

2017

**The Twigan Cultural Centre Dispute**

(Twiga v. Pundamilia)

Written Memorial on behalf of Twiga

(Applicant)

Registration number

5A

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**(b) List of Abbreviations**

AJIL	American Journal of International Law
ARIEL	Austrian Review of International and European Law
ARSIWA	Articles on State Responsibility for Internationally Wrongful Acts
Art./ Arts.	Article/ Articles
AUJILP	American University Journal of International Law and Policy
B & C	Barnewall & Cresswell (English Reports)
BYIL	British Yearbook of International Law
Doc.	Document
ECHR	European Court of Human Rights
edn.	edition
ed./ eds.	editor/ editors
e.g.	example given
EJIL	European Journal of International Law
<i>et al.</i>	<i>et alii</i>
FLJ	Forum Law Journal
FYROM	Former Yugoslav Republic of Macedonia
GoJIL	Goettingen Journal of International Law
HILJ	Harvard International Law Journal
HRC	Human Rights Committee
<i>Ibid.</i>	<i>Ibidem</i>
ICJ	International Court of Justice

ICLQ	International and Comparative Law Quarterly
ICLR	International Community Law Review
i.e.	<i>id est</i>
ILC	International Law Commission
ILR	International Law Reports
Inc.	Incorporated
JAIL	Japanese Annual of International Law
Loy. LA ICLJ	Loyola of Los Angeles International and Comparative Law Journal
MAA	Military Assistance Agreement between Twiga and Pundamilia
MJIL	Michigan Journal of International Law
MSJIL	Michigan State Journal of International Law
NJIL	Nordic Journal of International Law
No.	Number
para./ paras.	paragraph/ paragraphs
PCIJ	Permanent Court of International Justice
p./ pp.	page/ pages
RIAA	United Nations Reports of International Arbitral Awards
ser.	series
Stat.	Statute
TICLJ	Temple International and Comparative Law Journal
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations

UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
US	United States of America
USC	United States Code
UTLR	University of Toledo Law Review
v.	<i>versus</i>
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
VJTL	Vanderbilt Journal of Transnational Law
Vol.	Volume
YBILC	Yearbook of the International Law Commission
YJIL	Yale Journal of International Law



## **(c) List of Sources**

### **A. Treaties and Conventions**

*Statute of the International Court of Justice*, 26 June 1945, San Francisco, 59 Stat. 1055, 33 UNTS, p. 993; hereinafter cited as: **ICJ Statute**

*Vienna Convention on Diplomatic Relations*, 18 April 1961, Vienna, entry into force: 24 April 1964, 500 UNTS, p. 95; hereinafter cited as: **VCDR**

*Vienna Convention on the Law of Treaties*, 23 May 1969, Vienna, entry into force: 27 January 1980, 1155 UNTS, p. 331; hereinafter cited as: **VCLT**

### **B. Documents**

#### **1. UN Documents**

*Consideration of the Report of the International Law Commission on the work of its fifty-third session*, in Official Records of the UNGA 56<sup>th</sup> session: Summary Record of the 14<sup>th</sup> meeting of the Sixth Committee (1 November 2001), Doc. A/C.6/56/SR.14; hereinafter cited as: **Consideration of the ILC Report to the UNGA, 2001**

*Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001*, Doc. A/56/10 in YBILC, 2001, Vol. II, Part Two; hereinafter cited as: **ARSIWA Draft with commentaries, 2001**

*Draft Articles on the Law of Treaties with commentaries, 1966*, in YBILC, 1966, Vol. II; hereinafter cited as: **VCLT Draft with commentaries, 1966**

ILC Articles on Responsibility of States for Internationally Wrongful Acts, 31 May 2001,

available at: [www.un.org/law/ilc](http://www.un.org/law/ilc); hereinafter cited as: **ARSIWA**

*ILC Guide to Practice on Reservations to Treaties*, 2011, UN Doc. A/66/10/Add. 1; hereinafter cited as: **ILC Guide to Practice, 2011**

*Report of the International Law Commission on the work of its sixty-third session: Chapter IV: Reservations to Treaties*, UN Doc. A/66/10/Add. 1 in YBILC, 2011, Vol. II, Part Two; hereinafter cited as: **ILC Guide to Practice with commentaries, 2011**

*Report of the International Law Commission on the work of its forty-ninth session: Reservations to Treaties*, in YBILC, 1997, pp. 44-57; hereinafter cited as: **ILC Report on Reservations to Treaties, 1997**

*Report of the International Law Commission covering the work of its fifteenth session, 6 May - 12 July 1963*, Doc. A/5509 in YBILC, 1963, Vol. II; hereinafter cited as: **ILC Report to the UNGA, 1963**

*Report of the International Law Commission to the General Assembly covering the work of its tenth session, 23 April—4 July 1958*, Doc. A/3859 in YBILC, 1958, Vol. II; hereinafter cited as: **ILC Report to the UNGA, 1958**

*Report of the International Law Commission to the General Assembly covering the work of its ninth session, 23 April—28 June 1957*, Doc. A/3623 in YBILC, 1957, Vol. II; hereinafter cited as: **ILC Report to the UNGA, 1957**

*Sixth Report on the Law of Treaties*, by Sir H. Waldock, 1966, A/CN.4/186 and Add.1, 2/Rev.1, 3-7; hereinafter cited as: **Waldock's Sixth Report on the Law of Treaties, 1966**

*Tenth Report on Reservations to Treaties Mr. Alain Pellet, Special Rapporteur*, 2005, Doc.

A/CN.4/558 and Add.1–2; **Pellet’s Tenth Report on Reservations to Treaties, 2005**

*United Nations Conference on Diplomatic Intercourse and Immunities: Official Records*, Vol. I, A.CONF.20/14 (2 March-14 April 1961); hereinafter cited as: **Official Records, 1961**

## **2. Other Documents**

*UK Diplomatic and Consular Premises Act, 1987*, hereinafter cited as: **UK Diplomatic Premises Act, 1987**

*US Foreign Missions Act*, 22 USC 4301-4316, 1982, hereinafter cited as: **US Foreign Missions Act, 1982**

## **C. Jurisprudence**

### **1. Permanent Court of International Justice**

*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion, 1925 PCIJ (ser. B) No. 12; hereinafter cited as: ***Interpretation of the Treaty of Lausanne Advisory Opinion, 1925***

*Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923, PCIJ (ser. B) No. 4; hereinafter cited as: ***Nationality Decrees Advisory Opinion, 1923***

### **2. International Court of Justice**

*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, ICJ Reports 2011, p. 644; hereinafter cited as: ***FYROM v. Greece Case, 2011*** / Dissenting Opinion of Judge ad hoc Roucounas; hereinafter cited as: ***Roucounas Dissenting Opinion (FYROM v. Greece Case), 2011*** / Rejoinder of Greece of

October 27, 2010; hereinafter cited as: **Rejoinder of Greece (*FYROM v. Greece Case*), 2010**

*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 3; hereinafter cited as: **Arrest Warrant Case, 2002**

*Case Concerning Certain Norwegian Loans (France v. Norway)*, Judgement of July 6th 1957, ICJ Reports 1957, p. 9. / Separate Opinion of Sir Hersch Lauterpacht; hereinafter cited as: **Lauterpacht Separate Opinion (*Norwegian Loans Case*), 1957**

*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgement, ICJ Reports 2009, p. 213; hereinafter cited as: **Costa Rica v. Nicaragua Case, 2009**

*Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement, ICJ Reports 1997, p. 7; hereinafter cited as: **Gabčíkovo-Nagymaros Project Case, 1997**

*Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Request for the indication of provisional measures*, Order, December 7, 2016; hereinafter cited as: **Equatorial Guinea v. France Case, Order, 2016**

*Interhandel Case (Switzerland v. United States of America)*, Judgment of March 21st, 1959, ICJ Reports 1959, p. 6. / Dissenting Opinion of Sir Hersch Lauterpacht; hereinafter cited as: **Lauterpacht Dissenting Opinion (*Interhandel Case*), 1959**

*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement, ICJ Reports 1986, p. 14; hereinafter cited as: **Nicaragua v. US Case, 1986**

*Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, p. 15; hereinafter cited as: **Genocide Advisory Opinion, 1951**

*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgement, ICJ Reports 1980, p. 3; hereinafter cited as: ***Diplomatic and Consular Staff in Tehran Case, 1979*** / *United States Diplomatic and Consular Staff in Tehran (Request for the Indication of Provisional Measures)*, Order, December 15, 1979; hereinafter cited as: ***Diplomatic and Consular Staff in Tehran Case, Order, 1979***

### **3. European Court of Human Rights**

*Belilos v. Switzerland*, Application No. 10328/83, ECHR 4 (1988); hereinafter cited as: ***Belilos Case, 1988***

*Loizidou v. Turkey*, Application No. 15318/89, ECHR (1996); hereinafter cited as: ***Loizidou Case, 1996***

*Weber v Switzerland*, Merits and Just Satisfaction, Application No. 11034/84, A/177, ECHR (1990); hereinafter cited as: ***Weber Case, 1990***

### **4. United Nations Human Rights Committee**

UN Human Rights Committee, General Comment 24 (52), *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994).1; hereinafter cited as: **HRC General Comment 24**

UN Human Rights Committee, *Rawle Kennedy v. Trinidad and Tobago*, 31 December 1999, Communication No. 845 (CCPR/C67/D/845/1999); hereinafter cited as: ***Rawle Kennedy Case, 1999***

### **5. International Tribunals**

*Air Services Agreement of 27 March 1946 (United States v. France)*, RIAA, Vol. 18, pp. 417-493; hereinafter cited as: ***Air Services Agreement Case, 1946***

*Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique, 1928*, RIAA, Vol. 2, pp. 1011–1033; hereinafter cited as: ***Naulilaa Case, 1928***

## **6. National Courts**

*Bennett and Ball v. People's Republic of Hungary, Federal Republic of Germany, Supreme Restitution Court for Berlin, July 10, 1959*, ILR, Vol. 28, 1963, pp. 392-396; hereinafter cited as: ***Bennett and Ball v. Hungary Case, 1959***

*Cassirer and Geheeb v. Japan, Federal Republic of Germany, Supreme Restitution Court for Berlin, July 10, 1959*, ILR, Vol. 28, 1963, pp. 396-413; hereinafter cited as: ***Cassirer and Geheeb v. Japan Case, 1959***

*Friedberg v. Santa Cruz et al. United States, Appellate Division of the Supreme Court of the State of New York. January 31, 1949*, ILR, Vol. 15, 1948, pp. 289-291; hereinafter cited as: ***Friedberg v. Santa Cruz Case, 1949***

*LAFICO-Republic of Burundi Arbitral Tribunal, 4 March 1991*, ILR, Vol. 96, 1994, pp. 280-333; hereinafter cited as: ***LAFICO and Burundi Case, 1991***

*Novello v. Toogood, 29 April 1823*, 1 B & C, 1823, p. 554; hereinafter cited as: ***Novello v. Toogood Case, 1823***

*People v. Von Otter, United States, City Court of New Rochelle, New York. July 30, 1952*, ILR, Vol. 19, 1952, pp. 385-387; hereinafter cited as: ***People v. Von Otter Case, 1952***

*Portugal v. Goncalves, Belgium, Civil Court of Brussels (Second Chamber), 11 March 1982*,

ILR, Vol. 82, 1992, pp. 115-118; hereinafter cited as: ***Portugal v. Goncalves Case, 1982***

*Propend Finance Pty Limited and Others v. Sing and Others, England, High Court, Queen's Bench Division, 14 March 1996*, ILR, Vol. 111, 1998, pp. 611-672; hereinafter cited as: ***Propend Case, 1996***

*Tabion v. Mufti, United States District Court, Virginia, Alexandria Division, 16 February 1995*, 73F 3d 535, ILR, Vol. 107, 1996, pp. 452-456; hereinafter cited as: ***Tabion v. Mufti Case, 1996***

*Tietz et al. v. People's Republic of Bulgaria, Federal Republic of Germany, Supreme Restitution Court for Berlin, July 10, 1959*, ILR, Vol. 28, 1963, pp. 369-385; hereinafter cited as: ***Tietz et al. v. Bulgaria Case, 1959***

*Weinmann v. Republic of Latvia, Federal Republic of Germany, Supreme Restitution Court for Berlin, July 10, 1959*, ILR, Vol. 28, 1963, pp. 385-391; hereinafter cited as: ***Weinmann v. Latvia Case, 1959***

## **D. Literature**

### **1. Books**

Angelet N., “Art. 63, Convention of 1969”, in Corten O. & Klein P. (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, 2011; hereinafter cited as: **Angelet, 2011**

Aust A., *Modern Treaty Law and Practice*, 3<sup>rd</sup> edn., Cambridge University Press, 2013; hereinafter cited as: **Aust, 2013**

Barker, C. J., *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?*, Aldershot: Dartmouth, 1996; hereinafter cited as: **Barker, 1996**

Bjorge E., “*The Vienna Rules, Evolutionary Interpretation, and the Intention of the Parties*”, in Bianchi A., Peat D. & Windsor M. (eds.), *Interpretation in International Law*, Oxford University Press, 2015; hereinafter cited as: **Bjorge, 2015**

Bodeau-Livinec P. & Morgan-Foster J., “*Art. 61, Convention of 1969*”, in Corten O. & Klein P. (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, 2011; hereinafter cited as: **Bodeau-Livinec & Morgan-Foster, 2011**

Cassese A., *International Law*, 2<sup>nd</sup> edn., Oxford University Press, 2005; hereinafter cited as: **Cassese, 2005**

Clapham A., *Brierly’s Law of Nations: An introduction to the role of International Law in International Relations*, 7<sup>th</sup> edn., Oxford University Press, 2012; hereinafter cited as: **Clapham, 2012**

Crawford J., *Brownlie’s Principles of International Law*, 8<sup>th</sup> edn., Oxford University Press, 2012; hereinafter cited as: **Brownlie’s Principles, 2012**

Crawford J., *State Responsibility: The General Part*, Cambridge University Press, 2013; hereinafter cited as: **Crawford, 2013**

Crawford J., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002; hereinafter cited as: **Crawford, 2002**

Delcorde L., *Belgian Diplomats*, Editions Mardaga, 2012; hereinafter cited as: **Delcorde, 2012**

Dembinski L., *The Modern Law of Diplomacy*, Martinus Nijhoff Publishers, 1988; hereinafter cited as: **Dembinski, 1988**



Denza E., *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4<sup>th</sup> edn., Oxford University Press, 2016; hereinafter cited as: **Denza, 2016**

Denza E., “*Diplomatic Privileges and Immunities*”, in Grant J. P. & Barker J. C. (eds.), *The Harvard Research in International Law: Contemporary Analysis and Appraisal*, 2007; hereinafter cited as: **Denza, 2007**

Elagab O. Y., *The legality of non-forcible counter-measures in international law*, Clarendon Press, 1988; hereinafter cited as: **Elagab, 1988**

Feltham R. G., *Diplomatic Handbook*, 8<sup>th</sup> edn., Martinus Nijhoff Publishers, 2012; hereinafter cited as: **Feltham, 2012**

Gardiner R., *International Law*, Pearson Education Limited, 2003; hereinafter cited as: **Gardiner, 2003**

Hardy M. J. L., *Modern Diplomatic Law*, Manchester University Press, 1968; hereinafter cited as: **Hardy, 1968**

Hollis D. B. (ed.), *The Oxford Guide to Treaties*, Oxford University Press, 2012; hereinafter cited as: **Oxford Guide to Treaties, 2012**

Kamto M., “*The Time Factor in the Application of Countermeasures*”, in Crawford J., Pellet A. & Olleson S. (eds.), *The Law of International Responsibility*, Oxford University Press, 2010; hereinafter cited as: **Kamto, 2010**

Klabbers J., *International Law*, Cambridge University Press, 2013; hereinafter cited as: **Klabbers, 2013**

Michaels D. B., *International Privileges and Immunities: A Case for a Universal Statute*,

Martinus Nijhoff Publishers, 1971; hereinafter cited as: **Michaels, 1971**

Murty B. S., *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order*, Springer, 1989; hereinafter cited as: **Murty, 1989**

O’Keefe R., *International Criminal Law*, Oxford University Press, 2015; hereinafter cited as: **O’Keefe, 2015**

Roberts I. (ed.), *Satow’s Diplomatic Practice*, 6<sup>th</sup> edn., Oxford University Press, 2009; hereinafter cited as: **Satow’s, 2009**

Sen B., *A Diplomat’s Handbook of International Law and Practice*, 2<sup>nd</sup> edn., Martinus Nijhoff Publishers, 1979; hereinafter cited as: **Sen, 1979**

Shaw M. N., *International Law*, 6<sup>th</sup> edn., Cambridge University Press, 2008 (printed 2010); hereinafter cited as: **Shaw, 2008**

Swaine E. T., “*Treaty Reservations*”, in Hollis D. B. (ed.), *The Oxford Guide to Treaties*, Oxford University Press, 2012; hereinafter cited as: **Swaine, 2012**

Villiger M. E., *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, 2009; hereinafter cited as: **Villiger, 2009**

Watts A., *The International Law Commission 1949-1998, Vol. I: The Treaties*, Oxford University Press, 1999; hereinafter cited as: **Watts, 1999**

Whiteman M., *Digest of International Law*, Vol. 7, Department of State Publication, 1970; hereinafter cited as: **Whiteman, 1970**

Wickremasinghe C., “*Immunities Enjoyed by Officials of States and International*

*Organizations*”, in Evans M. (ed.), *International Law*, 4th edn., Oxford University Press, 2014; hereinafter cited as: **Wickremasinghe, 2014**

Wilson C. E., *Diplomatic Privileges and Immunities*, University of Arizona Press, 1967; hereinafter cited as: **Wilson, 1967**

## **2. Articles**

Anderson D. R., *Reservations to Multilateral Conventions: A Re-Examination*, ICLQ, Vol. 13, 1964, pp. 450-481; hereinafter cited as: **Anderson, 1964**

Barnidge R. P., *The Due Diligence Principle Under International Law*, ICLR, Vol. 8 (issue 1), 2006, pp. 81-121; hereinafter cited as: **Barnidge, 2006**

Bederman D. J., *Counterintuiting Countermeasures*, AJIL, Vol. 96, 2002, pp. 817-832; hereinafter cited as: **Bederman, 2002**

Bergmar N. M., *Demanding Accountability when Accountability is Due: A Functional Necessity Approach to Diplomatic Immunity under the Vienna Convention*, VJTL, Vol. 47, 2014, pp. 501-530; hereinafter cited as: **Bergmar, 2014**

Bowett D., *Reservations to Non-Restricted Multi-Lateral Treaties*, BYIL, Vol. 48, 1976, pp. 67-92; hereinafter cited as: **Bowett, 1976**

Brown J., *Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations*, ICLQ, Vol. 37, 1988, pp. 53-88; hereinafter cited as: **Brown, 1988**

Buffard I. & Zemanek K., *The “Object and Purpose” of a Treaty: An Enigma?*, ARIEL, Vol. 3, 1998, pp. 311-343; hereinafter cited as: **Buffard & Zemanek, 1998**

Cahier P., *Vienna Convention on Diplomatic Relations*, International Conciliation, Vol. 37 (issue 5), 1969, pp. 5-40; hereinafter cited as: **Cahier, 1969**

Cannizzaro E., *The Role of Proportionality in the Law of International Countermeasures*, EJIL, Vol. 12, 2001, pp. 889-916; hereinafter cited as: **Cannizzaro, 2001**

D'Aspremont J., *Diplomatic Premises in International Law*, Max Planck Encyclopedia of Public International Law, 2009, pp. 1-15; hereinafter cited as: **D'Aspremont, 2009**

Davidson S., Freestone D., Lowe V. & Warbrick C., *Treaties, Extradition and Diplomatic Immunity: Some Recent Developments*, ICLQ, Vol. 35, 1986, pp. 425-436; hereinafter cited as: **Davidson, Freestone, Lowe & Warbrick, 1986**

Edwards R. W., *Reservations to Treaties*, MJIL, Vol. 10, 1989, pp. 362-405; hereinafter cited as: **Edwards, 1989**

Edwards R. W., *Reservations to Treaties: The Belilos Case and the Work of the International Law Commission*, UTLR, Vol. 31, 1999-2000, pp. 195-207; hereinafter cited as: **Edwards, 2000**

Franck T. M., *On Proportionality of Countermeasures in International Law*, AJIL, Vol. 102, 2008, pp. 715-767; hereinafter cited as: **Franck, 2008**

Hurst C., *Les immunités diplomatiques*, Recueil des Cours II, Vol. 12, 1926, pp. 115-245; hereinafter cited as: **Hurst, 1926**

Kerley E. L., *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, AJIL, Vol. 56, 1962, pp. 88-129; hereinafter cited as: **Kerley, 1962**

Krieger H., *Between Evolution and Stagnation – Immunities in a Globalized World*, GoJIL,

Vol. 6 (issue 2), 2014, pp. 177-216; hereinafter cited as: **Krieger, 2014**

Liang Y., *The Third Session of the International Law Commission: Review of its Work by the General Assembly*, AJIL, Vol. 46, 1952, pp. 483-503; hereinafter cited as: **Liang, 1952**

Linderfalk U., *On the Meaning of the Object and Purpose Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19*, NJIL, Vol. 72, 2003, pp. 429-448; hereinafter cited as: **Linderfalk, 2003**

Marsh L. A., *Restoring Equilibrium: Maximizing State Consent through a Modified Severability Regime*, TICLJ, Vol. 29, 2015, pp. 89-114; hereinafter cited as: **Marsh, 2015**

Matsui Y., *Countermeasures in the international legal order*, JAIL, Vol. 37, 1994, pp. 1-37; hereinafter cited as: **Matsui, 1994**

McCall-Smith K. L., *Severing Reservations*, ICLQ, Vol. 63 (issue 3), 2014, pp. 599-634; hereinafter cited as: **McCall-Smith, 2014**

Milanovic M. & Sicilianos L. A., *Reservations to Treaties: An Introduction*, EJIL, Vol. 24 (issue 3), 2013, pp. 1055-1059; hereinafter cited as: **Milanovic & Sicilianos, 2013**

Nahlik S. E., *Development of Diplomatic Law: Selected Problems*, Recueil des Cours, Vol. 222, 1990 III, pp. 187-364; hereinafter cited as: **Nahlik, 1990**

O'Keefe P. J., *Privileges and Immunities of the Diplomatic Family*, ICLQ, Vol. 25, 1976, pp. 329-350; hereinafter cited as: **O'Keefe, 1976**

Ross M. S., *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, AUJILP, Vol. 4, 1989, pp. 173-205; hereinafter cited as: **Ross, 1989**

Scheffer D., *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, HILJ, Vol. 19, 1978, pp. 931-1009; hereinafter cited as: **Scheffer, 1978**

Summers M. A., *Diplomatic Immunity Ratione Personae: Did the International Court of Justice Create A New Customary Law Rule in Congo v. Belgium?*, MSJIL, Vol. 16, 2007-2008, pp. 459-473; hereinafter cited as: **Summers, 2008**

Swaine E. T., *Reserving*, YJIL, Vol. 31, 2006, pp. 307-366; hereinafter cited as: **Swaine, 2006**

Värk R., *Diplomatic Agents, Civil Actions and Jurisdictional Immunity*, Estonian law reform and global challenges: essays celebrating the Tenth Anniversary of the Institute of Law, University of Tartu, Tallinn: Tartu University Press, 2005, pp. 24-32; hereinafter cited as: **Värk, 2005**

Värk R., *The Siege of the of the Estonian Embassy in Moscow: Protection of a Diplomatic Mission and Its Staff in the Receiving State*, Juridica International, Vol. 15, 2008, pp. 144-153; hereinafter cited as: **Värk, 2008**

Wilson C. E., *Diplomatic Privileges and Immunities: The Retinue and Families of the Diplomatic Staff*, ICLQ, Vol. 14, 1965, pp. 1265-1295; hereinafter cited as: **Wilson, 1965**

Wilson R., *Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*, Loy. LA ICLJ, Vol. 7, 1984, pp. 113-138; hereinafter cited as: **Wilson, 1984**

Yavuz M., *Scope of Diplomatic Family in Vienna Convention on Diplomatic Relations*, Law & Justice Review, Vol. 4 (issue 1), 2013, pp. 163-182; hereinafter cited as: **Yavuz, 2013**

Zoglio E., *Diplomatic Immunity from Local Jurisdiction*, FLJ, Vol. 7, 1976-1977, pp. 33-36;

hereinafter cited as: **Zoglio, 1977**

**E. Varia**

*The Vienna Convention on Diplomatic Relations, Status as at: 08-01-2017 05:01:11 EDT,*  
available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-3&chapter=3&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en); hereinafter cited as: **VCDR Status on 8/1/2017**

**(d) Statement of Relevant Facts**

1. Twiga is a small State with a vivid artistic, cultural sense and a dynamic economy, since it is rich in natural resources and has many industries, active in the aerospace, defence and security sectors. Pundamilia is a large country and its economy relies on tourism, farming and trade of agricultural products. Twiga and Pundamilia are members of the United Nations and parties to the VCLT and the VCDR.

2. Upon ratification of the VCDR in 1961, Pundamilia appended a reservation by which it maintained its criminal jurisdiction upon foreign diplomatic agents and their families, for professional or commercial activities. There was no objection on behalf of Twiga to the reservation when it ratified the VCDR, in February 1962.

3. The Twigan diplomatic mission in Pundamilia is located at 20 Baobab Street in Savannah. Mr. Fisi is the Ambassador of the mission since 2014, and is accompanied in Pundamilia by his wife. Mrs. Fisi owns a large private collection of artwork, including Twigan paintings and sculptures, which she envisaged to use in order to promote cultural exchanges between Twiga and Pundamilia.

4. Mrs. Fisi bought, in September 2014, the building adjacent to the embassy, at 22 Baobab Street, and set up the “Twigan Cultural Centre”. Two of the building’s rooms were used for the exhibition of her collection and for the hosting of free workshops on a traditional Twigan painting technique. The Twigan embassy made its facilities and equipment available to the Twigan Cultural Centre, including the embassy’s official telephone line and security guards.

5. Shortly after the opening of the Cultural Centre, certain exhibits were put for sale. The 30% of the proceeds from the sales was transferred to the embassy’s bank account, in order for the



expenses of the services to be covered, by Mrs. Fisi., who managed the Cultural Centre. At the same time, the free workshops continued and the exhibition was enriched.

6. In 15 June 2015, Twiga bought the building from Mrs. Fisi, and the transaction was registered in the Pundamilia public land registry system. Twiga stated its intention to expand the premises of the diplomatic mission. Thus, the two buildings were internally connected and a sign “Diplomatic Mission of the Republic of Twiga in Pundamilia” and the Twigan flag was placed at the entrance of the Cultural Centre. The Cultural Centre continued to operate as usual, and the 30% of the proceeds kept being transferred to the embassy’s bank account.

7. In September and October 2015, three Pundamilian citizens filed separate complaints against Mrs. Fisi, alleging that she had sold them a fake Van Tembo painting and initiated a civil action to recover the money. Moreover, on 13 January 2016, the Pundamilian police searched the premises of the Twigan Cultural Centre. There, they found and seized a Van Tembo painting which Pundamilian investigating authorities claimed was fake.

8. On 14 January 2016, the embassy of Twiga in Pundamilia sent a Note Verbale to the Ministry of Foreign Affairs of Pundamilia, explaining that the building in question was used for the purposes of the diplomatic mission and requesting Pundamilia to respect its inviolability and assure its protection for the future. On 16 January 2016, a Pundamilian judge ordered the attachment of the premises of the Twigan Cultural Centre. After that, Pundamilia replied to the Twigan Note Verbale that the building located at 22 Baobab Street could not be considered as part of the premises and, thus, did not enjoy inviolability.

9. In the meantime, the Savannah investigating judge issued a summons for Mrs. Fisi to appear for a preliminary examination. Mrs. Fisi did not appear before the investigating judge, claiming that she had immunity from the jurisdiction of the receiving State.

10. On 3 February 2016, the embassy of Twiga in Pundamilia sent another Note Verbale to the Ministry of Foreign Affairs of Pundamilia, suggesting a negotiated solution to the dispute about the jurisdictional immunity of Mrs. Fisi, as well as the inviolability and immunity of the premises located at 22 Baobab Street. Pundamilia never replied. Instead, in March 2016, Mrs. Fisi was indicted on criminal charges.

11. In June 1992, Pundamilia and Twiga had concluded a Military Assistance Agreement. Twenty years after that, in June 2012, the Minister of Defence of Pundamilia and a Twigan private company concluded a contract for the delivery of 12 military helicopters to Pundamilia. In June 2013, the first two helicopters were delivered, as it was agreed upon; the remaining ten were to be delivered in June 2016.

12. In May 2016, Twiga's Ministers of Defence and Foreign Affairs announced the suspension of the delivery of the remaining helicopters and urged Pundamilia to comply with its international obligations. Once again, Pundamilia failed to communicate.

13. In July 2016, Twiga filed an application against Pundamilia before the ICJ requesting the Court to adjudge and declare that Pundamilia, by instituting proceedings against Mrs. Fisi, breached her diplomatic immunity and inviolability. Twiga further requests the Court to adjudge and declare that the inviolability of the building at 22 Baobab Street was breached. Pundamilia made a counterclaim requesting the Court to adjudge and declare that the suspension of the delivery of the helicopters is a breach of the MAA. Both States have accepted the jurisdiction of the Court while the admissibility of the counterclaim is not contested.

**(e) Issues**

**I. Has Pundamilia breached the immunity from jurisdiction and the inviolability enjoyed by Mrs. Fisi under the VCDR and customary international law, by instituting proceedings against her?**

A. Has Pundamilia breached the immunity from criminal jurisdiction enjoyed by Mrs. Fisi under the VCDR and customary international law?

1. Does Mrs. Fisi enjoy immunity from criminal jurisdiction under the VCDR and customary international law?

2. Is the reservation appended by Pundamilia to Art. 31 of the VCDR valid under the VCLT and customary international law?

2.1. Is Pundamilia's reservation compatible with the object and purpose of the VCDR?

2.2. Has Twiga acquiesced to Pundamilia's reservation by not reacting to it?

2.3. Is it within the power of the Court to sever Pundamilia's reservation?

3. Does the initiation of criminal proceedings against Mrs. Fisi constitute a breach of the immunity from criminal jurisdiction enjoyed by her?

B. Has Pundamilia breached the immunity from civil jurisdiction enjoyed by Mrs. Fisi under the VCDR and customary international law?

1. Does Mrs. Fisi's conduct constitute professional or commercial activity outside her official functions, according to Art. 31 para. 1 (c) of the VCDR?

2. Has Pundamilia breached the immunity from civil jurisdiction enjoyed by Mrs. Fisi by allowing litigation against her to proceed?

C. Does the issuance of the indictment constitute a breach of the inviolability enjoyed by Mrs. Fisi under Art. 29 of the VCDR and customary international law?

D. Does the seizure of the painting by the Pundamilian police constitute a breach of the inviolability of Mrs. Fisi's property under Art. 30 of the VCDR?

**II. Has Pundamilia breached its obligations under international law, notably the VCDR and customary international law, by searching and attaching the premises of the Twigan Cultural Centre located at 22 Baobab Street in Savannah?**

A. Does the building located at 22 Baobab Street constitute part of the premises of the Twigan diplomatic mission in Pundamilia?

1. Is the building used for mission purposes?
2. Does the diplomatic status of the building depend on prior notification to the receiving State?

B. Has Pundamilia breached the immunity and the inviolability of the mission premises under Art. 22 of the VCDR and customary international law, by searching and attaching the premises?

**III. Has Twiga breached its obligation under Art. I of the MAA, by suspending the delivery of ten military helicopters?**

A. Did Twiga violate Art. I of the MAA?

B. Did Twiga violate its obligations under international law by suspending the MAA?

1. Can Twiga invoke the severance of diplomatic relations under Art. 63 of the VCLT and the supervening impossibility of performance under Art. 61 of the VCLT as grounds for the suspension of the MAA?

1.1. Are diplomatic relations indispensable for the application of the MAA, so that their severe deterioration can be invoked as a ground for the suspension of the MAA under Art. 63 of the VCLT?

1.2. Are the conditions of Art. 61 of the VCLT met, so that supervening impossibility of performance can be invoked as a ground for the suspension of the MAA?

2. Is the procedure followed for the suspension of the MAA valid?

C. Is the breach of Art. I of the MAA, by suspending the contract, justified as a countermeasure?

1. Is Twiga's countermeasure reversible and commensurate?
2. Were the procedural requirements for recourse to countermeasures met?
3. In any case, can the countermeasures be considered as urgent?

**(f) Summary of Arguments**

**I. BY INSTITUTING PROCEEDINGS AGAINST MRS. FISI, PUNDAMILIA BREACHED THE IMMUNITY FROM JURISDICTION AND THE INVIOABILITY ENJOYED BY HER UNDER INTERNATIONAL LAW, NOTABLY THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS AND CUSTOMARY INTERNATIONAL LAW.**

A. Pundamilia breached the immunity from criminal jurisdiction enjoyed by Mrs. Fisi under the VCDR and customary international law.

1. By virtue of Art. 37 para. 1 of the VCDR the spouse of the diplomatic agent enjoys the same privileges and immunities as the diplomatic agent laid down in Arts. 29 to 36 of the VCDR. Therefore, Mrs. Fisi, being the wife of the Ambassador, enjoys immunity from criminal jurisdiction.

2. The reservation appended by Pundamilia to Art. 31 of the VCDR is invalid under the VCDR and customary international law.

2.1. Pundamilia's reservation to Art. 31 of the VCDR is incompatible with the object and purpose of the VCDR, according to Art. 19 (c) of the VCLT and customary international law.

2.2. Pundamilia's reservation is null and void *ab initio*. Consequently, Twiga's lack of objection does not affect its nullity.

2.3. It is within the inherent power of the Court to sever invalid reservations, such as Pundamilia's.

3. The initiation of criminal proceedings, i.e. the issuance of a summons and an indictment, against Mrs. Fisi constitutes a breach of the immunity from criminal jurisdiction she enjoys.

B. Pundamilia breached the immunity from civil jurisdiction enjoyed by Mrs. Fisi under the VCDR and customary international law.

1. Mrs. Fisi's conduct is held under the auspices of the Twigan embassy, in accordance with Art. 3 of the VCDR. Mrs. Fisi is not acting out of private interests. Therefore, Mrs. Fisi's conduct does not constitute professional or commercial activity outside her official functions as provided by Art. 31 para. 1 (c) of the VCDR.

2. Pundamilia, by allowing litigation against Mrs. Fisi to proceed, breached the immunity from civil jurisdiction enjoyed by her.

C. The issuance of the indictment, which is a potentially coercive measure constitutes a breach of the inviolability enjoyed by Mrs. Fisi under Art. 29 of the VCDR and customary international law.

D. The seizure of the painting by the Pundamilian police constitutes a breach of the inviolability of Mrs. Fisi's property under Art. 30 of the VCDR.

**II. BY SEARCHING AND ATTACHING THE PREMISES OF THE TWIGAN CULTURAL CENTRE LOCATED AT 22 BAOBAB STREET IN SAVANNAH WHICH ARE THE PROPERTY OF THE REPUBLIC OF TWIGA AND USED FOR THE PURPOSES OF THE DIPLOMATIC MISSION IN PUNDAMILIA, PUNDAMILIA BREACHED ITS OBLIGATIONS UNDER INTERNATIONAL LAW, NOTABLY THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS AND CUSTOMARY INTERNATIONAL LAW.**

A. The building located at 22 Baobab Street constitutes part of the premises of the Twigan diplomatic mission in Pundamilia.

1. Through the Cultural Center cultural exchange between Pundamilia and Twiga is promoted, as provided in Art. 3 of the VCDR. In this sense, Twiga is represented in Pundamilia through the building located at 22 Baobab Street as well. Therefore, it is

submitted that the premises at 22 Baobab Street are used for the purposes of the diplomatic mission.

2. The diplomatic status of the building does not presuppose prior notification neither under the VCDR and customary international law nor under the national legislation of Pundamilia.

B. Pundamilia, by searching and attaching the Twigan diplomatic premises, breached their immunity and inviolability under Art. 22 of the VCDR and customary international law.

**III. BY SUSPENDING THE DELIVERY OF 10 MILITARY HELICOPTERS, TWIGA DID NOT BREACH ITS OBLIGATIONS UNDER ARTICLE I OF THE MILITARY ASSISTANCE AGREEMENT.**

A. The contract was signed between the Minister of Defence of Pundamilia and the Twigan private company. For this reason it is irrelevant to the MAA. Therefore, Twiga did not violate Art. I of the MAA.

B. Even if the contract is an application of the MAA, Twiga has no obligation under the treaty, since it was suspended.

1. Twiga can invoke the severance of diplomatic relations and the supervening impossibility of performance as grounds for the suspension of the MAA, under Arts. 63 and 61 of the VCLT.

1.1. Diplomatic relations are indispensable for the application for the MAA, which is a political treaty. Because of the severe deterioration of diplomatic relations between Twiga and Pundamilia, Twiga can invoke Art. 63 as a ground for the suspension of the MAA.

1.2. Since there is no communication between Pundamilia and Twiga, their diplomatic relations have temporarily disappeared. This disappearance is a result of Pundamilia's



wrongful conduct. Therefore, Twiga can invoke Art. 61 as a ground for the suspension of the MAA.

2. Even if Twiga did not notify Pundamilia of the suspension, Twiga may, according to Art. 65 para. 5, make the notification as soon as Pundamilia request performance of the relevant obligation, that is, with respect to Pundamilia's counterclaim.

C. The breach of Art. I of the MAA, by suspending the contract, is justified as a countermeasure.

1. Twiga's countermeasure meets the conditions of reversibility and proportionality.

2. Twiga has called upon Pundamilia to comply with its international obligations before resorting to countermeasures.

3. Pundamilia did not reply to Twiga's Note Verbale, while criminal proceedings are still ongoing. Consequently, Twiga can resort to urgent countermeasures.

**(g) Jurisdiction of the Court**

Both Twiga and Pundamilia are members of the United Nations and parties to the Statute of the International Court of Justice. By virtue of Article 36 para. 2 of the ICJ Statute both States have submitted declarations accepting the Court's compulsory jurisdiction without any reservations. The jurisdiction of the Court over the present case is thus founded on Art. 36 para. 2 of the ICJ Statute.

Twiga has filed two claims. Pundamilia does not contest the jurisdiction of the Court or the admissibility of Twiga's claims. The Respondent has also filed a counterclaim. Twiga does not contest the jurisdiction of the Court or the admissibility of the counterclaim.

**(h) Argument****I. BY INSTITUTING PROCEEDINGS AGAINST MRS. FISI, PUNDAMILIA BREACHED THE IMMUNITY FROM JURISDICTION AND THE INVIOLABILITY ENJOYED BY HER UNDER INTERNATIONAL LAW, NOTABLY THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS AND CUSTOMARY INTERNATIONAL LAW.****A. Introduction**

It is the submission of Twiga that Mrs. Fisi enjoys immunity from jurisdiction and inviolability both under the Vienna Convention on Diplomatic Relations (hereinafter the VCDR) and customary international law. The reservation appended to Article 31 of the VCDR by Pundamilia is impermissible and should be severed by the Court. Furthermore, it is submitted that Mrs. Fisi's conduct was consistent with the mission's official functions. Therefore, Pundamilia, by instituting proceedings against Mrs. Fisi breached its obligation under Article 31 of the VCDR and customary international law.

**B. Pundamilia breached the immunity from criminal jurisdiction enjoyed by Mrs. Fisi.****1. Mrs. Fisi is entitled to immunity from criminal jurisdiction under the VCDR and customary international law.**

By virtue of Art. 31 para. 1 of the VCDR, the diplomatic agent enjoys immunity from the criminal jurisdiction of the receiving State. The diplomatic agent can operate effectively only when allowed to perform his duties without fear of prosecution.<sup>1</sup> Thus, he/she cannot be subjected to criminal trial or investigation by the receiving State.<sup>2</sup> Immunity from the criminal

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<sup>1</sup> *Arrest Warrant Case*, 2002, para. 52; Wilson, 1984, pp. 117-118; Ross, 1989, pp. 178-179; Barker, 1996, pp. 241, 243.

<sup>2</sup> *Diplomatic and Consular Staff in Tehran Case*, 1979, para. 79; Cahier, 1969, p. 27.

jurisdiction of the receiving State is complete and covers both official and private acts.<sup>3</sup> Art. 31 para. 1 reflects a well-established rule of customary international law.<sup>4</sup>

Art. 37 para. 1 extends the enjoyment of such immunity to the members of the family of the diplomatic agent forming part of his household, if they are not nationals of the receiving State. It is necessary for the diplomatic family to enjoy the same level of protection as the diplomatic agent for the obvious reason that he/she must feel free of any pressure.<sup>5</sup> Although the term “family members” is not defined in the VCDR, the spouse has always been regarded as the extension of the person of the diplomat, and, thus, a member of the family for the purposes of Art. 37 para. 1.<sup>6</sup> Indeed, the immunity of the spouse of the diplomatic agent has been recognized as a rule of customary law even prior to the conclusion of the VCDR.<sup>7</sup>

In the present case, Mrs. Fisi fulfils the criteria for the enjoyment of the immunity from criminal jurisdiction under Art. 37 para. 1 of the VCDR, since she is both the wife of the Ambassador and a Twigan national.

## **2. The reservation appended by Pundamilia has no legal effect and should be severed by the Court.**

Upon ratification of the VCDR in 1961, Pundamilia appended a reservation to Art. 31 according to which Articles 31 and 37 are to be interpreted as not granting a diplomatic agent

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<sup>3</sup> Watts, 1999, p. 190; Wickremasinghe, 2014, p. 381.

<sup>4</sup> *Diplomatic and Consular Staff in Tehran Case*, 1979, para. 62; *Arrest Warrant Case*, 2002, para. 51; Nahlik, 1990, p. 252; O’Keefe, 2015, p. 414.

<sup>5</sup> O’Keefe, 1976, pp. 330, 332-333; Brown, 1988, pp. 332-333; Klabbbers, 2013, p. 103.

<sup>6</sup> ILC Report to the UNGA, 1957, p. 141; Wilson, 1967, p. 184; Satow’s, 2009, p. 156; Yavuz, 2013, p. 174.

<sup>7</sup> *Friedberg v. Santa Cruz Case*, 1949; *People v. Von Otter Case*, 1952; Wilson, 1965, p. 1279.

and the members of his family immunity from the criminal jurisdiction of the receiving State in relation to professional or commercial activities.<sup>8</sup> Twiga submits that this reservation is not compatible with the object and purpose of the VCDR, according to Art. 19 (c) of the Vienna Convention on the Law of Treaties (hereinafter the VCLT<sup>9</sup>) and customary law.

### **2.1. The reservation is incompatible with the object and purpose of the VCDR.**

When a treaty is silent with respect to reservations, as the VCDR is, their legality is determined by the default rule of the compatibility with the object and purpose of the treaty.<sup>10</sup> This principle, which was upheld by the ICJ<sup>11</sup> and accepted by the ILC as a generally applicable rule to all multilateral treaties,<sup>12</sup> has been codified in Art. 19 (c) of the VCLT.

In determining a treaty's object and purpose, both the preamble and the text of the instrument are to be taken into account.<sup>13</sup> The object and purpose of the VCDR is the maintenance of friendly relations among nations.<sup>14</sup> The VCDR grants privileges and immunities to diplomatic missions because their unhindered function is essential for the conduct of diplomatic relations,<sup>15</sup> as was also held by the ICJ.<sup>16</sup> In this sense, Art. 31, which provides for

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<sup>8</sup> See para. 6 of the Case.

<sup>9</sup> Art. 19 (c) of the VCLT.

<sup>10</sup> VCLT Draft with commentaries, 1966, p. 205; Marsh, 2015, p. 98.

<sup>11</sup> *Genocide Advisory Opinion*, 1951, p. 13; Liang, 1952, p. 485.

<sup>12</sup> VCLT Draft with commentaries, 1966, p. 205; Anderson, 1964, pp. 470-471; Edwards, 1989, p. 389; Linderfalk, 2003, p. 443.

<sup>13</sup> Villiger, 2009, p. 272; Oxford Guide to Treaties, 2012, pp. 657-658.

<sup>14</sup> Buffard & Zemanek, 1998, p. 336.

<sup>15</sup> Preamble of the VCDR; Kerley, 1962, pp. 92-93; Bergmar, 2014, pp. 508-509.

<sup>16</sup> *Diplomatic and Consular Staff in Tehran Case*, Order, 1979, para. 38; Michaels, 1971, pp. 7-

absolute immunity of the diplomatic agent and the members of his family from criminal jurisdiction, is a core provision of the VCDR. This is also confirmed by the absence of any reservations to the Art. 31.<sup>17</sup> Therefore, a reservation that restricts the enjoyment of such immunity is manifestly incompatible with the object and purpose of the VCDR.

In the present case, the incompatibility of Pundamilia's reservation lies exactly in the fact that the pressure of criminal proceedings put on the diplomatic agent, either directly or through his family, hinders the conduct of diplomatic communication and risks the maintenance of friendly relations.

## **2.2. Twiga's non reaction to the reservation does not affect its nullity.**

Reservations incompatible with the object and purpose of the treaty are void *ab initio*.<sup>18</sup> Objections have legal effects only to valid reservations; thus, lack of objection, for one reason or another, is not deemed to be acceptance of the impermissible reservation.<sup>19</sup> Indeed, the ILC had concluded that the compatibility test should stand as an objective test, independent from the opinions of other States, even prior to the conclusion of the VCDR.<sup>20</sup> Pundamilia appended its reservation in December 1961 and Twiga ratified the VCDR in 1962, without objecting to Pundamilia's reservation. It is submitted that Twiga's lack of objection to Pundamilia's reservation is devoid of any legal effect.

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<sup>17</sup> VCDR Status on 8/1/2017.

<sup>18</sup> ILC Guide to Practice with commentaries, 2011, p. 410, para. 4; Pellet's Tenth Report on Reservations to Treaties, 2005, p. 187; Swaine, 2006, p. 316.

<sup>19</sup> ILC Report on Reservations to Treaties, 1997, p. 51, para. 107; Milanovic & Sicilianos, 2013, p. 1058.

<sup>20</sup> Bowett, 1976, p. 89; Edwards, 1989, p. 390; Cassese, 2005, p. 175; Aust, 2013, p. 128.

### **2.3. It is within the inherent power of the Court to apply the VCDR without the benefit of the reservation.**

Concerning the residual treaty relations between the reserving State and the other States parties, in case of impermissible reservations, three options have been put forward: a) the reserving State remains bound by the treaty without the benefit of the reservation; b) the reserving State remains party to the treaty except for the provision(s) to which the reservation related; c) the reserving State is not bound by the treaty at all.<sup>21</sup>

It has been strongly suggested, however, that an invalid reservation is null and void<sup>22</sup> and that the reserving State should be bound by the treaty without the benefit of the reservation, unless it has expressed the intention that in such case it would not be considered party to it at all.<sup>23</sup> It has been supported that the Court can sever incompatible reservations.<sup>24</sup> The severability doctrine has been applied in several cases by the ECHR and the HRC<sup>25</sup> and even when no objection towards the reserving State was ever expressed.<sup>26</sup> According to Art. 36 para. 6 of the ICJ Statute,<sup>27</sup> severance of the reservation is well within inherent powers of the Court.

Pundamilia never expressed an intention of not being bound by the VCDR in case its

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<sup>21</sup>, 2012, p. 293.

<sup>22</sup> ILC Guide to Practice, 2011, para. 4.5.1.

<sup>23</sup> *Ibid.*, para. 4.5.3; McCall-Smith, 2014, p. 611.

<sup>24</sup> Lauterpacht Separate Opinion (*Norwegian Loans Case*), 1957, pp. 56-57; Lauterpacht Dissenting Opinion (*Interhandel Case*), 1959, pp. 116-117.

<sup>25</sup> *Belilos Case*, 1988, paras. 50, 60; *Weber Case*, 1990, paras. 38-40; *Loizidou Case*, 1996, paras. 96-97; HRC General Comment 24; *Rawle Kennedy Case*, 1999, paras. 6.4-6.7.

<sup>26</sup> Edwards, 2000, p. 195.

<sup>27</sup> Art. 36 para. 6 of the ICJ Statute.

reservation was found to be severable. Therefore, Twiga submits that the Court should sever Pundamilia's reservation to Art. 31 and apply the VCDR as a whole.

### **3. Pundamilia acted in breach of its obligation under the VCDR and customary international law.**

In September and October 2015, three Pundamilian citizens filed separate complaints with the Pundamilian Public Prosecutor against Mrs. Fisi, alleging that the paintings she sold them were fake. On 17 January 2016 Pundamilia instituted criminal proceedings against Mrs. Fisi by issuing a summons. In March 2016, Mrs. Fisi was indicted on criminal charges. It is, therefore, submitted that Pundamilia has breached its obligation under Art. 31 para. 1 of the VCDR and customary law.

#### **C. Pundamilia breached the immunity from civil jurisdiction enjoyed by Mrs. Fisi.**

Immunity from the civil jurisdiction of the receiving State is well established in customary international law.<sup>28</sup> This is codified in Art. 31 para 1 of the VCDR and is also extended to the spouse of the diplomatic agent by virtue of Art. 37 para. 1.<sup>29</sup> However, Art 31 excludes its enjoyment in respect of action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.<sup>30</sup> Since this is an exception to the general rule, it should be narrowly construed.<sup>31</sup>

The term commercial activity is not defined in the VCDR, but it is perceived as the pursuit of commercial purposes for personal profit.<sup>32</sup> However, the beneficiary continues to

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<sup>28</sup> *Arrest Warrant Case*, 2002, para. 51; Värk, 2005, p. 29.

<sup>29</sup> Zoglio, 1977, p. 34.

<sup>30</sup> Art. 31 para. 1 (c) of the VCDR.

<sup>31</sup> *Nationality Decrees Advisory Opinion*, 1923, p. 25.

<sup>32</sup> *Costa Rica v. Nicaragua Case*, 2009, p. 241; *Tabion v. Mufti Case*, 1996, pp. 455-456;



enjoy immunity when, even if the activity he undertakes is *prima facie* commercial or professional, it is nevertheless connected with his official functions or the sending State instructed him to engage in it.<sup>33</sup>

By virtue of Art. 37 para. 1 the clause “official functions” also refers to the spouse of the diplomatic agent, having been already stated that she is the extension of the person of the diplomat.<sup>34</sup> Moreover, it is very common in State practice for the diplomatic spouse to exercise representative functions and engage herself in cultural activities.<sup>35</sup> Cultural exchange is among the official functions of a diplomatic mission under Art. 3 para. 1 (e).

Twiga submits that Mrs. Fisi was not acting out of private interests. Her activity was held under the auspices of the Twigan Embassy.<sup>36</sup> This is evident from both the fact that it remained unchanged even after the acquisition of the building by Twiga, and that the Embassy provided equipment and services and received 30% of the profits for them. Moreover, Mrs. Fisi’s intention was the promotion of cultural exchanges, not personal profit. The exhibition and the free workshops she hosted manifest this very intention. The 70% of the proceeds she kept from the sales does not constitute profit out of commercial activity or remuneration for professional activity. It is rather a compensation for the time she spends and the aid she offers towards the performance of the official functions of the Twigan diplomatic mission.

In September and October 2015 three Pundamilian citizens initiated civil action against Mrs. Fisi to recover the money spent on the purchase of the paintings. The Pundamilian civil

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*Propend* Case, 1996, p. 612.

<sup>33</sup> *Portugal v. Goncalves* Case, 1982, p. 117; Värk, 2005, p. 39; Krieger, 2014, p. 185.

<sup>34</sup> See *supra*, p. 2.

<sup>35</sup> Delcorde, 2012, p. 137.

<sup>36</sup> See *infra*, p. 11.

courts did not recognize Mrs. Fisi's immunity and allowed the proceedings to move forward.<sup>37</sup>

In light of the above, it is submitted that the commercial and professional activity exception is not applicable in this case. Therefore, by allowing civil proceedings to move forward, Pundamilia breached the immunity from civil jurisdiction that Mrs. Fisi enjoys under the VCDR and customary international law.

**D. Pundamilia breached the inviolability enjoyed by Mrs. Fisi.**

**1. Pundamilia breached Mrs. Fisi's personal inviolability under Art. 29 of the VCDR.**

Art. 29 of the VCDR provides that the person of a diplomatic agent shall be inviolable and that the receiving State shall treat him with due respect. The inviolability of the diplomatic agent suggests that no measures amounting to his direct coercion should be taken against him.<sup>38</sup> However, as held by the ICJ in the *Arrest Warrant Case*, inviolability can also be breached through measures which do not constitute direct coercion, but can inevitably lead to it, e.g. the issuance of an arrest warrant.<sup>39</sup> The principle of personal inviolability is well established as a rule of customary international law.<sup>40</sup>

In the present case, the issuance of the indictment suggests that the intention of the Pundamilian authorities was to pursue a criminal trial on the question whether the paintings Mrs. Fisi sold were fake. The indictment is a coercive measure as it precedes the issuance of the arrest warrant. Furthermore, Pundamilia disregarded Twiga's request for the recognition of Mrs. Fisi's privileged status implying that proceedings were to continue. It is, therefore, submitted that Pundamilia by allowing a procedure which would lead to her direct coercion,

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<sup>37</sup> See Clarifications on the Case, No. 37.

<sup>38</sup> ILC Report to the UNGA, 1958, p. 97; Whiteman, 1970, p. 132.

<sup>39</sup> *Arrest Warrant Case*, 2002, para. 70; Summers, 2008, pp. 470-471.

<sup>40</sup> *Diplomatic and Consular Staff in Tehran Case*, Order, 1979, para. 38; Denza, 2016, p. 213.

breached her inviolability under the VCDR and customary law.

## **2. Pundamilia breached the inviolability of Mrs. Fisi's property under Art. 30 of the VCDR.**

Under Art. 30 of the VCDR, the property of a diplomatic agent shall enjoy inviolability, if it is not related to any commercial or professional activity. The property of the spouse of the diplomatic agent enjoys the same inviolability according to Art. 37 para. 1 of the VCDR. The term "property" is not defined in the VCDR but it is accepted in State practice that it refers, among other things, to goods which are essential to diplomatic agent's duties.<sup>41</sup> Moreover, everything located inside the premises of the diplomatic mission constitutes inviolable property.<sup>42</sup>

In September 2014, Mrs. Fisi, after consulting the Ambassador, set up the Twigan Cultural Centre in the premises located at 22 Baobab Street, adjacent to the embassy's building. Mrs. Fisi's contribution to the promotion of cultural exchanges between Twiga and Pundamilia was based, among other things, on the artwork exhibited which were part of her private collection. On 13 January 2016, the Pundamilian police entered the premises of the Twigan Cultural Centre and seized a Van Tembo painting used for the purposes of the exhibition. Therefore, it is submitted that the Pundamilian police by seizing the painting breached the inviolability of Mrs. Fisi's property.

### **E. Conclusion**

In light of the above, it is submitted that, since the reservation appended to Article 31 of the VCDR by Pundamilia is impermissible and Mrs. Fisi's conduct was consistent with the mission's official functions, Pundamilia by instituting proceedings against Mrs. Fisi breached

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<sup>41</sup> *Novello v. Toogood* Case, 1823; Hurst, 1926, p. 126; Denza, 2016, p. 229.

<sup>42</sup> Hardy, 1968, p. 49.

the immunity from criminal and civil jurisdiction and the inviolability enjoyed by her under international law.

**II. BY SEARCHING AND ATTACHING THE PREMISES OF THE TWIGAN CULTURAL CENTRE LOCATED AT 22 BAOBAB STREET IN SAVANNAH WHICH ARE THE PROPERTY OF THE REPUBLIC OF TWIGA AND USED FOR THE PURPOSES OF ITS DIPLOMATIC MISSION IN PUNDAMILIA, PUNDAMILIA BREACHED ITS OBLIGATIONS UNDER INTERNATIONAL LAW, NOTABLY THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS AND CUSTOMARY INTERNATIONAL LAW.**

**A. Introduction**

It is the submission of Twiga that Pundamilia has violated the immunity and inviolability of the mission premises. The building located at 22 Baobab Street constitutes part of the premises of the Twigan diplomatic mission in Pundamilia and is entitled to these privileges under the VCDR and customary international law. It will also be demonstrated that notification of acquisition of premises does not affect their diplomatic status. Therefore, Pundamilia, by entering, searching, and attaching these premises, violated this obligation.

**B. The building located at 22 Baobab Street constitutes part of the premises of Twiga's diplomatic mission in Pundamilia.**

**1. The building is used for mission purposes.**

Art. 1 (i) of the VCDR defines the "premises of the mission" as the buildings or parts of buildings, irrespective of ownership, used for the purposes of the mission. It is evident that the decisive factor is, as also held by the ICJ,<sup>43</sup> that the building must be used for diplomatic

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<sup>43</sup> *Equatorial Guinea v. France* Case, Order, 2016.

purposes.<sup>44</sup> By virtue of Art. 3 of the VCDR, the functions of a diplomatic mission consist of, *inter alia*, representing the sending State in the receiving State, and promoting friendly relations between the sending State and the receiving State, as well as developing their economic, cultural and scientific relations. This implies certain initiatives on the part of the mission which shall be received with good will by local authorities.<sup>45</sup>

The premises located at 22 Baobab Street is a building adjacent to the Embassy at 20 Baobab Street. It is submitted that the premises have been used for the purposes of the diplomatic mission ever since Mrs. Fisi acquired them, since the free workshops held by Mrs. Fisi and the exhibition of paintings and sculptures serve as a means towards the development of cultural relations. This activity has been under the auspices of the Twigan mission and remained unaltered even after the Republic of Twiga acquired the building.

The representative function is not only perceived in the strictly legal sense; it also means that one State is made present in another through its Embassy.<sup>46</sup> Through the Cultural Center cultural exchange between Pundamilia and Twiga is promoted, as provided in Art. 3 of the VCDR. In this sense, the Cultural Center is instrumental for the representation of Twiga in Pundamilia. It is evident that Twiga is represented in Pundamilia through both buildings. Therefore, it is submitted that the premises at 22 Baobab Street are used for the purposes of the diplomatic mission.

## **2. The diplomatic status of the building does not presuppose prior notification.**

The VCDR does not impose any obligation on the sending State to notify or request the approval of the receiving State in case of acquisition of premises which shall be used or are

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<sup>44</sup> Cahier, 1969, p. 20; Gardiner, 2003, p. 347; Denza, 2016, p. 16.

<sup>45</sup> Dembinski, 1988, p. 43; Denza, 2016, p. 35.

<sup>46</sup> Dembinski, 1988, p. 40.

already in use as mission premises.<sup>47</sup> It is true that national legislation in some States requires notification of acquisition of property to be used as mission premises.<sup>48</sup> However, acquisition of property is subject to the laws of the receiving State,<sup>49</sup> thus, it is not a matter of international law. Moreover, national courts have on several occasions held that there is no obligation of prior notification;<sup>50</sup> it is the actual and present use of buildings for mission purposes that triggers their inviolability and immunity.<sup>51</sup>

Pundamilian national legislation does not impose an obligation of notification.<sup>52</sup> Twiga is not obliged to notify under international law either. In any event, on 14 January 2016, after the search and seizure by Pundamilian police of the premises of the Twigan Cultural Centre, the embassy of Twiga in Pundamilia sent a Note Verbale to the Ministry of Foreign Affairs of Pundamilia, explaining that the building in question is used for the purposes of the diplomatic mission. Consequently, it is submitted that lack of notification does not affect the diplomatic status of the premises and their inviolability.

### **3. The building can be identified as mission premises.**

According to Art. 20 of the VCDR, the sending State has the right to use its flag and emblem on the premises of the mission. The role of the flag is to assist the authorities of the

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<sup>47</sup> Davidson, Freestone, Lowe & Warbrick, 1986, p. 434; Denza, 2016, p. 16.

<sup>48</sup> US Foreign Missions Act, 1982; UK Diplomatic Premises Act, 1987.

<sup>49</sup> ILC Report to the UNGA, 1958, p. 95.

<sup>50</sup> D'Aspremont, 2009, pp. 3-4.

<sup>51</sup> *Tietz et al. v. Bulgaria* Case, 1959, pp. 372, 374; *Weinmann v. Latvia* Case, 1959, pp. 387-388, 390; *Bennett and Ball v. Hungary* Case, 1959, p. 396; *Cassirer and Geheeb v. Japan* Case, 1959, pp. 398-399.

<sup>52</sup> See Clarifications on the Case, No. 8.

receiving State to accord the privileges and immunities that the mission premises are entitled to, under the VCDR.<sup>53</sup> The receiving State shall act with due diligence when encountering such indications, before attempting enforcement of local jurisdiction.<sup>54</sup>

In the present case, the Twigan flag and the sign “Diplomatic Mission of the Republic of Twiga in Pundamilia” were placed outside the premises at 22 Baobab Street. These indications embody the intention of Twiga to expand the premises of its mission. It must be also noted that the acquisition of the building was registered in the Pundamilian land registry system.<sup>55</sup> Therefore, it is submitted that Pundamilia was aware that the building constitutes part of the mission premises.

### **C. Pundamilia breached Art. 22 of the VCDR and customary international law.**

#### **1. Pundamilia breached the inviolability of the Twigan mission premises.**

Art. 22 para. 1 of the VCDR provides that the premises of the mission are inviolable and the agents of the receiving State may not enter them except with the consent of the head of the mission. Without such consent, local authorities cannot enter the premises, even in cases of emergency.<sup>56</sup> Inviolability of the mission premises is a well-established rule of customary international law, imposing an obligation of result to the receiving States without any exception or derogation.<sup>57</sup> Thus, Art. 22 is not rendered inapplicable even when the premises are not used

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<sup>53</sup> Official Records, 1961, p. 129, para. 52; Nahlik, 1990, p. 279.

<sup>54</sup> Barnidge, 2006, p. 82; Crawford, 2013, p. 227.

<sup>55</sup> See Clarifications on the Case, No. 4.

<sup>56</sup> Sen, 1979, p. 93; Denza, 2007, p. 161; Satow’s, 2009, p. 102; Feltham, 2012, p. 35.

<sup>57</sup> *Diplomatic and Consular Staff in Tehran Case*, 1979, para. 62; Murty, 1989, p. 373; Nahlik, 1990, p. 273; Värk, 2008, p. 146; Brownlie’s Principles, 2012, p. 403.

for legitimate purposes.<sup>58</sup>

On 13 January 2016, the Pundamilian police entered the premises of the Twigan Cultural Centre, used for the purposes of the Twigan diplomatic mission. Local authorities neither attempted any prior communication towards confirming the diplomatic status of the premises nor did they request the consent of the head of the mission before entering. As a result, no authorization had been given by Mr. Fisi, the Ambassador of Twiga in Pundamilia. It is submitted that, by doing so, Pundamilia breached the inviolability of the premises of the Twigan embassy under the VCDR and customary international law.

## **2. Pundamilia breached the immunity of the Twigan mission premises.**

Art. 22 para. 3 of the VCDR provides that the premises of the mission shall be immune from search, requisition, attachment or execution. Accordingly, the enforcement of any decision of the courts of the receiving State shall not affect the premises of the mission, even if subsequent restriction of State immunity has occurred.<sup>59</sup>

On 13 January 2016, the Pundamilian police entered the premises of the Twigan Cultural Centre without the prior consent of Mr. Fisi, the Ambassador of Twiga. Even if the police was not aware of the actual use of the building as mission premises beforehand, it must have noticed, upon entry, the door connecting the two buildings. Despite that, the police conducted a thorough search of the building located at 22 Baobab Street. Therefore, this search constitutes a violation of the immunity which the premises are entitled to under international law.

In any event, Pundamilia was notified through the Note Verbale of January 14 on the actual use of the building as mission premises. However, on 16 January the Savannah judge

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<sup>58</sup> ILC Report to the UNGA, 1958, p. 104; Cahier, 1969, p. 21.

<sup>59</sup> D'Aspremont, 2009, p. 13.



ordered the attachment of these premises. Therefore, the execution of this order is an act in violation of the immunity accorded to these premises.

#### **D. Conclusion**

In light of the above, it is submitted that the Government of Pundamilia, in entering, searching, and attaching the premises located at 22 Baobab Street, which are used for the purposes of the Twigan diplomatic mission in Pundamilia, violated its international legal obligations towards Twiga, as provided by Art. 22 of the VCDR and customary international law.

### **III. BY SUSPENDING THE DELIVERY OF 10 MILITARY HELICOPTERS, TWIGA DID NOT BREACH ITS OBLIGATIONS UNDER ARTICLE I OF THE MILITARY ASSISTANCE AGREEMENT.**

#### **A. Introduction**

It is the submission of Twiga that it has not breached Art. I of the Military Assistance Agreement (hereinafter the MAA), as the contract signed by the Minister of Defence of Pundamilia and Twiga Helicopters Inc. is not in application of the MAA. In any event, Twiga was entitled to suspend the operation of the MAA, due to the severance of diplomatic relations and the supervening impossibility of performance, under Arts. 63 and 61 of the VCLT. In any event, if Twiga is found to be in breach of its international obligations, it is submitted that the wrongfulness of its act is precluded since it constitutes a lawful countermeasure.

#### **B. Twiga did not violate Art. I of the MAA.**

Art. I para. 1 of the MAA provides that Twiga will make available to Pundamilia assistance which consists, *inter alia*, of equipment, materials, and services, and whose furnishing may be restricted only for imperative security reasons. Moreover, the two Governments will negotiate detailed arrangements as well as the terms and conditions of the furnishing of such assistance.

Pursuant to Art. 31 para. 1 of the VCLT, a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The ordinary meaning of the terms of the treaty is the starting point of interpretation and usually reflects the common intention of the parties.<sup>60</sup> According to the ordinary meaning of the phrase “make available”, Art. I para, 1 of the MAA requires positive action on behalf of Twiga, while the phrase “negotiations from time to time” alludes to the actual and continuing negotiations between the two countries, Twiga and Pundamilia.

The MAA was concluded in June 1992. Twenty years later, in June 2012, the Minister of Defence of Pundamilia concluded a contract with Twiga Helicopters Inc., a private company, for the delivery of 12 military helicopters to Pundamilia. In May 2016, the Minister of Defence and the Minister of Foreign Affairs of Twiga announced that the delivery of the remaining 10 military helicopters was suspended in reaction to Pundamilia’s conduct. Negotiations between Twiga and Pundamilia, according to Art. I of the MAA, concerning this particular contract had never taken place. This contract constitutes a business transaction between Pundamilia and a private company located in the territory of Twiga and is, therefore, irrelevant to the MAA. Twiga does not contest whether the suspension is attributable to it or not. However, it is submitted that the non-delivery was not an internationally wrongful act. Therefore, Twiga did not breach its obligations under Art. I para. 1 of the MAA.

**C. In any event, the suspension of the MAA did not constitute a breach of Twiga’s obligations under international law.**

It is submitted that Twiga did not violate Art. I of the MAA, since it has suspended the treaty. Twiga was entitled to suspend the operation of the MAA, by invoking the severance of

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<sup>60</sup> *Interpretation of the Treaty of Lausanne* Advisory Opinion, 1925, p. 19; Bjorge, 2015, p. 190.

diplomatic relations and the supervening impossibility of performance, under Arts. 63 and 61 of the VCLT and in accordance with the procedural requirements of Art. 65 para. 1.

## **1. Grounds for the suspension of the MAA.**

### **1.1. Severance of diplomatic relations.**

Art. 63 of the VCLT provides that the severance of diplomatic relations between parties affects the legal relations established between them by a treaty, if the existence of diplomatic relations is indispensable for the application of the treaty. This suggests that severance of diplomatic relations can be invoked as a ground for the suspension of a treaty, if they are indispensable for its application,<sup>61</sup> i.e. where diplomatic means are the only technical method of executing that treaty,<sup>62</sup> and refers to parties to a treaty which had normal diplomatic relations prior to their severance.<sup>63</sup> This applies to political treaties, such as treaties of alliance etc., since the existence of diplomatic relations is required for their continued implementation,<sup>64</sup> while severance of diplomatic relations might be incompatible with their implementation.<sup>65</sup>

The MAA, which was concluded twenty years ago, at a time when the two parties maintained diplomatic relations, is a political treaty. This is evident from the object and purpose of the treaty as well as by its actual content. Specifically, for the application of the MAA “negotiations from time to time” are required between the two countries as well as “detailed arrangements”. No assistance agreement is conceivable without the existence of well established diplomatic relations and, actually, friendly relations between the states concerned.

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<sup>61</sup> Angelet, 2011, pp. 1443-1444.

<sup>62</sup> *LAFICO and Burundi Case*, 1991, p. 284.

<sup>63</sup> Angelet, 2011, p. 1442.

<sup>64</sup> Scheffer, 1978, p. 964.

<sup>65</sup> VCLT Draft with commentaries, 1966, p. 261, para. 4.

For this reason, diplomatic relations are indispensable for the application of the MAA; they constitute both the technical means for its execution, and its *raison d'être*.

It is undoubtful that diplomatic relations require communication between States, so that political and economic relations can exist. In the present case, Pundamilia and Twiga maintained long-standing diplomatic relations prior to the incidents of 13 January and March 2016. The unjustified prosecution of Mrs. Fisi and the unauthorized entry to the mission premises led to severe deterioration of their diplomatic relations.

Pundamilia now denies to communicate with Twiga. It did not reply to the Note Verbale of 3 February 2016, in which Twiga suggested a negotiated solution to this dispute. It is evident that Twiga's intention was to restore their diplomatic relations, despite the severity of Pundamilia's violation. Communication, which constitutes the prerequisite of diplomatic relations, between the two countries no longer exists. Therefore, since diplomatic relations between Twiga and Pundamilia are indispensable for the application of the MAA, their severe deterioration can be invoked as a ground for its suspension under Art. 63 of the VCLT.

## **1.2. Supervening impossibility of performance.**

### **1.2.1. Disappearance of an object indispensable for the execution of the MAA.**

Under Art. 61 para. 1 of the VCLT, a party may invoke the impossibility of performing a treaty as a ground for suspending the operation of the treaty if the impossibility results from the temporary disappearance or destruction of an object indispensable for the execution of the treaty. The term "object", a concept separate from the "object" of Art. 61,<sup>66</sup> is often referred to as having a physical nature.<sup>67</sup> However, it could also be of juridical character;<sup>68</sup> it may be a

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<sup>66</sup> Waldock's Sixth Report on the Law of Treaties, 1966, p. 78, para. 2.

<sup>67</sup> Bodeau-Livinec & Morgan-Foster, 2011, p. 1387.

<sup>68</sup> *Gabčíkovo-Nagymaros Project Case*, 1997, para. 103.

legal situation which is the *raison d'être* of the treaty.<sup>69</sup> In this sense, Art. 63 certainly overlaps with Art. 61 concerning cases where diplomatic relations are indispensable for the application of the treaty.<sup>70</sup>

As aforementioned, diplomatic relations constitute the *raison d'être* of the MAA. In this sense, they are an object indispensable for the application of the MAA. Pundamilia, by not replying to the Note Verbale of 3 February 2016 for a negotiated solution offered by Twiga, implies its denial of communication. In fact, diplomatic relations have temporarily disappeared between the two countries. Therefore, Twiga submits that Art. 61 para. 1 can be invoked as ground for the suspension of the MAA.

### **1.2.2. The disappearance was not the result of a breach of the international obligations of Twiga.**

Para. 2 of Art. 61 provides that the impossibility of performance may not be invoked by a party as a ground for suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. The article distinguishes two situations in which a party cannot take advantage of its own wrongful conduct: a violation of the treaty in question and of any other obligation under international law.<sup>71</sup>

Twiga has not violated its obligation under Art. I of the MAA, nor any other obligation owed to Pundamilia under the VCDR or international law. The severe deterioration of diplomatic relations stems from Pundamilia's wrongful conduct. Therefore, it is submitted that Twiga can invoke Art. 61 of the VCLT for the suspension of the MAA.

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<sup>69</sup> ILC Report to the UNGA, 1963, p. 206, para. 2.

<sup>70</sup> Villiger, 2009, p. 760.

<sup>71</sup> *Ibid.*, pp. 758-759.

## **2. Validity of the procedure of the suspension of the MAA.**

Art. 65 para. 1 of the VCLT provides that a party which invokes a ground for suspending the operation of a treaty, must notify the other parties of its claim and that the notification must indicate the measure proposed to be taken with respect to the treaty and the reasons thereof. However, under Art. 65 para. 5, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in response to another party claiming performance of the treaty or alleging its violation.

It is true that Twiga did not notify Pundamilia of its intention to suspend the MAA. However, it did invite Pundamilia to negotiate in light of the severe deterioration of diplomatic relations. Pundamilia never replied; it filed a counterclaim instead. Therefore, it is Twiga's right to make the notification on the suspension of the MAA, under Art. 65 para. 5 of the VCLT, in its reply to Pundamilia's counterclaim, i.e. in this very memorial.

### **D. In any event, the breach of Art. I of the MAA, by suspending the contract, is justified as a countermeasure.**

In the event that the suspension of the delivery of the helicopters is considered to be unlawful, its wrongfulness is precluded as it can be justified as a countermeasure under international law. Under Arts. 49-52 of the ARSIWA,<sup>72</sup> countermeasures must be taken by an injured State against a wrongdoing State in response to its internationally wrongful conduct and must be limited to the temporary non-performance of an obligation. They must be reversible and commensurate to the injury suffered. Furthermore, the State resorting to countermeasures shall call upon the wrongdoing State to cease its wrongful conduct and inform it of its intention to resort to countermeasures. Notification is not necessary when countermeasures are urgent.<sup>73</sup>

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<sup>72</sup> Arts. 49-52 of the ARSIWA.

<sup>73</sup> Crawford, 2013, p. 701.

**1. The countermeasure is taken in response to Pundamilia's internationally wrongful conduct against Pundamilia and consists of the temporary non-performance of Twiga's obligation.**

The fundamental principle laid down in Art. 49 para. 1 is that countermeasures shall be taken by the injured State<sup>74</sup> in response to an internationally wrongful act against the responsible State.<sup>75</sup> Para. 2 suggests that countermeasures are temporary and, as such, they aim to restoring legality between the two States.<sup>76</sup>

It is submitted that Pundamilia has breached and continues to be in breach of its obligations owed to Twiga under the VCDR and international law. Furthermore, in the announcement of May 2016, the two Ministers declared that the suspension of the delivery of the helicopters was in reaction to the conduct of Pundamilia. Thus, Twiga has indicated that the aim of its action is to urge Pundamilia to comply with its international obligations.

**2. Twiga's countermeasure is reversible and commensurate.**

Under Art. 49 para. 3, countermeasures shall be taken in such a way as to permit the resumption of performance of the obligations in question and should be limited to suspension of obligations, not causing irreversible damage in a way that the resumption of the obligation is rendered impossible after they are lifted.<sup>77</sup>

Moreover, Art. 51 provides that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. It is well established that countermeasures must have some degree of equivalence

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<sup>74</sup> *Nicaragua v. US* Case, 1986, para. 249.

<sup>75</sup> *Gabčíkovo-Nagymaros Project* Case, 1997, para. 83; Elagab, 1988, p. 47.

<sup>76</sup> ARSIWA Draft with commentaries, 2001, pp. 130-131; Clapham, 2012, p. 398.

<sup>77</sup> Bederman, 2002, p. 824.

with the alleged breach.<sup>78</sup> The importance of the interest protected by the rule infringed and the seriousness of the breach are factors to be taken into account in assessing the proportionality of the countermeasure.<sup>79</sup>

In the present case, it is submitted that violation of the Art. I of the MAA, by suspending the contract is not excessive in comparison to the serious injury caused by the conduct of Pundamilia. The injury suffered by the breach of the VCDR and customary international law calls for action far more serious than the suspension of the sale of few helicopters. It must be added that the suspension cannot cause irreversible harm; the delivery of the helicopters according to the contract may be delivered at any time. Therefore, the prerequisites of both proportionality and reversibility are met.

### **3. Twiga has called upon Pundamilia to fulfil its obligations.**

Before taking countermeasures the injured State shall call upon the responsible State to fulfil its obligations, as provided under Art. 52 para. 1 (a) of the ARSIWA. Under the requirement of “*sommation*” the injured State shall give notice to the responsible State of the breach, so that the latter has an opportunity to present a response.<sup>80</sup> This practice is well established in customary law.<sup>81</sup>

On the contrary, the notification of the intention to recourse to countermeasures laid down in Art. 52 para. 2 (b) is not necessarily a requirement for the legality of countermeasures

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<sup>78</sup> *Air Services Agreement Case*, 1946, para. 83; *FYROM v. Greece Case*, 2011, para. 164; Matsui, 1994, pp. 17-18.

<sup>79</sup> Cannizzaro, 2001, p. 900; Crawford, 2002, p. 296; Franck, 2008, p. 754.

<sup>80</sup> *Naulilaa Case*, 1928, p. 1027; *Air Services Agreement Case*, 1946, paras. 85-87; *Gabčíkovo-Nagymaros Project Case*, 1997, para. 84.

<sup>81</sup> *Gabčíkovo-Nagymaros Project Case*, 1997; Crawford, 2002, p. 298; Bederman, 2002, p. 824.



under customary international law.<sup>82</sup> Notably, the ICJ did not include such prerequisite in its Judgement in the *Gabčíkovo-Nagymaros Project* case.<sup>83</sup> This clearly procedural requirement is rather a ‘progressive development of international law’ rather than a *de lege lata* strict requirement.<sup>84</sup>

Twiga called upon Pundamilia to comply with its obligations under the VCDR, in the Note Verbale of 14 January 2016. Pundamilia’s inaction led Twiga to send another Note Verbale on 3 February 2016, by which it suggested negotiations on this issue. Therefore, Pundamilia was duly called to return to legality and was given the opportunity to discuss with Twiga on the means of solving this dispute.

#### **4. In any case, countermeasures are urgent, considering Pundamilia’s silence.**

According to Art. 52 para. 2 of the ARSIWA, the injured State may take urgent countermeasures as are necessary to preserve its rights. Therefore, even if notification is considered to be obligatory, the right to recourse to countermeasures is not precluded if they are taken in light of an urgent situation where notification would jeopardize the rights of the injured State.<sup>85</sup>

In the present case, although Pundamilia was informed about the diplomatic status of the premises, by Twiga’s first Note Verbale, it subsequently ordered their attachment. Moreover, although Pundamilia was informed about the immunity and inviolability of Mrs.

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<sup>82</sup> Roucounas Dissenting Opinion (*FYROM v. Greece* Case), 2011, p. 107; Rejoinder of Greece (*FYROM v. Greece* Case), p. 202; ARSIWA Draft with commentaries, 2001, p. 136; Consideration of the ILC Report to the UNGA, 2001, p. 2.

<sup>83</sup> *Gabčíkovo-Nagymaros Project* Case, 1997, paras. 55-57.

<sup>84</sup> Shaw, 2008, p. 121.

<sup>85</sup> ARSIWA Draft with commentaries, 2001, p. 136; Kamto, 2010, p. 1172.

Fisi, by Twiga's second Note Verbale, Mrs. Fisi was indicted on criminal charges. Twiga suggested a negotiated solution but Pundamilia's reply was pending since 3 February 2016. This continuous violation of the VCDR and customary law, as well as Pundamilia's silence indicates that the immunities enjoyed by the Twigan diplomatic mission are in danger.

Therefore, recourse to urgent countermeasures is justified due to the imminent threat that the Twigan diplomatic mission was facing.

### **E. Conclusion**

It follows that Twiga did not breach its obligations under the MAA, since the contract is irrelevant to the application of MAA. In any event, the suspension of the MAA constitutes a lawful exercise of Twiga's rights by virtue of Arts. 63 and 61 of the VCLT. In any case, it is submitted that Twiga's action in response to Pundamilia's unlawful conduct meet the prerequisites of countermeasures. Thus, even if the Court finds them unlawful, the wrongfulness is still precluded under international law.

**(i) Submissions**

In light of the above, Twiga respectfully requests the Court to adjudge and declare as follows, that:

I. By instituting proceedings against Mrs. Fisi, Pundamilia breached the immunity from jurisdiction and the inviolability enjoyed by her under international law, notably the Vienna Convention on Diplomatic Relations and customary international law.

II. By searching and attaching the premises of the Twigan Cultural Centre located at 22 Baobab Street in Savannah, which are the property of the Republic of Twiga and used for the purposes of its diplomatic mission in Pundamilia, Pundamilia breached its obligations under international law, notably the Vienna Convention on Diplomatic Relations and customary international law.

III. By suspending the delivery of 10 military helicopters, Twiga did not breach its obligations under Article I of the Military Assistance Agreement.

Finally, Twiga respectfully requests the Court to order Pundamilia to put an end to the ongoing proceedings against Mrs. Fisi, to recognize the status of the building located at 22 Baobab Street in Savannah as part of the premises of its diplomatic mission in Pundamilia and to ensure its protection as required by international law.