

CR 2016/14

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Lundi 17 octobre 2016 à 10 heures

Monday 17 October 2016 at 10 a.m.

8 The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today under Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the request for the indication of provisional measures submitted by Equatorial Guinea in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*.

Article 32, paragraph 1, of the Rules of Court states that “[i]f the President of the Court is a national of one of the parties in a case he shall not exercise the functions of the presidency in respect of that case”. Since the President of the Court, Judge Abraham, is of French nationality, he will not be exercising the functions of the presidency in the present case. It thus falls to me, as Vice-President of the Court, to assume that role, in accordance with Article 13 of the Rules.

Since the Court included upon the Bench no judge of the nationality of Equatorial Guinea, the latter availed itself of its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc*; it chose Mr. James Kateka.

Article 20 of the Statute provides that “[e]very member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”. Pursuant to Article 31, paragraph 6, of the Statute, this provision is equally applicable to judges *ad hoc*.

Although Mr. Kateka has sat as a judge *ad hoc* in another case and has previously been called upon to make the solemn declaration provided for by the Statute, he is required, in accordance with Article 8, paragraph 3, of the Rules of Court, to make a new solemn declaration in the present case.

Before inviting him to make that declaration, I shall say a few words about Mr. Kateka’s career and qualifications.

9 Of Tanzanian nationality, Mr. Kateka studied at the University of Dar es Salaam and at King’s College, University of London. He then had a long and prestigious diplomatic career. Mr. Kateka served as Director of the Department for Legal Affairs and International Organizations of the Ministry of Foreign Affairs. He represented Tanzania as ambassador in numerous countries, before becoming Dean of the Ambassadors of the Republic of Tanzania from 2004 to 2005. Since 2005, Mr. Kateka has been a judge at the International Tribunal for the Law of the Sea in Hamburg,

where he has been serving as President of the Chamber for Marine Environment Disputes since October 2014. In addition, he has served as a judge *ad hoc* at the Court, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, and as an arbitrator in two arbitrations: one between Mauritius and the United Kingdom, and the other between Malta and São Tomé and Príncipe. Mr. Kateka is furthermore a former member of the United Nations International Law Commission and the author of numerous publications on international law.

I shall now invite Mr. Kateka to make the solemn declaration prescribed by Article 20 of the Statute, and I would request all those present to rise. Mr. Kateka.

Mr. KATEKA:

«Je déclare solennement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience»

The VICE-PRESIDENT, Acting President: Thank you. Please be seated. The Court takes note of the solemn declaration made by Mr. Kateka and declares him duly installed as judge *ad hoc* in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*.

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I shall now briefly recall the principal procedural steps in the case.

On 13 June 2016, the Republic of Equatorial Guinea instituted proceedings against the French Republic with regard to a dispute concerning the immunity from criminal jurisdiction of the Vice-President of the Republic of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangue, and the legal status of the building located on avenue Foch in Paris, which is said by Equatorial Guinea to house its embassy in France.

As basis for the Court's jurisdiction, Equatorial Guinea invokes the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, of 18 April 1961, as well as the United Nations Convention against Transnational Organized Crime of 15 November 2000.

I shall now ask the Registrar to read out the decision requested of the Court, as formulated in the Application of Equatorial Guinea.

The REGISTRAR:

“Equatorial Guinea respectfully requests the Court:

(a) With regard to the French Republic’s failure to respect the sovereignty of the Republic of Equatorial Guinea,

(i) to adjudge and declare that the French Republic has breached its obligation to respect the principles of the sovereign equality of States and non-interference in the internal affairs of another State, owed to the Republic of Equatorial Guinea in accordance with international law, by permitting its courts to initiate criminal legal proceedings against the Second Vice-President of Equatorial Guinea for alleged offences which, even if they were established, *quod non*, would fall solely within the jurisdiction of the courts of Equatorial Guinea, and by allowing its courts to order the attachment of a building belonging to the Republic of Equatorial Guinea and used for the purposes of that country’s diplomatic mission in France;

(b) With regard to the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security,

(i) to adjudge and declare that, by initiating criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, His Excellency Mr. Teodoro Nguema Obiang Mangue, the French Republic has acted and is continuing to act in violation of its obligations under international law, notably the United Nations Convention against Transnational Organized Crime and general international law;

(ii) to order the French Republic to take all necessary measures to put an end to any ongoing proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security;

(iii) to order the French Republic to take all necessary measures to prevent further violations of the immunity of the Second Vice-President of Equatorial Guinea in charge of Defence and State Security and to ensure, in particular, that its courts do not initiate any criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in the future;

(c) With regard to the building located at 42 avenue Foch in Paris,

(i) to adjudge and declare that, by attaching the building located at 42 avenue Foch in Paris, the property of the Republic of Equatorial Guinea and used for the purposes of that country’s diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations and the United Nations Convention, as well as general international law;

(ii) to order the French Republic to recognize the status of the building located at 42 avenue Foch in Paris as the property of the Republic of Equatorial Guinea,

and as the premises of its diplomatic mission in Paris, and, accordingly, to ensure its protection as required by international law;

(d) In view of all the violations by the French Republic of international obligations owed to the Republic of Equatorial Guinea,

- (i) to adjudge and declare that the responsibility of the French Republic is engaged on account of the harm that the violations of its international obligations have caused and are continuing to cause to the Republic of Equatorial Guinea;
- (ii) to order the French Republic to make full reparation to the Republic of Equatorial Guinea for the harm suffered, the amount of which shall be determined at a later stage.”

The VICE-PRESIDENT, Acting President: Thank you. On 29 September 2016, referring to Article 41 of the Statute and to Articles 73 to 75 of the Rules of Court, Equatorial Guinea filed in the Registry of the Court a Request for the indication of provisional measures. In its Request, Equatorial Guinea states *inter alia* that, by an order dated 5 September 2016, the investigating judges of the Paris *Tribunal de grande instance* decided to refer Mr. Teodoro Nguema Obiang Mangué to the Paris *Tribunal correctionnel*. It notes that, on 21 September 2016, the Financial Prosecutor issued a summons, ordering Mr. Teodoro Nguema Obiang Mangué to appear on 24 October 2016 before the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel* for a hearing on the merits. Equatorial Guinea claims that “[t]he imminence of criminal proceedings” against Mr. Teodoro Nguema Obiang Mangué “constitutes an impediment to the exercise of his functions in the interest of his country”; it also considers that the “premises of the diplomatic mission at 42 avenue Foch in Paris . . . are now open to confiscation by the courts, and the diplomatic mission to expulsion as a result of the judicial sale of the building”. Emphasizing the urgency of its request, it asserts that “[t]he pursuit of criminal proceedings in France against the Vice-President and the property of Equatorial Guinea, and France’s refusal to respect the building located at 42 avenue Foch in Paris as premises of Equatorial Guinea’s diplomatic mission in France, create a real and imminent risk of irreparable prejudice to the rights of Equatorial Guinea”.

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I shall now ask the Registrar to read out the passage from the Request specifying the provisional measures that the Government of Equatorial Guinea is asking the Court to indicate.

The REGISTRAR:

“Equatorial Guinea respectfully asks the Court, pending its judgment on the merits, to indicate the following provisional measures:

- (a) that France suspend all the criminal proceedings brought against the Vice-President of the Republic of Equatorial Guinea, and refrain from launching new proceedings against him, which might aggravate or extend the dispute submitted to the Court;
- (b) that France ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea’s diplomatic mission in France and, in particular, assure its inviolability, and that those premises, together with their furnishings and other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition, attachment or any other measure of constraint;
- (c) that France refrain from taking any other measure that might cause prejudice to the rights claimed by Equatorial Guinea and/or aggravate or extend the dispute submitted to the Court, or compromise the implementation of any decision which the Court might render.”

The VICE-PRESIDENT, Acting President: Thank you. On 29 September 2016, immediately after the filing of the Request for the indication of provisional measures, the Registrar transmitted a copy of that document to the French Government, pursuant to Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations.

By a letter dated 3 October 2016, in my capacity as President in the present case, and acting in accordance with Article 74, paragraph 4, of the Rules of Court, I called the attention of France to the need to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.

Under the terms of Article 74 of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases. The date of the hearing must be fixed in such a way as to afford the parties an opportunity of being represented at it. Consequently, the Parties were informed on 3 October 2016 that the date for the opening of the oral proceedings, during which they could present their observations on the request for the indication of provisional measures, had been fixed as Monday 17 October 2016, at 10 a.m.

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I note the presence before the Court of the Agents and counsel of the two Parties. This morning the Court will hear Equatorial Guinea, which has submitted the request for the indication

of provisional measures. It will hear France tomorrow morning at 10 a.m. Each Party will have a maximum of two hours for the first round.

After the first round of oral observations, on Wednesday 19 October 2016, the Parties will have the opportunity to respond. Equatorial Guinea will have the floor at 10 a.m. and France at 5 p.m. Each Party will have a maximum of one hour in which to present its reply.

I draw the Parties' attention to Practice Direction XI, according to which,

“[i]n the oral pleadings on requests for the indication of provisional measures parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.”

I now give the floor to H.E. Mr. Carmelo Nvono Nca, Agent of the Republic of Equatorial Guinea. Your Excellency, you have the floor.

Mr. NVONO NCA:

#### INTRODUCTION

1. Mr. President, distinguished Members of the Court, good morning. It is a great honour and privilege to appear before you, and to do so on behalf of my country, the Republic of Equatorial Guinea. I would like to point out that I am joined in this delegation of Equatorial Guinea by the President of the Supreme Court and the Attorney General, among others. Owing to its history, our country is well aware of the need to ensure justice and peace between peoples.

2. Mr. President, this is the second time that Equatorial Guinea has appeared before this Court. Its first appearance was 15 years ago, in March 2002, as a non-party intervener in the case between Cameroon and Nigeria.

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3. I wish to emphasize that my country has profound respect for this Court and for international law. Article 8 of our Constitution, the Basic Law, stipulates that “[t]he State of Equatorial Guinea respects the principles of international law and reaffirms its commitment to the rights and obligations emanating from the international organizations and bodies of which it shall become a member” [*translation by the Registry*]. In keeping with this solemn undertaking, Equatorial Guinea has accepted the Court's jurisdiction in accordance with various international treaties and conventions.

4. I would now like to greet our counterparts in the French delegation, led by my friend Mr. François Alabrune. Equatorial Guinea and France have excellent relations in many areas and are united by a vast array of co-operation agreements, while our two countries actively work together in a number of international forums, notably the Organisation internationale de la Francophonie.

5. And so we find it particularly regrettable that we have needed to come to the Court today in order to defend our sovereign rights that are under threat. We would have preferred to resolve our dispute through negotiation and conciliation, but sadly this suggestion has fallen on deaf ears, despite my country's sincere and persistent efforts. Since we have reached this point, we are extremely grateful to this Court and to you, Mr. President, for organizing these provisional measures proceedings so promptly, as the situation demands.

6. A number of very important questions arise in this case for my country, such as the fundamental principles of the sovereign equality of States and non-interference in the internal affairs of another State, respect for which by all States — whether large or small — is essential to the international order.

7. We are here before you today to request urgent provisional measures, since the French courts appear bent on pursuing their criminal proceedings in total violation of the immunities to which Equatorial Guinea is entitled under international law, in respect of its Vice-President in charge of National Defence and State Security and its Embassy premises in Paris.

15 8. Mr. President, Members of the Court, let me assure you that the Government and the people of Equatorial Guinea are deeply offended by the unjust and insulting treatment which our country is receiving in France at this moment. It is this sense of indignation, coupled with the belief that we have the law on our side, which has led us to seek justice at this high Court. The risk of harm to Equatorial Guinea's sovereign rights is grave and imminent, and seising the International Court of Justice is the most appropriate way to defend our rights.

9. Mr. President, during this sitting, counsel for Equatorial Guinea will address the Court in the following order:

— first, Mr. Jean-Charles Tchikaya will describe the criminal proceedings currently ongoing in France;



— next, Sir Michael Wood will focus on the Court’s prima facie jurisdiction, as well as on the urgency of the question and the real risk of irreparable harm to Equatorial Guinea’s right to immunity for its Vice-President in charge of National Defence and State Security.

10. He will be followed by Professor Maurice Kamto, who will talk about the urgency and the real risk of irreparable harm to the inviolability of the Embassy building in Paris. Professor Kamto will conclude this first round of oral observations by explaining the provisional measures requested.

11. Mr. President, having reached the end of my presentation today, I would like to ask you to invite Mr. Tchikaya to the podium. Thank you for your attention.

The VICE-PRESIDENT, Acting President: Thank you Your Excellency. I now give the floor to Mr. Jean-Charles Tchikaya. You have the floor.

M. TCHIKAYA :

**2. THE CRIMINAL PROCEEDINGS IN FRANCE AGAINST THE VICE-PRESIDENT OF  
EQUATORIAL GUINEA AND THE BUILDING LOCATED AT 42 AVENUE FOCH  
IN THE 16TH ARRONDISSEMENT OF PARIS**

**I. Introduction**

1. Mr. President, Members of the Court, it is a great honour for me to appear before you on behalf of the Republic of Equatorial Guinea.

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2. My purpose today is to explain the current status of the criminal proceedings in France against the Vice-President of Equatorial Guinea in charge of National Defence and State Security, and what might happen in the days and weeks to come.

3. We have already described the criminal proceedings that have taken place in France in our Application instituting proceedings<sup>1</sup> and our Request for the indication of provisional measures<sup>2</sup>. Those proceedings were initiated on the basis of complaints filed by certain French NGOs and associations against five African Heads of State and members of their families, as from 2007.

4. The dispute between Equatorial Guinea and France originated with the criminal proceedings initiated in France against Mr. Teodoro Nguema Obiang Mangue, former Minister for

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<sup>1</sup> Application, paras. 21-30.

<sup>2</sup> Request, paras. 6-12.

Agriculture and Forestry and, from 2012 to 2016, Second Vice-President in charge of National Defence and State Security. I would emphasize that, since June 2016, he has been the “only” Vice-President of Equatorial Guinea. In these proceedings, the French courts have felt it necessary to extend their territorial criminal jurisdiction to Equatorial Guinea, to deny immunity from criminal jurisdiction to its Vice-President in charge of National Defence and State Security, and to disregard the legal status of the building located at 42 avenue Foch in the 16th arrondissement of Paris, both as property of the State of Equatorial Guinea and as premises assigned to its diplomatic mission in France. The proceedings have been continued in spite of the firm and consistent protests of Equatorial Guinea.

## II. The criminal proceedings

5. In these criminal proceedings, the French courts have refused to recognize the immunity from foreign criminal jurisdiction enjoyed by the Vice-President of Equatorial Guinea. They have done so in a confused and inappropriate manner.

— Confused, because they have avoided making a distinction between immunity *ratione materiae* and immunity *ratione personae*. In so doing, they have misjudged the extent of the group of individuals who enjoy immunity as holders of high-ranking office in the State, relying on reasons which have no basis in international law and which ignore, in particular, the jurisprudence of the International Court of Justice<sup>3</sup> in this regard.

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— Inappropriate, because they have repeatedly impugned the motives for Equatorial Guinea’s appointment of Mr. Teodoro Nguema Obiang Mangue as a senior representative of Equatorial Guinea, and those which led to Equatorial Guinea’s acquisition of the building located at 42 avenue Foch in Paris.

6. Mr. President, it should be noted that in these proceedings, the Vice-President and his counsel have consistently asserted that the Vice-President enjoys immunity *ratione personae*, in accordance with international law and with the jurisprudence of this Court.

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<sup>3</sup>*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, pp. 20-21, para. 51.*

7. Moreover, the French courts have not recognized the status of the building located at 42 avenue Foch in Paris as premises of the diplomatic mission of Equatorial Guinea and as the property of that State.

8. Equatorial Guinea has sought to co-operate with France during these criminal proceedings. For example, it provided France with a report concerning the alleged criminal offences committed in its territory, which was disregarded. That report, which was the result of an investigation by the Public Prosecutor of the State of Equatorial Guinea, nonetheless concluded that no offences had been committed in Equatorial Guinean territory.

### **III. The current stage of the criminal proceedings**

9. Mr. President, as the Court learned in the case between the Congo and France, French criminal proceedings comprise three stages: the preliminary investigation under the authority of the Prosecutor; the pre-trial investigation under the authority of the investigating judge; and then the trial. The proceedings concerning the Vice-President of Equatorial Guinea and the building located at 42 avenue Foch in Paris are now in that third and final stage, namely, the trial. For this reason, it is truly urgent to grant Equatorial Guinea's request for provisional measures in this case.

10. Recent developments have led to the following situation:

- 18** — The end of the investigation, with the issuance of the final submissions (*réquisitoire définitif*) in May 2016.
- And, above all, the order of the investigating judges dated 5 September 2016, referring the Vice-President to the Paris *Tribunal correctionnel*. That order is crucial. At this stage of the proceedings, the Vice-President is now — as French law refers to it — a “*prévenu*” (defendant), that is, he is required to appear before the *Tribunal correctionnel* to answer for the offences of which he is accused. In other words, he is now exposed to a real and imminent risk of being tried and definitively convicted, which would cause irreparable prejudice to Equatorial Guinea's rights to respect both for the immunity of its Vice-President and for the inviolability of the premises of its diplomatic mission in France. There is also a genuine risk of an arrest warrant being issued at any time by the *Tribunal correctionnel* against the

Vice-President as a result of his absence from the hearing, for which it will no doubt be considered that there is no legitimate excuse.

11. The summons sent to the Vice-President instructing him to appear at a hearing on the merits before the Paris *Tribunal correctionnel*<sup>4</sup> on 24 October 2016 constitutes further proof of the imminence of a trial against him. Of course, France will probably attempt to take advantage of the fact that — according to a letter sent by the Deputy Financial Prosecutor to the Vice-President’s counsel on 26 September 2016 — the hearing on 24 October 2016 is intended to rectify a “purely clerical error”. Yet, in that letter, the Prosecutor clearly specifies: “Once the order has been regularized, we will resume scheduling of the hearings . . . We must allow justice to follow its natural course . . .”. And then, addressing the issue of the availability of the Vice-President’s counsel at the forthcoming hearing, the Prosecutor adds: “Subject to the decision of the *Tribunal* and unless you feel it is premature, we could discuss together in the near future . . . the question of when the case can be examined on the merits once the order has, if necessary, been regularized.”<sup>5</sup>

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12. However, the summons sent to the Vice-President’s counsel on 21 September 2016 simply states: “Please be informed that a hearing on the merits in the OBIANG case concerning your client, Mr. Teodoro Nguema Obiang Mangue, defendant, will take place before the 32nd *Chambre correctionnelle* . . . on Monday 24 October 2016 at 1.30 p.m.” There is no mention of a hearing intended to rectify a clerical error relating to procedure in this document addressed to the Vice-President.

13. Beyond that, and even more importantly: it is clear in our Request for the indication of provisional measures that the urgency in this case derives from the order of 5 September 2016 referring the Vice-President to the *Tribunal correctionnel*. In fact, we prepared the Request for the indication of provisional measures following that order, and we would have filed it even if the summons of 21 September had not been served.

14. Consequently, the current situation is as follows:  
— the Vice-President’s immunity *ratione personae*, which is clearly established in international law, has not been recognized by the French criminal courts;

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<sup>4</sup>Request for provisional measures, Ann. 2.

<sup>5</sup>Documents communicated to the Court by France on 14 October 2016, No. 51.

- the Vice-President of Equatorial Guinea will be summoned at any moment to be tried and convicted;
- if he fails to appear, an arrest warrant will necessarily be issued against him — as I previously mentioned — because of his absence, for which it will be considered that there is no legitimate excuse;
- his personal liberty will be restricted at any moment;
- the building located at 42 avenue Foch in Paris is currently under attachment and now risks being confiscated and sold at public auction, since additional penalties of confiscation apply to the offences for which the Vice-President is required to appear in court.

#### **IV. Equatorial Guinea's protests and the efforts to settle the dispute by means of negotiation, conciliation or arbitration**

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15. Equatorial Guinea has protested consistently. At the same time, it has also sought to settle the dispute by means of negotiation, conciliation or arbitration. In particular, in the absence of any reaction from France to these proposals — contained in an initial memorandum — Equatorial Guinea sent a second memorandum with a Note Verbale from its Ambassador in Paris dated 2 February 2016, suggesting arbitration under the auspices of the Permanent Court of Arbitration in The Hague, in accordance with its Optional Conciliation Rules and Optional Rules for Arbitrating Disputes between two States<sup>6</sup>. Thereafter, by a Note Verbale from the Ministry of Foreign Affairs and International Development dated 17 March 2016, France responded by refusing Equatorial Guinea's offer to settle the dispute.

16. On 12 September 2016, by a Note Verbale, the Embassy of Equatorial Guinea in Paris protested strongly at the referral order of 5 September 2016. Since then, no response has been received from France.

#### **V. Conclusions**

17. It follows from all of the foregoing that the French courts are determined to continue the criminal proceedings against the Vice-President of Equatorial Guinea, and the French authorities seem unable to do anything to put an end to them. It is for this reason that Equatorial Guinea filed

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<sup>6</sup>Application instituting proceedings, Ann. 12.

an Application against France and — on account of the recent developments that I have just described — was compelled to submit a request for provisional measures to the Court.

18. Mr. President, Members of the Court, that concludes my presentation.

19. Thank you very much, Mr. President, Members of the Court, for your attention. Mr. President, may I respectfully ask you to give the floor to Sir Michael Wood.

The VICE-PRESIDENT, acting as President: Thank you, Mr. Tchikaya. I now give the floor to Sir Michael Wood.

**21** Sir Michael WOOD :

### **3. LES CONDITIONS POUR L'INDICATION DES MESURES CONSERVATOIRES SONT RÉUNIES S'AGISSANT DE L'IMMUNITÉ DU VICE-PRÉSIDENT**

#### **I. Introduction**

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un grand honneur pour moi que de plaider devant vous, et de le faire au nom de la Guinée équatoriale.

2. Mon exposé portera sur les conditions requises aux fins de l'indication de mesures conservatoires, telles qu'elles ressortent du Statut, du Règlement et de la jurisprudence de la Cour, et se déroulera comme suit :

- je commencerai par expliquer pourquoi la condition de la compétence *prima facie* sur le fond du différend est satisfaite ;
- je montrerai ensuite que les droits invoqués par la Guinée équatoriale sont au moins plausibles ;
- et qu'il existe un lien suffisant entre les droits objet de l'affaire et les mesures conservatoires demandées ;
- je montrerai enfin qu'un préjudice irréparable, réel et imminent, risque d'être causé aux droits en question avant que la Cour ne rende un arrêt définitif en l'affaire, et que la condition du caractère d'urgence est par conséquent satisfaite. A cet égard, je me pencherai plus précisément sur le droit de la Guinée équatoriale au respect de l'immunité de juridiction pénale étrangère de son vice-président, chargé de la défense nationale et de la sécurité de l'Etat.

3. M. Kamto examinera quant à lui ce même risque de préjudice irréparable s'agissant des droits que détient la Guinée équatoriale relativement à l'immeuble sis 42 avenue Foch à Paris, qui abrite les locaux de son ambassade en France.

## II. Deux observations préliminaires

4. Monsieur le président, il me faut commencer par faire deux observations au sujet des documents que la France a soumis vendredi à la Cour.

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5. Tout d'abord, il importe de préciser ce qui est objet de la présente affaire, et ce qui ne l'est pas. Ce qui nous occupe ici, c'est l'application, dans les relations entre la Guinée équatoriale et la France, des règles et principes fondamentaux du droit international, parmi lesquels l'égalité souveraine des Etats, la non-ingérence dans leurs affaires intérieures, l'immunité de certaines personnes occupant un rang élevé dans l'Etat, et le statut des locaux des missions diplomatiques et des biens de l'Etat. Ces règles et principes sont tous essentiels pour la conduite de relations pacifiques entre les Etats. En revanche, il ne s'agit pas en l'espèce de savoir si tel ou tel acte attribué à un particulier est ou non répréhensible. De la même manière que l'affaire relative aux *Immunités juridictionnelles de l'Etat* ne concernait pas les atrocités commises par les forces d'occupation allemandes, et que celle relative au *Mandat d'arrêt du 11 avril 2000* ne concernait pas des cas présumés de violations du droit international humanitaire ou de crimes contre l'humanité, pour ne prendre que ces deux exemples, il n'entre pas dans le cadre de la présente affaire de juger des actions ou des omissions en relation avec certaines infractions présumées qui ont pu se produire ou non.

6. Ma seconde observation préliminaire concerne la liasse de documents — quelque 200 pages au total — que la France a soumise à la Cour et qui a été communiquée à la délégation de la Guinée équatoriale vendredi 14 octobre dans l'après-midi. Dans la lettre de couverture<sup>7</sup>, également datée du 14 octobre, l'agent de la France indique qu'il s'agit de «documents que la République française souhaite porter à la connaissance de la Cour et auxquels elle se réserve le droit de se référer à l'occasion des audiences qui auront lieu devant la Cour les 17, 18 et 19 octobre 2016».

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<sup>7</sup> Lettre adressée le 14 octobre 2016 au greffier par M. François Alabrune, agent de la République française.

7. Monsieur le président, l'agent de la France n'explique pas selon quels critères ces documents ont été sélectionnés, ni en quoi ils sont pertinents — à supposer qu'ils le soient — au stade actuel de la procédure. La Guinée équatoriale devra donc attendre, pour faire d'éventuels commentaires sur ce qui semble être une sorte de «dossier de plaidoiries», de savoir si, demain, la délégation française a elle-même quelque chose à dire sur l'un ou l'autre de ces documents. A première vue, cependant, il est difficile de comprendre quelle peut être leur pertinence au stade des mesures conservatoires. La plupart des documents soumis vendredi dernier par la France semblent n'avoir aucun rapport avec les questions qui se posent à ce stade. Quelques-uns ont trait à des points juridiques que nous traiterons dans notre mémoire. Mais l'on ne voit guère quel serait l'intérêt pour la Cour, à ce stade, d'examiner dans le détail des procès-verbaux et autres documents, en particulier eu égard à son instruction de procédure XI que vous avez vous-même invoquée ce matin.

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8. Conformément à cette même instruction de procédure, la Guinée équatoriale a, quant à elle, veillé à ne pas accabler la Cour de documents qui ne seront pertinents qu'au stade du fond. Ceux qu'elle juge les plus utiles ont été joints en annexe à sa demande en indication de mesures conservatoires (en sus de ceux qui sont annexés à sa requête introductive d'instance).

### III. Compétence *prima facie*

9. Monsieur le président, Mesdames et Messieurs de la Cour, j'en reviens à présent aux conditions à satisfaire aux fins de l'indication de mesures conservatoires, et en premier lieu à celle de la compétence *prima facie*. Il est bien établi que, je cite, «[l]a Cour ne peut indiquer des mesures conservatoires que si les dispositions invoquées par le demandeur semblent *prima facie* constituer une base sur laquelle sa compétence pourrait être fondée, mais n'a pas besoin de s'assurer de manière définitive qu'elle a compétence quant au fond de l'affaire.»<sup>8</sup>

10. Dans la présente espèce, ainsi que vous l'avez rappelé ce matin, la Guinée équatoriale invoque l'article 35 de la Convention des Nations Unies contre la criminalité transnationale organisée (dite «Convention de Palerme») et l'article 2 du Protocole de signature facultative à la

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<sup>8</sup> *Questions concernant la saisie et la détention de certains documents et données (Timor-Leste c. Australie), demande en indication de mesures conservatoires, ordonnance du 3 mars 2014, C.I.J. Recueil 2014, p. 151, par. 18.*



convention de Vienne sur les relations diplomatiques, concernant le règlement obligatoire des différends.

11. Nous avons démontré dans la requête introductive d'instance<sup>9</sup> que ces deux chefs de compétence constituaient clairement une base propre à fonder la compétence de la Cour. Nous avons démontré en particulier que les conditions énoncées dans ces dispositions étaient satisfaites.

12. Je ne crois pas nécessaire d'en dire plus aujourd'hui sur la question de la compétence, mais je peux, bien entendu, y revenir si la Cour le souhaite, ou si les arguments de nos contradicteurs appellent une réponse à ce sujet.

#### **IV. Les droits revendiqués par la Guinée équatoriale sont au moins plausibles**

13. Monsieur le président, je vais à présent démontrer que les droits revendiqués par la Guinée équatoriale sont au moins plausibles. Les droits revendiqués dans l'instance introduite par la Guinée équatoriale contre la France le 13 juin 2016 sont :

- 24** — le droit au respect des principes de l'égalité souveraine et de la non-intervention, ainsi que l'exige l'article 4 de la convention de Palerme<sup>10</sup> ;
- le droit au respect des règles d'immunité découlant des principes fondamentaux de l'ordre juridique international, notamment l'immunité *ratione personae* de certaines personnes occupant un rang élevé dans l'Etat, ainsi que l'immunité d'exécution dont jouissent les Etats à l'égard de leurs biens ; et
- enfin, le droit au respect de l'inviolabilité des locaux de sa mission diplomatique consacré par la convention de Vienne sur les relations diplomatiques.

14. Ces droits sont au moins plausibles. Premièrement, la plausibilité du droit de la Guinée équatoriale au respect de l'immunité *ratione personae* de son vice-président, chargé de la défense nationale et de la sécurité de l'Etat, est selon nous évidente. A cet égard, je rappellerai la déclaration faite par la Cour en l'affaire relative au *Mandat d'arrêt* et, de nouveau, en l'affaire *Djibouti c. France*, selon laquelle «il est clairement établi en droit international que, de même que les agents diplomatiques et consulaires, certaines personnes occupant un rang élevé dans l'Etat,

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<sup>9</sup> Requête, par. 4-10.

<sup>10</sup> Demande en indication de mesures conservatoires, annexe 5.

telles que le chef de l'Etat, le chef du gouvernement ou le ministre des affaires étrangères, jouissent dans les autres Etats d'immunités de juridiction, tant civiles que pénales»<sup>11</sup>. Je rappellerai en outre que l'immunité *ratione personae* des représentants de haut rang responsables de la défense a également été reconnue par la jurisprudence interne de certains Etats<sup>12</sup>. Nous considérons qu'en raison du poste qu'il occupe et des fonctions particulières qu'il exerce au nom de la Guinée équatoriale, le vice-président chargé de la défense nationale et de la sécurité de l'Etat relève de la catégorie des «personnes occupant un rang élevé dans l'Etat» ayant droit à l'immunité *ratione personae*.

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15. L'inviolabilité et l'immunité à l'égard des mesures de contrainte de l'immeuble de l'avenue Foch sont également «au moins plausibles», eu égard aux termes de la convention de Vienne sur les relations diplomatiques et aux règles de droit international coutumier consacrées par la convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens et reconnues par la Cour<sup>13</sup>.

#### **V. Lien entre les droits qui font l'objet de l'affaire et les mesures conservatoires demandées**

16. Monsieur le président, Mesdames et Messieurs de la Cour, j'en viens à présent au lien entre les droits qui font l'objet de l'affaire et les mesures conservatoires demandées.

17. L'on verra que les mesures conservatoires demandées sont étroitement liées aux droits en cause au fond. Les membres de la Cour se souviendront, et cela a été rappelé ce matin, que, en résumé, les mesures conservatoires demandées<sup>14</sup> sont :

a) que la France suspende toutes les procédures pénales engagées contre le vice-président et s'abstienne de lancer une nouvelle procédure contre lui ;

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<sup>11</sup> *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, arrêt, C.I.J. Recueil 2002, p. 20-21, par. 51 ; *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France)*, arrêt, C.I.J. Recueil 2008, p. 236-237, par. 170.

<sup>12</sup> Voir par exemple les affaires *Nezzar*, Tribunal pénal fédéral suisse (dossier n° BB.2011.140), 25 juillet 2012, par. 5.4.2 ; et *Re Mofaz*, Bow Street Magistrates' Court (Royaume-Uni), 12 février 2004 (*International Law Reports*, vol. 128, p. 712).

<sup>13</sup> *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran)*, mesures conservatoires, ordonnance du 15 décembre 1979, C.I.J. Recueil 1979, p. 19-20, par. 38-41 ; *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant))*, arrêt, C.I.J. Recueil 2012 (I), p. 148, par. 118.

<sup>14</sup> Demande en indication de mesures conservatoires, par. 19.

- b) que la France veille à ce que l'immeuble sis au 42 avenue Foch à Paris soit traité comme locaux de la mission diplomatique de la Guinée équatoriale en France, et, en particulier, assure son inviolabilité, et que ces locaux, ainsi que leur ameublement et les autres objets qui s'y trouvaient, soient protégés contre toute intrusion ou dommage, toute perquisition, réquisition, saisie ou toute autre mesure de contrainte ; et
- c) que la France s'abstienne de prendre toute autre mesure qui pourrait porter préjudice aux droits revendiqués par la Guinée équatoriale.

18. Monsieur le président, chacune de ces mesures conservatoires est liée de façon évidente aux droits qui font l'objet de l'affaire. La demande de suspension de toutes les procédures pénales correspond à notre conviction que ces procédures constituent une violation du droit de la Guinée équatoriale au respect des principes de l'égalité souveraine et de la non-intervention et, en particulier, de son droit au respect de l'immunité *ratione personae* de son vice-président.

19. De même, la demande tendant à ce que soient respectées l'inviolabilité et l'immunité de l'immeuble sis au 42 avenue Foch est étroitement liée aux droits en cause dans la présente affaire en ce qui concerne ledit immeuble.

20. La troisième demande, à savoir que la France s'abstienne de prendre toute autre mesure qui pourrait porter préjudice aux droits revendiqués par la Guinée équatoriale, est cruciale pour la bonne administration de la justice.

**VI. Risque réel et imminent de préjudice irréparable au droit de la Guinée équatoriale  
au respect de l'immunité de son vice-président, chargé de la défense nationale  
et de la sécurité de l'État**

**26**

21. Monsieur le président, Mesdames et Messieurs de la Cour, je passerai maintenant à la question de l'urgence, c'est-à-dire à la question de savoir si, dans la présente espèce, il existe un risque réel et imminent qu'un préjudice irréparable soit causé aux droits en cause avant que la Cour ne rende son arrêt définitif. Comme je l'ai déjà dit, je répondrai au volet de cette question qui concerne plus particulièrement la complète immunité de juridiction pénale étrangère dont jouit le vice-président en droit international. M. Kamto répondra plus tard au volet de la même question qui concerne l'immeuble où sont situés les locaux de l'ambassade.

22. M<sup>e</sup> Tchikaya a décrit le stade avancé auquel se trouve la procédure pénale engagée en France contre le vice-président de la Guinée équatoriale. Il a rappelé que par ordonnance datée du 5 septembre 2016, le vice-président de la Guinée équatoriale a été renvoyé devant le Tribunal correctionnel de Paris pour y répondre des prétendus délits figurant dans le réquisitoire.

23. Dès le 12 septembre 2016, comme l'a rappelé encore M<sup>e</sup> Tchikaya, la Guinée équatoriale élevait contre cette ordonnance une protestation très vive par une note verbale<sup>15</sup> qui est restée sans réponse pendant plus d'un mois. Elle s'est donc sentie obligée d'adresser à la Cour la présente demande en indication de mesures conservatoires afin de préserver ses droits et d'empêcher une nouvelle aggravation du différend.

24. Monsieur le président, Mesdames et Messieurs de la Cour, la procédure pénale engagée contre le vice-président de la Guinée équatoriale, chargé de la défense nationale et de la sécurité de l'Etat, fait courir un risque réel et imminent de préjudice aux droits de la Guinée équatoriale. Comme l'a expliqué M<sup>e</sup> Tchikaya, c'est tout particulièrement le cas depuis l'ordonnance du 5 septembre, dont je soulignerai qu'elle a été rendue postérieurement à l'introduction de la présente instance. Nous sommes maintenant parvenus à la troisième phase de la procédure pénale française, celle du jugement. L'ordonnance de renvoi est insusceptible d'appel. Cela veut dire qu'à tout moment, et sans notification préalable, des mesures peuvent être prises contre le vice-président, y compris la délivrance d'un mandat d'arrêt exécutoire en France ou à l'étranger. De plus, il existe désormais un risque permanent de voir les juridictions françaises déclarer le vice-président coupable des délits dont il est prévenu et le condamner, y compris à une peine d'emprisonnement. A franchement parler, il ne semble guère probable en effet que le Tribunal correctionnel respecte l'immunité du vice-président, que ce soit *in limine litis* ou autrement, étant donné la position adoptée jusqu'à maintenant par les juridictions françaises, y compris la Cour de cassation dans son arrêt du 15 décembre 2015<sup>16</sup>.

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25. A ce jour, la Guinée équatoriale n'a aucune raison de croire que les juridictions françaises ne vont pas donner suite à leur mandement de citation à prévenu, puis décerner un mandat d'arrêt si le vice-président ne comparaît pas. Ces juridictions n'ont pas hésité par le passé à

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<sup>15</sup> Demande en indication de mesures conservatoire, annexe 4.

<sup>16</sup> Requête introductive d'instance, annexe 7.

décerner un mandat d'arrêt contre lui, lorsqu'il leur a opposé son immunité et s'est abstenu de comparaître à une audience à laquelle elles l'avaient cité. Il n'y a aucune raison de croire qu'elles ne feront pas de même à un moment ou à un autre au cours des prochaines semaines.

26. La situation en est maintenant arrivée au point où le vice-président, chargé de la défense nationale et de la sécurité de l'Etat, ne peut plus voyager librement à l'étranger — que ce soit à destination de la France ou d'autres pays — pour y exercer ses fonctions officielles, qui lui imposent de voyager, sans courir à tout moment le risque d'être arrêté et transféré en France. Il importe de rappeler tout particulièrement la responsabilité qui est la sienne de contrôler l'application du très important accord bilatéral de coopération militaire entre la Guinée équatoriale et la France (daté du 9 mars 1985 et toujours en vigueur), et de diriger, dans ce contexte, l'action des ministres du gouvernement (dont le ministre de la défense et le ministre des affaires étrangères). Il importe également de rappeler que le vice-président est — et doit être — constamment en communication avec les représentants d'autres Etats qui lui reconnaissent la qualité de représentant de la Guinée équatoriale du seul fait de ses fonctions. L'exercice effectif de fonctions officielles aussi importantes au nom de la Guinée équatoriale est par conséquent gravement compromis et menacé.

27. Comme l'a déclaré la Cour dans l'affaire relative au *Mandat d'arrêt*, en formulant au sujet d'un ministre des affaires étrangères des observations qui s'appliquent également à une personne occupant un rang élevé dans l'Etat comme l'est un vice-président chargé de la défense nationale :

«si un ministre des affaires étrangères est arrêté dans un autre Etat à la suite d'une quelconque inculpation, il se trouvera à l'évidence empêché de s'acquitter des tâches inhérentes à ses fonctions. Les obstacles ainsi apportés à l'exercice de telles fonctions officielles ont des conséquences aussi graves, que le ministre des affaires étrangères, au moment de son arrestation, ait été présent à titre officiel ou privé sur le territoire de l'Etat ayant procédé à cette arrestation, que celle-ci concerne des actes qu'il aurait accomplis avant d'occuper le poste de ministre des affaires étrangères ou des actes accomplis dans le cadre de ses fonctions, ou encore qu'elle concerne des actes qu'il aurait accomplis à titre «officiel» ou des actes qu'il aurait accomplis à titre «privé». En outre, le simple fait qu'en se rendant dans un autre Etat ou qu'en traversant celui-ci un ministre des affaires étrangères puisse être exposé à une procédure judiciaire peut le dissuader de se déplacer à l'étranger lorsqu'il est dans l'obligation de le faire pour s'acquitter de ses fonctions<sup>17</sup>.»

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<sup>17</sup> *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, arrêt, C. I. J. Recueil 2002, p. 22, par. 55.

28. Je répète, Monsieur le président :

«le simple fait qu'en se rendant dans un autre Etat ou qu'en traversant celui-ci un ministre des affaires étrangères puisse être exposé à une procédure judiciaire peut le dissuader de se déplacer à l'étranger lorsqu'il est dans l'obligation de le faire pour s'acquitter de ses fonctions.»

29. Dans l'affaire relative au *Mandat d'arrêt*, le mandat en cause avait déjà été décerné.

Dans l'affaire qui nous occupe, le risque est toujours présent, puisqu'un mandat peut maintenant être décerné à tout moment. Comme je l'ai dit plus tôt, cela s'est déjà produit dans le cadre de cette même procédure en France.

30. Dans la présente affaire cependant, le risque imminent n'est pas seulement celui de l'arrestation, avec tout ce que cela implique pour une personne occupant un rang élevé dans l'Etat en tant que vice-président, mais encore celui de voir prendre, dans un procès pénal, des mesures irréversibles qui pourraient aller jusqu'à une condamnation. La condamnation d'un vice-président de la Guinée équatoriale (qui, si la Cour n'indique pas les mesures conservatoires demandées, semble probable au vu des positions adoptées par les juridictions françaises dans cette affaire) constituerait un fait accompli qui priverait d'effet l'arrêt de la Cour sur le fond.

31. Monsieur le président, Mesdames et Messieurs de la Cour, la disposition manifestée par les autorités judiciaires françaises à faire avancer rapidement ce procès pénal malgré l'instance introduite devant la Cour internationale de Justice met en évidence l'urgence de la situation et la nécessité de mesures conservatoires. Nous devons ajouter à cela l'apparente réticence, ou peut-être l'impuissance, des autorités françaises, y compris le ministère des affaires étrangères, à appeler l'attention des juridictions françaises sur l'immunité reconnue au vice-président en droit international. Nous avons vu qu'alors même que la présente instance avait été introduite le 13 juin de cette année, une juridiction française n'a pas hésité à rendre une ordonnance de renvoi le 5 septembre, ce qui a considérablement aggravé le différend entre la Guinée équatoriale et la France. En vérité, on serait presque tenté de croire que les juridictions françaises ont accéléré leur procédure interne à cause de la procédure engagée ici même au Palais de la Paix. En l'absence de mesures conservatoires, il est fortement à craindre que les actes portant atteinte aux droits de la Guinée équatoriale ne soient commis avant que la Cour ne rende son arrêt définitif.

32. Or, si ces mesures conservatoires n'étaient pas indiquées avant qu'un arrêt définitif ne soit rendu sur le fond, le préjudice causé aux droits de la Guinée équatoriale serait irréparable. En effet, ni le dommage qu'infligerait à la conduite des relations internationales et aux intérêts de défense de l'Etat le fait que le vice-président, chargé de la défense nationale et de la sécurité de l'Etat, ne puisse plus communiquer librement sur le plan international et voyager sans craindre constamment d'être arrêté, ni l'atteinte portée à la réputation de la Guinée équatoriale dans le monde, ne seraient susceptibles de remède ou de réparation.

33. Monsieur le président, Mesdames et Messieurs de la Cour, pour toutes ces raisons, la Guinée équatoriale conclut qu'il existe un risque réel et imminent que soit causé, avant que la Cour ne rende son arrêt définitif, un préjudice irréparable aux droits de la Guinée équatoriale relatifs à l'immunité que le droit international reconnaît à son vice-président, chargé de la défense nationale et de la sécurité de l'Etat.

34. Monsieur le président, Mesdames et Messieurs de la Cour, ainsi se termine mon intervention. Je vous remercie de votre attention et vous prie de bien vouloir inviter M. Maurice Kamto à prendre la parole.

Le VICE-PRESIDENT, faisant fonction de président : Je remercie sir Michael Wood. Je donne la parole à M. Kamto. Vous avez la parole, professeur.

Mr. KAMTO:

**4. THE CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES ARE ALSO SATISFIED IN RESPECT OF THE BUILDING LOCATED AT 42 AVENUE FOCH IN PARIS**

1. Mr. President, Members of the Court, it is always a great honour to appear before this Court and I am grateful for the renewed privilege of speaking before you on behalf of the Republic of Equatorial Guinea.

2. I shall not revisit the circumstances that have brought us before the Court at this stage in the case. Provisional measures proceedings before the Court are generally deemed exceptional. We are indeed in an exceptional situation in this case, where criminal proceedings initiated in a State, France, in violation of the immunity of a "holder of high-ranking office" in another State, Equatorial Guinea, and against the premises of that State's diplomatic mission, pose an imminent

risk of irreparable prejudice to its rights as guaranteed by international law. Our dearest wish, Mr. President, is for this case to resume its normal course, so that the Court, by the decision it will hand down on the merits of the case, can give the Parties the opportunity to pursue peaceful and friendly relations which should never have been undermined by contentious judicial proceedings.

3. Besides the measures that Equatorial Guinea is asking the Court to order with a view to preserving its right to respect for the immunity of a “holder of high-ranking office” in its country, as so eloquently described by my colleague Sir Michael Wood, Equatorial Guinea is also asking the Court to order the measures required to protect the building located at 42 avenue Foch in Paris, which houses its diplomatic mission in France. The Request for the indication of provisional measures, dated 29 September 2016, sent by Equatorial Guinea to the Court, seeks in this regard:

“(b) that France ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea’s diplomatic mission in France, and, in particular, assure its inviolability, and that those premises, together with their furnishings and . . . property [that might be] thereon, are protected from any intrusion or damage, any search, requisition, attachment or any other measure of constraint”.

4. It falls to me to demonstrate that the requested measures, which are dictated by the circumstances and seek to preserve the respective rights of both Parties to the dispute, are consistent with Article 41 of the Statute of the Court and with Article 73 of its Rules, two provisions that have, moreover, been clarified by the Court’s jurisprudence, as my distinguished colleague has just illustrated.

5. It is a “principle universally accepted” that “the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute”.

6. Such was the view expressed by the Permanent Court of International Justice regarding the request for the indication of provisional measures in the case concerning the *Electricity Company of Sofia and Bulgaria*<sup>18</sup>. This concept, expressed in a variety of ways, has been taken up in this Court’s jurisprudence. It is the failure to respect this well-established and basic principle of

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<sup>18</sup>*Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79, p. 199.



international adjudication that has led Equatorial Guinea to ask the Court to order provisional measures in this case.

7. In accordance with Article 41 of the Statute and the Court's jurisprudence, in order to indicate provisional measures, the Court requires the protected rights to be plausible and there to be a link between those rights and the provisional measures being sought<sup>19</sup>. I will show, first, that these conditions are satisfied in this case, with regard to the building located at 42 avenue Foch in Paris, which houses the diplomatic mission of Equatorial Guinea. I will then explain that the sole purpose of the measures which Equatorial Guinea is seeking of the Court is:

- first, to protect the respective rights of the Parties;
- second, to protect those rights in the face of a situation of urgency due to the serious risk of irreparable prejudice posed by the contested judicial proceedings with regard to the fate of the building located at 42 avenue Foch in Paris housing the premises of its diplomatic mission;
- third, to protect those rights, while at the same time avoiding any prejudgment of the merits of the dispute that has been brought before the Court.

8. With your permission, Mr. President, Members of the Court, I would like to take up and briefly develop each of these four points in turn, after which I will present Equatorial Guinea's submissions to the Court.

**1. The rights whose protection is sought are plausible  
and linked to the requested measures**

32 9. The plausibility of Equatorial Guinea's rights has already been discussed in general terms by Sir Michael Wood. As regards the building located at 42 avenue Foch in Paris more specifically, the rights at issue relate, first, to respect for the immunity and inviolability of the building as premises of the diplomatic mission of Equatorial Guinea in France, and, second, to respect for its immunity as a property used or intended for use by the State of Equatorial Guinea for government non-commercial purposes. The right to immunity and inviolability of this building, which houses the premises of Equatorial Guinea's diplomatic mission, is based on the provisions of

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<sup>19</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53 and p. 19, paras. 55-58.

Article 22 of the 1961 Vienna Convention on Diplomatic Relations<sup>20</sup> and customary international law.

10. Furthermore, there is a link between the requested measures and these rights which are undeniably plausible. Indeed, the second measure sought by Equatorial Guinea in the submissions contained in its request for the indication of provisional measures is based on the fact that the continuation or resumption of searches in the building at 42 avenue Foch in Paris, which houses Equatorial Guinea's diplomatic mission, or worse still, its confiscation and sale at public auction, would be likely to affect the rights whose plausibility has been established.

## **2. The requested measures protect the respective rights of the Parties**

11. Mr. President, Members of the Court, it is clear that developments in the criminal proceedings under way in France constitute a direct threat to the rights of Equatorial Guinea. But it cannot be overemphasized that the provisional measures that Equatorial Guinea is seeking of the Court protect the respective rights of both Parties to the dispute: by preserving the rights of Equatorial Guinea from violations which might, in the light of the Court's decision on the merits, prove contrary to international law, the measures being sought in no way affect the rights of France. The said measures will ensure that the rights of both Parties are safeguarded, irrespective of the outcome of the proceedings on the merits.

12. More specifically, the measures sought by Equatorial Guinea will not affect any right to which France is entitled under international law in this case. They will achieve the fundamental purpose of all provisional measures, which is to suspend, *pendente lite*, any prejudicial action that has been initiated pending the final decision of the Court on the dispute brought before it. When the suspension of such action, on the one hand, or the preservation of the status quo, on the other, does not affect the respective rights of either Party — as in these proceedings — and when, on the contrary, the absence of such measures of suspension or preservation creates a serious risk of severe prejudice to the rights of one of the Parties, the Court is entitled to order the requested measures; and it has always done so.

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<sup>20</sup>Vienna Convention on Diplomatic Relations, adopted on 18 April 1961, entered into force on 24 April 1964, United Nations, *Treaty Series*, Vol. 500, p. 95.

### **3. The urgency of the situation: there is a serious risk of irreparable prejudice to the rights of Equatorial Guinea**

13. Thirdly, there is a serious risk of irreparable prejudice to the rights of Equatorial Guinea with regard to the building located at 42 avenue Foch in Paris. Mr. President, to order provisional measures, the Court also requires that there should exist a “serious”<sup>21</sup> or “real and imminent”<sup>22</sup> risk — it depends on the case in question — that “irreparable prejudice”<sup>23</sup> might be caused to rights which are the subject of dispute in the proceedings before it. This phrase is in line with the wording of the Order issued in 1927 in the case concerning the *Denunciation of the Treaty of 2 November 1865, between China and Belgium*, in which the Permanent Court noted that the potential violation of the alleged rights “[could not] be made good simply by the payment of an indemnity or by compensation or restitution in some other material form”<sup>24</sup>. Thus, as the Court stated in the *Arrest Warrant of 11 April 2000*, the task of the Court is to be concerned to preserve, by the measures sought of it, “the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent”<sup>25</sup>, and that “presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute” in the case before it<sup>26</sup>.

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14. Accordingly, Members of the Court, what the Court must consider when ordering provisional measures, is not the realization of irreparable prejudice but the risk that such prejudice might occur. It is thus the risk, not the prejudice itself, that is the determining factor.

15. In this case, the serious risk that irreparable prejudice might be caused to the rights of Equatorial Guinea with regard to the building located at 42 avenue Foch in Paris is high. That prejudice, which is severe considering the asset represented by the building concerned, becomes irreparable when we know that it is the premises of the diplomatic mission of Equatorial Guinea,

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<sup>21</sup>See, for example, *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Provisional Measures, Order of 10 January 1986*, I.C.J. Reports 1986, p. 10, para. 21.

<sup>22</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, I.C.J. Reports 2011 (I), pp. 21-22, para. 64; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 13 December 2013*, I.C.J. Reports 2013, p. 405, para. 24.

<sup>23</sup>*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Provisional Measures, Order of 8 April 1993*, I.C.J. Reports 1993, p. 19, para. 34.

<sup>24</sup>*Provisional Measures, Order of 8 January 1927*, P.C.I.J., Series A, No. 8, p. 6.

<sup>25</sup>*Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Interim Protection, Order of 5 July 1951*, I.C.J. Reports 1951, p. 93; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, I.C.J. Reports 2011 (I), p. 18, para. 53.

<sup>26</sup>*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Provisional Measures, Order of 8 December 2000*, I.C.J. Reports 2000, p. 201, para. 69.

since violation of the building is likely to have a severe effect on the conduct of relations between the two countries and infringe the sovereignty, honour and dignity of Equatorial Guinea. The term “irreparable” refers here to what cannot really be made good by any form of compensation, be it financial or otherwise. This, of course, applies when peace and security are at stake; but it also applies when, as in this case, the peaceful conduct of diplomatic relations and the honour and dignity of a State are affected and likely to be further affected.

16. The premises of the diplomatic mission located at 42 avenue Foch in Paris are now exposed to the risk of judicial confiscation, liable to occur at any moment — I repeat, at any moment — and the diplomatic mission risks being evicted following the sale at public auction of the building. Furthermore, since the premises housing the diplomatic mission of Equatorial Guinea have not been recognized as such by France, there is a permanent risk of intrusion either by the police and the French judicial authorities, or by private individuals. This affects the capacity of the Embassy of Equatorial Guinea to conduct its daily activities. As the Court stated in its Order in the *Diplomatic and Consular Staff* case: “[t]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose”<sup>27</sup>.

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17. In the proceedings under way before the French criminal courts, the fate of the building located at 42 avenue Foch is inextricably linked to that of the Vice-President of Equatorial Guinea. If the latter were to be convicted, the building would be confiscated and sold at public auction. What a spectacle that would be, Mr. President: if the Embassy of Equatorial Guinea were sold at auction, the Ambassador of Equatorial Guinea in France, the Embassy staff, the furnishings and files would be thrown out onto the street. This untenable prospect is demeaning for a sovereign State, but the prospect is a genuine one if the measures sought are not ordered. Nothing besides these measures can stop the current momentum of the French courts.

18. As we have said, Mr. President, Members of the Court, the proceedings have picked up pace: an order referring the Vice-President of Equatorial Guinea before the Paris *Tribunal*

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<sup>27</sup>*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 19, para. 38.

*correctionnel* was issued on 5 September last and his trial could open at any moment. Henceforth, only the judges of the *Tribunal correctionnel* have any control over the judicial calendar. It would seem that even the French Government cannot do anything or, in any event, not very much. Apparently a promise by the French executive does not suffice to stop the course of justice; the French courts would only allow such an intervention for a legitimate reason, such as the implementation of a decision emanating from the International Court of Justice.

19. It is to be recalled that, notwithstanding Equatorial Guinea's protests, the building housing the premises of its diplomatic mission has been searched repeatedly; that, despite the explanations it has given, the building has nonetheless been judicially attached. This is why Equatorial Guinea maintains that there is an urgent need to order provisional measures in the present case, because "action prejudicial to the rights of either party is likely to be taken before such final decision is given", as the Court stated in its Order in the case concerning *Passage through the Great Belt*<sup>28</sup>.

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20. In his oral observations on the subject of provisional measures in the case concerning *Certain Criminal Proceedings in France*, my distinguished colleague and friend, Professor Alain Pellet, argued, as counsel for France, that the Congo could not fear the occurrence of any irreparable damage, or indeed any damage "at all", he stressed, because the request to give testimony addressed to the Congolese Head of State was simply an "invitation", which that latter could decline without legal consequence or consequence for his personal immunity. Accordingly, he declared, in that instance, that the measure sought "could only be indicated if and to the extent that an alleged procedural measure is likely to cause it — the Congo — irreparable prejudice by threatening the enjoyment of internationally recognized immunities"<sup>29</sup>.

21. This is precisely the situation we are facing in the present case. Unlike the *Congo v. France* case — in which the applicant State confined itself to invoking a violation of such immunities with respect to the Congolese Head of State, "and to him alone" — in these proceedings, a violation of immunity is invoked not only with respect to the Vice-President of

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<sup>28</sup>*Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 17, para. 23.*

<sup>29</sup>*Certain Criminal Proceedings in France (Republic of the Congo v. France), CR 2003/21, p. 25, para. 20 (Pellet).*

Equatorial Guinea, but also with respect to the premises of that State's diplomatic mission. And, I repeat, those premises were searched on no fewer than four occasions between 2011 and 2016, despite firm and repeated protests by Equatorial Guinea, notably through its Ambassador in Paris; the building housing those premises has already been judicially attached; finally, and of even greater concern, the advancement of the criminal proceedings before the French courts means that it is now exposed to a real and imminent risk of confiscation and, as we have mentioned, sale at public auction, since those proceedings are now in their third and final stage under the French Penal Code — I would just recall, for the record, that France gave a clear and detailed presentation of French criminal procedure in its pleadings in the *Congo v. France* case — this final phase is the judgment phase, and it is already under way in respect of the Vice-President of Equatorial Guinea, with direct implications for the building located at 42 avenue Foch in Paris.

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22. Pending the resolution of the dispute on the merits, this Court alone, through the provisional measures requested, can prevent the irreparable from occurring, namely further searches of the premises of the diplomatic mission of a sovereign State — Equatorial Guinea — in breach of the principle of the inviolability of those premises, and the real risk of the building housing the said mission being confiscated and sold at public auction, to the detriment of the peaceful conduct of Equatorial Guinea's diplomatic relations and to the great shame of that State, which, it must be said, prior to the criminal proceedings at issue, had friendly and trusting relations with France.

#### **4. The requested measures do not prejudge the merits of the dispute**

23. I would recall that, at this stage, the Court is not being asked to rule on the status of the building located at 42 avenue Foch in Paris, or on the question of the ownership of the building. Equatorial Guinea is well aware that while the Court, in these proceedings on the indication of provisional measures, must examine whether the circumstances brought to its attention require the indication of such measures, it cannot, as it notably recalled in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, “make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it,

to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits, must remain unaffected by the Court's decision<sup>30</sup>.

24. Equatorial Guinea is not, therefore, asking the Court to rule on those matters during these incidental proceedings. We are not asking the Court to recognize Equatorial Guinea as the proprietor of the building located on avenue Foch. We are not asking the Court to annul the attachment order on the building. We are, however, asking that the said building be treated as premises of Equatorial Guinea's diplomatic mission, in the understanding that Equatorial Guinea would comply with any decision of the Court, even if, for the sake of argument, it had to disregard that building's status as premises of a diplomatic mission. In short, faced with the risk of the said building being removed from Equatorial Guinea's possession and of irreparable harm being caused to that State's honour and dignity through the expulsion of its diplomatic mission, it is for the Court to take appropriate action with regard to the indication of the provisional measures sought.

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25. The status of the building or, more precisely, the question of its ownership and its status as premises of a diplomatic mission, is a fundamental aspect of the dispute between Equatorial Guinea and France. According to jurisprudence, as reflected in the Order of the Permanent Court of International Justice in the case concerning *Polish Agrarian Reform and German Minority*,

“the essential condition which must necessarily be fulfilled in order to justify a request for the indication of interim measures, should circumstances require them, is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court<sup>31</sup>.”

26. Mr. President, Members of the Court, Equatorial Guinea has recalled all the rights forming the subject of the dispute submitted to the Court — there is no need to go over them again. On the other hand, it is necessary to reiterate that there is now a real risk of irreparable prejudice to those rights and that, therefore, the provisional measures requested are not designed “to obtain an interim judgment in favour of a part of the claim formulated in the Application”, to use the words of the Permanent Court of International Justice in its Order in the *Factory at Chorzów* case<sup>32</sup>.

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<sup>30</sup>*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 22, para. 44.*

<sup>31</sup>*Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58, p. 177.*

<sup>32</sup>*Factory at Chorzów, Order of 21 November 1927, P.C.I.J., Series A, No. 12, p. 10.*

27. Let us be clear: the measures sought are provisional and are indicated only “on a temporary basis”, as the Court itself states in its orders when it consents to indicate such measures<sup>33</sup>. The measures ordered will cease to have effect, once the Court has ruled on the merits of the dispute before it. Equatorial Guinea is confident that the Court will indicate these measures, so that the proceedings on the merits can take place in an atmosphere of calm that will be made possible by guaranteeing the rights protected in its order.

### 5. Equatorial Guinea’s submissions

39 28. Mr. President, Members of the Court, my colleagues and I have shown that the conditions required for the Court to indicate the requested measures have been met in the present case. The purpose — the sole purpose — of these incidental proceedings is simple: to enable this distinguished Court to find that recent developments in the French criminal proceedings, which form the subject of the dispute between Equatorial Guinea and France, and in particular the order of 5 September 2016, create a real and serious risk of irreparable prejudice to Equatorial Guinea’s rights and, accordingly, to take appropriate action to ensure that a future decision of the Court on the merits of the dispute is not deprived of effect.

29. We have shown that the immunity of a “holder of high-ranking office” in Equatorial Guinea, in this instance the Vice-President of that State, is being disregarded, and that, worse still, the proceedings initiated against him have reached the judgment stage, the final phase of criminal proceedings in France: there is therefore a risk of a judgment and a criminal conviction at any moment. We have shown that the inviolability of the premises of Equatorial Guinea’s Embassy in France, which is housed in the building located at 42 avenue Foch in Paris, is the subject of an ongoing violation as a result of repeated searches by the French judicial authorities, notwithstanding the immunity enjoyed by that diplomatic mission under international law; that, even more seriously, the building in question, which has already been judicially attached, is at imminent risk of confiscation and sale at public auction in the context of the criminal proceedings pending before the French courts.

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<sup>33</sup>See, for example, *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 11, para. 32; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86.



30. The facts and rules of law applicable in this case have been clearly presented by Equatorial Guinea. The urgency, which is reflected in a serious risk of irreparable prejudice to the rights at issue in these proceedings, has been demonstrated. Therefore, Equatorial Guinea is confident, Mr. President, Members of the Court, that the Court will order the measures it has requested, because only this Court can still banish the spectre of the threat posed by the contentious criminal proceedings to the rights of Equatorial Guinea, rights which it is seeking to protect in the case between itself and France and of which the Court is seised.

31. This concludes Equatorial Guinea's first round of oral observations. It remains for me to thank you, Mr. President, Members of the Court, for your kind attention.

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The VICE-PRESIDENT, Acting President: Thank you. That concludes the first round of oral observations of Equatorial Guinea. The Court will meet again tomorrow at 10 a.m. to hear the first round of oral observations of France. The Court is adjourned.

*The Court rose at 11.45 a.m.*

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