not fall within the scope of Art. 3 para. 1 lit. e VCDR. This is in accordance with the purpose of granting privileges under the VCDR which is to preserve the functionality of the diplomatic mission but not to benefit individuals.<sup>18</sup> Hence, activities which primarily serve private needs fall outside of a diplomatic agent's official functions, even if some mission-related functions are incidentally fulfilled

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<sup>14</sup> *Portugal v. Goncalves*, pp. 116-117; *United States v. Guinand*, p. 119.

<sup>15</sup> See A. I. 1.

<sup>16</sup> No. 4 lit. b Guidelines for establishing cultural sections of Diplomatic Missions; UKMIL, p. 445.

<sup>17</sup> See A. I. 1. a.

<sup>18</sup> Preamble VCDR.



within their course.<sup>19</sup> Therefore, it is irrelevant if the predominantly commercial use of the TCC contained minor cultural elements.

The exception in Art. 31 para. 1 sent. 2 lit. c VCDR was incorporated into the VCDR in order not to deprive private individuals of their ordinary remedies when trading with diplomatic agents.<sup>20</sup> In light of this, Mrs *Fisi*'s activity must fall within its scope, otherwise buyers of her artwork could not resort to their statutory warranty rights.

In addition, the fulfilment of official functions requires attribution to the sending state.<sup>21</sup> The sale of private artwork cannot be attributed to *Twiga*. The mere conversation with her husband Mr *Fisi* before setting up the TCC<sup>22</sup> is not sufficient for such an attribution.

Diplomatic missions are not legally independent from the sending state.<sup>23</sup> By implication, independent institutions cannot form part of the diplomatic mission. Mrs *Fisi* managed the TCC autonomously. She bought the premises using her own money to display her private art collection and paid the embassy for using its services.<sup>24</sup> Furthermore, the TCC has its own entrance. Mrs *Fisi* managed the TCC independently; it cannot be attributed to *Twiga*.

Mrs *Fisi* engaged in a commercial activity outside of her official functions. She does not enjoy immunity from civil jurisdiction under Arts. 31 para. 1 sent. 2, 37 para. 1 VCDR.

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<sup>19</sup> *Swarna v. Al-Awadi*, p. 633; confirmed in *Wokuri v. Kassam*, p. 565.

<sup>20</sup> Art. 27 ILC DADII Commentaries, p. 98.

<sup>21</sup> *Former Syrian Ambassador*, pp. 605-606; *Dinstein*, ICLQ (1966), p. 82.

<sup>22</sup> Case, para. 9.

<sup>23</sup> *Laforest v. Commercial Department of the Spanish Embassy*, p. 358; *Richtsteig*, p. 75.

<sup>24</sup> Case, paras. 9, 12.

## 2. Mrs Fisi does not enjoy immunity from civil jurisdiction under customary international law

Immunity from civil jurisdiction with its exception as codified in Art. 31 para. 1 sent. 2 lit. c VCDR constitutes customary international law.<sup>25</sup> As outlined above,<sup>26</sup> Mrs *Fisi* engaged in a commercial activity outside her official functions and therefore does not enjoy immunity from civil jurisdiction under customary international law.

In conclusion, Mrs *Fisi* is not covered by immunity from civil jurisdiction under Arts. 31 para. 1 sent. 2, 37 para. 1 VCDR or customary international law. Thus, *Pundamilia* could not have possibly breached its obligations under international law.

## II. Pundamilia did not breach Mrs Fisi's immunity from criminal jurisdiction under international law

In the present case, Mrs *Fisi* does not enjoy immunity from criminal jurisdiction under Arts. 31 para. 1 sent. 1, 37 para. 1 VCDR (1.) or customary international law (2.). By instituting criminal proceedings against Mrs *Fisi*, *Pundamilia* did not breach her immunity from criminal jurisdiction.

### 1. Mrs Fisi does not enjoy immunity from criminal jurisdiction under Arts. 31 para. 1 sent. 1, 37 para. 1 VCDR

Mrs *Fisi*'s sale of artwork falls within the scope of application of the reservation submitted by *Pundamilia* in relation to Art. 31 VCDR (a.) which is valid (b.).

#### a. Mrs Fisi's management of the TCC is within the scope of application of Pundamilia's reservation

The reservation submitted by *Pundamilia* in relation to Art. 31 VCDR limits the immunity from criminal jurisdiction enjoyed by diplomatic agents and their family members under

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<sup>25</sup> *Cimino Bosco v. Lujano Escheverri*, p. 304; *De Andrade v. De Andrade*, pp. 305-306; *M.H. v. Embassy of China*, p. 395; *Portugal v. Goncalves*, pp. 117-118; *Propend Finance Pty Limited v. Sing*, p. 635; *Reyes v. Al-Malki*, p. 689; *Tabion v. Mufti*, p. 454; *Wokuri v. Kassam*, p. 558.

<sup>26</sup> See A. I. 1.

Art. 31 para. 1 sent. 1 VCDR with regard to commercial activities.<sup>27</sup> When interpreting treaty terms, one must recognise their context.<sup>28</sup> The principles of treaty interpretation apply to the interpretation of reservations as well.<sup>29</sup> Therefore, the reservation must be interpreted as in Art. 31 para. 1 sent. 2 lit. c VCDR. As outlined above,<sup>30</sup> Mrs *Fisi* engaged in a commercial activity in the sense of the VCDR.

Mrs *Fisi*'s sale of artwork falls within the scope of application of the reservation submitted by *Pundamilia*.

b. The reservation submitted by *Pundamilia* in relation to Art. 31 VCDR is valid

Due to the lack of retroactivity laid down in Art. 4 VCLT, the VCLT does not apply to the VCDR inasmuch as the VCDR entered into force on 24 April 1964 before the VCLT did on 27 January 1980. Therefore, the reservation submitted by *Pundamilia* in December 1961<sup>31</sup> is governed only by such rules which then constituted customary international law.

Validity of reservations requires acceptance by all parties to the VCDR and not compatibility with the object and purpose of the VCDR (aa.). In any case, the reservation would fulfil the requirement of compatibility with the object and purpose (bb.).

aa. The reservation submitted by *Pundamilia* required unanimous consent

Traditionally, reservations had to be accepted by all treaty parties.<sup>32</sup> The object and purpose test was later established by the ICJ in *Genocide Convention* in which it required reservations

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<sup>27</sup> Case, para. 6.

<sup>28</sup> *Competence of the ILO*, p. 23; *Constitution of the Maritime Safety Committee*, pp. 158-159.

<sup>29</sup> *Orakhelashvili*, in: *Orakhelashvili/Williams*, p. 117 Fn. 1; see also the ICJ's statement as an *argumentum e contrario* in *Navigational and Related Rights*, p. 234.

<sup>30</sup> See A. I. 1. a.

<sup>31</sup> Case, para. 6.

<sup>32</sup> *Anderson*, ICLQ (1964), p. 454; *Fitzmaurice*, ICLQ (1953), p. 2; *Redgwell*, BYIL (1993), p. 246; see for state practice of Dutch Government in 1899 *Malkin*, BYIL (1926), p. 156 and French Government in 1905 *Ruda*, RdC (1975), p. 112; Committee for Progressive Codifica-

to be compatible with the object and purpose of a treaty instead.<sup>33</sup> The ICJ thereby deviated from the existing rule of customary international law on unanimous consent.<sup>34</sup> The Advisory Opinion was only supported by seven Judges, the remaining five dissented.<sup>35</sup> The ILC considered this notion to be unsuitable for the application to multilateral conventions and failed to recognise a corresponding rule of customary international law.<sup>36</sup> Thus, the object and purpose test had not developed into a rule of existing customary international law when *Pundamilia* submitted its reservation in 1961.

The reservation submitted by *Pundamilia* required unanimous consent to be valid. Subsequent reservations can be accepted expressly or tacitly.<sup>37</sup> It has not been established that any other party to the VCDR objected to the reservation in the present case.<sup>38</sup> This means that all treaty parties accepted at least by implication.

If *Twiga* considered the reservation submitted by *Pundamilia* incompatible with the object and purpose of the VCDR, it would have had to object in order to render it invalid and preclude the entry into force of the treaty as between itself and *Pundamilia*.<sup>39</sup> The object and purpose may only serve as a basis for guidance when responding to a reservation.<sup>40</sup> Treaty

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tion of International Law, p. 772; Resolution of the Assembly of the League of Nations 1931, p. 905.

<sup>33</sup> *Genocide Convention*, p. 24.

<sup>34</sup> *Genocide Convention (Dissenting Opinion)*, pp. 32-36; Report by Special Rapporteur Briery, p. 241; ILC Report 1950, p. 381.

<sup>35</sup> *Genocide Convention*, p. 29.

<sup>36</sup> ILC Report 1951, p. 128; Report by Special Rapporteur Lauterpacht, pp. 123-124.

<sup>37</sup> *Fitzmaurice*, ICLQ (1953), p. 2; Report of the ILC 2011, pp. 291-294.

<sup>38</sup> Case, para. 6; Clarifications, No. 12.

<sup>39</sup> See for a respective approach Art. 20 para. 2 lit. b in ILC Report 1962, p. 176.

<sup>40</sup> *Ruda*, RdC (1975), p. 190.

parties are also free to accept the reservation and therefore trigger its application.<sup>41</sup> *Twiga* did not object to the reservation submitted by *Pundamilia*.<sup>42</sup>

The reservation submitted by *Pundamilia* is thus valid.

bb. The reservation submitted by *Pundamilia* is compatible with the object and purpose of the VCDR

Regardless of the foregoing, the reservation submitted by *Pundamilia* does not contradict the object and purpose of the VCDR. A reservation only fails to meet the requirement of the object and purpose test if it is “in flagrant contrast to the treaty”<sup>43</sup>. The VCDR, however, provides for virtually the same exception concerning immunity from civil and administrative jurisdiction,<sup>44</sup> indicating the compatibility of such an exception to immunity from criminal jurisdiction as well. Diplomatic immunities and privileges exist because diplomatic agents are representatives of their sending state and shall perform its functions.<sup>45</sup> The exception to immunity from civil and administrative jurisdiction was created to avoid competitive advantages which diplomatic agents would have towards private actors due to their privileged status.<sup>46</sup> This thought also applies to criminal immunity; it creates the competitive advantage of not having to fear any form of criminal prosecution.

A strong indication for compatibility with the object and purpose is the lack of objections,

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<sup>41</sup> *Ipsen*, p. 437.

<sup>42</sup> Case, para. 6; Clarifications, No. 12.

<sup>43</sup> *Tomuschat*, ZaöRV (1967), p. 474.

<sup>44</sup> *Pundamilia*'s reservation in relation to criminal jurisdiction creates an exception for ‘professional or commercial activities’, while Art. 31 VCDR exempts ‘professional or commercial activity *outside his official functions*’.

<sup>45</sup> Preamble VCDR; *Hobe*, pp. 360-361.

<sup>46</sup> *Nahlik*, RdC (1990), p. 258.

particularly by *Twiga* or any other state party to the VCDR.<sup>47</sup> In light of incompatible reservations, the remaining state parties to a treaty usually object to them.<sup>48</sup>

The reservation submitted by *Pundamilia* is compatible with the object and purpose of the VCDR.

In conclusion, Mrs *Fisi*'s management of the TCC falls within the scope of application of the reservation; the reservation is valid as all treaty parties accepted it and it is compatible with the object and purpose of the VCDR.

Mrs *Fisi* does not enjoy immunity from criminal jurisdiction under Arts. 31 para. 1 sent. 1, 37 para. 1 VCDR in relation to her management of the TCC.

## 2. Mrs *Fisi* does not enjoy immunity from criminal jurisdiction under customary international law

Even though immunity from criminal jurisdiction constitutes customary international law,<sup>49</sup> it is not binding for *Pundamilia*. The ICJ established in *Asylum*<sup>50</sup> and *Fisheries*<sup>51</sup> that customary international law is not binding for a state which has opposed to its application. This rule can be applied to *Pundamilia*. *Pundamilia* submitted its reservation to Art. 31 VCDR upon signing the treaty text,<sup>52</sup> thereby displaying its stance towards the principle laid down in Art. 31 VCDR.

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<sup>47</sup> Case, para. 6; Clarifications, No. 12.

<sup>48</sup> UNTC, see e.g. the objections by Belgium, the Czechoslovak Republic, Germany, Hungary, Japan and Mongolia to reservations made to the VCDR.

<sup>49</sup> *Former Syrian Ambassador*, p. 607; *Gustavo J.L. and Another*, pp. 519-520; *Public Prosecutor v. JBC*, p. 340; *Re Regina and Palacios*, p. 310; *O'Keefe*, p. 414; *Shaw*, p. 556.

<sup>50</sup> *Asylum*, pp. 277-278.

<sup>51</sup> *Fisheries*, p. 131.

<sup>52</sup> Case, para. 6.

If *Twiga* was to suggest that *Pundamilia*'s protest was not explicit enough, this argument could not be given any weight. The persistent objector has the purpose of protecting a state's interest while at the same time avoiding an escalating dispute.<sup>53</sup> It cannot be expected from *Pundamilia* to protest in an extremely confrontational way, risking its long-standing diplomatic relations with *Twiga*<sup>54</sup>. The reservation made by *Pundamilia* is to be considered as sufficient protest to render *Pundamilia* a persistent objector regarding the absolute immunity from criminal jurisdiction under customary international law.

Mrs *Fisi* neither enjoys immunity from criminal jurisdiction under customary international law nor under Arts. 31 para. 1 sent. 1, 37 para. 1 VCDR with regard to her management of the TCC. By instituting criminal proceedings against Mrs *Fisi*, *Pundamilia* did not breach her immunity from criminal jurisdiction.

### III. *Pundamilia* did not breach Mrs *Fisi*'s inviolability under international law

By issuing a summons for Mrs *Fisi* to appear for a preliminary examination, *Pundamilia* did not breach the inviolability she enjoys under international law, namely Arts. 29, 37 para. 1 VCDR (1.) or customary international law (2.).

#### 1. *Pundamilia* did not breach Mrs *Fisi*'s inviolability under Arts. 29, 37 para. 1 VCDR

The principle of inviolability is laid down in Art. 29 VCDR. As per Art. 37 para. 1 VCDR Mrs *Fisi* enjoys this privilege, but in the present case her inviolability is not breached. Art. 29 VCDR prohibits arrest and detention and obliges the receiving state to protect the diplomatic agent from attacks. Accordingly, the VCDR clearly depicts the principle of inviolability as one of a physical nature.<sup>55</sup> It would be violated if a national court issued an enforceable doc-

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<sup>53</sup> *Colson*, WLR (1986), p. 963-964.

<sup>54</sup> Case, para. 6.

<sup>55</sup> *Aziz v. Aziz*, p. 611; *Värk*, JI (2003), p. 112.

ument which would lead to the arrest of the diplomat.<sup>56</sup> However, a court summons not connected with any act of constraint does not infringe the diplomatic agent's inviolability.<sup>57</sup>

The summons asking Mrs *Fisi* to appear before an investigating judge did not contain any warning or threat and Mrs *Fisi* was not compelled to attend court after she refused to comply.<sup>58</sup> There is no reason why a mere invitation to attend a hearing should amount to a breach of inviolability.<sup>59</sup>

It therefore cannot reasonably be argued that *Pundamilia* breached Mrs *Fisi*'s inviolability under Arts. 29, 37 para. 1 VCDR.

## 2. *Pundamilia* did not breach Mrs *Fisi*'s inviolability under customary international law

As a rule of customary international law, diplomatic agents and their family members enjoy inviolability.<sup>60</sup> The principle of inviolability originates from the notion that diplomatic envoys must not be attacked.<sup>61</sup> It follows that the principle of inviolability under customary international law is of a physical nature as well. A summons only constitutes a breach of inviolability if it leads to arrest or imprisonment of the diplomat.<sup>62</sup> As outlined above,<sup>63</sup> the summons issued for Mrs *Fisi* did not confront her with any kind of direct or indirect physical coercion.

*Pundamilia* did not breach Mrs *Fisi*'s inviolability under Arts. 29, 37 para. 1 VCDR or customary international law.

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<sup>56</sup> *Arrest Warrant*, p. 29.

<sup>57</sup> *Questions of Mutual Assistance*, p. 237.

<sup>58</sup> Case, para. 18.

<sup>59</sup> *Questions of Mutual Assistance*, pp. 236-237.

<sup>60</sup> See for example Arts. 27, 36 AALCC on Diplomatic Privileges; Art. 14 Diplomatic Officers; *De Meeus v. Forzano*, pp. 424-426; *Re Regina and Palacios*, p. 310.

<sup>61</sup> *Phillimore*, pp. 160-167 regarding the *Trent Incident*; *Wilson*, pp. 51-52.

<sup>62</sup> Art. 118 UK DPA; *Musurus Bey v. Gadban*, pp. 356-357.

<sup>63</sup> See A. III. 1.



**B. By searching and attaching the premises of the TCC, *Pundamilia* did not breach its obligations under international law, notably the VCDR and customary international law**

*Pundamilia* did not breach its obligations under Art. 22 VCDR (I.) or customary international law (II.) by searching and attaching the premises of the TCC.

I. *Pundamilia* did not breach the inviolability and immunity of the TCC under Art. 22 VCDR

The TCC does not enjoy inviolability and immunity under Art. 22 VCDR. It does not form part of the premises of the *Twigan* diplomatic mission (1.). Furthermore, notification would have been required to bestow upon the TCC the privileges of inviolability and immunity (2.).

1. The TCC does not form part of the premises of the *Twigan* diplomatic mission

The premises of a diplomatic mission are defined in Art. 1 lit. i VCDR as the buildings used for the purposes of the mission, irrespective of ownership.

As outlined above,<sup>64</sup> Mrs *Fisi* used the TCC as a trading place for artwork which is incompatible with the purposes of a diplomatic mission as per Art. 3 para. 1 VCDR. Consequently, the TCC does not meet the definition in Art. 1 lit. I VCDR.

State practice indicates that the status of cultural centres is usually governed by bilateral agreements even if the states are also parties to the VCDR.<sup>65</sup> This goes to show that cultural centres do not automatically enjoy inviolability and immunity under Art. 22 VCDR; instead, these privileges are granted on the basis of a more favourable treatment as per Art. 47 para. 2 lit. b VCDR.<sup>66</sup> States do not as a general rule accord diplomatic inviolability and immunity to cultural centres.<sup>67</sup> In view of the inconsistent state practice, it cannot be claimed that diplo-

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<sup>64</sup> See A. I. 1. a.

<sup>65</sup> Arts. 12, 13 ASEAN/KOR MOU; Arts. 11, 13 ESP/BGR Juridical System and Conditions for Activities of Cultural Centres; *Maria B. v. Australian Cultural Institute*, p. 4.

<sup>66</sup> *Denza*, p. 17.

<sup>67</sup> Art. 6 ESP/BGR Juridical System and Conditions for Activities of Cultural Centres; ESP/CUB Establishment of Spanish Cultural Centre, p. 67; Art. 12 para. 3 UK/CSR Estab-

matic privileges and immunities of cultural centres have been concretised in customary international law. As of today, *Twiga* and *Pundamilia* have not agreed on a more favourable treatment of the TCC.

Furthermore, the diplomatic status of the premises of the TCC cannot be derived from its outer appearance. Neither signs, nor flags positioned in front of a building, nor its name are constitutive of its status.<sup>68</sup> Ownership is likewise irrelevant for the classification of a building as part of the mission premises.<sup>69</sup> The transfer of ownership upon *Twiga* and the subsequent changes of the appearance of the TCC<sup>70</sup> therefore did not change its legal status.

The TCC does not form part of the premises of the *Twigan* diplomatic mission and is thus not covered by its diplomatic privileges and immunities.

2. *Twiga* was further required to notify *Pundamilia* in order to invest the TCC with inviolability and immunity

Customary international law requires the sending state to notify the receiving state prior to using premises for the purpose of its diplomatic mission.<sup>71</sup> This applies to cultural centres as well.<sup>72</sup> There is sufficient state practice indicating that such premises are not accorded diplo-

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lishment and Activities of Cultural Centres; No. 4 lit. b Guidelines for establishing cultural sections of Diplomatic Missions; *Richtsteig*, p. 22.

<sup>68</sup> *Wagner/Raasch/Pröbstl*, p. 162.

<sup>69</sup> Art. 1 lit. I VCDR.

<sup>70</sup> Case, para. 14.

<sup>71</sup> Sec. 4305 US FMA; Part 1, Sec. 1 UK DCPA; Sec. 2 Arts. 2, 3 para. 1 Harvard DCDPI.

<sup>72</sup> No. 5 Guidelines for establishing cultural sections of Diplomatic Missions; Arts. 6, 7 para. 2 FRA/GDR Statute and Operational Agreements for Cultural Centres.

matic privileges and immunities without the prior participation of the receiving state, namely the transfer of possession.<sup>73</sup>

The legal concept of involving the receiving state when expanding the premises of diplomatic missions is also manifested in several provisions of the VCDR: Art. 11 VCDR entitles the receiving state to control the size of diplomatic missions with regard to the staff of the diplomatic mission; Art. 21 VCDR obliges the receiving state to help the mission find appropriate premises and Art. 12 VCDR prohibits the sending state from establishing offices forming part of the mission in localities other than those in which the mission itself is established without the prior consent of the receiving state. Finally, under Art. 22 para. 2 VCDR, the receiving state is obliged to protect the mission premises. It is impossible for the receiving state to comply with this obligation without knowing the premises' exact location. It is in the very interest of the sending state to notify the receiving state when acquiring new premises used for its diplomatic purposes which is why a lack of notification is a strong indication that buildings are in fact not used for those purposes.<sup>74</sup>

Thus, the TCC does not form part of the premises of the *Twigan* diplomatic mission and *Twiga* failed to notify *Pundamilia* in advance. The TCC does not enjoy inviolability and immunity under Art. 22 VCDR so *Pundamilia* did not breach its obligations thereunder.

## II. *Pundamilia* did not breach the inviolability and immunity of the TCC under customary international law

*Pundamilia* did not breach its obligations under customary international law with respect to diplomatic (1.) and state immunity (2.).

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<sup>73</sup> Sec. 3, para. 4 US/ISR Construction of Diplomatic Facilities; Sec. 9, paras. 1-2 US/CH Construction of Embassy Complexes; Sec. 8, paras. 1-2 US/CH Diplomatic and Consular Property.

<sup>74</sup> *Denza*, p. 17.

1. Pundamilia did not breach the diplomatic inviolability and immunity of the TCC under customary international law

The premises of the diplomatic mission enjoy inviolability and immunity under customary international law to the same extent as codified in Art. 22 VCDR.<sup>75</sup> As stated before,<sup>76</sup> the TCC does not form part of the premises of the *Twigan* diplomatic mission and therefore does not enjoy inviolability and immunity under customary international law.

*Pundamilia* could not have breached its obligations under customary international law.

2. Pundamilia did not breach the state immunity from measures of constraint of the TCC under customary international law

The TCC does not enjoy state immunity from measures of constraint as it falls under the scope of its exception. Therefore, by searching and attaching the TCC, *Pundamilia* did not breach *Twiga*'s state immunity.

Measures of constraint in the context of state immunity are actions taken by the enforcement powers of state organs.<sup>77</sup> Customary international law does not grant absolute state immunity from measures of constraint; quite the contrary, state practice shows that property of a foreign state serving or intended for non-governmental purposes is open to such measures.<sup>78</sup> State

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<sup>75</sup> Art. 7 USSR SDCM; *Third Avenue Associates v. Permanent Mission of the Republic of Zaire*, p. 201; *Embassy Eviction*, p. 254; *Philippine Embassy Bank Account*, p. 186; *Yugoslav Military Mission*, p. 167; Sec. 2 Art. 3 para. 1 Harvard DCDPI.

<sup>76</sup> See B. I. 1.

<sup>77</sup> *Reinisch*, EJIL (2006), p. 803; *Reinisch*, in: *Hafner/Kohen/Breau*, p. 151.

<sup>78</sup> *Condor and Filvem v. Minister of Justice*, pp. 401-402; *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, pp. 221-222; *NIOC Revenues*, pp. 228, 239; *Republic of Iran v. Sociétés Eurodif and Sofidif and Commissariat à l'Énergie Atomique*, p. 97; *Trendtex Trading Corporation v. Central Bank of Nigeria*, pp. 129-132; further case law thoroughly detailed in *Philippine Embassy Bank Account*, pp. 167-184; *Crawford*, AJIL (1981), pp. 862-863; Report by Special Rapporteur Sucharitkul, pp. 211-225.

property serves a non-governmental purpose when commercial interests are pursued<sup>79</sup> and the state acts as if it was a private person<sup>80</sup>.

As detailed above,<sup>81</sup> the TCC was used for commercial purposes and managed by Mrs *Fisi* as a private person<sup>82</sup>. Moreover, the UNCJISP, which largely codifies customary international law,<sup>83</sup> expressly denies a governmental purpose of property used for cultural exhibitions in which art is placed or intended to be placed on sale<sup>84</sup>.

The TCC does not enjoy state immunity from measures of constraint. Therefore, by searching and attaching the TCC, *Pundamilia* did not breach *Twiga*'s state immunity.

**C. *Pundamilia* requests the ICJ to refrain from ordering it to put an end to the ongoing proceedings against Mrs *Fisi*, to recognise the status of the building located at 22 *Baobab* Street in *Savannah* as part of the premises of the *Twigan* diplomatic mission in *Pundamilia* and to ensure its protection**

As outlined above,<sup>85</sup> *Pundamilia* fully complied with its obligations under international law. This is why *Pundamilia* is neither obliged to put an end to the proceedings against Mrs *Fisi* (I.), nor to recognise the status of the TCC as part of the premises of the *Twigan* diplomatic mission (II.), or to ensure its protection (III.).

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<sup>79</sup> *Aschenbrenner v. Conseil Regional De Haute-Normandie*, para. 585; *The Charkieh*, pp. 99-100.

<sup>80</sup> *Mol Inc. v. Bangladesh*, p. 585; *Yang*, pp. 81-82.

<sup>81</sup> See B. I. 1.

<sup>82</sup> See A. I. 1. b.

<sup>83</sup> *Jurisdictional Immunities of the State*, pp. 122-123; *O'Keefe/Tams*, in: *O'Keefe/Tams*, p. xli.

<sup>84</sup> Art. 21 para. 1 lit. e UNCJISP.

<sup>85</sup> See A., B.

I. *Pundamilia* is not obliged to put an end to the proceedings against Mrs *Fisi*

The proceedings against Mrs *Fisi* are consistent with international law: Mrs *Fisi* does not enjoy immunity from *Pundamilian* jurisdiction under Arts. 31 para. 1, 37 para. 1 VCDR or customary international law<sup>86</sup> and *Twiga* does not raise any further arguments as to why the proceedings would be inadmissible<sup>87</sup>.

*Twiga* could only claim cessation of the ongoing proceedings if *Pundamilia* was responsible for an internationally wrongful act<sup>88</sup>. However, this is not the case here.

II. *Pundamilia* is not obliged to recognise the status of the TCC

The TCC does not form part of the premises of the *Twigan* diplomatic mission in *Pundamilia*.<sup>89</sup> Furthermore it is not exempt from measures of constraint under state immunity.<sup>90</sup> It follows that *Pundamilia* does not have to treat the premises of the TCC in a special manner; it is rather entitled to exercise its sovereign functions<sup>91</sup> as the TCC is on *Pundamilian* territory.

III. *Pundamilia* is not obliged to ensure the protection of the TCC

In order to be awarded restitution, the respondent state must be responsible for an internationally wrongful conduct.<sup>92</sup> However, the TCC does not enjoy inviolability or immunity under Art. 22 VCDR or customary international law and by searching and attaching its premises, *Pundamilia* did not breach its obligations under international law.<sup>93</sup> It is a state's right under

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<sup>86</sup> See A.

<sup>87</sup> Case, paras. 18, 20, 23-24.

<sup>88</sup> Art. 30 ILC DARS; *Arnauld*, p. 164.

<sup>89</sup> See B. I. 1.

<sup>90</sup> See B. II. 2.

<sup>91</sup> *Islands of Palmas*, p. 838; *Crawford/Koskenniemi*, p. 121.

<sup>92</sup> Art. 35 ILC DARS; *Arnauld*, p. 164.

<sup>93</sup> See B.

international law to exercise jurisdiction on its territory.<sup>94</sup> *Pundamilia* is therefore not obliged to ensure its protection, to refrain from any further searches or to repeal the attachment order.

**D. By suspending delivery of ten military helicopters, *Twiga* breached its obligations under Art. I para. 1 MAA and no circumstance justifies that breach**

*Twiga* breached its obligations under Art. I para. 1 MAA (I). There is no circumstance which justifies the breach of the MAA (II.).

I. *Twiga* breached its obligations under the MAA

By suspending the delivery of the remaining ten military helicopters, *Twiga* did not fulfil its obligations under Art. I para. 1 MAA (1.). There are no imperative security reasons which would constitute the only circumstance in which restrictions of the obligations under Art. I para. 1 MAA would be permitted (2.). *Twiga* failed to fulfil the procedural requirements under Art. 67 para. 2 VCLT (3.).

1. *Twiga* did not fulfil its obligations under Art. I para. 1 MAA

*Twiga* is obliged under Art. I para. 1 MAA to make military assistance available to *Pundamilia*. Consistent with this obligation, the *Pundamilian* Minister of Defence concluded a contract for the delivery of twelve military helicopters to *Pundamilia* within four years of the said date with *Twiga Helicopters Inc.*<sup>95</sup> Ten of these helicopters were not delivered, even though delivery was due in June 2016.<sup>96</sup> To the present day, delivery is still suspended,<sup>97</sup> while *Pundamilia* at all times fulfilled its obligation under Art. II MAA<sup>98</sup>.

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<sup>94</sup> *Lotus*, pp. 18-19; *Islands of Palmas*, p. 838; *Crawford/Koskenniemi*, p. 121; *Staker*, in: *Evans*, p. 316.

<sup>95</sup> Case, para. 22.

<sup>96</sup> Case, paras. 22-23, 28.

<sup>97</sup> Case, para. 28.

<sup>98</sup> Clarifications, 35.

*Twiga* did not fulfil its obligation under Art. I para. 1 MAA.

## 2. *Twiga* was not permitted to suspend delivery

Art. I para. 1 MAA states that the furnishing of military assistance may only be restricted due to ‘imperative security reasons’. However, there were no imperative security reasons which would have permitted *Twiga* to suspend delivery of the helicopters.

As per Art. 31 para. 1 VCLT, treaty provisions must be interpreted in accordance with their ordinary meaning. The ordinary meaning of ‘Imperative’ is “of vital importance”<sup>99</sup>. There is a general rule in international law according to which exceptions must be interpreted narrowly.<sup>100</sup> High standards have to be met in the present case since the possibility to restrict delivery constitutes an exception to *Twiga*’s obligation to furnish military assistance. This narrow interpretation is also supported by other international regulations<sup>101</sup> which use the term ‘imperative security reasons’ to create very narrow exceptions to important rules.<sup>102</sup>

Pursuant to the foregoing, ‘imperative security reasons’ must be interpreted as having an exceptional character and thus can only permit the suspension of delivery if it is crucial for maintaining *Twiga*’s national security.

*Twiga*’s explanation for the suspension of the delivery<sup>103</sup> cannot possibly meet this high threshold. Firstly, *Pundamilia* did not breach any of its obligations under international law.<sup>104</sup> Secondly, *Twiga*’s national security is not at risk in the present case: Mrs *Fisi* acted outside

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<sup>99</sup> *Oxford Dictionary*, p. 877.

<sup>100</sup> *Linderfalk*, p. 286.

<sup>101</sup> See for example Arts. 62, 78 GC IV; Art. 28 para. 3 Directive 2004/38/EC.

<sup>102</sup> Recital 24 Directive 2004/38/EC; *Uhler*, ICRC, p. 368.

<sup>103</sup> Case, para. 23.

<sup>104</sup> See A., B.



her official functions,<sup>105</sup> and therefore not as a representative of *Twiga*. There is no relation to *Twiga* or the military assistance the two states agreed upon in the MAA. *Pundamilia*'s actions against Mrs *Fisi* are the result of her private conduct<sup>106</sup> and do not affect the long-standing relations between *Twiga* and *Pundamilia*<sup>107</sup>.

The delivery of the remaining ten helicopters poses no risk to *Twiga*'s security; *Pundamilia* specifically agreed to use this military assistance for the promotion of peace and security only.<sup>108</sup> Furthermore, *Pundamilia* complied with its obligation under Art. II MAA to make available to *Twiga* the military base of *Nyasiville* until the present day.<sup>109</sup>

As there are no imperative security reasons to indicate otherwise, *Twiga* was not permitted to restrict delivery. It follows that *Twiga* breached its obligations under Art. I para. 1 MAA.

### 3. *Twiga* failed to fulfil the procedural requirements under Art. 67 para. 2 VCLT

In any case, suspension of delivery would constitute a breach of *Twiga*'s obligations under the MAA as *Twiga* failed to comply with the constitutive procedure for treaty suspension<sup>110</sup>. As per Art. 67 para. 2 VCLT, the instrument declaring the suspension has to be communicated to the other party. A public speech, not directly addressed to the other states concerned is not sufficient.<sup>111</sup> The suspension was announced in a press statement, in which *Pundamilia* was neither directly addressed, nor is there any evidence of other communication directed at *Pun-*

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<sup>105</sup> See A. I. 1. b.

<sup>106</sup> See A. I. 1.

<sup>107</sup> Case, para. 6.

<sup>108</sup> Art. I para. 2 MAA.

<sup>109</sup> Clarifications, 35.

<sup>110</sup> Report on the Law of Treaties, pp. 165, 167; *Villiger*, p. 840.

<sup>111</sup> *Aust*, p. 265.

*damilia*.<sup>112</sup> In addition, the instrument under Art. 67 para. 2 VCLT must be made in writing.<sup>113</sup> In the present case, the press statement<sup>114</sup> does not meet these requirements as it was made orally.

Thus, the suspension was not effective. *Twiga* breached its obligations under the MAA.

## II. *Twiga*'s breach of the MAA cannot be justified

There is no justification for the breach of Art. I para. 1 MAA. *Twiga* may not invoke the deterioration of diplomatic relations between *Twiga* and *Pundamilia* (1.) or the alleged breach of diplomatic immunities (2.). Even if it could, the suspension of delivery would not meet the requirements of countermeasures imposed by international law (3.).

### 1. *Twiga* may not invoke the deterioration of diplomatic relations

As per Art. 63 VCLT, the severance of diplomatic relations between treaty parties does not modify a treaty's effect, except insofar that diplomatic relations are indispensable for the treaty's application. Art. 63 VCLT seeks to distinguish legal issues of treaty obligations from the political issue of diplomatic relations.<sup>115</sup> This principle applies *a fortiori* to less serious diplomatic frictions.<sup>116</sup> Accordingly, the mere deterioration of diplomatic relations between *Twiga* and *Pundamilia*<sup>117</sup> cannot affect *Twiga*'s obligation to comply with the provisions of the MAA.

The existence of diplomatic relations is dispensable for the application of the MAA. Diplomatic relations are only indispensable for the application of the treaty, if performance is im-

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<sup>112</sup> Case, para. 23.

<sup>113</sup> *Tzanakopoulos*, in *Corten/Klein*, p. 155.

<sup>114</sup> Case, para. 23.

<sup>115</sup> *Dörr/Schmalenbach*, p. 1105.

<sup>116</sup> *Angelet*, in: *Corten/Klein*, p. 1442.

<sup>117</sup> Case, para. 23.

possible due to the worsening of diplomatic relations.<sup>118</sup> However, the performance of the MAA is independent of diplomatic relations; there is no indication supporting the impossibility of delivery. In any case, the helicopter agreement was negotiated not between diplomatic agents or other state officials, but only between *Pundamilia* and *Twiga Helicopters Inc.*,<sup>119</sup> hence diplomatic relations are not required to fulfil the obligations thereunder.

It follows that *Twiga* may not invoke the deterioration of diplomatic relations as a justification for the breach of Art. I para. 1 MAA.

## 2. *Twiga* did not meet the requirements for countermeasures

Countermeasures may only be taken in response to a previous internationally wrongful act of another state.<sup>120</sup> However, *Pundamilia*'s actions were not wrongful in any way.<sup>121</sup>

Should the Court hold that *Pundamilia* has committed an internationally wrongful act, the suspension of delivery of the helicopters would not have met the other requirements for invoking countermeasures set forth by international law, namely the duty to suspend the countermeasures during legal proceedings (a.), the requirement of prior notification (b.) and the principle of proportionality (c.). Countermeasures which do not meet these requirements constitute an internationally wrongful act themselves.<sup>122</sup>

### a. *Twiga* must suspend its countermeasures during legal proceedings

Regardless of their legality, countermeasures must be suspended when the dispute in question is pending before a court or tribunal which has the authority to make decisions binding on the

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<sup>118</sup> *Capotorti*, RdC (1971), p. 530.

<sup>119</sup> Case, para. 22.

<sup>120</sup> *Gabčíkovo-Nagymaros Project*, p. 55; *Portugal Colonies (Naulilaa Incident)*, p. 1027.

<sup>121</sup> See A., B.

<sup>122</sup> *White/Bass in Evans*, p. 540.

parties.<sup>123</sup> On 3 July 2016, *Twiga* filed an application against *Pundamilia* before the ICJ.<sup>124</sup> Both *Twiga* and *Pundamilia* have accepted the jurisdiction of the ICJ without reservation.<sup>125</sup> The ICJ is therefore entitled to issue a binding decision in the present case. It follows that *Twiga* was obliged to suspend its breach of obligations under Art. I para. 1 MAA and discharge its obligations thereunder.

b. *Twiga* was required to notify *Pundamilia* prior to suspension of delivery

In addition, *Twiga*'s suspension did not meet the requirement of the prior notification<sup>126</sup>. Art. 67 para. 2 VCLT demands any instrument for suspension to be communicated to the other party. Although the notification concerning countermeasures is not regulated in the VCLT, Art. 67 para. 2 VCLT can be applied by analogy. The situation in which a treaty is suspended in accordance with its provisions is similar to the situation in which it is suspended by means of a countermeasure, both of which preclude wrongfulness<sup>127</sup>.

As outlined above,<sup>128</sup> *Twiga*'s press statement does not meet the requirements of Art. 67 para. 2 VCLT, respectively, the requirement of adequate notification

c. *Twiga* failed to comply with the principle of proportionality

Countermeasures must be proportionate in relation to the internationally wrongful act to which they are a reaction.<sup>129</sup> Should the Court hold that the institution of proceedings against Mrs *Fisi* and the attachment and search of the TCC constituted an internationally wrongful act, the breach of the MAA would be disproportionate.

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<sup>123</sup> Art. 52 para. 3 lit. b ILC DARS; *Air Service Agreement*, pp. 445-446.

<sup>124</sup> Case, para. 24.

<sup>125</sup> Case, para. 3.

<sup>126</sup> Art. 52 para. 1 lit. b ILC DARS.

<sup>127</sup> Art. 22 ILC DARS; Arts. 57, 59-60 VCLT.

<sup>128</sup> See D. I. 3.

<sup>129</sup> Art. 51 ILC DARS; *Gabčíkovo-Nagymaros Project*, p. 56; *Air Service Agreement*, p. 443.

The suspension of delivery of the helicopters is a breach of the fundamental principle of international law *pacta sunt servanda*<sup>130</sup>. Compliance with the MAA is of great importance to *Pundamilia*. Unlike *Twiga*, it does not have many industries in the military sector.<sup>131</sup> To only receive one sixth of the military assistance<sup>132</sup> previously pledged therefore constitutes a grave impairment to *Pundamilia*. The self-help measure of enacting countermeasures bears the risk that economically and militarily more prominent states may be favoured.<sup>133</sup> By suspending delivery, *Twiga* abused its superior position. *Pundamilia* depends on the delivery of military assistance. In contrast, the alleged violation of Mrs *Fisi*'s immunity and the inviolability of the premises of the TCC do not constitute great impairments to *Twiga*.

In light of the damage suffered by *Pundamilia*, *Twiga*'s countermeasure can by no means be put into perspective and is thus not proportionate. Accordingly, *Twiga* failed to meet the requirements of countermeasures set forth by international law.

No circumstance justifies the breach of obligations under Art. I para. 1 MAA.

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<sup>130</sup> Art. 26 VCLT; Art. 2 para. 2 UN-Charter; *Armed Actions*, p. 105; *Nuclear Tests*, p. 268; *Legality of Nuclear Weapons*, pp. 264, 265; *Pulp Mills*, p. 67.

<sup>131</sup> Case, paras. 1, 2.

<sup>132</sup> Case, paras. 22, 28.

<sup>133</sup> Schröder, in: *Vitzthum/Proeßl*, pp. 586-587.

**(i) Submissions**

*Pundamilia* requests the ICJ to adjudge and declare that:

- A. By instituting proceedings against Mrs *Fisi*, *Pundamilia* did not breach the immunity from jurisdiction and inviolability enjoyed by her under international law, notably the VCDR and customary international law.
- B. By searching and attaching the premises of the TCC, *Pundamilia* did not breach its obligations under international law, notably the VCDR and customary international law.
- C. By suspending the delivery of ten military helicopters, *Twiga* breached its obligations under Art. I MAA and no circumstance justifies that breach.

*Pundamilia* requests the ICJ to refrain from ordering it to put an end to the ongoing proceedings against Mrs *Fisi*, to recognise the status of the building located at 22 *Baobab* Street in *Savannah* as part of the premises of *Twiga*'s diplomatic mission in *Pundamilia* or to ensure its protection.