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**INTERNATIONAL COURT OF JUSTICE**

# CASE CONCERNING IMMUNITIES AND CRIMINAL PROCEEDINGS

# (EQUATORIAL GUINEA *v.* FRANCE)

## PRELIMINARY OBJECTIONS

## OF THE

## FRENCH REPUBLIC

**30 March 2017**

*[Translation by the Registry]*

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## INTRODUCTION

1. Article 79, paragraph 1, of the Rules of Court provides that:

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial."

2. The French Republic (hereinafter "France") has decided to avail itself of this possibility and raise objections to the jurisdiction of the Court to entertain the case brought by the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") by an Application dated 13 June 2016. That is the subject of these written pleadings.

### A. Procedural history

3. On 13 June 2016, Equatorial Guinea filed an Application against France before the International Court of Justice with regard to a dispute concerning "the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security [Mr. Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea" in France. As basis for the jurisdiction of the Court in the case, Equatorial Guinea invoked Article 35 of the Convention against Transnational Organized Crime and the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.

4. On 29 September 2016, Equatorial Guinea submitted a Request for the indication of provisional measures, asking 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
6 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".

5. After the public hearings which were held from 17 to 19 October 2016, the Court, by an Order dated 7 December 2016, rejected Equatorial Guinea's request for the legal proceedings before the French courts to be suspended, finding that it did not have prima facie jurisdiction to entertain Equatorial Guinea's request relating to the immunity from criminal jurisdiction which, according to the Applicant, Mr. Teodoro Nguema Obiang Mangue enjoys as Second Vice-President

of the Republic of Equatorial Guinea in charge of Defence and State Security[1]. The Court found that a dispute capable of falling within the scope of the Convention against Transnational Organized Crime did not exist between the Parties.

6. Regarding the building located at 42 avenue Foch, the Court considered that the conditions for indicating provisional measures were met and ordered France, pending a final decision in the case, to take "all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability"[2].

7. On 3 January 2017, Equatorial Guinea filed its Memorial in the Registry of the Court. Pursuant to the provisions of Article 79, paragraph 1, of the Rules of Court, and the Court's Order of 1 July 2016 fixing time-limits for the proceedings, France wishes to raise objections to the Court's jurisdiction.

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## B. General presentation and structure of the preliminary objections

8. In the first chapter, France will make some general observations on the facts underlying the dispute submitted to the Court, the scope of that dispute, and the abusive nature of the Application.

9. In the second chapter, it will show, as the Court found prima facie in its Order of 7 December 2016, that a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime does not exist between Equatorial Guinea and France, and that, therefore, the Court lacks jurisdiction over that aspect of the case.

10. In the third chapter, France will argue that the Court does not have jurisdiction to entertain aspects of the dispute based on the Vienna Convention on Diplomatic Relations.

11. These preliminary objections will thus be structured as follows:

— Chapter 1: General Observations

— Chapter 2: The Court's lack of jurisdiction on the basis of the United Nations Convention against Transnational Organized Crime

— Chapter 3: The Court's lack of jurisdiction on the basis of the Vienna Convention on Diplomatic Relations.

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[1] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, Order of 7 Dec. 2016, para. 46.

[2] *Ibid*., para. 99.

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## CHAPTER 1

### GENERAL OBSERVATIONS

12. As a preliminary matter, France would like to return to certain facts underlying the proceedings (I), the scope of the dispute (II), and the abusive nature of Equatorial Guinea's Application, which should lead the Court to decide that it lacks jurisdiction to entertain it (III).

### I. Facts of the case

13. During the Court's consideration of the Request for the indication of provisional measures filed by Equatorial Guinea, the presentation by the Agent of France and the oral arguments of its counsel demonstrated that the facts of the case that gave rise to the dispute submitted to the Court were singular in nature and had been the subject of contradictory statements by Equatorial Guinea. France notes that those contradictions are once again reflected in the Memorial that Equatorial Guinea submitted to the Court on 3 January 2017.

14. As the Court has pointed out, "[t]he existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law to be resolved in the light of the relevant facts"[3]. Consequently, without going into any great detail, France wishes to return to certain factual elements underlying Equatorial Guinea's Application, which it was able to discuss only briefly at the hearings on the request for provisional measures.

15. The facts set out in Equatorial Guinea's Memorial that are not discussed in the present submission should, however, not be considered as accepted by France, which reserves the right to return to them as necessary.

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#### A. The origin of the criminal proceedings instituted before the French courts

16. The criminal proceedings instituted against Mr. Teodoro Nguema Obiang Mangue before the French courts originated with a complaint filed on 2 December 2008 by the French association Transparency International France against several African Heads of State and members of their families, including Mr. Teodoro Nguema Obiang Mangue, before the senior investigating judges of the Paris *Tribunal de grande instance*, for acts of handling misappropriated public funds, money laundering, misuse of corporate assets, breach of trust and concealment[4].

17. By a judgment dated 9 November 2010, the *Chambre criminelle* of the *Cour de cassation* found Transparency International France's civil-party application admissible[5].

18. On 4 July 2011, the Paris Public Prosecutor submitted an application for characterization, requesting that the investigation should concern only facts that could be characterized as money

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[3] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16.

[4] Complaint with civil-party application filed by Transparency International France and Mr. Grégory Ngbwa Minsta with the Paris *Tribunal de grande instance*, 2 Dec. 2008, p. 22 (Ann. 1).

[5] *Cour de cassation, Chambre criminelle*, 9 Nov. 2010 (No. 09-88272) (Ann. 4 of the Application of Equatorial Guinea, 13 June 2016 (hereinafter "AEG")).

laundering or handling offences, that is, acts committed on French territory in 1997 and up to October 2011. The criminal proceedings that were instituted do not therefore involve an extraterritorial extension of the jurisdiction of the French courts, contrary to what Equatorial Guinea claims[6].

19. In the course of the judicial investigation, the investigating judges had occasion to look into the Obiang family's assets in France, including, in particular, those accumulated by Mr. Teodoro Nguema Obiang Mangue.

**B. The townhouse located at 42 avenue Foch in Paris**

20. In its complaint filed on 2 December 2008, Transparency International France drew the attention of the French authorities to a building located at 42 avenue Foch in Paris, in the following terms:

**11** "*(b)* As regards Mr. Teodoro OBIANG and his family:

Mr. Teodoro OBIANG is the President of Equatorial Guinea.

> According to the 12 April 2006 edition of *Le Figaro* (see article by Stéphane Bern, "*Drapeau rouge et billet vert*", 12 May 2006 — document 16), he acquired a townhouse located on avenue Foch. It is evident that Mr. Teodoro OBIANG took pains not to be named as the apparent owner of the property, but the verifications to be made in the forthcoming investigations will undoubtedly establish that he is."[7]

21. The investigation subsequently established that the building in fact belonged to Mr. Teodoro Nguema Obiang Mangue and was used in a personal capacity. The testimony gathered in the course of the proceedings and the records of the searches conducted by the French authorities speak for themselves[8]. On 19 July 2012, the judges attached the building (*saisie pénale immobilière*), as a provisional measure, to prevent it from being sold before the end of the judicial investigation[9].

22. Equatorial Guinea then engaged in a considerable amount of diplomatic correspondence in an attempt to block the criminal proceedings. Its contentions regarding the use of the building located at 42 avenue Foch thus varied as the judicial proceedings progressed: sometimes it was

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[6] Memorial of Equatorial Guinea filed on 3 Jan. 2017 (hereinafter "MEG"), p. 91, para. 6.26.

[7] Complaint with civil-party application filed by Transparency International France and Mr. Grégory Ngbwa Mintsa with the Paris *Tribunal de grande instance*, 2 Dec. 2008, p. 9 (Ann. 1).

[8] See Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), pp. 17-20 (Ann. 7 MEG).

[9] See Order of attachment of real property (*saisie pénale immobilière*), 19 July 2012 (No. 47 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

Teodoro's accommodation as a young student[10], and at other times it was the residence of Equatorial Guinea's Permanent Delegate to UNESCO[11] or the premises of its diplomatic mission[12].

**12** 23. Faced with these fluctuating and contradictory statements, France — through the Protocol Department of the Ministry of Foreign Affairs — consistently stated that it was unable to recognize Equatorial Guinea's claims in respect of the building located at 42 avenue Foch, recalling that there had been an order to attach the property and that judicial proceedings were pending[13]. This position was reiterated to the Equatorial Guinean authorities on multiple occasions, including quite recently[14].

### 1. Uncertainty about the date on which Equatorial Guinea claims to have acquired ownership of the building located at 42 avenue Foch in Paris

24. By a Note Verbale dated 4 October 2011, the Embassy of Equatorial Guinea in France drew the attention of the French Ministry of Foreign Affairs to the building located at 42 avenue Foch in the following terms:

> "The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs . . . and has the honour to inform it that the Embassy has for a number of years owned a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to your Department.
>
> Since the building forms part of the premises of the diplomatic mission, pursuant to Article 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Republic of Equatorial Guinea wishes to give you official notification so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention."[15]

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[10] Letter from the President of Equatorial Guinea to the French President, 14 Feb. 2012 (No. 5 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[11] Note Verbale No. 387/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 17 Oct. 2011 (No. 3 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures). See also Note Verbale No. 251/12 from the Ministry of Foreign Affairs of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 14 Feb. 2012 (No. 6 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 173/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 14 Feb. 2012 (No. 7 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[12] Note Verbale No. 249/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 12 Mar. 2012 (No. 16 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[13] Note Verbale No. 803 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 20 Feb. 2012 (No. 12 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[14] Note Verbale No. 158/865 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 2 Mar. 2017 (Ann. 2).

[15] NoteVerbale No. 365/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 4 Oct. 2011 (No. 1 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

25. Whereas on 4 October 2011 Equatorial Guinea had affirmed that it had "for a number of years owned" the building, in its response to the question put by Judge Bennouna at the end of the
**13** oral proceedings on the request for provisional measures, it stated that it considered that it had "definitively acquired the title to the property located at 42 avenue Foch on 15 September 2011"; that is, less than a month before the aforementioned Note Verbale had been sent, not "a number of years". Compounding the uncertainty, the Embassy of Equatorial Guinea stated, in a Note Verbale dated 15 February 2012, that "[t]he title to the property is in the process of being transferred"[16].

26. On 5 October 2011, as part of the judicial investigation, investigators went to the address of the townhouse. As noted in the order for partial referral, "[a]t the entrance porch, [the investigators] noted the presence of two makeshift signs marked '*République de Guinée Équatoriale — locaux de l'ambassade*' (Republic of Equatorial Guinea — Embassy premises). The building's caretaker explained to them that, the previous day [the day the Embassy sent the Ministry of Foreign Affairs its Note Verbale stating that it had owned the building for a number of years], a driver and two employees of the Embassy of the Republic of Equatorial Guinea had come to the premises in a Mercedes with diplomatic plates and had affixed the signs . . ."[17]

### 2. Uncertainty about Equatorial Guinea's use of the building located at 42 avenue Foch in Paris

27. The Notes Verbales from the Embassy of Equatorial Guinea to the Protocol Department of the French Ministry of Foreign Affairs show contradictions in Equatorial Guinea's position regarding the status of the building located at 42 avenue Foch:

**14** — On 4 October 2011, the Embassy claimed that the building had been "use[d] [for a number of years] for the performance of the functions of its diplomatic mission"[18].

— On 17 October 2011, the building was then described by the Embassy as housing the new official residence of the Permanent Delegate to UNESCO[19]. In its reply to the question put by Judge Donoghue at the end of the oral proceedings on the request for provisional measures, Equatorial Guinea admitted that it had not notified UNESCO of its Permanent Delegate's change of residence until 14 February 2012[20], that is, the first day of the searches and attachment of movable assets carried out at 42 avenue Foch. Yet, by a Note Verbale dated 31 October 2011, the French Ministry of Foreign Affairs had taken care to remind

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[16] Note Verbale No. 187/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 15 Feb. 2012 (No. 10 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[17] Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), p. 16 (Ann. 7 MEG).

[18] Note Verbale No. 365/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 4 Oct. 2011 (No. 1 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[19] Note Verbale No. 387/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 17 Oct. 2011 (No. 3 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[20] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, pp. 8-9, para. 27.

Equatorial Guinea that any such change of residence had to be notified not to France, but rather to UNESCO's protocol department[21].

— In this regard, Equatorial Guinea claims in its Memorial that "[o]n 17 October 2011, following the end of Ambassador Edjo Ovono Frederico's mission, the designated Chargée d'affaires *a.i.*, Ms Bindang Obiang, who is also the Permanent Delegate of Equatorial Guinea to UNESCO, was rehoused at 42 avenue Foch. The reason for this change in accommodation was that the dwelling at 46 rue des Belles Feuilles notified to UNESCO was unfit for habitation, and the dignity of Ms Bindang Obiang's new functions required a better residence"[22]. However, on 19 September 2012, in the Note Verbale from the Embassy of Equatorial Guinea requesting
**15** that the Protocol Department issue a special residence permit to Ms Bindang Obiang in her capacity as Extraordinary and Plenipotentiary Ambassador, the address listed in the notification form regarding her appointment and the assumption of her duties is given as 8 bis avenue de Verzy in Paris (17th arr.), not 42 avenue Foch[23].

— On 16 February 2012, when Equatorial Guinea's Ministry of Foreign Affairs was seeking the approval of the French authorities for Ms Bindang Obiang's appointment as Equatorial Guinea's Ambassador to France, it was then stated in the curriculum vitae attached to the Note Verbale that she was residing at 46 rue des Belles Feuilles in Paris (16th arr.).

— Furthermore, in its reply to the question put by Judge Donoghue, Equatorial Guinea admitted, concerning its Embassy's request by Note Verbale dated 15 February 2012[24] for protection for two Equatorial Guinean ministers who had to go to the building at 42 avenue Foch, that "it was in fact in order to supervise preparations for the effective occupation of the building, which had been acquired for use as premises of the diplomatic mission of Equatorial Guinea"[25].

— On 27 July 2012, that is, eight days after the investigating judges had decided to order the attachment of the property, a new Note Verbale from the Embassy of Equatorial Guinea (its footer still showing the Embassy's address as 29 boulevard de Courcelles, Paris (8th arr.)) stated that:

> "as from Friday 27 July 2012, the Embassy's offices are located at 42 avenue Foch, Paris (16th arr.), a building which it is henceforth using for the performance of the functions of its diplomatic mission in France".

**16** 28. These contradictions are reflected in Equatorial Guinea's written pleadings in the present proceedings:

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[21] Note Verbale No. 5393 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 31 Oct. 2011 (No. 4 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[22] MEG, pp. 47-48, para. 4.9.

[23] Note Verbale No. 628/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 19 Sep. 2012 (Ann. 3).

[24] Note Verbale No. 185/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 15 Feb. 2012 (No. 9 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[25] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, p. 9, para. 28.

— In its Application instituting proceedings dated 13 June 2016, Equatorial Guinea claimed that the building located at 42 avenue Foch had been used by its diplomatic mission in France since 15 September 2011[26].

— In its reply to the questions put by Judge Bennouna and Judge Donoghue, dated 26 October 2016, Equatorial Guinea gave 4 October 2011 as the date marking the start of its use of the premises for the performance of its diplomatic mission in France[27].

— Furthermore, in its Memorial filed on 3 January 2017, Equatorial Guinea states that it protested against the first searches conducted in the building on 28 September and 3 October 2011, but acknowledges in the next line that it was not until 4 October 2011 that it informed the French Ministry of Foreign Affairs that the property was assigned to its diplomatic mission in France[28]. Equatorial Guinea thus protested against the search measures before it had even sent the first Note Verbale, dated 4 October 2011, informing the French authorities of the building's status.

29. In response to each of these Notes Verbales — which might be seen as so many reactions on the part of Equatorial Guinea to developments in the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue — France recalled, through the Protocol Department of the Ministry of Foreign Affairs, that the building located at 42 avenue Foch in Paris had never been recognized as forming part of the premises of Equatorial Guinea's diplomatic mission[29].

## 17 C. Mr. Teodoro Nguema Obiang Mangue's placement under judicial examination

30. When Transparency International France filed its complaint before the French courts, Mr. Teodoro Nguema Obiang Mangue was serving as Minister for Agriculture and Forestry of the Republic of Equatorial Guinea. As the criminal proceedings progressed, his functions changed.

31. On 23 January 2012, the judges in charge of the investigation summoned Mr. Teodoro Nguema Obiang Mangue to a first appearance to be held on 1 March 2012, informing him that they were considering placing him under judicial examination. Mr. Teodoro Nguema

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[26] AEG, p. 6, para. 20: "The building located at 42 avenue Foch in Paris was, until 15 September 2011, co-owned by five Swiss companies of which Mr. Teodoro Nguema Obiang Mangue had been the sole shareholder since 18 December 2004. On 15 September 2011, he transferred his shareholder's rights in the companies to the State of Equatorial Guinea. Since then, the building has been used by the diplomatic mission of Equatorial Guinea."

[27] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, p. 10, para. 32.

[28] MEG, p. 150, para. 8.49.

[29] See, in particular, Note Verbale No. 5007 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 11 Oct. 2011 (No. 2 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 5393 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 31 Oct. 2011 (No. 4 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 802 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 20 Feb. 2010 (No. 12 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 1341 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 28 Mar. 2012 (No. 18 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 158/865 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 2 Mar. 2017 (Ann. 2).

Obiang Mangue refused to appear[30]. Summoned a second time on 11 July 2012, Mr. Teodoro Nguema Obiang Mangue, again, failed to appear[31].

32. In the meantime, on 21 May 2012, Mr. Teodoro Nguema Obiang Mangue was appointed Second Vice-President in charge of Defence and State Security, by decree of the President of the Republic of Equatorial Guinea[32].

33. On 14 November 2013, the French judicial authorities sent a request for international mutual assistance in criminal matters to the judicial authorities of Equatorial Guinea, with a view to placing Mr. Teodoro Nguema Obiang Mangue under judicial examination.

**18** 34. This request was accepted and voluntarily executed, on 4 March 2014, by the Equatorial Guinean authorities, which did not therefore consider that the request conflicted with the principle of sovereign equality of States. On 18 March 2014, judges from the Supreme Court of Malabo, acting as investigating judges for the purpose of executing the mutual legal assistance, notified Mr. Teodoro Nguema Obiang Mangue that he was being placed under judicial examination:

> "for having in Paris and on national territory during 1997 and until October 2011, in any event for a period not covered by prescription, assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms EDUM, SODAGE and SOMAGUI FORESTAL, acts characterized as laundering of the proceeds of the above-mentioned misdemeanours which are defined and punishable under Articles 324-1; 432-15; 314-1 of the French Penal Code and Article L1241-3 of the French Commercial Code"[33].

35. On 23 May 2016, the National Financial Prosecutor sought the referral of Mr. Teodoro Nguema Obiang Mangue to the Paris *Tribunal correctionnel*[34]. Less than a month later, Equatorial Guinea filed its Application instituting proceedings before the Court.

36. The body of evidence accumulated over the course of the proceedings led the investigating judges, on 5 September 2016, to issue an order referring Mr. Teodoro Nguema Obiang Mangue to the Paris *Tribunal correctionnel* for the same offences that had prompted his

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[30] See Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), pp. 28 (Ann. 7 MEG) and Record of failure to appear before the Paris *Tribunal de grande instance*, 1 Mar. 2012 (Ann. 4).

[31] See Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), pp. 28 (Ann. 7 MEG), Summons to attend a first appearance, Paris *Tribunal de grande instance*, 22 May 2012 (Ann. 5) and Record of failure to appear before the Paris *Tribunal de grande instance*, 11 July2012 (Ann. 6).

[32] Decree of the President of the Republic of Equatorial Guinea No. 64/2012, 21 May 2012 (Ann. 3 MEG).

[33] Record of questioning at first appearance and placement under judicial examination, 18 Mar. 2014 (Ann. 20 MEG).

[34] Final submissions seeking separation of the complaints, and either their dismissal or their referral to the *Tribunal correctionnel*, 23 May 2016 (Ann. 1 AEG).

placement under judicial examination[35]. Less than a month later, Equatorial Guinea filed a Request for the indication of provisional measures with the Court.

37. On 21 June 2016, Mr. Teodoro Nguema Obiang Mangue was appointed Vice-President in charge of National Defence and State Security by decree of the President of the Republic of Equatorial Guinea[36].

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38. As the Agent of France explained during the oral proceedings on Equatorial Guinea's request for provisional measures, at a procedural hearing on 24 October 2016 the judges scheduled the hearings in the case from 2 to 12 January 2017[37].

39. On 2 January 2017, an initial hearing on the merits took place before the 32nd *Chambre* of the Paris *Tribunal correctionnel*, in the absence of Mr. Teodoro Nguema Obiang Mangue, who was represented by his counsel. The proceedings instituted by Equatorial Guinea before the International Court of Justice were mentioned. The President of the *Tribunal* noted, *inter alia*, that, pursuant to the Order of the Court dated 7 December 2016, any confiscation measure that might be directed against the building located at 42 avenue Foch could not be executed until the conclusion of the international proceedings.

40. By decision of 4 January 2017, in response to a request from Mr. Teodoro Nguema Obiang Mangue's counsel, who deemed they did not have enough time to prepare his defence, the President of the *Tribunal correctionnel* ordered the hearings in the case to be postponed and held from 19 June to 6 July 2017, to ensure the sound administration of justice.

41. As the Agent of France pointed out during the oral proceedings on the request for provisional measures[38], if Mr. Nguema Obiang Mangue were to be convicted at first instance, he would still be able to appeal by filing a simple statement with the Registry of the *Tribunal*. The appeal would have suspensive effect. The decision made on appeal could also be contested by means of a further appeal — which would itself also have suspensive effect — before the *Chambre criminelle* of the *Cour de cassation*, which could, if appropriate, decide to quash the decision and refer the case back to the lower appeal court.

**20**

## II. The subject-matter of the dispute

42. In both its Application and its Memorial, Equatorial Guinea describes its dispute with France as follows:

> "The dispute between Equatorial Guinea and France, arising from certain ongoing criminal proceedings in France, concerns the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, and the legal status of the building which

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[35] Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), pp. 17-20 (Ann. 7 MEG).

[36] Decree of the President of the Republic of Equatorial Guinea No. 55/2016, 21 June 2016 (Ann. 6 MEG).

[37] CR 2016/15, 18 Oct. 2016, p. 14, paras. 35-37 (Alabrune).

[38] *Ibid.*, pp. 14-17, paras. 36-52 (Alabrune).

houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property."[39]

43. France will establish, in the following preliminary objections, that the Court lacks jurisdiction to rule on either the alleged immunity from criminal jurisdiction claimed by the Second Vice-President — now the sole Vice-President — of the Republic of Equatorial Guinea, or the legal status of the building at 42 avenue Foch. First, however, the subject-matter and scope of the Application need to be clearly defined.

44. Given that:

— the submissions in Equatorial Guinea's Memorial go far beyond its definition of the subject-matter of the dispute;

— and, more generally, Equatorial Guinea takes great liberties with the treaties on which it purports to base its claims.

45. First of all, it is patently clear that Equatorial Guinea's submissions in both its Application and its Memorial go far beyond the subject-matter of the dispute as Equatorial Guinea itself defines it[40]. They are identical:

"*(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.

**21**

*(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;

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[39] AEG, para. 2; MEG, para. 0.2.

[40] See above, para. 42.

(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 [against Transnational Organized Crime], 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."[41]

**22** 46. Equatorial Guinea's first submission considerably broadens the scope of the dispute as defined in the Memorial: it concerns the alleged violation of very broad principles of international law, which Equatorial Guinea attempts to link artificially to the United Nations Convention against Transnational Organized Crime.

47. Most significantly, in examining Equatorial Guinea's request for provisional measures, the Court simply found "that, prima facie, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties"[42]. Of course, that was merely a prima facie finding and, for good measure, France will return to this point below, in Chapter 2 of these Preliminary Objections. It should be noted, however, that this basis of jurisdiction is so obviously artificial that Equatorial Guinea does not actually rely on the Palermo Convention of 15 December 2000 but rather on general international law, in the absence of any basis establishing the Court's jurisdiction in this regard.

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[41] AEG, para. 41; MEG, pp. 177-181, para. 9.42. See also Sir Michael Wood's oral argument during the hearings on Equatorial Guinea's request for the indication of provisional measures (CR 2016/14, 17 Oct. 2016, pp. 21-22, para. 5). See also CR 2016/15, 18 Oct. 2016, p. 19, para. 5.

[42] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 Dec. 2016*, p. 13, para. 50.

48. This is, moreover, characteristic of Equatorial Guinea's claims as a whole: Equatorial Guinea seeks to establish its case on principles of general international law rather than on treaty bases, of which there are none. It is striking here that Equatorial Guinea's Application contains a number of references to general — or customary — principles of international law, regardless of whether they relate to Article 4 of the Palermo Convention. This extensive and systematic reliance on general international law concerns both the allegation of violations, with regard to Equatorial Guinea, of the principles of sovereign equality and non-interference in internal affairs, and the questions of the immunity *ratione personae* allegedly enjoyed by Mr. Teodoro Nguema Obiang Mangue and the legal status of the building at 42 avenue Foch as State property.

49. Thus, regarding Mr. Teodoro Nguema Obiang Mangue's alleged immunity — and these are just some of several examples — it is stated:

**23** — in paragraph 19 of the Application:

> "As the Republic of Equatorial Guinea has always maintained to France, the nature of the functions of the Second Vice-President, Mr. Teodoro Nguema Obiang Mangue, requires France to respect his personal immunity, *in accordance with customary international law*, in particular since he is called upon to travel abroad on behalf of Equatorial Guinea in order to perform those functions effectively." (Emphasis added)

— in paragraphs 7.23 and 7.24 of the Memorial:

> "In these proceedings, the legislation of States that have adopted laws on the immunity of holders of high-ranking office in a State constitutes a particularly important State practice. Generally speaking, such national legislation does not restrict the immunity *ratione personae* of holders of high-ranking office in a State to Heads of State, Heads of Government and Ministers for Foreign Affairs. Rather, it provides that such immunity should be granted *in accordance with general international law* . . .
>
> The decisions of national courts on the immunity of holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs, also constitute a particularly important State practice. They may equally be relevant by virtue of Article 38, paragraph 1 *(d)*, of the Statute of the Court. These decisions show that national courts also take the view that *customary international law* confers immunity *ratione personae* on certain holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs, and that they have interpreted the Court's Judgment in the *Arrest Warrant* case in that way. They also shed light on the criteria for determining which holders of high-ranking office fall within the small circle of beneficiaries of immunity *ratione personae*." (Emphasis added)

— in paragraph 7.42 of its Memorial:

> "As regards the work of the International Law Commission on the topic 'Immunity of State officials from foreign criminal jurisdiction', in 2013 it provisionally adopted a draft article entitled 'Persons enjoying immunity *ratione personae*'. The draft article provides that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction, but makes no reference to other holders of high-ranking office in a State. It is important to remember that the Commission's work is still at a relatively early stage, since it has not yet completed its first reading of the draft

articles on the subject. In any event, it cannot be argued that the provisionally adopted text reflects the *lex lata* on immunity *ratione personae*, which is enjoyed by a small circle of holders of high-ranking office in a State *under customary international law*." (Emphasis added)

— in paragraph 7.62 of its Memorial:

**24**

"Equatorial Guinea has consistently explained to France the nature of its Second Vice-President's functions, in particular that he has to travel abroad on behalf of Equatorial Guinea in order to perform those functions effectively, and has consistently required France to respect his personal immunity, *in accordance with customary international law*." (Emphasis added)

50. As regards the immunities it claims in respect of the building at 42 avenue Foch, Equatorial Guinea maintains:

— in paragraph 39 of its Application:

"France is also in breach of its obligations, *under general international law*, to ensure that no pre-judgment measures of constraint, such as attachment or arrest, are taken against the property of a State in connection with a proceeding before a court of another State, unless the State has consented to the taking of such measures. *The rules of customary international law* governing States' immunities in relation to the attachment of their property are reflected in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. These establish strict limitations on the attachment of State property, as the Court confirmed in its Judgment in the case concerning *Jurisdictional Immunities of the State*." (Emphasis added)

— in paragraph 8.63 of its Memorial:

"As we have amply demonstrated in Chapter 2, Section II, the building at 42 avenue Foch in Paris is used as the premises of Equatorial Guinea's diplomatic mission. It is therefore presumed to be State property used for government non-commercial purposes and must accordingly enjoy State immunity *under customary international law*." (Emphasis added)

— and in paragraph 8.66:

"France did not have the right to carry out measures of constraint against the building at 42 avenue Foch, since Equatorial Guinea has become its owner, uses it for government non-commercial purposes and has not waived the immunity *granted to it* in respect of such property *under customary international law*." (Emphasis added)

51. And, even more blatantly with regard to the violation of certain general principles of international law, we can refer — once again to one among several examples — to paragraph 9.40 of the Memorial:

"It also goes without saying that most of the obligations owed to Equatorial Guinea (inviolability of its diplomatic mission, immunity from execution of its property, non-interference in its internal affairs and sovereign equality) *are part of general international law — specifically, customary international law*. The continuing nature of the requirement to perform those obligations is reinforced by the fact that

they form part of *the fundamental rules governing relations between States*." (Emphasis added)

**25** 52. The same is true of the submissions themselves in the Application and the Memorial, which read:

"*(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"

And:

"*(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 against Transnational Organized Crime, *as well as general international law*."[43] (Emphasis added)

53. It should further be noted that in its submissions in support of its request for provisional measures, Equatorial Guinea included in its claims relating to the building an additional request to protect the furnishings or other property that were in the building at the time the first searches were conducted in the context of the criminal proceedings instituted before the French courts. Counsel for France drew the Court's attention to what appeared to be a new development in the requests made by Equatorial Guinea[44]. The Court merely noted this incongruity in its Order of 7 December 2016, which probably did not require any further commentary to justify rejecting the request[45]. Equatorial Guinea did not return to this point in the second round of oral argument or in its
**26** Memorial, leaving the matter open. This uncertainty is symptomatic of Equatorial Guinea's approach in these proceedings: a fluctuating definition of the scope of the subject-matter of the dispute, unencumbered by reliance on a basis for compulsory jurisdiction, with a preference instead for general references to customary international law.

54. There is no need for a lengthy discussion recalling the self-evident principle that the Court's jurisdiction is strictly limited to disputes over which the Parties have conferred jurisdiction

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[43] AEG, submissions, p. 12, para. 41; MEG, submissions, pp. 181-182.

[44] CR 2016/15, 18 Oct. 2016, pp. 40-41, paras. 34-35 (Pellet).

[45] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 Dec. 2016*, para. 19.

on the Court. They can do this by subscribing to the optional clause for compulsory jurisdiction; in this instance, neither France nor Equatorial Guinea has made the declaration provided for in Article 36, paragraph 2, of the Statute of the Court. They can also do so by entering into a special agreement referring a specific dispute before the Court; this has not been done either. Lastly, they can confer jurisdiction on the Court in "all matters specially provided for . . . in treaties and conventions in force", as stated in the first paragraph of Article 36. This is what Equatorial Guinea claims to have done, by invoking two conventional bases of jurisdiction:

— first, "Article 35 of the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000";

— second, the "Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, done at Vienna on 18 April 1961"[46].

55. In such circumstances, the jurisdiction of the Court is strictly confined to disputes falling within the scope of the conventions on which the applicant State seeks to rely. In accordance with its well-established jurisprudence, the Court cannot exercise jurisdiction (be it prima facie or substantive) until it has satisfied itself that this is indeed the case[47].

56. Moreover, the Court has already dealt with this question in the present case. First, it recalled that:

**27**

> ". . . in order to determine, even prima facie, whether a dispute within the meaning of Article 35, paragraph 2, of the Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it. It must ascertain whether the acts complained of by Equatorial Guinea are prima facie capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article 35, paragraph 2, of the Convention . . ."[48]

Then, adopting a more general stance, the Court took the firm view that:

> "The purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States. The provision does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities. Accordingly, any dispute which might arise with regard to 'the interpretation or application' of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention. It appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under

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[46] MEG, para. 5.1.

[47] See, in particular, *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* p. 137, para. 38; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 16.

[48] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 Dec. 2016*, para. 47.

customary international law and, if so, whether France has violated that immunity by instituting proceedings against him."[49]

57.It is therefore within the strict limits of the subject-matter of the dispute, as described in Equatorial Guinea's Application and Memorial and as delineated by the conventions on which it seeks to establish the Court's jurisdiction, that such jurisdiction must be assessed.

## III. The abusive nature of the Application

58. During the hearings on the request for the indication of provisional measures, counsel for France asserted that the proceedings initiated by Equatorial Guinea were abusive in two respects[50]. Equatorial Guinea links its claims to conventional provisions which, given the facts of the case, cannot be regarded as a credible basis for the exercise of the Court's jurisdiction (A) and may be construed as an abuse of rights (B).

28

### A. Equatorial Guinea's claim is an abuse of the International Court of Justice

59. In its Order of 7 December 2016, the Court held that in the present case, there being no manifest lack of jurisdiction, it could not accede to France's request that the case be removed from the List[51]. Nonetheless, the case's referral to the Court is completely artificial and therefore appears to be an abuse of process.

60. Moreover, until now, Equatorial Guinea's treatment of the question of the Court's jurisdiction has been particularly cursory. In its introduction to the section of its Memorial devoted to this subject, Equatorial Guinea takes a rather odd stance, stating that "[since t]he Order indicating provisional measures dated 7 December 2016 was issued by the Court a few days before the text of this Memorial was finalized[, it] was unable to examine it in detail and reserves the right to address the jurisdiction of the Court in greater detail at a later date"[52]. Yet in the light of France's oral arguments on 18 and 19 October 2016[53], it might have been advisable for Equatorial Guinea to elaborate on this matter.

61. It is a "fundamental principle", recalled consistently by the International Court of Justice[54] and its predecessor[55], that "no State may be subject to its jurisdiction without its

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[49] *Ibid.*, para. 49.

[50] CR 2016/15, 18 Oct. 2016, p. 23, para. 17 (Pellet) and p. 35, para. 12 (Ascensio).

[51] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, para. 70.

[52] MEG, para. 5.2.

[53] See CR 2016/15, 18 Oct. 2016, and CR 2016/17, 19 Oct. 2016.

[54] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 Feb. 2015,* para. 88, and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64.

[55] See, for example, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 16; *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20,* pp. 16-17; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 23.

consent"[56]. A basis of jurisdiction must be established before the merits of a case are addressed. Equatorial Guinea's approach in these proceedings is the reverse. The Applicant sets out its version of the facts underlying the dispute, alleges breaches by France of its international obligations, and requests the Court to make a finding to that effect, but remains evasive about the basis for the exercise of the Court's jurisdiction in the case.

**29** 62. Apart from the alleged diplomatic status of the building located at 42 avenue Foch, which is artificially linked to the Vienna Convention on Diplomatic Relations[57], all of Equatorial Guinea's claims in this case are based on customary international law, which it seeks to invoke through Article 4 of the Palermo Convention in respect of: the purported violations by France — *quod non* — of the principles of sovereign equality of States and non-intervention in the domestic affairs of other States; the personal immunity said to be enjoyed by Mr. Teodoro Nguema Obiang Mangue as Second Vice-President in charge of Defence and Security; as well as the status of the building located at 42 avenue Foch as property of Equatorial Guinea.

63. Regarding the Court's jurisdiction to entertain Equatorial Guinea's claims relating to the "failure to respect the immunity of the building at 42 avenue Foch in Paris as property of Equatorial Guinea used for government non-commercial purposes", the Applicant confines itself to the terse assertion that "[p]rotection of the property of foreign States from measures of execution by the forum State is based on customary international law, which is incorporated into the Palermo Convention"[58]. No specific provision of the Palermo Convention is mentioned, not even Article 4.

64. As France explained during the hearings on the request for provisional measures, there is a dispute between the Parties[59]. However, there is no provision binding the Parties that confers jurisdiction on the Court over that dispute. To circumvent France's lack of consent to the Court's jurisdiction, Equatorial Guinea uses compromissory clauses provided for in international agreements, to which France is a party, without ever establishing precisely which conventional provisions it is whose interpretation or application it in fact believes to be the subject of the present dispute.

**30** 65. In support of its claims, Equatorial Guinea repeatedly refers in its Memorial to a number of cases brought before the Court in the past, and in particular to the cases concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*[60] and *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*[61]. Equatorial Guinea cites them in particular in its exposition of France's alleged violations of the principles of general international law, in respect of the immunities said to be enjoyed by Mr. Teodoro Nguema Obiang Mangue and the building located at 42 avenue Foch as diplomatic premises and as property of Equatorial Guinea. It is worth pointing out that in the *Arrest Warrant* and *Jurisdictional Immunities* cases the Court's jurisdiction was based on declarations by which the States parties had consented to the compulsory jurisdiction of the Court in

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[56] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 76, para. 76.

[57] See Chap. 3 below.

[58] MEG, para. 8.52.

[59] CR 2016/17, 19 Oct. 2016, pp. 8-9, para. 3 (Pellet).

[60] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

[61] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 99.

"all legal disputes concerning:

*(a)* the interpretation of a treaty;

*(b)* any question of international law;

*(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;

*(d)* the nature or extent of the reparation to be made for the breach of an international obligation"[62].

66. The acceptance of such compromissory clauses authorizes the Court to examine claims relating to the application or interpretation of principles and rules of customary international law. The question of whether France has violated the alleged immunities of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and Security, and of the building located at 42 avenue Foch as State property, is most certainly within the purview of customary international law. Equatorial Guinea itself states as much[63]. The scope of Article 35, paragraph 2, of the Palermo Convention is much more limited. As the Court observed in its Order of 7 December 2016,

> "[a]ccordingly, any dispute which might arise with regard to 'the interpretation or application' of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention. It appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under customary international law and, if so, whether France has violated that immunity by instituting proceedings against him."[64]

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The Parties' consent to the exercise of the Court's jurisdiction expressed in the Palermo Convention is therefore much more strictly circumscribed than in the cases that Equatorial Guinea cites in support of its claims.

67. Equatorial Guinea also relies on the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the only proceedings which have led to the Court ruling on the basis of *forum prorogatum.* On 9 January 2006, Djibouti filed an Application with the Court pursuant to Article 38, paragraph 5, of the Rules of Court. By letter dated 25 July 2006, France consented to the Court's jurisdiction to entertain the Application, being careful to limit that consent

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[62] In the *Arrest Warrant* case, the Court's jurisdiction was based on the declarations accepting the compulsory jurisdiction of the Court, in accordance with Article 36, paragraph 2, of the Statute of the Court. In the case concerning *Jurisdictional Immunities*, the Court's jurisdiction was based on the provisions of Article 1 of the European Convention for the Peaceful Settlement of Disputes.

[63] See, in particular, MEG, pp. 41-42, para. 3.64; p. 99, para. 7.8; p. 124, para. 7.62; p. 130, para. 8.3; p. 151, para. 8.52.

[64] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, para. 49.

very strictly to the framework set by the Convention[65]. The Republic of Djibouti claimed, *inter alia*, violations by France of the principle of sovereign equality of States and of the immunities of representatives of the Djiboutian State, under customary international law, as a result of procedural steps taken by the French courts. This led France to raise objections to the Court's jurisdiction, since Djibouti had sought to extend the Court's remit to facts which did not fall strictly within the subject-matter of the dispute, as defined by the Application instituting proceedings[66]. The Court partly allowed France's objections[67].

68. By a letter dated 25 September 2012, the Registry of the Court informed France that Equatorial Guinea had filed an Application instituting proceedings on the basis of Article 38, paragraph 5, of the Rules of Court, including a request for provisional measures[68]. This Application reflected a degree of uncertainty about the possible bases of the Court's jurisdiction. France did not consent to the exercise of the Court's jurisdiction, and does not intend to do so in the present case, given that the facts which gave rise to the filing of the 2012 Application are the same as those underlying the present proceedings, namely, the initiation by the French courts of proceedings against Mr. Teodoro Nguema Obiang Mangue following the filing of a complaint by Transparency International France on 2 January 2008, and the searches and attachment of the building located at 42 avenue Foch in the context of those proceedings[69]. Equatorial Guinea's submissions are similar to those in its 2012 Application, in which it contended that:

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— "the opening of a judicial investigation in the French Republic with regard to the handling and laundering of misappropriated foreign public funds is contrary to international law, since it violates the principle of non-interference in the internal affairs of another State, the principle of the equality of States, and the sovereignty of the Republic of Equatorial Guinea;

. . . . . .

— the opening of that investigation and the issuance of an arrest warrant against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security violate, at the very least, the most well-established principles of international law regarding the jurisdictional immunity enjoyed by foreign Heads of State and high-ranking representatives of the State;

— the searches undertaken and the attachment of the diplomatic mission of the Republic of Equatorial Guinea in the French Republic violate the immunity accorded to diplomatic premises and their furnishings"[70].

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[65] In his letter dated 25 July 2006, the French Minister for Foreign Affairs thus indicated that: "The present consent to the Court's jurisdiction is valid only for the purposes of the case, within the meaning of Article 38, paragraph 5, i.e., in respect of the dispute forming the subject of the Application and *strictly within the limits of the claims formulated therein by the Republic of Djibouti*" (emphasis added). See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* pp. 200-201, paras. 48-49.

[66] See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* pp. 201-213, paras. 59-95. See also the Counter-Memorial filed by the French Republic, 13 July 2007, pp. 8-16.

[67] *Ibid.*, pp. 209-213, paras. 85-95, and pp. 246-247, para. 205.

[68] Letter No. 140831 from the Registrar of the Court to the Minister for Foreign Affairs of the French Republic, 25 Sep. 2012 (Ann. 7).

[69] See paras. 13-29 above.

[70] Application of Equatorial Guinea, 22 Sep. 2012, p. 17.

69. The request for provisional measures accompanying the Application was also very similar to that of 29 September 2016. Equatorial Guinea requested the Court to order:

> "(i) the immediate suspension of the proceedings being conducted by the investigating judges of the Paris *Tribunal de grande instance* and (ii) the immediate suspension of the effects of the arrest warrant issued by the investigating judges of the Paris *Tribunal de grande instance* against Mr. Teodoro Nguema Obiang Mangue, and, in any event, (iii) the restitution of the movable and immovable property belonging to the Republic of Equatorial Guinea attached by the said judges in the context of the investigation"[71].

**33**

70. Since France did not accept the exercise of the Court's jurisdiction, Equatorial Guinea devised a strategy to circumvent that lack of consent.

71. First, on 4 November 2014, Equatorial Guinea acceded to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, and publicly announced its intention to bring France before the Court[72]. As we will show below[73], Equatorial Guinea has still not specified, even at this advanced stage of the proceedings, which provisions of the Vienna Convention it is whose interpretation or application it believes to be at the origin of the dispute with France. The reason is very simple: the dispute which Equatorial Guinea wishes the Court to settle does not concern violations by France of the provisions invoked (in fact of *the single* provision invoked, Article 22) of the Vienna Convention.

72. Second, in order to bring before the Court the question of Mr. Teodoro Nguema Obiang Mangue's alleged immunity from foreign criminal jurisdiction — which undoubtedly lies at the heart of the dispute between the Parties — Equatorial Guinea sought to find another convention on which to hang its claim. It chose the Palermo Convention, to which France and Equatorial Guinea have been parties since 29 October 2002 and 10 September 2007 respectively (they were therefore already bound by that text when the Application of 25 September 2012 was filed, although Equatorial Guinea had relied on France giving its consent pursuant to Article 38, paragraph 5, of the Rules of Court, and had not invoked the Palermo Convention). As the Court itself observed in its Order, this case does not concern a question of interpretation or application of the provisions of that Convention[74]. And Equatorial Guinea makes no real attempt to convince us otherwise[75].

**34**

73. Equatorial Guinea's manipulation of the proceedings before the International Court of Justice is notably reflected in the press releases that it publishes at each procedural step. For example, regarding the Court's Order of 7 December 2016, Equatorial Guinea stated in several press releases that:

> "[T]he Government of Equatorial Guinea is satisfied because, in the ruling given by the International Court of Justice in The Hague this 7th December 2016, there is clear recognition of the diplomatic nature of the building located at

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[71] *Ibid.*, p. 19.

[72] "France — Guinée Équatoriale: porte de sortie en vue pour Teodorín?", *Jeune Afrique,* 13 March 2015; available at: http://www.jeuneafrique.com/226650/politique/france-guin-e-quatoriale-porte-de-sortie-en-vue-pour-teodor-n/, in French only, site consulted on 21 March 2017 (Ann. 8).

[73] See Chap. 3 below.

[74] See para. 66 above.

[75] See para. 60 above.

42, Avenida Foch, in Paris, and as such, recognition that the property does not constitute 'dishonestly acquired goods'. The Equatoguinean State has reiterated its claim to ownership of this property, which was the property of the Equatoguinean State, but the French party refused to recognise this, refusing to yield on this point.

The recognition that the State of Equatorial Guinea is the legitimate owner of the building, with all the objects it contains, is thus recognition that it is not 'dishonestly acquired goods', and it is also evidently proof of the judicial farce that French justice is unilaterally trying to serve up.

On demonstrating that the building is not 'dishonestly acquired goods', the French party should have finally withdrawn the accusation against the Vice-President of the Republic of Equatorial Guinea, as it was unsupported by the basis of the main accusation, and thus recognise unambiguously the immunity of H.E. Nguema Obiang Mangue."[76]

74. It goes without saying that France does not share this rather surprising reading of the Court's Order on Equatorial Guinea's request for the indication of provisional measures. Nevertheless, this statement exposes Equatorial Guinea's strategy in this case: to use the Court as a means to obstruct the proceedings brought against Mr. Teodoro Nguema Obiang Mangue before the French courts.

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75. More generally, it is clear from the above that by invoking the provisions of the Vienna and Palermo Conventions on the compulsory settlement of disputes between States parties, Equatorial Guinea is seeking to circumvent the "fundamental principle that no State may be subject to [the] jurisdiction [of the Court] without its consent"[77]. Furthermore, it is seeking to shore up a situation founded on a manifest abuse of rights.

**B. Equatorial Guinea's claim seeks to consolidate an abuse of rights**

76. The timing of the events which gave rise to these proceedings is sufficient in itself to show that Equatorial Guinea's claim is an abuse of the rights and obligations invoked by it. According to the definition in the *Dictionnaire de droit international public*, an abuse of rights occurs when "a State exercises a right, power or jurisdiction in a manner or for a purpose for which that right, power or jurisdiction was not intended, for example to evade an international obligation or obtain an undue advantage"[78].

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[76] Press release of the spokesperson for the Government of the Republic of Equatorial Guinea, 7 Dec. 2016, Malabo (English version available on the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9000&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9000&lang=es; site consulted on 20 March 2017) (Ann. 9). See also press release of the Representation of Equatorial Guinea in The Hague, 8 Dec. [2016] (English version available on the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9002&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9002&lang=es) (Ann. 10); and press release of the Equatorial Guinea Press and Information Office, 9 Dec. 2016 (English version available on the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9005&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9005&lang=es) (Ann. 11).

[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 76, para. 76.

[78] J. Salmon (ed.), *Dictionnaire de droit international public*, Bruylant, Brussels, 2001, pp. 3-4. *[Translation by the Registry.]*

77. This is a "general principle of international law", and even a "general principle of law"[79]. The Court has recognized that it applies automatically in the international legal order, as a necessary corollary of the principle of good faith, in the form of both an abuse of process and an abuse of rights[80]. Numerous international conventions expressly recall that States parties must fulfil their obligations in good faith and not abuse the rights to which they are entitled[81]. It is, moreover,
**36** the very essence of the law of treaties, which is dominated by the principle of *pacta sunt servanda*, whereby "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"[82].

78. Privileges and immunities are granted for a legitimate purpose, and help ensure the independence of foreign States, in accordance with the principle of the sovereign equality of States and the territorial sovereignty of the host State. Their very purpose, however, leaves them open to abuse. In light of the growing mistrust of privileges and immunities — which are nevertheless vital for States' external action — we must be vigilant about preventing attempts to abuse them, which may ultimately call into question the continued existence of those fundamental rights. It was with that risk in mind that the drafters of the Vienna Convention on Diplomatic Relations made a point of recalling, in the preamble to that text, that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"[83].

79. A large number of international agreements on privileges and immunities contain similar provisions[84]. The purpose of privileges and immunities is not to benefit the individuals who enjoy them, but to safeguard the independence of the State and its representatives abroad. The application of rules on immunities must not shield their beneficiaries — be they individuals or property —

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[79] DSB, *Shrimps*, Report of the Appellate Body (WT/DS58/AB/R), 12 Oct. 1998.

[80] See *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7,* p. 30. See also *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46,* p. 167; *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951,* p. 142; *Ambatielos (Greece* v. *United Kingdom), Merits, Judgment, I.C.J. Reports 1953,* p. 23; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970,* p. 39, para. 56; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 268, para. 46; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974,* p. 473, para. 49; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 255, paras. 37-38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 622, para. 46.

[81] See, in particular, the Convention on Rights and Duties of States of 26 Dec. 1933, Art. 3; the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1950, Art. [17] "Prohibition of abuse of rights"; the Convention on the High Seas of 29 Apr. 1958, Art. 2; the United Nations Convention on the Law of the Sea of 10 Dec. 1982, Arts. 294 and 300 "Good faith and abuse of rights"; the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Art. 34.

[82] Vienna Convention on the Law of Treaties, 23 May 1969, Art. 26. France is not a party to the Convention, but considers that, on this point, it reflects the state of customary international law.

[83] Vienna Convention on Diplomatic Relations, 18 Apr. 1961, fourth paragraph of the preamble.

[84] See, in particular, the Convention on the Privileges and Immunities of the United Nations of 13 Feb. 1946, Sections 20 and 21; Supplementary Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of the Organisation of 16 Apr. 1948, Art. 10; the Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory of 2 July 1954, Art. 21; the Convention on Special Missions of 8 Dec. 1969, seventh paragraph of the preamble; the Agreement on the Privileges and Immunities of the International Criminal Court of 9 Sep. 2002, Art. 24, para. 1, and Art. 25; the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea of 23 May 1997, Art. 19.

from ordinary legal proceedings brought for purposes other than those for which such protections have been granted.

37 80. As we shall demonstrate in these written pleadings[85], in this case, Equatorial Guinea's use of the provisions of the United Nations Convention against Transnational Organized Crime and the Vienna Convention on Diplomatic Relations is legally abusive, in its claim for immunities for Mr. Teodoro Nguema Obiang Mangue and for the building at 42 avenue Foch.

81. Moreover, in a letter to the French President dated 14 February 2012, the President of the Republic of Equatorial Guinea explicitly acknowledged that the reason for invoking the diplomatic nature of the building located at 42 avenue Foch was to protect the building from criminal proceedings:

> "Your Excellency is not unaware of the fact that my son, Teodoro NGUEMA OBIANG MANGUE, lived in France, where he pursued his studies, from childhood until he reached adulthood. France was his preferred country and, as a young man, he purchased a residence in Paris; however, due to the pressures on him as a result of the supposed unlawful acquisition of assets, he decided to resell the said building to the Government of the Republic of Equatorial Guinea."[86]

82. The "pressures" are the initiation of judicial proceedings. And both the resale of the property — the date of which varies from one declaration to the next[87] — and the invocation of its diplomatic status are designed to obstruct those proceedings.

83. The date of 14 February 2012 is none other than the first day of the searches conducted in the building by the French authorities. On the same day, Equatorial Guinea also issued three Notes Verbales:

— the first from the Ministry of Foreign Affairs of Equatorial Guinea to the French Ministry of Foreign Affairs regretting that "the residence of the Chargée d'affaires and Permanent
38 Representative of Equatorial Guinea to UNESCO in Paris is the subject of intervention by the investigating judge and the French police"[88];

— the second from the Chargée d'affaires of Equatorial Guinea, Ms Bindang Obiang, indicating that she was "presently in the residence belonging to the Government of Equatorial Guinea purchased on 19 September 2011, at 42 avenue Foch, in Paris, which is the place of residence of the Permanent Delegation of the Republic of Equatorial Guinea to UNESCO" and that a search was then underway "contrary to the Vienna Convention"[89];

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[85] See Chaps. 2 and 3 below.

[86] Letter from the President of Equatorial Guinea to the French President, 14 Feb. 2012 (No. 5 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[87] See paras. 24-26 above.

[88] Note Verbale No. 251/12 from the Ministry of Foreign Affairs of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 14 Feb. 2012 (No. 6 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[89] Note Verbale No. 173/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 14 Feb. 2012 (No. 7 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

— and the last one from the Permanent Delegation of Equatorial Guinea to UNESCO's Protocol Unit "informing them that the official residence of the Permanent Delegate of Equatorial Guinea to UNESCO is located at 42 avenue Foch 75016 Paris, property of the Republic of Equatorial Guinea"[90].

84. On the day of the searches targeting the assets acquired in France by Mr. Teodoro Nguema Obiang Mangue, Equatorial Guinea (i) admitted, in a letter from its President, that the building at 42 avenue Foch was resold to protect him from judicial "pressures", (ii) protested against the searches carried out at the "official residence of the Permanent Delegate of Equatorial Guinea to UNESCO", (iii) and informed UNESCO, for the first time, that the building was now the official residence of the Permanent Delegate.

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85. A recent letter, dated 19 January 2017, from the President of Equatorial Guinea to the French President, contained an annex entitled "Note seeking a diplomatic resolution of the dispute". Surprisingly, it invoked the bilateral Agreement between France and Equatorial Guinea on the mutual promotion and protection of investments as an alternative means to resolve the dispute:

> "The Agreement on the mutual protection of investments dated 3 March 1982, by which both States are bound, provides for inter-State disputes concerning its interpretation and application to be resolved by diplomatic means.
>
> Since Equatorial Guinea has consistently maintained that the assets attached by the French courts were all acquired lawfully and do not represent the proceeds of misappropriated public funds or of an offence of any kind, consideration must be given to the question of their protection by France under the aforementioned Agreement.
>
> That being the case, in the context of diplomatic discussions between the two States provided for under Article 11 of the said Agreement, and before any decision by the French courts on the substance of the dispute, the two States could agree to consider that the assets lawfully acquired in France meet the definition of 'investments' within the meaning of Article 1 of the same Agreement and that, consequently, France has a duty to protect them."[91]

86. In keeping with its consistent position in this case, France indicated that the facts mentioned were the subject of judicial decisions and ongoing legal proceedings, and that consequently it was not possible to accept the offer to settle the dispute by the means proposed by Equatorial Guinea[92]. However, this initiative demonstrates Equatorial Guinea's willingness to invoke — with a blatant disregard for legal credibility — any conventional provision that provides for a dispute settlement mechanism and binds the Parties, in order to halt the ongoing judicial proceedings. And it assumes that its referral of the case to the Court will achieve precisely that:

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[90] Note Verbale No. 011/12 from the Embassy of the Republic of Equatorial Guinea to the UNESCO Protocol Unit, 14 Feb. 2012 (No. 8 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[91] Annex to the letter from the President of Equatorial Guinea to the French President, "Note seeking a diplomatic resolution of the dispute", 19 Jan. 2017 (Ann. 12).

[92] Letter from the French President to the President of Equatorial Guinea, 16 Feb. 2017 (Ann. 13).

> "Thus, [the Note concludes,] a permanent solution to the dispute between the two States having been found, it will only remain for the Republic of Equatorial Guinea to end the proceedings pending before the International Court of Justice."[93]

**40** 87. This has all the hallmarks of an abuse of rights. As France's counsel explained during the hearings on the request for provisional measures[94], in this case Equatorial Guinea is seeking to abuse its international rights and obligations in order to obstruct the proper administration of the judicial proceedings instituted in France, both by suddenly and unexpectedly transforming a private residence into "premises of the mission", and by appointing its owner to increasingly eminent political positions as the investigation instigated by Transparency International's complaint proceeds.

88. For the reasons set out above, in light of the abusive nature of the Application, France requests the Court to adjudge and declare that it lacks jurisdiction to rule on the Application filed by Equatorial Guinea on 13 June 2016. Furthermore, France raises the following objections regarding the Court's lack of jurisdiction on the basis of the Convention against Transnational Organized Crime (Chapter 2), and the Court's lack of jurisdiction on the basis of the Vienna Convention on Diplomatic Relations and its Optional Protocol concerning the Compulsory Settlement of Disputes (Chapter 3).

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[93] Annex to the letter from the President of Equatorial Guinea to the French President, "Note seeking a diplomatic resolution of the dispute", 19 Jan. 2017 (Ann. 12).

[94] See CR 2016/15, 18 Oct. 2016, pp. 23-32, paras. 17-25 (Pellet) and p. [35], paras. 11-12 (Ascensio).

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## CHAPTER 2

## THE COURT'S LACK OF JURISDICTION ON THE BASIS OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

89. In both the Application instituting proceedings and the Memorial of 3 January 2017, Equatorial Guinea contends that the Court has jurisdiction in the present case on the basis of the United Nations Convention against Transnational Organized Crime. To that end, it invokes Article 35, paragraph 2, of the Convention, pursuant to which a State party may refer any dispute between two or more States parties "concerning the interpretation or application of this Convention" to the International Court of Justice, if the parties to the dispute have been unable to settle it by negotiation or have not agreed on the organization of an arbitration within a period of six months.

90. The preliminary objection raised by France concerns the Court's lack of jurisdiction *ratione materiae* under the Palermo Convention, since the dispute submitted by Equatorial Guinea does not relate to "the interpretation or application" of that Convention.

91. The Court's jurisdiction *ratione materiae* was already discussed during the proceedings on the request for provisional measures. Equatorial Guinea's line of argument at that time failed to convince the Court, which held, in its Order of 7 December 2016, that it did not have prima facie jurisdiction in the present case on the basis of the Palermo Convention[95]. The Memorial filed by Equatorial Guinea on 3 January 2017 contains no arguments likely to be any more convincing about the existence of such a basis of jurisdiction.

92. To establish a link between the present case and the Palermo Convention, Equatorial Guinea contends that Article 4 of the Convention "incorporates rules of customary international law" concerning the immunities both "of holders of high-ranking office in a State" and the building
42 "as State property used or intended for use by the State for government non-commercial purposes", rules which it links to the principle of sovereign equality[96]. It goes on to state that this is a question of the interpretation and application of Article 4 "read in conjunction with other provisions of the Convention"[97].

93. France, for its part, is of the view that none of the provisions of the Palermo Convention invoked is at issue in the present case and that, therefore, the Court has no jurisdiction on that basis. This is clear from an examination of Article 4 (I) and the obligations laid down by the Convention (II).

### I. Article 4 of the Convention

94. Article 4 of the Palermo Convention, entitled "Protection of sovereignty", is a general clause recalling several fundamental principles of international law. It reads as follows:

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[95] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, para. 50.

[96] MEG, para. 5.10.

[97] MEG, paras. 5.10-5.11.

> "1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."

95. The language of the first paragraph clearly establishes that sovereign equality, territorial integrity and non-intervention are "principles", not independent obligations, and that they concern the way in which States perform their "obligations under this Convention", which are set out elsewhere in the treaty.

96. The ordinary meaning of the words is perfectly consistent with the object and purpose of the treaty. The Convention is in no way intended to organize, in a general way, the legal relations between States in light of the principles mentioned, and, in particular, does not seek to create a system of immunities or establish the status of property belonging to the States parties. The Palermo Convention concerns transnational organized crime and its purpose, according to its first article, is "to promote cooperation to prevent and combat transnational organized crime more effectively". As the United Nations General Assembly explained at the time the Convention was adopted, the objective is to provide

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> "an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes"[98].

97. The Palermo Convention thus falls into the category of conventions whose objective is to combat transnational threats by harmonizing criminal legislation and facilitating judicial co-operation between States, in respect of specific offences[99]. Other conventions adopted during the same period have the same objective and adhere to a similar formula[100].

98. In its Memorial, Equatorial Guinea seeks to extend the object of the Convention unduly by maintaining confusion between the obligations themselves and the manner in which they must be performed. Despite acknowledging that Article 4 must be "read in conjunction" with the other provisions of the Convention, it contends that Article 4 contains an "independent obligation" to comply with customary international law in general[101]. In so doing, it attempts to ascribe to the Convention an object that it does not have, in order to broaden the scope of the consent in Article 35, paragraph 2, thereof[102].

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[98] Resolution 55/25 adopted by the United Nations General Assembly on 15 Nov. 2000, preamble.

[99] Neil Boister, "The concept and nature of transnational criminal law", in Neil Boister and Robert J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law,* London/New York, Routledge, 2015, pp. 16-18.

[100] The International Convention for the Suppression of Terrorist Bombings of 15 Dec. 1997 (*UNTS*, Vol. 2149, p. 256); the International Convention for the Suppression of the Financing of Terrorism of 9 Dec. 1999 (*UNTS*, Vol. 2178, p. 197); the United Nations Convention against Corruption of 31 Oct. 2003 (*UNTS*, Vol. 2349, p. 41); the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 Apr. 2005 (*UNTS*, Vol. 2445, p. 89).

[101] MEG, para. 5.18.

[102] See paras. 46-48 and 63-64 above.

**44** 99. The Court nevertheless stated very clearly, in its Order of 7 December 2016, that the purpose of Article 4 is not to create new obligations concerning the immunities of agents of the State, of any rank, or to incorporate the rules of customary international law concerning those immunities[103]. This observation is perfectly consistent with its jurisprudence on general clauses that refer to principles of general international law. In the *Oil Platforms* case, the Court similarly considered that a conventional formulation of this kind could not be interpreted "in isolation from the object and purpose of the Treaty" and that it must "be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied"[104].

100. Furthermore, in its Memorial, Equatorial Guinea supports the idea that each of the two paragraphs of Article 4 is independent, and that the second paragraph of Article 4 provides "additional protection for State sovereignty", without specifying its nature[105]. Yet the content of that provision quite obviously relates to the principles of sovereign equality, territorial integrity and non-intervention mentioned in the first paragraph. As a commentator notes:

> "This paragraph is the counterpoint of the first, stating what States Parties may *not* do if they are to observe the principle of territorial integrity. Of course the whole Convention seeks to improve international cooperation, which in many contexts will produce a situation in which agents of one State Party will perform functions within the territory of another State normally reserved to its own competent authorities. This activity will be consensual and so not in breach of the principle of territorial integrity."[106]

101. The second paragraph is therefore merely a reformulation, in a negative form, of the principle of territorial integrity mentioned in the first paragraph, in the context of judicial co-operation. It is therefore difficult to see how the present case could be connected in any way to the second paragraph of Article 4, since judicial co-operation is not the subject of the dispute
**45** submitted to the Court by Equatorial Guinea, and since France has not exercised any jurisdiction or performed any function "within the territory" of Equatorial Guinea.

102. In support of its position, Equatorial Guinea cites yet more conventions and draws on the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 2 of which served as a model for Article 4 of the Palermo Convention[107]. The passage cited, however, confirms that the drafters of the Vienna Convention on Narcotic Drugs and Psychotropic Substances were merely seeking to reiterate the principles of sovereign equality and non-intervention. Above all, the Commentary provides some very revealing insights into what such a provision really means:

> "2.20. Paragraph 3 is conceptually linked to the preceding paragraph and is complementary to it insofar as practical implications are concerned. Whereas paragraph 2 lays down, in affirmative language, a code of conduct to which parties should conform in fulfilling their obligations under the Convention, paragraph 3 sets

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[103] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, para. 49.

[104] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. [813-814], paras. 27-28.

[105] MEG, para. 5.19.

[106] David McClean, *Transnational Organized Crime — A Commentary on the UN Convention and its Protocols*, Oxford University Press, 2007, p. 58.

[107] MEG, para. 5.21.

out, in negative language, what parties should not do if they are to comply with the accepted customary norms of international law.

. . . . . .

2.23. The conduct of inquiries or investigations, including covert operations, on the territory of another State without its consent, in relation to criminal offences established in accordance with article 3, is not permissible . . .

2.24. Similarly, there is no general right of hot pursuit across land boundaries."[108]

None of this is at issue in the present case.

103. Finally, the *travaux préparatoires* of the Palermo Convention make no mention of an independent obligation, in respect of either the first or second paragraph, both of which were borrowed from the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[109]. The Commentary on the latter Convention even explicitly notes that the equivalent article "has the import of a statement of guiding principles for a correct interpretation and proper implementation of the substantive articles of the Convention"[110]. The same is true of Article 4 of the Palermo Convention[111]. That the draft was restructured at some point during the negotiations to create Article 4, as Equatorial Guinea notes[112], is of no particular significance as regards the existence of an independent obligation.

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## II. The obligations laid down by the Convention

104. Equatorial Guinea now concedes that, to be applicable, Article 4 of the Palermo Convention should be "read in conjunction" with other provisions of the Convention. Unless a link can be established between the subject-matter of the dispute and the conventional obligations provided for in other articles of the Convention, it must be concluded that the Court does not have jurisdiction *ratione materiae*.

105. As the Court noted in its Order of 7 December 2016, the obligations under the Convention mainly concern the adoption of the necessary measures, in domestic law, to criminalize certain transnational offences[113]. The other provisions seek to facilitate judicial co-operation between the States parties. Regarding the main category of obligations, one thing is clear: in the present case, Equatorial Guinea is certainly not accusing France of failing to criminalize the offences mentioned in the Palermo Convention in its domestic legislation, or of failing to establish the jurisdiction of its national courts over those same offences. Equally obviously, Equatorial

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[108] United Nations, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, New York, 2000, doc. E/CN.7/590, pp. [46-47].

[109] See United Nations, Economic and Social Council, Commission on Crime Prevention and Criminal Justice, doc. [E/CN.15/1998/5], 18 Feb. 1998, pp. 19-20.

[110] United Nations, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, New York, 2000, doc. E/CN.7/590, p. [41], para. 2.5.

[111] The Memorial also cites various texts relating to other conventions, which are not legally binding and cannot be treated as *travaux préparatoires* (para. 5.23). None of the citations speaks of an independent obligation.

[112] MEG, para. 5.22.

[113] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, para. 48.

Guinea has never claimed to have a dispute with France about judicial co-operation. Consequently, no question of interpretation or application of a conventional obligation is at issue.

47 106. The link established by Equatorial Guinea between the present case and the Palermo Convention is in fact based on two contrivances. The first, which was partially dispelled in the Memorial, is to dissociate Article 4 from the other provisions of the Convention, by claiming that they should be read as independent obligations; this has already been addressed in Section I of this chapter. The second is to contend that the initiation of legal proceedings in the domestic courts of a State party to the Palermo Convention, relating to acts likely to fall within a domestic criminal classification corresponding to the offences mentioned in the Palermo Convention, amounts to implementing that Convention[114], or even to "apply[ing]" it[115]. That is absolutely not the case, as is shown by both the overall scheme of the conventional obligations (A) and a precise analysis of the provisions invoked by Equatorial Guinea (B).

**A. The overall scheme of the obligations in the Palermo Convention**

107. The purpose of the Palermo Convention is certainly not to provide a legal basis in itself for criminal proceedings. The international obligation consists merely of the adoption, where necessary, of rules criminalizing certain offences in domestic law. The State implements the Convention by ensuring that its legal system is in conformity with those provisions. Proceedings are conducted by the State's judicial authorities on the basis of criminal legislation that is specific to each State, in accordance with the model for all the conventions on transnational crime[116]. The State thus applies its own law.

108. In addition, it should be noted that the Palermo Convention contains no provision on the implementation of criminal legislation in specific cases, and in particular no obligation to investigate or prosecute. There is thus a notable difference between the Palermo Convention — and a number of others[117] — and those conventions on transnational offences which do provide for an
48 obligation to investigate and prosecute[118]. In the Palermo Convention, the only obligations likely to affect specific domestic procedures are those in Articles 16 to 18 concerning judicial co-operation in criminal matters.

109. The *Legislative Guide* prepared by the United Nations Secretariat following the adoption of the Convention confirms this analysis:

> "In essence, States parties must establish a number of offences as crimes in their domestic law, if these do not already exist. States with relevant legislation already in

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[114] MEG, para. 5.26.

[115] MEG, para. 5.27.

[116] Gerhard Werle, Florian Jessberger, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, 2014, p. 46; Neil [Boister], "The concept and nature of transnational criminal law", in Neil [Boister] and Robert J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, London/New York, Routledge, 2015, p. 15.

[117] That also applies, in particular, to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 22 Dec. 1988.

[118] For example, the International Convention for the Suppression of Terrorist Bombings of 15 Dec. 1997, Art. 7, paras. 1 and 2; the International Convention for the Suppression of the Financing of Terrorism of 9 Dec. 1999, Art. 9, paras. 1 and 2; the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 Apr. 2005, Art. 10, paras. 1 and 2. See Roger O'Keefe, *International Criminal Law*, Oxford University Press, 2015, p. 330.

place must ensure that the existing provisions conform to the Convention requirements and amend their laws, if necessary."[119]

110. Equatorial Guinea flagrantly disregards the content of the obligations when it claims that French law applies the Palermo Convention[120], and that any implementation of domestic law therefore falls within the scope of the Convention. Each of the two stages in its reasoning is erroneous.

111. First, the Memorial explains that "in the absence of an obligation to do otherwise, States remain free to choose how they give effect to their obligations"[121]. That is true, but, since the obligation consists of establishing criminal offences and bases of jurisdiction, the choice of the means relates to how the general rules of domestic criminal law and criminal procedure are adapted to the requirements of the Convention. That free choice reflects the fact that the Convention has no direct effect and seeks merely to harmonize the legal systems of the States parties. However, Equatorial Guinea does not claim that French law is not in harmony with the Convention.

112. Second, while it is true that the conventional obligations require domestic laws to be brought into conformity with the Convention, they do not require criminal proceedings to be
**49** initiated in a particular case. The implementation of domestic legislation still falls under the criminal sovereignty of the States parties to the Convention. It makes this crystal clear, since Article 11, paragraph 6, expressly states: "Nothing contained in this Convention shall affect the principle . . . that such offences shall be prosecuted and punished in accordance with [the] law [of that State party]."

113. By virtue of this principle, the French judicial authorities commenced proceedings against Mr. Teodoro Nguema Obiang Mangue on the basis of French law[122]. That they did so regarding money laundering, an offence which the States parties to the Convention are also obliged to establish as a criminal offence in their domestic law, does not place those proceedings within the scope of the conventional obligations.

**B. An examination of the provisions of the Convention invoked by Equatorial Guinea**

114. The provisions of the Palermo Convention correspond perfectly to its object and purpose, which is to establish a "legal framework" to combat transnational organized crime, and not to govern the conduct of proceedings in specific cases. Notwithstanding the overall scheme of the conventional obligations, in its Memorial Equatorial Guinea cites several articles of the Convention, in addition to Article 4, in an attempt to justify the Court's jurisdiction. However, it rarely enters into detail, since a simple perusal of the provisions invoked reveals that they have no connection with the case submitted to the Court. Consequently, the purpose of the following observations is simply to provide a precise response to Equatorial Guinea's Memorial. We begin by examining the provisions invoked in respect of the proceedings against Mr. Teodoro Nguema

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[119] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, United Nations, New York, 2005, p. [17], para. 37.

[120] MEG, para. 5.29.

[121] MEG, para. 5.33.

[122] See Paris *Cour d'appel*, National Financial Prosecutor's Office, Final submissions seeking separation of the complaints, and either their dismissal or their referral to the *Tribunal correctionnel*, 23 May 2016 (Ann. 30 MEG); Order for partial dismissal and partial referral of proceedings to the *Tribunal correctionnel*, 5 Sep. 2016, regularized by an order of 2 Dec. 2016, p. 35 (Ann. 7 MEG).

Obiang Mangue (1) and continue with those invoked in respect of the building located at 42 avenue Foch in Paris (2).

50 **1. Provisions invoked in respect of the proceedings against Mr. Teodoro Nguema Obiang Mangue**

115. First, the Memorial mentions Article 3, interpreted in conjunction with Article 34, paragraph 1[123]. Article 3, however, is devoted to the scope of the Convention, and contains no obligation. While it refers to investigations and prosecution, it does so because of the conventional provisions relating to judicial co-operation. Article 34, paragraph 1, contains no specific obligation either, but recalls that the States must adopt the "necessary measures . . . to ensure the implementation of [their] obligations under this Convention". The conventional obligations said to be at issue therefore remain to be identified.

116. Second, Equatorial Guinea mentions Article 6, entitled "Criminalization of the laundering of proceeds of crime"[124]. Here, there is indeed an obligation incumbent on the States parties. It is to adopt "such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally"[125] certain acts listed as constituting the laundering of proceeds of crime. Each State party "shall seek to apply [this obligation] to the widest range of predicate offences"[126] and "shall furnish copies of its laws that give effect to this article . . . to the Secretary-General of the United Nations"[127]. France complies with that obligation, since money laundering is provided for and punishable under Articles 324-1 to 324-9 of the French Penal Code. As Equatorial Guinea itself points out in its Memorial, French legislation already included those offences before the Convention was adopted. And it does not claim that this legislation is not in conformity with Article 6.

117. Third, Equatorial Guinea claims that the criminal proceedings initiated in France constitute an implementation of Article 15[128]. Under that article, each State party "shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in
51 accordance [with the Convention]"[129], depending on the place of the offence, its perpetrator or its victim. Here too, the obligation incumbent on the States parties is to adopt the necessary rules in their domestic law — if they have not already done so — to establish the jurisdiction of their courts over those offences. Domestic French law complies with that provision[130]. Equatorial Guinea does not contend that France has not performed its obligations in that regard. Moreover, the provision

[123] MEG, para. 5.28.

[124] MEG, para. 5.29.

[125] Art. 6, para. 1, of the Convention.

[126] Art. 6, para. 2 *(a)*, of the Convention.

[127] Art. 6, para. 2 *(d)*, of the Convention.

[128] MEG, para. 5.29.

[129] Art. 15, para. 1.

[130] Arts. 113-1 to 113-13 of the Penal Code; Art. 689 of the Code of Criminal Procedure. France has informed the Secretary-General of the United Nations of the domestic legislative measures giving effect to Art. 15 of the Palermo Convention (see https://www.unodc.org/cld/v3/sherloc/legdb/).

relates to the establishment of bases of jurisdiction, not to the exercise of one of them in a given case[131]. There is therefore no dispute regarding Article 15.

118. It should also be noted that Article 15 relates to adjudicative jurisdiction, and not to immunities. As the Court has already had occasion to explain, immunity is not a question of jurisdiction, but of the exercise of that jurisdiction[132], since it is "*procedural in nature*"[133]; the two questions must be carefully distinguished[134]. Article 15 therefore concerns neither the immunities of State representatives nor those of the property of foreign States.

119. Fourth, the Memorial refers at slightly greater length to Article 11, paragraph 2, of the Convention[135], which provides that:

> "Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences."

120. Here, Equatorial Guinea's reasoning is astonishing:

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> "By initiating criminal proceedings against the Vice-President of Equatorial Guinea for criminal offences which he allegedly committed, the French courts have sought to fulfil this obligation . . . This is a clear effort by France to exercise its jurisdictional authority and apply its criminal law to the maximum extent possible in order to deter money laundering. However, it cannot give effect to this obligation in disregard of Article 4 of the Convention."[136]

France is therefore not accused of violating this provision, but of applying it too well. That paradox aside, the flawed analysis of the provision deserves particular attention.

121. The wording of Article 11, paragraph 2 — "shall endeavour to ensure" — indicates that the provision is not legally binding, but a recommendation. That recommendation is of a general nature and relates to the States parties' penal policy. The aim of the negotiators was to ensure that the prosecuting authorities would bear in mind the need to give effect to the law as efficiently as possible — for example, without abusing mechanisms for granting concessions to the accused, be it in exchange for information or as part of a plea bargain[137]. This is also evident from the context of the provision, since under Article 11, paragraph 1, the States parties are required to "make the

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[131] David McClean, *Transnational Organized Crime — A Commentary on the UN Convention and its Protocols*, Oxford University Press, 2007, p. 167: "It is mandatory for States to 'establish' jurisdiction over the specified offences, but that does not carry with it an obligation to exercise that jurisdiction in any particular case."

[132] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 20, para. 46.

[133] *Ibid.*, p. 26, para. 60 (emphasis added).

[134] *Ibid.*, pp. 25-26, para. 59.

[135] MEG, paras. 5.30-5.31.

[136] MEG, para. 5.31.

[137] David McClean, *Transnational Organized Crime — A Commentary on the UN Convention and its Protocols*, Oxford University Press, 2007, p. 133.

commission of an offence [covered by the Convention] liable to sanctions"[138]. As the *Legislative Guide* adopted by the United Nations explains, the harmonization required by Article 11 seeks to ensure that the sanctions clearly outweigh "the benefits of the crime"[139]. The whole of the article therefore concerns the overall effectiveness of the law, and not measures relating to specific cases[140]. This is confirmed, if confirmation were needed, by the final paragraph of Article 11. This
**53** provision thus has no bearing on the present case, since Equatorial Guinea does not claim that the French judicial authorities have pursued a penal policy that runs counter to it.

122. Immunity is a procedural aspect of the law applicable to a given case, which the judicial authorities do not have discretion to accept or reject. The subject-matter of this dispute therefore has no connection with Article 11, paragraph 2.

123. Fifth, Equatorial Guinea refers to Article 18 of the Palermo Convention, which concerns mutual legal assistance[141]. It is true that the Palermo Convention was mentioned in the request for international assistance sent by the French judges to the Equatorial Guinean authorities on 14 November 2013[142]. However, Equatorial Guinea, which made a sovereign decision to comply with that request, has never claimed to have a dispute with France in this regard[143]. Moreover, and contrary to what is stated in the Memorial[144], the simple fact that reference is made to the Convention in a request for mutual legal assistance in no way modifies the legal basis of the proceedings, which were initiated under French law alone.

### 2. Provisions invoked in respect of the building located at 42 avenue Foch in Paris

124. Equatorial Guinea's Memorial, while not always explicit, mentions three articles of the Convention in connection with the part of the dispute relating to the building at 42 avenue Foch in Paris. The reference to Article 18, which is common to the immunities and the building, has been examined above. Articles 12 and 14, for their part, get a particularly cursory mention[145].

125. Article 12 imposes an obligation on the States parties to adopt "such measures as may be necessary to enable confiscation of: *(a)* Proceeds of crime derived from offences covered by this Convention [and property used to commit them]". As with Article 6, that obligation is therefore
**54** performed once the State party has adopted rules in its domestic law which enable the proceeds of

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[138] Art. 11, para. 1, of the Convention.

[139] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, United Nations, New York, 2005, p. [130], para. 262. To that end, the prosecution and sanctions must be "consistent with the harm [the perpetrators of the crimes] have caused and with the benefits they have derived from their criminal activities" (*ibid.*, p. [130], para. 261). Consequently, pursuant to Art. 11, "States parties [must] give serious consideration to the gravity of the offences covered by the Convention when they decide on the appropriate punishment and possibility of early release or parole" (*ibid.*, p. [131], para. 264).

[140] *Ibid.*, [p. 133], para. 275: States "must make an effort to encourage the application of the law to the maximum extent possible in order to deter the commission of the four main offences".

[141] MEG, paras. 5.32 and 5.33.

[142] Paris *Cour d'appel*, National Financial Prosecutor's Office, Final submissions seeking separation of the complaints, and either their dismissal or their referral to the *Tribunal correctionnel*, 23 May 2016, p. 29 (MEG, Ann. 30).

[143] AEG, para. 41. See also MEG, submissions, p. 181.

[144] MEG, para. 5.32.

[145] MEG, para. 5.32.

crime to be confiscated. The French Penal Code includes such provisions[146], and it is not alleged that they do not comply with the Convention.

126. Article 14 concerns the disposal of confiscated proceeds of crime and property. Its first paragraph provides that the State should dispose of them "in accordance with its domestic law and administrative procedures", thus recognizing States' freedom of action in this area. The remaining two paragraphs set out how States should co-operate for the purposes of returning or contributing the value of such proceeds of crime or property to international bodies, or sharing it with other States. None of this is at issue in the present dispute.

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127. In conclusion, it follows from the foregoing that the claims submitted to the Court regarding the criminal proceedings initiated against Mr. Teodoro Nguema Obiang Mangue, and the building located at 42 avenue Foch in Paris, in no way concern the application or interpretation of any of the provisions of the Palermo Convention. Article 4 refers to principles intended to guide the implementation of the conventional obligations, and there is no dispute between the Parties calling into question any of the obligations under that Convention. Consequently, the Court has no jurisdiction to entertain the dispute submitted by Equatorial Guinea on the basis of Article 35, paragraph 2, of the Palermo Convention.

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## CHAPTER 3

## THE COURT'S LACK OF JURISDICTION ON THE BASIS OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

128. In the chapter of its Memorial devoted to "[t]he jurisdiction of the Court", Equatorial Guinea deals only very briefly with the question of whether, in this instance, the Vienna Convention on Diplomatic Relations of 18 April 1961 enables the Court to entertain the submissions put forward in the Application on the basis of that treaty. Apart from a few citations recalling the preconditions for referral to the Court and a brief presentation of the position set out by France during the hearings on the request for provisional measures, the relevant passage of the Applicant's argument occupies just one paragraph, which reads as follows:

> "The dispute before the Court concerns the interpretation and application of several provisions of the VCDR, including but not limited to Article 1 (i) and Article 22. One of the fundamental aspects of the dispute is indeed to determine whether the building located at 42 avenue Foch in Paris forms part of the premises of Equatorial Guinea's diplomatic mission in France, and as from what date. This raises a number of factual and legal issues, which the Court is called upon to decide. Equatorial Guinea and France have different views on these matters, which is why there is no question that a dispute concerning the VCDR exists."[147]

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[146] Arts. 131-21 and 324-7 of the Penal Code (see https://www.unodc.org/cld/v3/sherloc/legdb/).

[147] MEG, p. 78, para. 5.46.

129. Such deliberate brevity is surprising in several respects, primarily because Equatorial Guinea had indicated during the exchanges on the request for the indication of provisional measures, and in a bid to play down the importance already accorded by France to the question of the Court's jurisdiction, that the latter would subsequently be the subject of "detailed written pleadings"[148]. Yet instead of producing a detailed argument, the Applicant confines itself here to making bald, unsubstantiated assertions, which it presents as self-evident truths. For the reasons given below, France considers that these cursory observations can, and must, be refuted. A mere reference to "different views" evidently cannot suffice to accept that "there is no question that a
**56** dispute concerning the VCDR exists"[149]. As the Court clearly recalled in the Judgment delivered in the *Oil Platforms* case, it

> "cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty . . . pleaded . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain."[150]

130. Exactly the same is true in the present instance. Rather than upholding the Applicant's distinctly succinct reasoning[151], the Court prudently reserved its position on the matter during its examination of the request for the indication of provisional measures. That stance was no doubt dictated by the limits that such a claim traditionally places on the Court's power to assess its own jurisdiction. The Court thus recalled, as it does consistently in such circumstances, that at that stage it needed only to satisfy itself of the existence, prima facie, of a basis of jurisdiction, and did not need to "satisfy itself in a definitive manner that it ha[d] jurisdiction as regards the merits of the case"[152]; consequently, the decision rendered on 7 December 2016 "in no way prejudges the question"[153] considered here.

131. Nonetheless, the language used by the Court to establish its jurisdiction — even prima facie — on the basis of the Vienna Convention on Diplomatic Relations remains notably cautious. The Court observes, for example, that "the rights *apparently at issue may fall within the scope* of Article 22 of the Vienna Convention, which guarantees the inviolability of diplomatic premises"[154], before enjoining the Respondent to "take all measures at its disposal to ensure that the premises *presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris* enjoy *treatment equivalent to that* required by Article 22 of the Vienna Convention on Diplomatic
**57** Relations, in order to ensure their inviolability"[155]. By choosing this form of words, the Court left unresolved the questions raised in this instance by the possibility of applying the Vienna Convention *ratione materiae,* particularly regarding the legal status of the building located at

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[148] CR 2016/16, 19 Oct. 2016, p. 10, para. 9 (Wood).

[149] MEG, p. 78, para. 5.46.

[150] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 810, para. 16.

[151] According to the Applicant, there is a "dispute 'arising out of the interpretation and application of the [Vienna] Convention' within the meaning of Article I of the Optional Protocol. As such, under Article II the Court has jurisdiction if certain conditions are met. Those conditions are met, as we explained in the Application instituting proceedings" (CR 2016/16, 19 Oct. 2016, p. 14, para. 20 (Wood)).

[152] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 31.

[153] *Ibid.*, para. 98.

[154] *Ibid.*, para. 67 (emphasis added).

[155] *Ibid.*, para. 99 (emphasis added).

42 avenue Foch in Paris (16th arrondissement). These are precisely the questions underlying the preliminary objection raised here.

132. Before examining them, and in the interests of the sound administration of justice, it should be recalled that France does not dispute that the formal conditions for relying on the Protocol are met in this instance[156] and, more specifically, does not consider Articles II and III of that instrument as obstacles to the Court's jurisdiction. Indeed, in the context of the request for the indication of provisional measures, France explained that respect for the principle of judicial independence, and the fact that French legislation does not allow for criminal proceedings to be stopped by means of a compromise agreement, meant that it was not in a position to pursue Equatorial Guinea's offer of conciliation and arbitration[157].

133. Careful examination of the elements of law and fact put forward in Equatorial Guinea's Application and Memorial, however, shows that the Court does not have jurisdiction *ratione materiae* to entertain Equatorial Guinea's claims on the basis of the Vienna Convention and Article I of its Optional Protocol, which reads as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

134. Thus, for the Court to have jurisdiction on the basis of that text, the dispute alleged by the Applicant must actually fall under the provisions of the Vienna Convention. While the Court has a degree of discretion to determine whether that is indeed so in the context of a case submitted
58 to it, it must clearly pay particular attention to the terms used by the Applicant to present the dispute[158].

135. According to the Applicant's Memorial, which uses a slightly more precise form of words than its Application[159],

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[156] France ratified the Vienna Convention on Diplomatic Relations and the Optional Protocol on 31 Dec. 1970; Equatorial Guinea acceded to the Convention on 30 Aug. 1976 and to the Protocol on 4 Nov. 2014.

[157] See CR 2016/17, p. 18, para. 2 (Alabrune) and *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, para. 62.

[158] In its Judgment in the case concerning *Fisheries Jurisdiction*, the Court explains that it is for the Court itself, "while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties . . . The Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute . . . The Court will itself determine the *real dispute* that has been submitted to it (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995,* pp. 24-25). It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* pp. 262-263)" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* pp. 448-449, paras. 30-31, emphasis added).

[159] See AEG, para. 2.

> "[t]he dispute between Equatorial Guinea and France regarding the building located at 42 avenue Foch in Paris concerns whether that building enjoys immunity, both as premises of the diplomatic mission of Equatorial Guinea and as the property of that State, under international law and the Vienna Convention on Diplomatic Relations"[160].

136. In France's opinion, however, that is not the subject of the "real dispute" brought before the Court, despite Equatorial Guinea's fluid and subjective presentations of it[161]. As regards reliance on the Vienna Convention, the dispute thus does not concern the protection which, under Article 22, the receiving State must grant to the premises of the sending State's diplomatic mission, in particular from search or attachment (I).

137. The dispute in fact relates to a separate question, which is preliminary to that of the protection which it is alleged should be offered to the building at 42 avenue Foch: the question of whether, at the time of the events of which Equatorial Guinea complains in its Application, that building should — or should not — have been regarded as being used for the purposes of Equatorial Guinea's mission in France. As recalled above, in this and in other respects, Equatorial Guinea's Application is abusive, which is sufficient to establish that the Court lacks jurisdiction to entertain it[162]. Moreover, it is important to note that, if a dispute does exist between the Parties, it does not fall within the provisions of the Vienna Convention, which stipulates neither the means nor the methods for identifying the diplomatic purpose of buildings (II).

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138. Alternatively, and assuming — *quod non* — that the Court were to agree that its jurisdiction was established on the basis of that instrument, it would only be able to address on that basis breaches of the Convention that are specifically alleged in the Application. In that instance, the Court's jurisdiction would therefore be limited to examining the lawfulness of the attachment of the building located at 42 avenue Foch in Paris in the light of the Vienna Convention (III).

## I. The lack of a dispute between the Parties concerning the interpretation or application of Article 22 of the Vienna Convention

139. In its written pleadings, Equatorial Guinea is distinctly vague about the provisions of the Vienna Convention whose interpretation or application is said to lie at the root of the dispute between itself and France. After briefly indicating that "applicable in the present dispute are the provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961"[163], the Application instituting proceedings merely states that France "has breached its obligations owed to Equatorial Guinea under the Vienna Convention . . ., *in particular Article 22 thereof*"[164]. The submissions relating to the building at 42 avenue Foch, which are repeated verbatim in the Memorial[165], are barely more forthcoming, since they simply request the Court to adjudge and declare that France, by attaching the building, "is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations"[166].

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[160] MEG, pp. 19-20, para. 2.9.

[161] See paras. 13-41 above.

[162] See paras. 58-88 above.

[163] AEG, p. 10, para. 36.

[164] *Ibid.*, p. 11, para. 38 (emphasis added).

[165] MEG, p. 182, para. *(c)* (i).

[166] AEG, p. 13, para. 41 *(c)* (i).

140. Even more surprisingly, Equatorial Guinea's Memorial provides no further evidence of
**60** the precise nature of the obligations under the Vienna Convention which France is alleged to have breached in this instance. As we have already noted, the section about the Court's jurisdiction simply states that the dispute "concerns the interpretation and application of several provisions of the VCDR, including but not limited to Article 1 (i) and Article 22"[167]. Equatorial Guinea does subsequently mention Article 1 (i), but solely to point out that the inviolability of diplomatic premises is not dependent on their being owned by the sending State[168] — a point which France does not dispute — and then, "[t]o recall"[169], it quotes the definition contained in that provision. However, as we shall demonstrate, in this instance Article 1 (i) is not capable of providing the legal basis for a dispute between the Parties[170].

141. As for the other provisions of the Convention to which Equatorial Guinea alludes, they in fact prove to be ineffective for the purposes of determining the nature of the supposed dispute between the Parties on the basis of the Convention. For example, Equatorial Guinea does not claim that France has failed to perform its obligations under Article 21 of the Convention; it merely notes that "[i]f inviolability were made dependent on the sending State's ownership of the building, it would deprive Article 21 of the Convention of its substance and considerably narrow the scope of protection offered by this principle"[171]. France does not disagree: in the context of the questions being examined here, it is not ownership of the building that matters, but rather, as we shall see, its possible status as "premises of the mission"[172].

142. Similarly, and even more obviously, Article 12 of the Convention plainly has no bearing on the definition of the dispute between the Parties. As the Applicant explains in its Memorial, "[t]his provision is irrelevant for the purposes of the present case, since Equatorial Guinea has neither established, nor sought to establish, offices forming part of its mission 'in [other] localities'"[173].

**61** 143. Consequently, only Article 22 of the Vienna Convention would appear, at least at first sight, to be capable of providing a legal basis on which it would be possible to establish that in this case a dispute exists concerning the interpretation or application of the Convention, which is likely to be subject to the compulsory jurisdiction of the Court. Indeed, it is the only provision which Equatorial Guinea mentioned in its request for provisional measures, in respect of the rights that it was seeking to protect on the basis of the Convention[174]. It is also the only one which the Court took into account in its Order of 7 December 2016, when it considered that "at [that] stage, the existence between the Parties of a dispute capable of falling within the provisions of the Vienna Convention and concerning the interpretation or application of Article 22 thereof" was sufficiently established[175].

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[167] MEG, p. 78, para. 5.46.

[168] *Ibid.*, p. 142, para. 8.32.

[169] *Ibid.*, p. 143, para. 8.34.

[170] See paras. 160-169 below.

[171] MEG, p. 143, para. 8.32.

[172] See paras. 159-176 below.

[173] MEG, p. 144, para. 8.36, on the *"[a] contrario"* interpretation that the Applicant seeks to put forward on the basis of that provision.

[174] See CR 2016/14, 17 Oct. [2016], p. 32, para. 9 (Kamto).

[175] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, p. 17, para. 68.

144. However, although it sufficed to acknowledge, for the purposes of the request for provisional measures, "that Equatorial Guinea has a plausible right to ensure that the premises which it claims are used for the purposes of its mission are accorded the protections required by Article 22 of the Vienna Convention"[176], the Court noted that "the rights apparently at issue [might] fall within the scope of Article 22 of the Vienna Convention, which guarantees the inviolability of diplomatic premises, and that the acts alleged by the Applicant in respect of the building on avenue Foch appear[ed] to be capable of contravening such rights"[177]. In so doing, it relied not only on Equatorial Guinea's assertion that the building at 42 avenue Foch had been assigned for diplomatic use since 4 October 2011, but, above all, on the purely factual observation made by France "that, from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear[ed] to have been transferred"[178] to that address.

145. In other words, the possibility that, from the end of July 2012, the building concerned might have accommodated certain of Equatorial Guinea's diplomatic services was sufficient to render plausible the rights for which Equatorial Guinea was seeking protection, on the basis of Article 22 of the Convention, by requesting provisional measures. For the Court it was clearly not a
**62** question of determining whether the searches and attachment of the building located at 42 avenue Foch — all of which took place prior to the end of July 2012[179] — might have contravened the rights invoked by the Applicant on the basis of Article 22, but rather, more simply, of preserving those possible rights until the end of the proceedings initiated before it.

146. Such an approach is not at all unusual. As the Court itself recalled at the provisional measures stage, it "is not called upon to determine definitively whether the right which Equatorial Guinea wishes to see protected exists"[180], *a fortiori* when the request for the indication of such measures precedes the examination of the Court's jurisdiction. At that point the allegations made by each of the Parties are undeniably important. However, at the stage of establishing jurisdiction, that provisional assessment of the apparent existence and plausibility of the rights at issue cannot suffice. In the words of an arbitral tribunal constituted under the United Nations Convention on the Law of the Sea, "in any . . . case invoking the compromissory clause of a treaty, the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty in point, as determined by the court or tribunal whose jurisdiction is at issue"[181].

147. Following that logic, it is for the Court to determine whether Equatorial Guinea's claims are capable of falling within the provisions of Article 22 of the Vienna Convention. They are certainly not in this case, since Equatorial Guinea has failed to demonstrate that the provision concerned is applicable to its dispute with France.

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[176] *Ibid.*, p. 19, para. 79.

[177] *Ibid.*, p. 17, para. 67.

[178] *Ibid.*, [p. 19, para. 79].

[179] See paras. 20-29 [above].

[180] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, p. 19, para. 78. See also *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 153, para. 26.

[181] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*, Decision of 4 Aug. 2000, *RIAA*, Vol. XXIII, pp. 38-39, para. 48.

148. Article 22 of the Vienna Convention on Diplomatic Relations reads as follows:

> "1. The *premises of the mission* shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> **63** 2. The receiving State is under a special duty to take all appropriate steps to protect the *premises of the mission* against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
>
> 3. The *premises of the mission*, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."[182]

149. Article 22 thus sets out an inviolability régime protecting all buildings reserved for the use of diplomatic missions; at the same time, this conventional legal régime, which derogates from ordinary law, only applies to premises "used for the purposes of the mission", as defined by Article 1 (i) of the Convention.

150. France of course — and Equatorial Guinea does not claim otherwise — in no way disputes the fact that diplomatic premises are entitled to inviolability, as established by Article 22. To be even more specific, it fully accepts that the premises of the diplomatic mission of the Republic of Equatorial Guinea in France, located at 29 boulevard de Courcelles in Paris (8th arrondissement)[183], must benefit unconditionally from the legal régime of Article 22. On the other hand, it considers that the sending State's rights under Article 22 can only be applied and implemented if it has previously been established that the premises in question do indeed enjoy diplomatic status. Article 22 contains no reference to any criteria or procedure for determining the diplomatic purpose of a particular premises. It sets out the legal régime for diplomatic premises, but includes no provision on how such status is acquired.

151. An examination of the practice to which Article 22 of the Convention has given rise corroborates this interpretation, which, moreover, merely derives from the ordinary meaning of the words and phrasing used to set out the obligations contained in that provision. To take just one recent example, the High Court of Justice of England and Wales declined to extend the enjoyment of the protective legal régime of Article 22 to a building in London owned by the Federal Republic of Nigeria for the following reasons:

> **64** "45. Section 16 of the State Immunity Act preserves the immunities available to a state under the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968. The defendants rely on section 2 of the former Act together with Article 22 of the Vienna Convention on Diplomatic Relations of 1961.
>
> 46. Section 2 gives the force of law to certain articles of the Convention including Article 22 which provides that 'The premises of the mission shall be inviolable'. However, despite the terms of the Acting High Commissioner's certificate, I do not accept that the Fleet Street property forms part of the premises of the Nigerian High Commission. The Acting High Commissioner's certificate has no

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[182] Emphasis added.

[183] The address of the Embassy of Equatorial Guinea in France is listed in the "Annuaire des représentations étrangères en France" (see http://www.diplomatie.gouv.fr/fr/le-ministere-et-son-reseau/annuaires-et-adresses-du-maedi/ambassades-et-consulats-etrangers-en-france/, consulted on 17 Mar. 2017).

> special status for this purpose. A certificate from the Secretary of State would be conclusive on the question whether the property comprises diplomatic or consular premises (see section 1 (7) of the Diplomatic & Consular Premises Act 1987), but there is no such certificate."[184]

152. Thus, the issue of determining whether a building must be regarded as forming part of the premises of the mission must undoubtedly be addressed prior to invoking Article 22 for its benefit. As one of the most authoritative commentaries on the 1961 Vienna Convention indicates, in its observations on Article 22,

> "[a] question which cannot be clearly resolved from the text of the Convention or from the *travaux préparatoires* is when the inviolability of mission premises begins and ends. [. . .] In the Vienna Convention . . ., although there are elaborate provisions for notification of persons entitled to privileges and immunities and for determining the time when entitlement begins and ends, there are no analogous provisions for premises."[185]

153. Moreover, Equatorial Guinea seems to have the measure of the subject-matter and limits of Article 22. The only reference to that provision in the "[l]egal bases of Equatorial Guinea's Application" reads as follows:

> "[B]y the fact that its judicial authorities have seized a building used for the purposes of the diplomatic mission of Equatorial Guinea in France, and *by failing to recognize the building as the premises of the diplomatic mission*, the French Republic has breached its obligations owed to Equatorial Guinea under the Vienna Convention on Diplomatic Relations of 18 April 1961, in particular Article 22 thereof"[186].

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154. This line of argument would suggest that Article 22 was breached because of the failure by the French authorities previously to recognize the diplomatic status of the building at 42 avenue Foch. The wording of the submissions in the Application is equally illuminating on this point, since Equatorial Guinea requests the Court

> "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*"[187].

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[184] *L R Avionics Technologies Ltd* v. *The Federal Republic of Nigeria & Anor* [2016] EWHC 1761 (Comm), 15 July 2016; available at: http://www.bailii.org/ew/cases/EWHC/Comm/2016/1761.htm.

[185] E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed., Oxford, Oxford University Press, 2016, p. 145. J. Salmon agrees: "The Vienna Convention does not specify at which point the premises acquire the status of 'premises of the mission'. There is no provision for a notification procedure for premises such as the one in Article 1[0] for people. Hence, for example, if a building or plot of land is purchased by a State to establish an embassy (or consulate), but is not yet assigned to it, the courts do not recognize the State's immunity from jurisdiction in connection with that acquisition. However, as soon as the premises are assigned, their protection is ensured" (J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, pp. 191-192, para. 287). *[Translation by the Registry.]*

[186] AEG, p. 11, para. 38 (emphasis added). "Memorandum No. 2 from the Republic of Equatorial Guinea to the French Republic. The case of the so-called 'ill-gotten gains': the Equatorial Guinean chapter" already indicated in the same vein: "[u]ltimately, because of the difference in positions between the two States regarding the legal status of the building in question, the diplomatic mission of Equatorial Guinea in France is being deprived of the protection to which it is entitled under Article 22 of the Vienna Convention on Diplomatic Relations and according to relevant practice" (Ann. 12, p. 1[0], para. 51, AEG).

[187] AEG, p. 13, para. 41 *(c)* (ii) (emphasis added).

155. The fact that the building at 42 avenue Foch is not recognized as forming part of the premises of the diplomatic mission of Equatorial Guinea thus appears, from the very wording it has chosen, to be the trigger for the alleged breaches of Article 22. Yet that article imposes no such obligation of recognition on the receiving State. Nevertheless, Article 22 is in fact the only specific provision of the Convention in respect of which Equatorial Guinea has asserted that a dispute exists between itself and France.

156. That last point alone would suffice to conclude that the Court has no jurisdiction to entertain the dispute alleged by Equatorial Guinea on the basis of the Vienna Convention of 18 April 1961. That dispute does not relate to the régime for the inviolability of diplomatic premises, but more directly and, as it were, upstream, to the legal status of a building which Equatorial Guinea claims to own and use. Consequently, to paraphrase the words used by the Court regarding the compromissory clause of another treaty, Equatorial Guinea "has not shown that there
**66** [is] a question concerning the interpretation or application" of Article 22 of the Vienna Convention — the only article specifically invoked in the Applicant's Application and Memorial — "on which itself and [France have] opposing views, or that it [has] a dispute with that State in regard to this matter"[188].

157. No doubt consideration should also be given to the possibility open to the Court, when determining the subject of the "real dispute"[189], to remedy any formal defects in Equatorial Guinea's Application. However, that power is of necessity restricted and must be exercised with a narrow margin of appreciation, if only to preserve the rights and interests of the Defendant. As the Court itself has explained,

> "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to 'substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced' (*P.C.I.J., Series A, No. 7*, p. 35)."[190]

158. In this instance, Equatorial Guinea has failed to produce a scrap of evidence in support of its allegation that a dispute exists between itself and France concerning the interpretation or application of Article 22. That failure is an insurmountable barrier to establishing the jurisdiction of the Court on the basis of Article I of the Optional Protocol to the Vienna Convention. Moreover, in this case it appears to be all the more fatal, since that Convention in fact contains no provision under which the legal status of the building located at 42 avenue Foch could effectively be determined. The relevant rules are governed exclusively by customary norms, which the Court has no jurisdiction to apply in this case[191].

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[188] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 43, para. 99.

[189] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 31.

[190] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; see also *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29.

[191] See paras. 150-156 above.

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## II. The impossibility of linking the dispute alleged by Equatorial Guinea to the provisions of the Vienna Convention

159. The dispute between Equatorial Guinea and France does not concern the régime of inviolability of diplomatic premises provided for by Article 22 of the Vienna Convention. The Court's jurisdiction could nonetheless be established on the basis of that instrument, if the Applicant were able to "establish a reasonable connection between the Treaty and the claims submitted to the Court"[192]. In this case, however, no such "reasonable connection" can be established, since the Vienna Convention contains no rules specifying the modalities or procedure for identifying the premises of a diplomatic mission and, therefore, for determining whether the Article 22 régime applies to a given building. The Convention merely sets out the obligations resulting from the principle of inviolability of premises whose diplomatic status is established, but leaves States to identify buildings capable of enjoying protection under the Convention as they see fit.

160. The only provision relating to the status of certain buildings as diplomatic premises is in Article 1 of the Vienna Convention, which lists the definitions required "[f]or the purpose of the present Convention". It reads as follows: "(i) the 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission".

161. The object and meaning of that provision is clear from the Convention's *travaux préparatoires*. It did not appear in the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission in 1958[193], which do not specify how the status of diplomatic premises is acquired. The commentary on draft Article 20, on the "[i]nviolability of the mission premises" simply indicates in this regard that:

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> "The expression 'premises of the mission' includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented. The premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park."[194]

162. At the Vienna Conference, it was decided in the end to add "a somewhat shortened version of this descriptive Commentary"[195] to Article 1 of the Convention. And indeed, in both the brief passage in the Commission's commentary and the text of Article 1 (i) which it ultimately inspired, the definition of "premises of the mission" does appear to be essentially descriptive, above all because it does not stipulate the modalities or procedures for establishing that a building does indeed fall into the category of diplomatic premises[196]. In other words, the question of determining the legal status — or the diplomatic purpose — of a building for the purposes of the

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[192] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 427, para. 81.

[193] The text of the draft articles is reproduced in the *Yearbook of the International Law Commission (YILC)*, 1958, Vol. II, doc. A/CN.4/SER.A/1958/Add.1, pp. [89] *et seq.*, para. 53.

[194] *Ibid.*, p. 98 (commentary on Article 20, para. 2).

[195] E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations,* 4th ed., Oxford, Oxford University Press, 2016, p. 16.

[196] "The one definition contained in Article 1 which is clearly objective in character is the definition of 'the premises of the mission'" *(ibid.)*.

Vienna Convention is not settled by the Convention and remains entirely outside its scope of application[197].

163. The diversity of State practice alone is testimony to the fact that the question of how a particular building is recognized as having the legal status of "premises of the mission" is not covered by the Convention. Moreover, Equatorial Guinea does not seem to deny that fact, since it refers to the different ways in which States establish that a given building must be regarded as the premises of a diplomatic mission[198]. The statement that "[m]ost countries do not impose any particular formalities for the premises of a diplomatic mission to be recognized as inviolable"[199] is not in any way substantiated by the Applicant, which is nonetheless forced to concede that a "few States" — it goes on to cite South Africa, Canada, Spain, the United States, India, the United Kingdom, Switzerland and Sweden[200] — "require consent to the assignment of a building as premises of a diplomatic mission"[201].

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164. The practice of these States can also be instructive in that it reveals how they understand the extent of their international obligations, as regards giving their consent for a given building to be used for a diplomatic purpose. Under the United Kingdom's Diplomatic and Consular Premises Act of 1987, for example, the acquisition of the status of premises of a diplomatic mission is subject to the consent of the Secretary of State; the Act provides that "[t]he Secretary of State shall only give or withdraw consent or withdraw acceptance if he is satisfied that to do so is permissible under international law"[202]. Thus, while the official interpretation of the text makes it clear that the notion of "premises of the mission" has the meaning given by Article 1 (i) of the Vienna Convention[203], the lawfulness of the consent is not required to be evaluated under that Convention, but rather in the more general and non-specific context of "international law". In a similar vein, the United States Foreign Missions Act of 1982 lists as the first criterion for "determination concerning the location of a chancery", "[t]he international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital"[204]. Thus, American legislation does not make the consent of the federal authorities subject to compliance with any provisions in the Vienna Convention concerning recognition of the legal status of "premises of the mission", but solely and implicitly to those obliging the receiving State to help the sending State acquire or obtain in some other way the premises necessary for its mission (Article 21 of the Convention).

165. Furthermore, Equatorial Guinea does not contend that these national practices are contrary to international law or, more specifically, to the Vienna Convention, even though it seems to attach particular importance to the fact that "France has no legislation to which it could have

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[197] In this context it is significant that the notification obligations incumbent on the sending State under Article 10 of the Convention do not concern the premises of the mission; that silence indicates simply that the Convention does not seek to regulate the acquisition of the legal status of "premises of the mission".

[198] See MEG, pp. 146-148, paras. 8.42-8.44.

[199] *Ibid.*, p. 148, para. 8.44.

[200] *Ibid.*, pp. 146-147, para. 8.42. This list is not exhaustive.

[201] *Ibid.*, p. 146, para. 8.41.

[202] Diplomatic and Consular Premises Act, 15 May 1987, Section 1 (4); available at: http://www.legislation.gov.uk/ukpga/1987/46.

[203] See *ibid.*, the "Interpretation of Part I" appended to the Act.

[204] Foreign Missions Act (22 U.S.C. 4301-4316); available at: https://www.state.gov/documents/organization/17842.pdf, § 4306 *(d)* (1).

**70** referred Equatorial Guinea"[205], unlike the States that it mentions elsewhere[206]. Quite clearly, such a circumstance is immaterial from the point of view of international law: the only important question is in fact whether the practice concerned, regardless of the form it takes, is capable of constituting an internationally wrongful act that is contrary to the Convention. As one author observes:

> "In States where no specific domestic legal framework controls the acquisition or disposal of mission premises, the definition of Article 1 (i) falls to be applied by agreement between sending and receiving State. Generally speaking, a receiving State is likely to be notified of mission premises for the purpose of ensuring that it carries out its duties under Article 22 to protect those premises and ensure their inviolability. Challenge to such notification will usually take place only where there are grounds to suspect that the premises are not being used for purposes of the mission."[207]

166. The Vienna Convention, through its Optional Protocol, constitutes the only possible basis of jurisdiction in this case; it is also the only one invoked by Equatorial Guinea[208]. Since the Convention contains no provision under which it is possible to assess the lawfulness of France's conduct, as disputed by the Applicant, the Court cannot exercise jurisdiction over the dispute submitted by Equatorial Guinea.

167. Equatorial Guinea was reminded of France's constant practice in the clearest of terms, in reply to its assertion that "the mere designation of premises by any diplomatic mission is sufficient for those premises to be afforded the benefit of such protection as is provided for by Article 22 of the Vienna Convention of 18 April 1961"[209]. In the words of the Protocol Department of the Ministry of Foreign and European Affairs:

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> "In accordance with constant practice in France, an Embassy which envisages acquiring premises for its mission so notifies the Protocol Department beforehand and undertakes to assign the said premises for the performance of its missions or as the residence of its head of mission.
>
> Official recognition of the status of 'the premises of the mission' within the meaning of Article 1, paragraph (i), of the Vienna Convention on Diplomatic Relations of 18 April 1961 is determined on the date of completion of the assignment of the said premises to the services of the diplomatic mission, i.e., at the time that they are effectively moved into. The criterion of actual assignment must accordingly be satisfied.

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[205] MEG, p. 146, para. 8.41.

[206] In fact, as Equatorial Guinea itself notes, it is "legislation and/or guides and published guidelines" (*ibid.*, para. 8.42).

[207] E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed., Oxford, Oxford University Press, 2016, p. 17. The author cites the even more explicit position adopted by J. Salmon, who considers that: "[c]ontrary to the attempt made with regard to the size of missions (Article 11), *the Vienna Convention contains no provisions on conflicts of classification.* While the mission is entitled to classify what it regards as premises used for the purposes of the mission, that classification is merely provisional and unilateral, and the receiving State, which may have the power to refuse the necessary authorizations, may dispute it. The conflict resolution model provided for in Article 11 therefore seems to us to be equally apposite here. Agreement must be sought. In the absence of agreement, it seems to us that here too the receiving State should have the last word" (J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, p. 190, para. 286 (emphasis added). *[Translation by the Registry.]* See also Ph. Cahier, *Le droit diplomatique contemporain*, 2nd ed., Geneva, Droz, 1964, p. 198.

[208] See paras. 139-143 above.

[209] Note Verbale No. 249/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 12 Mar. 2012 (No. 16 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

> It is only as from that date, notified by Note Verbale, that the premises enjoy the benefit of appropriate protection as provided for by Article 22 of the Vienna Convention on Diplomatic Relations of 18 April 1961."[210]

168. It is striking that the section of the Applicant's Memorial devoted to the "violation of international law in respect of the building at 42 avenue Foch in Paris"[211], which focuses entirely on the "failure to respect the inviolability" of that building, provides no evidence in support of its conclusion that "France's refusal to recognize the diplomatic status of the building located at 42 avenue Foch in Paris is contrary to the provisions of the Vienna Convention on Diplomatic Relations and general international law"[212]. That silence is no doubt due to the difficulty of establishing such a fact under international law. As Chapter 1 of these preliminary objections recalled, in this instance the claim that the premises were used for diplomatic purposes at the material time is so implausible that it constitutes an abuse of rights and rules out the Court's jurisdiction *in limine litis*.

169. More fundamentally, that silence is explained above all by the fact that it is impossible for Equatorial Guinea to identify a norm within the Convention which is effective against France's
**72** refusal to endorse its claims concerning the building at 42 avenue Foch[213] and, hence, to establish that there is a dispute between them about the interpretation or application of the Vienna Convention, which would indeed fall under the Court's jurisdiction *ratione materiae.* In this regard, it appears to be particularly significant that in the submissions in its Application, which are identical on this point in its Memorial, Equatorial Guinea mentions no international legal norm — *a fortiori* the Vienna Convention — to substantiate its claim that France has an obligation to "recognize the status of the building located at 42 avenue Foch in Paris . . . as the premises of its diplomatic mission"[214].

170. Furthermore, France's practice, like that of the other States mentioned above, is fully consistent with the principle of mutual consent and the pursuit of friendly relations which must characterize diplomatic relations. It would therefore be paradoxical, to say the least, for the receiving State to have no influence over the identification of the premises of a foreign diplomatic mission on its territory, when that status triggers the application of an inviolability régime that

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[210] Note Verbale No. 1341 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 28 Mar. 2012 (No. 18 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures). As the Protocol Department's reply to the questions of the investigating judges assigned to the "ill-gotten gains" case indicates,

> "[f]or reference, a building with diplomatic status must be declared as such to the Protocol Department, with a specific date of entry into the premises. Once it has been verified that the building is actually assigned to a diplomatic mission, the Protocol Department informs the French Government that it has been officially recognized in accordance with the relevant provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961 . . . The building at 42 avenue Foch has never been recognized by the Protocol Department as forming part of the diplomatic mission of the Republic of Equatorial Guinea" (Note Verbale No. 5009/PRO/PID, 11 Oct. 2011, Ann. 35 MEG).

[211] MEG, pp. 129-159.

[212] *Ibid.*, p. 159, para. 8.71.

[213] Equatorial Guinea only puts forward an *"a contrario"* interpretation of Article 12 of the Convention, to conclude "that the opening of offices of a mission in the same locality, or the transfer of premises within the same locality, is not subject to the consent of the receiving State" (MEG, p. 144, para. 8.36). The very wording of that provision unquestionably precludes such a radical conclusion: Article 12 merely establishes a formal and rigorous procedure — including the need to obtain "*the prior express consent* of the receiving State" (emphasis added) — for the particular circumstances to which it refers; it cannot reasonably be inferred from it that the Convention also rules out any form of intervention by the receiving State in the designation of the premises of the mission of the sending State.

[214] AEG, p. 13, para. 41 *(c)* (ii), and MEG, p. 182, *(c)* (ii).

derogates from ordinary law, and thus places an indeterminate limitation on its sovereign rights. Yet that is what Equatorial Guinea contended in its correspondence with the Protocol Department of the French Ministry of Foreign Affairs:

> "[T]he régime for the protection of diplomatic premises is declaratory in nature, such that the mere designation of premises by any diplomatic mission is sufficient for those premises to be afforded the benefit of such protection as is provided for by Article 22 of the Vienna Convention of 18 April 1961"[215].

171. If, as Equatorial Guinea thus maintains, the receiving State's role were confined to endorsing the designation of premises by the sending State, the risks of abuse would inevitably
**73** increase. France already indicated in the hearings on the request for provisional measures that the consequences of such a scenario could reach the point of being "absurd"[216]. Equally worryingly, a sending State could choose to declare that a property formed part of the premises of its mission — even if it did not own it — in order to protect that property from the consequences of ongoing legal proceedings in the receiving State, and have recourse to the International Court of Justice if the latter refused to endorse that designation and allow an abuse of that kind. As the present proceedings demonstrate, such a scenario would appear to be entirely possible in practice.

172. It is precisely to counter the effects of that kind of abusive practice[217] that France has consistently refused to lend either credence or substance to Equatorial Guinea's claim that the building at 42 avenue Foch should be regarded as forming part of the premises of its mission. At this stage of examining the Court's jurisdiction there is no need to return in detail to those claims, which more often than not are driven by the developments in the judicial proceedings against Mr. Teodoro Nguema Obiang Mangue in France[218], in which a manifest abuse of the right to diplomatic immunities is evident[219]. Moreover, it is worth recalling that the French authorities have consistently refused to regard the building at 42 avenue Foch as forming part of the premises of Equatorial Guinea's diplomatic mission in France[220].

173. With a certain candour Equatorial Guinea states that, regarding "the legal status of the building located at 42 avenue Foch in Paris", it "has been consistent since the start of the said 'case'"[221]. The credibility of this version of events could be assessed on the basis of the present proceedings alone[222]: having maintained in its Application instituting proceedings that the building had been "used by the diplomatic mission of Equatorial Guinea"[223] since 15 September 2011, the Applicant stated — finally? — in reply to the question put by Judge Donoghue at the close of the

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[215] Note Verbale No. 249/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 12 Mar. 2012 (No. 16 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures). This Note, like all the correspondence sent from the Embassy of Equatorial Guinea to the Ministry between Sep. 2011 and Aug. 2012, gives the Embassy's address as 29 bd de Courcelles, Paris (8th arr.).

[216] CR 2016/17, p. 12, para. 11 (Pellet).

[217] See paras. 76-88 above.

[218] See paras. 30-41 above for the timeline of the relevant events, and the presentation of those developments made by the Agent of the French Republic during the hearings on the request for the indication of provisional measures (CR 2016/15, 18 Oct. 2016, pp. 9-12, paras. 11-28, in particular paras. 14-24).

[219] See paras. 76-88 above.

[220] See fn. 29 above.

[221] MEG, p. 57, para. 4.38.

[222] See paras. 27-29 above.

[223] AEG, p. 6, para. 20.

hearings on provisional measures that "the building at 42 avenue Foch in Paris acquired diplomatic
**74** status as of 4 October 2011"[224], a position confirmed, albeit only imprecisely, in its Memorial of 3 January 2017:

> "As Equatorial Guinea explained in its reply to the question put by Judge Donoghue during the hearings on the request for provisional measures, the building at 42 avenue Foch acquired diplomatic status as of 4 October 2011. The diplomatic mission of Equatorial Guinea in France transferred all its offices there in July 2012 [*sic*], after allowing due time to prepare for that move."[225]

174. Further reading of the Memorial does not correct that oversight, since the precise date of the move is never specified[226]. According to the Note Verbale to the Protocol Department of the French Ministry of Foreign Affairs, the offices of the Embassy of Equatorial Guinea were located as from 27 July 2012 — namely a few days after the attachment of the building — at 42 avenue Foch, the address which the Embassy "is *henceforth* using for the performance of the functions of its diplomatic mission in France"[227].

175. France has consistently refused to confirm the successive versions of events relating to the building at 42 avenue Foch, either before or after 27 July 2012, for reasons which it has already fully explained to the Court[228]. In this regard, as the Court noted in its Order of 7 December 2016,

> "the Parties do indeed appear to have differed, and still differ today, on the question of the legal status of the building located at 42 avenue Foch in Paris. While Equatorial Guinea has maintained at various times that the building houses the premises of its diplomatic mission and must therefore enjoy the immunities afforded under Article 22 of the Vienna Convention, France has consistently refused to recognize that this is the case, and claims that the property has never legally acquired the status of 'premises of the mission'. In the view of the Court, there is therefore every indication that, on the
> **75** date the Application was filed, a dispute existed between the Parties as to the legal status of the building concerned."[229]

176. However, that dispute does not concern the interpretation or application of the Vienna Convention on Diplomatic Relations, the relevant provisions of which deal with the legal régime for premises of a diplomatic mission, but leave outside the conventional scope the prior question of how given buildings are recognized as enjoying that legal status[230]. In this instance, Equatorial Guinea has not fulfilled its obligation to establish the "legal right in respect of the subject-matter of

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[224] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, p. 5. See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, p. 18, para. 77.

[225] MEG, p. 25, para. 2.30.

[226] See in particular *ibid.*, p. 58, para. 4.38, and p. 149, para. 8.48.

[227] Note Verbale No. 501/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 27 July 2012 (which gives the Embassy's address as 29 bd de Courcelles) (No. 22 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[228] See para. 172 above; see also the comments of the French Republic on the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 31 Oct. 2016, paras. 17-32.

[229] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures*, Order of 7 Dec. 2016, p. 17, para. 66.

[230] See paras. 152-156 above.

that which it claims"[231]. Consequently, the Court cannot exercise jurisdiction over the dispute between Equatorial Guinea and France on the basis of the Vienna Convention on Diplomatic Relations of 18 April 1961.

### III. The limits of the Court's jurisdiction on the basis of the Vienna Convention on Diplomatic Relations

177. Even assuming, *ex abundanti cautela*, that the Court dismissed France's preliminary objection relating to the Vienna Convention on Diplomatic Relations, it would only be able to entertain, on that basis, those aspects of the dispute based on precisely alleged violations of the Convention. The only reference to that instrument in Equatorial Guinea's submissions appears in the section concerning the building located at 42 avenue Foch in Paris. There, Equatorial Guinea requests the Court:

> "(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"[232].

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178. According to the wording of the relevant part of the submissions, the only point that the Court is called upon to decide, on the basis of the Vienna Convention, is whether the attachment of the building on 19 July 2012 constituted a breach of the international obligations owed by France to Equatorial Guinea under that treaty. This interpretation is further confirmed by reading the "legal bases of . . . [the] Application", where Equatorial Guinea lists the alleged breaches of France's international obligations: the legal proceedings initiated against Mr. Teodoro Nguema Obiang Mangue[233], the attachment of the building at 42 avenue Foch[234] and, finally, the attachment of property belonging to the Equatorial Guinean State[235]. However, the Vienna Convention is only mentioned in connection with the second of the alleged breaches[236].

179. During the provisional measures proceedings, however, Equatorial Guinea seemed to want to extend the scope of its claims relating to the building at 42 avenue Foch, since it asked the Court to indicate

> "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*

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[231] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 39, para. 64.

[232] AEG, p. 13, para. 41 *(c)* (i) and MEG, p. 182, *(c)* (i) (emphasis added). As has been pointed out, the second submission relating to the building, which seeks to have the Court order France to recognize its status as the premises of Equatorial Guinea's diplomatic mission, makes no reference to the Vienna Convention (see para. 169 above).

[233] AEG, p. 11, para. 37.

[234] *Ibid.*, para. 38.

[235] *Ibid.*, para. 39.

[236] "[B]y the fact that its judicial authorities have seized a building used for the purposes of the diplomatic mission of Equatorial Guinea in France, and *by failing to recognize the building as the premises of the diplomatic mission*, the French Republic has breached its obligations owed to Equatorial Guinea under the Vienna Convention on Diplomatic Relations of 18 April 1961, in particular Article 22 thereof" (*ibid.*, para. 38, emphasis added).

> *other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition*, attachment or any other measure of constraint"[237].

77 180. Despite returning only very briefly to that point during the hearings on the request for the indication of provisional measures[238], Equatorial Guinea maintained that submission at the close of the hearings[239]. As one of France's counsel stated,

> "[i]n the view of the French Republic, the request relating to the furnishings and property that were in the building prior to its attachment is unrelated to the subject-matter of the dispute. In paragraph *(c)* of the submissions in the Application, the Applicant requests only the protection of the building located at 42 avenue Foch and the premises of its diplomatic mission in Paris. It did not at any point request the protection of furniture or other property — in particular the furniture or other property present before 27 July 2012, the date on which the Applicant officially declared that it was transferring its diplomatic premises to 42 avenue Foch."[240]

181. That observation, made during the examination of the request for provisional measures, applies *a fortiori* in considering the Court's jurisdiction. If its jurisdiction could be established on the basis of the Optional Protocol to the Vienna Convention, it would be strictly limited to an examination of the lawfulness of the attachment of the building at 42 avenue Foch — the only claim that appears in the submissions in the Application and Memorial[241] — to the exclusion of any question relating to the movable property present in the building before its attachment on 19 July 2012.

182. The same applies to Equatorial Guinea's other claims, which have no connection, not even a superficial one, to the Vienna Convention on Diplomatic Relations. This is true of the alleged failure to respect the immunities which Equatorial Guinea's property is said to enjoy "under general international law"[242]. The same conclusion must be drawn regarding the immunity of Mr. Teodoro Nguema Obiang Mangue. Equatorial Guinea itself confirmed during the hearings on the request for provisional measures that it was not seeking to extend the enjoyment of diplomatic
78 immunities to Mr. Nguema Obiang Mangue[243], a fact which the Court explicitly noted in its Order:

> "However, at the hearings, Equatorial Guinea relied only upon Article 35 in respect of its claim regarding the immunity of Mr. Teodoro Nguema Obiang Mangue. The Court will therefore proceed on the basis that the Optional Protocol to the Vienna Convention is invoked by Equatorial Guinea only in relation to the claim regarding the alleged inviolability of the premises at 42 avenue Foch."[244]

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[237] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 4, para. 9 (emphasis added).

[238] See CR 2016/14, 17 Oct. 2016, p. 30, para. 3 (Kamto). See para. 53 above.

[239] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 5, para. 17.

[240] CR 2016/15, 18 Oct. 2016, pp. 40-41, para. 34 (Ascensio). See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 18, para. 76.

[241] See paras. 177-178 above.

[242] AEG, p. 11, para. 39.

[243] CR 2016/16, 19 Oct. 2016, p. 10, para. 10 (Wood).

[244] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 8, para. 32.

183. It is within the strict limits specified above that the Court could examine Equatorial Guinea's claims, if it decided that the Optional Protocol to the Vienna Convention on Diplomatic Relations gave it jurisdiction to consider the Application on the merits, *quod non.*

*

* *

184. In light of the foregoing, it would appear:

— that there is no dispute, within the meaning of Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations, between Equatorial Guinea and France concerning the interpretation or application of the inviolability régime for diplomatic premises set out in Article 22 of the Convention;

— that the real dispute between the Parties concerns a question which arises before Article 22 of the Convention can be invoked, regarding recognition of the building located at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission in France;

— that the provisions of the Vienna Convention on Diplomatic Relations do not cover that question;

— that, consequently, the Court has no jurisdiction to entertain the claims made by Equatorial Guinea on the basis of that Convention.

**79** 185. Very much in the alternative, and assuming, *quod non*, that the Court's jurisdiction could be established on the basis of the Optional Protocol to the Vienna Convention, such jurisdiction could only extend *ratione materiae* to the one question of whether the attachment of the building located at 42 avenue Foch in Paris is lawful under the Convention.

**81** **SUBMISSIONS**

186. For the reasons set out in these preliminary objections, and for any such others as might be put forward in the subsequent proceedings or raised *proprio motu*, the French Republic respectfully requests the International Court of Justice to decide that it lacks jurisdiction to rule on the Application filed by the Republic of Equatorial Guinea on 13 June 2016.

Paris, 30 March 2017

*(Signed)* Mr. François ALABRUNE,

Agent of the French Republic.

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**ANNEX 1**

**Complaint with civil-party application filed by Transparency International France and Mr. Grégory Ngbwa Mintsa with the Paris *Tribunal de grande instance*, 2 December 2008**

**Complaint with civil-party application filed by Transparency International France and Mr. Grégory Ngbwa Mintsa with the Paris *Tribunal de grande instance*, 2 December 2008**

**COMPLAINT WITH CIVIL-PARTY APPLICATION**

**(1) Transparency International France**, an association governed by the Law of 1 July 1901, with its registered office located at 2 bis rue de Villiers, 92300 Levallois-Perret, acting through its President, Mr. Daniel LEBEGUE;

**(2) Grégory Ngbwa Mintsa**, residing at BP 2415 Libreville, Gabon, a Gabonese national.

**Counsel:** Mr. William BOURDON

Avocat à la Cour

156 rue de Rivoli, 75001 Paris

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Courthouse box No. R 143

Whose offices are chosen as the address for service.

**HAVE THE HONOUR OF SETTING FORTH THE FOLLOWING FACTS**

## I. Factual background

In an ordinary complaint lodged with the Paris Public Prosecutor's Office in March 2007, the associations Sherpa, Survie and *Fédération des congolais de la diaspora* set forth the following:

> "(1) Over many years, various observers have gathered a certain amount of information showing that leaders of African States or certain members of their families had, during or after their terms of office, acquired or procured the acquisition of immovable property on French territory.
>
> It is also clear that, at about the same time, some of those African leaders acquired movable assets, that is, they had bank holdings in France, at French banks and/or foreign banks with operations in France.
>
> (2) It is also certain and indisputable that, in recent years, in the wake of regime changes, various African States have not hesitated to issue international letters rogatory or, more generally, to request the assistance of the international community in repatriating to the treasuries of the States concerned, sometimes with success, the bank holdings misappropriated by those African leaders who have been removed from office or lost elections, or who are deceased.
>
> One could cite, *inter alia*, and simply as an example, the measures taken by the Nigerian Government with regard to the considerable bank holdings misappropriated by former President Sani Abacha.

These judicial measures not only targeted misappropriated bank holdings, they also aimed to identify any immovable property acquired by the African leaders in question.

It is true that these measures have not always been successful, since the real or apparent owners of the immovable assets took great care to take certain precautions in an attempt to conceal the actual ownership of the property and the financial arrangements.

Nevertheless, following their various investigations and by collating information gathered by different observers, the undersigned associations have in recent years been able to prove, or at least to establish with a very high degree of probability, that African leaders who are still in office and certain members of their families own immovable property of sometimes considerable value on French territory, and in Paris in particular.

They have also been able to acquire such proof with regard to immovable property previously owned by ousted or deceased leaders, the ownership of which was automatically passed on to their beneficiaries.

(3) Regardless of these leaders' merits and capabilities, no one can seriously believe that the immovable property in question, which in some cases is currently valued at several million euros, could have been acquired solely out of their remuneration.

This observation holds especially true for the family members of these African leaders, when they appear to own a number of properties, since in many instances they have no occupation or their occupation is unknown.

With regard to certain offences, such as money laundering, there is a presumption under the law that the offence has been committed if a person cannot provide proof of resources commensurate with his or her lifestyle (see for example *Cass. crim.*, 30 October 2002, No. 01-83.852).

In parallel, and with regard to the misuse of corporate assets, it has been recognized that corporate funds withdrawn by a chief executive are necessarily withdrawn in his own personal interest if there is nothing to show that the funds have been used in the sole interest of the company (see, for example, *Cass. crim.*, 11 January 1996, No. 95-81.776).

Such reasoning may be applied, by analogy, to a Head of State, with regard to the offences of misappropriation of public funds or handling misappropriated public funds.

It is recalled that the offence of misappropriation of public funds is provided for and punishable under Article 432-15 of the Penal Code, which states that:

> 'The destruction, misappropriation or purloining of a document or security, of private or public funds, papers, documents or securities representing such funds, or of any other object entrusted to him, by reason of his functions or his mission, committed by a person holding public authority or discharging a public service mission, a public accountant, a public depositary or any of his subordinates, is punishable by ten years imprisonment and a fine of €150,000'.

Handling misappropriated public funds, for its part, is punishable under the combination of Article 432-15 and Article 321-1 of the same Code, which provides:

> 'Handling is the act of concealing, possessing or transferring something, or acting as an intermediary in its transfer, with the knowledge that it was obtained through a felony or misdemeanour.
>
> Handling is also the act of knowingly benefiting in any manner from the product of a felony or misdemeanour'.

Attached to this complaint, as required, is the most recent relevant jurisprudence (document 1).

It is acknowledged, however, that in certain cases some of the Heads of State in question may have received, non-transparently of course, rather extravagant remuneration.

Even though it is indisputable that the French courts cannot pass judgment on the remuneration of these African leaders, it must also be borne in mind — for each of the leaders and their families, whose situations will be examined below — that these French immovable assets were acquired at about the same time as immovable assets were acquired locally or in other countries, which, as will be shown, were sometimes quite considerable in terms of both volume and value.

Finally, and at this point, it is to be noted that there are strong grounds to believe that some of these African leaders, whose situations will be examined one by one, are or were the instigators of misappropriations of large amounts of public funds.

These suspicions are not simply the fruit of activist agitation, but are rather, as regards some of the leaders, corroborated by well-documented reports from, *inter alia*, international financial institutions or even creditors of the States in question.

(4) For this reason, we draw the Public Prosecutor's attention more specifically to the following facts:

**(4.1) As regards Mr. Omar BONGO or members of his family:**

— General observations

There is a large body of documentation concerning the misappropriation of public funds committed by the BONGO clan.

In particular, we know that an attempt to block Mr. Omar BONGO's accounts was made by investigating judge Paul Perraudin in Switzerland on 11 May 1998. An account opened in the name of one of President Bongo's advisers, Samuel Dossou-Aworet, was attached at the Canadian Imperial Bank of Commerce in Geneva. The Head of State of Gabon declared that he was the actual beneficiary of the account at issue, which made it possible to claim presidential immunity in order to stop the investigating judge's investigation (see documents listed below):

— '*Les comptes d'Omar Bongo*', article in the newspaper *Sud-Ouest*, 28 August 1998 (document 2);

— '*Pas de comptes en Suisse . . .*' *La Lettre du Continent*, 15 February 2001;

— articles in *Le Monde*, 6 August and 2 April 1997 (documents 4 and 5);

— article in *L'Express*, 21 January 1999 (document 6).

A United States Senate investigation published in June 2000 also shed light on Mr. Omar Bongo's secret accounts at City Bank.

Mr. Omar BONGO is suspected of having diverted US$130 million into bank holdings in the United States between 1985 and 1997, not to mention City Bank's loans to the Bongo family, which total US$50 million.

City Bank is said to have explained 'that the money came from a budget allocation, with 8.5 per cent of the Gabonese budget — US$111 million — being reserved for the President each year'.

The Senate investigators, notably the Democratic Senator from the state of Michigan, Carl Levin, who sifted through the IMF's reviews of the Gabonese budget never found any trace of any 'presidential allocation' on that scale (see '*Vieux comptes gabonais*', *La Lettre du Continent*, 11 November 1999 — document 7).

Mr. Omar BONGO was also seriously implicated in the Elf affair, and it was only because of his immunity as Head of State that the investigating judges decided not to interview him, at least as a witness.

Significantly, on 3 July 2002, the 11th Chamber of the Paris *Cour d'appel* found that François-Xavier Verschave and his publisher, Les Arènes, were 'not guilty of the offence of affronting foreign Heads of State', even though they had referred to Omar Bongo as a '*parrain régional* [regional godfather]' and to his régime as a '*démocrature prédatrice* [predatory democratorship]'.

The Court found that 'the documents adduced and the testimonies collected over the course of the proceedings . . . establish not only the importance and topicality of the subjects raised, but also the thoroughness of the investigations conducted'.

— The properties owned by Mr. Omar BONGO (or members of his family) in France, and Paris in particular, include:

— a townhouse at 18 rue Dosne in Paris (16th arr.): located on a private street between 157 rue de la Pompe and 25 avenue Bugeaud (see '*DDV et Sarko chez Bongo à Paris*', *La Lettre du Continent*, 14 September 2006 — document 8), this townhouse purportedly belongs to his wife, Edith Bongo;

— several apartments near avenue Foch in Paris, in the name of members of the Bongo family:

Albert Bongo: 5 rue Laurent Pichat, 75016 Paris;

Arthur Ondimba Bongo: 53 boulevard Lannes, 75016 Paris;

Nesta Bongo Ping: 6 rue Marbeau, 75016 Paris;

Nesta Bongo Ting: 52 avenue Foch, 75016 Paris.

Strong suspicions seriously suggest that this property belongs to the Bongo family or clan (as required, see extract from the Pages Blanches telephone directory — document 9).

It should be noted that Nesta Bongo Ping (the daughter or son born of the marriage between one of Omar Bongo's daughters and Jean Ping, the Gabonese Minister for Foreign Affairs; Nesta Bongo Ping is moreover doing a master's degree in management at Paris Dauphine) owns two apartments appearing in his/her name in the directory mentioned above.

In 1993, in his work entitled *L'or des dictatures*, Mr. Philippe Madelin listed the Bongo clan's various properties, including an apartment on avenue Foch and a property in Nice.

Ten years later, in March 2005, *La Lettre du Continent* revealed once again the existence of apartments on avenue Foch (€8 million for 1,000 $m^2$) belonging to Omar Bongo's extended family (see '*Appartements gabonais à vendre avenue Foch*', *La Lettre du Continent*, 24 March 2005 — document 10).

**(4.2) As regards Mr. Denis SASSOU NGUESSO and his family:**

— General observations

Mr. Denis SASSOU NGUESSO is the current President of the Republic of Congo.

Like Mr. Omar BONGO, he has been seriously implicated, by senior World Bank officials among others, in the misappropriation of public funds.

Paul Wolfowitz, the former President of the World Bank, purportedly lambasted the Congolese President's staggering hotel bills.

Indeed, in connection with the ceremony for the 60th anniversary of the United Nations, Denis Sassou Nguesso allegedly ran up over €140,000 in hotel bills for a five-minute speech on poverty.

The former President of the World Bank purportedly told a journalist from *The New York Times*: 'It's an injustice to the developing countries and their people when we hide problems'.

The World Bank has long been reluctant to pursue negotiations to restructure Congo's national debt, owing to the fraudulent practices of its President.

More specifically, Denis Sassou Nguesso is suspected of having misappropriated a substantial portion of oil rents for his own benefit or that of his family and clan. These misappropriations purportedly began during his first term in power, from 1979 to 1992, by negotiating below-market sales of oil in exchange for payments to him. 'The World Bank pointed out in 1990 and 1991 that returns on oil exploitation [in the Congo] were among the world's lowest' (see the interview of Martial Cozette, conducted by the parliamentary fact-finding mission chaired by Marie-Hélène Aubert, '*Le rôle des compagnies pétrolières dans la politique internationale et son impact social et environnemental*', National Assembly report No. 1859, 1999, p. 228).

With regard to the Congo, the former CEO of Elf, Loïk Le Floch-Prigent, mentioned 'phantom oil cargoes [that] are kept off the official books and divvied up among men in the shadows' (cited in Nicolas Lambert, *Elf, la pompe d'Afrique: Lecture d'un procès*, Tribord, 2005, p. 82).

Mr. Le Floch-Prigent knows what he is talking about, considering that Elf, followed by Total, supplies the Congolese State with 70 per cent of its oil revenue.

To date, Denis Sassou-Nguesso's fortune is estimated at over a billion dollars (see Mr. Xavier Harel's work '*Afrique : le pillage à huis clos*', pp. 37-45 — document 11).

A 2001 report by the International Monetary Fund (IMF) condemned the channelling of Congolese public funds into private accounts other than those of the Treasury. According to the IMF, there is no trace of US$248 million from the extraction of crude oil between 1999 and 2002 in Congo's accounting.

In the 2003 budget, of US$800 million in oil rents, only US$650 million was accounted for (see *Le Monde*, 25 March 2004 — document 12).

According to the observation of a vulture fund, FG Hemisphere, the Congolese authorities 'forgot' to record nearly a billion dollars between 2003 and 2005 (see work by Mr. Xavier Harel cited above, p. 152).

The Congolese President and his clan also took advantage of additional benefits — guaranteed loans and pre-financing — as well as various commissions on oil sales and the *provision pour investissements diversifiés* (PID) [provision for diversified investments], a veritable slush fund, which was not accounted for between 1997 and 2002.

In 2005, legal action taken by 'vulture funds', which had enabled part of the Congolese debt to be purchased at a discount, brought to light a system of shell companies controlled by men close to President Denis Sassou-Nguesso (see article '*Les millions envolés du Congo*' in *La Tribune*, 13 December 2005, and '*Les fonds vautours multiplient les attaques contre les pays pauvres*' in *Les Échos*, 14 March 2007).

According to British and American court judgments, these companies channelled a portion of oil proceeds into bank accounts in tax havens (see the judgment of the Commercial Court, Royal Courts of Justice, London, 28 November 2005, and the April 2006 decision of a United States federal judge admitting a complaint filed in May 2005 by Kensington International before the United States District Court [for the Southern District] of New York — documents 13 and 14).

On 28 November 2005, the Commercial Court at the Royal Courts of Justice in London ordered the Congo to repay debts owed to Kensington International, a vulture fund based in the tax haven of the Cayman Islands.

It was discovered that at the heart of the scheme was a small Bermuda-based company, Sphynx Bermuda, which had only US$12,000 in share capital but carried out about US$472 million worth of business! It would buy oil from the Société Nationale des Pétroles du Congo (SNPC) [Congo's State-owned oil company], frequently at above-market prices, and sell it on the international market.

According to the Royal Courts of Justice in London, there is 'no connection between the cash passing through its bank accounts and the sums it should have received for the oil it sold' (document 15).

These two companies had the same chief executive: Denis Gokana, an adviser to Denis Sassou-Nguesso. The President's son was also involved in the companies.

In April 2006, a United States federal judge then declared admissible a complaint filed by Kensington International against the French banking group BNP Paribas and SNPC for money laundering.

BNP Paribas and SNPC had allegedly worked together to knowingly hide oil proceeds from Congo's creditors through a 'complex and unusually structured' pre-payment system.

Under the direction of Mr. Itoua, between 2001 and 2004 the Congo State-owned oil company used a dizzying series of complex fictitious transactions and smokescreen companies to plunder the country's abundant oil resources. The supposed intermediaries include one company registered in the British Virgin Islands with 'as its sole identifiable place of activity . . . a private residence in Monaco'.

— The properties owned by Mr. Denis SASSOU NGUESSO in France, and Paris in particular, include:

— Villa Suzette, 45 avenue Maurice Berteaux, 78110 Le Vésinet: 700 $m^2$ townhouse estimated at between €5 million and €10 million. Sumptuous works were carried out at a cost of over €800,000: 'solid mahogany library, Aubusson tapestries, gold-leaf taps and door handles, even for the basement with its six bedrooms for domestic staff, cameras, bulletproof glass', tile with 'white Carrara marble', 'bathrooms with gold taps';

— 19 avenue Rapp, 75007 Paris.

Members of his family also own immovable property in Paris:

— Wilfrid Nguesso, the President's nephew, is reported to own an apartment located at 10 promenade Millénaire, 92400 Courbevoie (see Jean-François Julliard, '*L'appartement d'un émule africain de Gaymard*', *Le Canard Enchaîné*, 16 March 2005: a 550 sq m luxury apartment (including a 100 sq m terrace) estimated at between €2.5 million and €3 million);

— other apartments in Courbevoie owned by the Nguesso family: Ines Nguesso, 10 promenade Millénaire, and Edna Ambendet Nguesso, 20 rue Clos Lucé (see Pages Blanches);

— Maurice Nguesso, the President's brother and CEO of the oil company LIKOUALA SA, are reported to own a property at 38 rue Poirier Fourrier in Argenteuil (see Pages Blanches);

— Jean François Ndengue, head of the Congolese police, has a property in Meaux. He was implicated in the 'Disappeared of the Beach' case (see book by Xavier Harel, chapter '*Les disparus du Beach*').

The associations draw the Public Prosecutor's attention to a serious effort made by a group of Congolese citizens to itemize the ill-gotten gains that concern

Congo-Brazzaville. The list of implicated property and individuals can be found on the following website:

http://congo-biensmalacquis.over-blog.com/ (copy of the website as of 21 March 2007 annexed hereto).

**(4.3) On the property in France purportedly owned by other African leaders**

The undersigned associations wish to point out that they have not been able to assemble sufficient factual elements to have the property discussed below included in the scope of the forthcoming investigations.

They underscore, however, that it would be particularly inappropriate for those who have acted with the least transparency also to receive the greatest rewards.

In other words, even though, as matters stand, the property discussed below is not very precisely itemized and has sometimes only been alluded to in certain news clippings, it is extremely likely that it exists and is effectively owned by the African leaders in question.

In these circumstances, it falls to the Public Prosecutor to assess whether, as the associations believe, despite the limited information concerning this property, it is nonetheless justified, in light of France's commitments (as recalled below), to include the property in the scope of the forthcoming investigations.

(**a)** ***As regards Mr. Blaise COMPAORE and his family:***

Mr. Blaise COMPAORE is the President of Burkina Faso.

Even though, in comparison with the previous two individuals, there is less documentation indicating that he misappropriated public funds, the fact remains that he owns (through his wife, Ms Chantal COMPAORE) an apartment located at 2 rue Capitaine Olchanski in Paris (16th arr.).

The Public Prosecutor's attention is also drawn to a few references which demonstrate the misappropriation of funds, such as *L'ère Compaoré : crimes, politique et gestion du pouvoir*, Vincent Ouattara (Klanba, December 2006). The 1-15 March 2007 edition of the bimonthly publication *Afrique Éducation* contains an article entitled "*Compaoré, chef de l'État ou chef de la mafia*", which discusses, *inter alia*, his role alongside Charles TAYLOR, the former Head of State/dictator of Liberia, who was prosecuted before an international criminal tribunal in The Hague and whose assets were frozen in Europe under a regulation adopted by the European Union in 2004.

**(b)** ***As regards Mr. Teodoro OBIANG and his family:***

Mr. Teodoro OBIANG is the President of Equatorial Guinea.

According to the 12 April 2006 edition of *Le Figaro* (see article by Stéphane Bern, '*Drapeau rouge et billet vert*', 12 May 2006 — document 16), he acquired a townhouse located on avenue Foch. It is evident that Mr. Teodoro OBIANG took pains not to be named as the apparent owner of the property, but the verifications to be made in the forthcoming investigations will undoubtedly establish that he is.

Mr. Teodoro OBIANG has been branded as one of the most corrupt Heads of State in Africa (see the 15 July 2004 report by Senators Carl Levin and Norm Coleman entitled "Money laundering and foreign corruption: enforcement and effectiveness of the Patriot Act", Permanent Subcommittee on Investigations — document 17. See also the Global Witness report cited above with regard to Congo-Brazzaville).

According to the most recent ranking by Forbes magazine, his fortune is estimated at over US$600 million.

**(c)** ***As regards Mr. Eduardo DOS SANTOS and his family:***

Mr. Eduardo DOS SANTOS is the President of the Republic of Angola.

For years, he has been branded as one of the most corrupt Heads of State in the world (see the Global Witness report '*L'histoire accablante du pétrole en Angola*').

Mr. Eduardo Dos Santos has been identified as the owner, undoubtedly in the same non-transparent circumstances as President Teodoro Obiang, of an absolutely sumptuous villa in Cap d'Antibes (see *La Lettre du Continent* of 11 December 2002 — document 18).

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* *

In conclusion, the present complaint and the documents attached hereto demonstrate the following:

(1) the existence in France, and in Paris in particular, of immovable assets of considerable value which, regardless of the circumstances in which they were acquired, could not have been financed solely through the remuneration paid to the leaders of the countries concerned.

(2) Some of these same leaders have been identified as having perpetuated a culture of bribery and corruption.

(3) As regards third parties who are the legal owners of the properties in question or those who have benefited from them, that is, those who enjoy their use — be they members of the families concerned or other individuals — there are very strong grounds to believe that they have committed the offence of handling misappropriated public funds, over a period not covered by prescription since the offence is continuing.

France, through declarations made by its highest representatives, has in recent years consistently voiced its intention to focus on combating any behaviour that is likely to impoverish the peoples of Africa, in particular as a result of such misappropriations of public funds.

Indeed, the consequences of this siphoning of considerable amounts of money — needed to acquire such immovable assets — reflect the extent to which public resources have been diminished in Africa.

It should be recalled that:

— at the G8 summit in Evian (in June 2003), France spearheaded efforts to seek the repatriation of misappropriated funds to the countries concerned;

— France was also the first G8 country to ratify the United Nations Convention against Corruption, the so-called Merida Convention, which establishes the return of misappropriated property and monies as a fundamental principle of international law.

Furthermore, Mr. Prosecutor, before our very eyes, normative as well as customary international law is being formed which, with each passing day, places every State in the world under an increasingly stringent obligation to do whatever they can to combat threats to the major economic and political balances, namely, financial crime, regardless of who benefits from it or how it is carried out.

At the same time, and in response to this increasingly universal concern, there is no question that the principles which, for many years, have protected incumbent Heads of State, in respect of either their criminal or civil immunity, have been gradually been eroding and crumbling.

This movement in treaty and customary international law has, moreover, led a number of national courts to consider that an incumbent Head of State cannot claim immunity of any kind with regard to such property (movable or real), if there are strong grounds to believe that it was acquired through a criminal offence. This is precisely the situation in the present case.

The undersigned associations recall that, in any event, the family members of the African leaders concerned cannot claim any form of immunity.

What is more, it appears extremely likely that the offence of laundering misappropriated public funds has also been committed, this offence having accompanied, preceded or coincided with the financial flows needed to acquire the real properties in question (or at least some of them).

As the Public Prosecutor is aware, the offence of laundering misappropriated public funds applies to the perpetrator of the predicate offence.

Finally, the forthcoming investigations will ascertain whether certain third parties, who offered their expertise or assistance in arranging the financial flows needed to acquire property, have committed either the offence of complicity in the misappropriation of public funds or the offence of laundering misappropriated public funds.

While it is true that the prescription period for these related offences may have expired, the undersigned associations are unsure of the dates on which some of the properties mentioned above were acquired.

By the same token, the lack of transparency which surrounds these offences could lead to it being considered, during the forthcoming investigations and as regards these related offences, that the prescription period has not expired as far as the perpetrators are concerned.

Moreover, the forthcoming investigations alone will ascertain (since the prescription period has not expired for the offence of handling misappropriated public

funds) whether the prescription period for the predicate offence — misappropriation of public funds (which was committed in connection with the acquisition of the real property) — has expired with regard to the perpetrators.

Finally, this court must be aware that even if all or part of the predicate offence were committed in a foreign country, according to jurisprudence and the law, the French courts retain jurisdiction over handling offences.

In these circumstances, the undersigned complainants have the honour to file a complaint before the Public Prosecutor, as matters stand, solely for handling misappropriated public funds, an offence provided for and punishable under Articles 432-15 and 321-1 of the Penal Code, and complicity, provided for under Articles 121-6 and 121-7 of the Penal Code."

It was decided on 12 November 2007 that no further action would be taken in relation to this first complaint.

On 9 July 2008, a second complaint alleging the exact same facts was filed by TRANSPARENCY INTERNATIONAL FRANCE, Béatrice TOUNGAMANI née MIAKAKELA, Abdoul Aziz MAIGA and Grégory NGBWA MINTSA, and in early September 2008 it was again decided that no further action would be taken.

A preliminary investigation (the full report of which is annexed hereto) was initially launched by the Paris Public Prosecutor on 18 May 2007. The investigation corroborated most of the facts alleged by the complainants. For this reason, we believe the complete conclusions reached by the police bear repeating:

## THE FACTS

On 18 June 2007, Mr. ALDEBERT, Deputy Prosecutor at the Paris *Tribunal de grande instance*, Financial Division, addressed an investigation request *(soit-transmis)* to the OCRGDF (serious financial crime squad). The request was in response to a complaint filed with the Paris Public Prosecutor's Office by three associations (SHERPA, SURVIE and Fédération des Congolais de la Diaspora).

In their application, the associations filed a complaint against person(s) unknown for handling misappropriated public funds. They mentioned considerable assets acquired over a number of years by five African Heads of State and their families. The funds used to acquire these assets in France were allegedly derived from misappropriations carried out in their own countries. To support their allegations, the associations provided substantial documentation, primarily news articles, mentioning some of the immovable properties owned by the Heads of State in question.

The five countries cited in the complaint are Gabon, the Congo, Burkina Faso, Equatorial Guinea and Angola. For reasons of convenience, it was decided to classify the acts covered by our investigations into separate sub-files: sub-file A for Gabon, sub-file B for the Congo, sub-file C for Burkina Faso, sub-file D for Equatorial Guinea and sub-file E for Angola. An initial partial transmission was made on 27 September 2007.

## THE INVESTIGATION

The mission entrusted to the OCRGDF's criminal asset identification platform (PIAC) involved the following tasks:

— identifying the immovable assets in Paris and on national territory belonging to Omar BONGO, President of Gabon, Denis SASSOU NGUESSO, President of the Congo, Blaise COMPAORE, President of Burkina Faso, Teodoro OBIANG, President of Equatorial Guinea, and Eduardo DOS SANTOS, President of Angola;

— ascertaining the circumstances in which the assets were acquired and identifying the corresponding financial flows;

— identifying the family members, third parties and official owners of the immovable property thus identified who were likely to have benefited from it;

— checking whether each of these persons enjoys diplomatic immunity.

Our initial investigations make it possible to pinpoint the identities of the persons named in the file; this personal information is the only way to identify any movable or immovable assets. The associations' letter/complaint gives only a surname, and sometimes a first name, but no date of birth; what is more, the relationships between the persons are not always specified.

A list of natural persons is drawn up with regard to each country for use in the investigations (see record No. 1 in each sub-file).

Our inquiries revealed a considerable vehicle collection, in particular in the names of Wilfrid NGUESSO, the nephew of the President of the Congo, and Teodoro NGUEMA, the son of the President of Equatorial Guinea. Teodoro NGUEMA had, *inter alia*, purchased some fifteen vehicles in France for an amount estimated at more than €5,700,000. For example, he ordered three BUGATTI Veyron vehicles from the manufacturer in Alsace for a unit price of more than €1 million (see record No. 132/2007/D/5 of 6 August 2007).

The financing of certain vehicles appeared unusual, to say the least: in 2006, Pascaline BONGO, who is believed to be the daughter of the President of Gabon, purchased a Mercedes vehicle paid for with three cheques drawn on the bank accounts of Ms Joannie ARTIGA, Mr. François MEYER and the Treasury Office of Gabon in France (see record No. 132/2007/A/4 of 20 July 2007). Similarly, some of the vehicles purchased by Teodoro NGUEMA were paid for through transfers from SOMAGUI FORESTAL (see records No. 132/2007/D/5 of 6 August 2007 and No. 132/2007/D/8 of 26 October 2007). Wilfrid NGUESSO paid the balance of an Aston Martin DB9 vehicle through a transfer made by MATSIP CONSULTING (see record No. 132/2007/B/28 of 5 November 2007).

Substantial immovable assets were identified, in particular in the names of individuals who were likely to be members of the families of Omar BONGO and Denis SASSOU NGUESSO:

— concerning the President of Gabon, a property in his name was discovered at 3 boulevard Frédéric Sterling in Nice (Alpes-Maritimes). The property is not mentioned in the letter of 10 July 2007 from Mr. François MEYER to the Paris Public Prosecutor, which provides a summary of Omar BONGO's assets. The property comprises two apartments (170 sq m and 100 sq m), three houses (67 sq m, 215 sq m and 176 sq m) and a swimming pool (see record No. 132/2007/A/8 of 17 September 2007).

— concerning the members of the BONGO and SASSOU NGUESSO family, the tax authorities found a *société civile immobilière* (non-commercial property

company), SCI De la Baume, whose shareholders include Edith SASSOU NGUESSO, who is the daughter of Denis SASSOU NGUESSO and wife of Omar BONGO. On 15 June 2007, the company purchased a townhouse located at 4 rue de la Baume in the 8th arrondissement of Paris for **€18,875,000** (see record No. 132/2007/B/9 of 17 September 2007).

Lastly, it would appear that the majority of the immovable property owned by the individuals identified is located in high-end neighbourhoods: the 16th and 7th arrondissements of Paris for Omar BONGO and his wife, the 16th arrondissement of Paris and Neuilly-sur-Seine (Hauts-de-Seine) for Jeff BONGO, Le Vésinet (Yvelines) for Denis SASSOU NGUESSO's brother, Courbevoie (Hauts-de-Seine) for Wilfrid NGUESSO, and the 16th arrondissement of Paris for Chantal CAMPAORE.

Numerous active bank accounts were identified in the names of natural persons likely to be members of the families of the Heads of State concerned. A list for each person is set out in a record. It states the account number, the date on which the account was opened, the type of account, the exact address of the bank and branch office, and the address of the account holder.

With regard to the possible immunities enjoyed by the persons appearing in the file, the Protocol Department of the Ministry of Foreign Affairs sent a letter stating that only incumbent Heads of State enjoy inviolability and absolute immunity from criminal jurisdiction when abroad. Their family members may enjoy immunity if they accompany the Head of State on a visit that is official (see record No. 132/2007/7 of 24 October 2007).

In accordance with the express instructions of the issuing judge, these proceedings are transmitted as they stand.

## II. Discussion

### (1) Information gathered from the preliminary investigation

The investigations carried out by the investigation units revealed the following:

**As regards Mr. Omar BONGO and his entourage:**

— immovable assets comprising thirty-nine (39) properties, of which seventeen (17) are in the name of Mr. Omar Bongo, most of those properties being located in the 16th arrondissement of Paris;

— the identification of seventy (70) bank accounts (BNP, Société Générale, Crédit Lyonnais, Barclays, etc.), of which eleven (11) are in the name of Mr. Omar Bongo;

— a vehicle collection comprising at least nine (9) vehicles, estimated at a total of €1,493,443.

**As regards Mr. Denis SASSOU NGUESSO and his entourage:**

— immovable assets comprising eighteen (18) properties;

— the identification of a hundred and twelve 112 bank accounts (BNP, Crédit du Nord, Société Générale, Crédit Lyonnais, Barclays, etc.);

— a vehicle collection comprising at least one (1) vehicle, valued at €172,321.

**As regards Mr. Teodoro OBIANG and his entourage:**

— immovable assets comprising at least one (1) property in the name of Mr. Teodoro Obiang (born 5 June 1942);

— the identification of one (1) bank account with Barclays in the name of Mr. Teodoro Nguema Obiang (born 24 June 1969);

— a vehicle collection comprising at least eight (8) vehicles owned by Mr. Teodoro Nguema Obiang (born 24 June 1969), estimated at a total of €4,213,618.

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Considering the magnitude of the movable and immovable assets owned by Mr. Omar BONGO and Mr. Denis SASSOU NGUESSO in France, it is difficult to believe that they could have acquired such assets solely through their salaries and emoluments. True, they have held on to power for many years. Even so, it is rather unlikely that they have saved up enough money to amass assets such as these.

The preliminary investigation also confirmed the presence in France of considerable assets held by various members of the leaders' entourages (family and close associates). This revelation is particularly surprising given that some of them do not hold public office.

The preliminary investigation revealed, moreover, the existence of assets of considerable value — primarily luxury vehicles — benefitting the OBIANG family.

In any event, given the conditions in which some of the property targeted by the police was financed, one could reasonably question the lawful provenance of the funds and the property thus accumulated on French territory.

In particular, as regards the vehicle collection, it has to be recognized that the means by which certain vehicles were financed are particularly "unusual", to quote the term used in the summary report of the police.

For example, a number of the vehicles purchased by Teodoro NGUEMA OBIANG were paid for by transfers from SOMAGUI FORESTAL, a logging company based in Equatorial Guinea and run by Teodoro NGUEMA OBIANG.

TRACFIN (the national anti-money laundering unit), which investigated the company, considers that:

> "in the light of all of these elements, both financial and environmental, it can be considered that the operations set out above could reflect laundering of the proceeds of the misappropriation of public funds by a person in a position of public authority, through the acquisition of vehicles of considerable value" (p. 3 of the TRACFIN memorandum).

This analysis is shared by the Immigration and Customs Enforcement Office in Miami, United States, which is tasked with an investigation in the United States concerning Mr. Teodoro Nguema Obiang, the son of the President of Equatorial Guinea: "The American investigation into the activities of Mr. Teodoro Nguema Obiang and his associates identified a

number of suspicious transactions originating in or transiting through the French financial system" (Point 2 of the request for assistance in the investigation of Teodoro Nguema Obiang and his associates).

Similarly, the preliminary investigation shows that two vehicles purchased by Edith Bongo and Pascaline Bongo, respectively, were paid for with cheques drawn on accounts opened in the name of the Treasury of Gabon.

In conclusion, there is evidence of the existence on French territory of substantial movable and immovable assets acquired in particularly dubious circumstances.

A judicial investigation must be opened to determine the provenance of the funds the above-mentioned persons used to acquire those assets. Furthermore, the full extent of the role played by various intermediaries in carrying out these operations should also be brought to light.

**(2) On the standing of Transparency International France**

Transparency International France is a non-profit association that has been duly registered with the relevant prefecture since 1995.

Its mission is to combat all forms of corruption, in accordance with the association's purpose as recalled below:

Article 2 — Purpose

The mission of Transparency International (France) is to combat and prevent corruption at the national and international levels, in relations between States, between States and natural or legal persons, whether public or private, and between such persons themselves.

To that end, its purpose is to:

— raise awareness of all forms of corruption in order to develop tools and processes to curb and restrict their expansion and assess their impact;

— develop and implement programmes of action and reviews in France and countries afflicted by corruption;

— educate and train professional technicians, administrators and decision-makers;

— advise public authorities and natural and legal persons, whether public or private, on subjects relating to the many facets of corruption;

— provide support, particularly financial support, to Transparency International and back efforts to pursue its purpose;

— assemble documentation on all aspects of corruption;

— engage the professional, social and political spheres in pursuing greater accountability in economic and financial affairs;

— **take any action to prevent, deter or combat illegal practices or any form of corruption;**

— **provide assistance and support to the victims of illegal practices after examining the cases submitted to the association;**

— organize events intended to advance individual, collective and professional ethics, particularly through the use of communications;

— disseminate information which raises awareness about problems that lead to corruption in public and business relations.

The *Cour de cassation* has for many years recognized the admissibility of civil-party applications filed by associations in instances where the offence in question undermines the interests that they have a legal or statutory duty to defend. The examples are legion:

— regarding the admissibility of the application of the association "Aide à tout détresse", which provides care for destitute individuals who are unable to safeguard their own interests and rights: Colmar *Cour d'appel*, 10 February 1977;

— regarding the admissibility of the application of the association "Choisir" in rape proceedings, on the grounds that the purpose of the association, according to its charter, is to ensure respect for human beings and protect women who are in danger: Paris *Cour d'assises*, 15 December 1977;

— regarding an anti-smoking association whose civil-party application relating to tobacco advertising was found admissible: *Cass. crim.*, 7 February 1984, Bull. crim. No. 41; *Cass. crim.*, 29 April 1986, Bull. crim. No. 146; *Cass. crim.*, 29 June 1994, Bull. crim., No. 260;

— regarding a French football federation, whose civil-party application was found admissible in proceedings relating to the corruption of professional sportspersons in the Valenciennes/Olympique de Marseilles scandal: *Cass. crim.*, 4 February 1997, Bull. crim. No. 45;

— regarding the Union fédérale des consommateurs Que Choisir, whose civil-party application based on Article L. 221-1 of the Consumer Code relating to the requirement of safe services was found admissible in proceedings for homicide and involuntary injuries following the collapse of a stand at Furiani stadium: *Cass. crim.*, 24 June 1997, Bull. crim. No. 251;

— regarding an association that defends beef industry interests in proceedings for the offence of misleading advertising as to beef origin: *Cass. crim.*, 26 October 1999, Bull. crim., No. 233.

More recently, the *Cour de cassation* had occasion to find admissible the civil-party application of an unaccredited environmental protection association. The *Chambre criminelle* found that the association had suffered direct and personal harm through the undermining of the collective interests which, under its charter, it was intended to defend.

As mentioned above, the purpose of Transparency International France is to combat all forms of corruption. The misappropriation of public funds and the handling thereof clearly fall within the scope of corruption. This is moreover the approach taken in the United Nations Convention against Corruption (Articles 17 and 24).

Therefore, if the legal interests defended by associations are not to be given unjustified differential treatment, the possibility for Transparency International France to bring legal proceedings must be recognized. Indeed, it would be quite surprising if an anti-corruption association were denied something that has been granted to unaccredited environmental protection associations or anti-smoking associations.

As a final note, Transparency International France satisfies the requirements of Article 5 of the Law of 1 July 1901 (registration with the prefecture), which all associations must comply with

in order to have the right to take part in court proceedings, hence there are no impediments to the admissibility of the association's civil-party application: *Cass. crim.*, 12 April 2005, Appeal No. 0485.982.

It follows from the foregoing that Transparency International France has suffered direct and personal harm as a result of the offences alleged in this complaint, with regard to which it is entitled, under Article 2 of the Code of Criminal Procedure, to seek redress by filing a civil-party application with the criminal courts.

**(3) On the standing of Mr. Grégory Ngbwa Mintsa**

First of all, considering the pressure placed on the complainants[1], it is important to emphasize that Mr. Grégory Ngbwa Mintsa has demonstrated great bravery in filing the present civil-party application.

Mr. Grégory Ngbwa Mintsa is a Gabonese national. He has provided documentation proving that, during a period corresponding to all or part of the period relating to the alleged facts, he paid taxes to the Public Treasury of Gabon (see documents annexed hereto) and is filing the present civil-party application in that capacity.

The complainant puts forward two grounds for his action.

**The first ground: the harm suffered by the body politic of Gabon**

Firstly, Mr. Grégory Ngbwa Mintsa seeks to file a civil-party application in the name and on behalf of the State of Gabon with the aim of obtaining redress for the harm suffered by Gabon as a result of the misconduct committed by Mr. Omar Bongo and the members of his entourage.

— **On the existence of the harm claimed by the complainants:**

It has long been recognized that "*Articles 2 and 3 of the Code of Criminal Procedure open civil-party actions to anyone who has personally suffered material or moral harm resulting from acts which are the subject of prosecution, without excluding public-law corporations*" (*Cass. crim.*, 7 April 1999, Parc national des Écrins).

In the present case, the State of Gabon suffered harm as a result of the misconduct committed by Mr. Omar Bongo and members of his entourage. This harm is both direct and personal.

Direct because it is clear that the ownership on French territory by the leader of Gabon and members of his entourage of property or funds derived from the misappropriation of public funds harms the body politic as a whole.

— From a material perspective, this harm consists of diminished government revenues;

— from a moral perspective, harm is caused in so far as the facts at issue — since they were in part carried out by persons performing public functions and in connection with the performance of those functions — are liable to bring discredit upon the entire body politic: *Cass. crim.*, 10 March 2007, Bull. crim. No. 64; *Cass. crim.*, 8 February 2006, Appeal No. 05-80.488;

[1] In this regard, it should be noted that two complainants (Ms Béatrice Tougamani and Mr. Abdoul Aziz Maiga) decided not to file civil-party applications after receiving threats — facts which are the subject of two complaints filed with the police.

*Cass. crim.*, 14 March 2007, Appeal No. 06-81.010. In these various cases, the *Chambre criminelle* found that the body politic had suffered moral harm separate from the public interest which is safeguarded by the Public Prosecutor's Office.

It has indeed long been recognized that breaches of the duty of probity not only undermine the public interest, they can also undermine individual interests: "Although the offence of passive corruption established by Article 177 of the Penal Code was primarily established in the public interest, it also aims to protect individuals who might . . . suffer direct and personal harm for which they are entitled to seek redress before the criminal courts" (*Cass. crim.*, 1 December 1992; Dr. pén. 1993, comm. 126).

Since then, in such cases, the *Chambre criminelle* has recognized the admissibility of civil-party applications filed by both natural persons and legal persons, regardless of whether they are governed by private law, as in the case of a sporting federation (*Cass. crim.*, 4 February 1997: Juris-Data No. 1997-000569; Bull. crim. 1997, No. 45), or public law, as in the case of a public housing office (*Cass. crim.*, 21 May 1997: Juris-Data No. 1997-003328; Bull. crim. 1997, No. 193).

As regards the person of the State, the *Chambre criminelle* specifically declared admissible the State's civil-party action against civil servants who engaged in favouritism and influence peddling (Cass. crim., 10 March 2004, Bull. crim. No. 64).

— **On the complainants' ability to file a civil-party application in the name and on behalf of Gabon**

We know that company law recognizes shareholders' and members' right to seek, in the name and on behalf of the company, compensation for any harm caused to the company, which will be awarded damages as appropriate: this is known as an ***ut singuli* action**.

This individual action may be brought by any shareholder or member, regardless of the number of shares they own or the extent of their ownership interest.

This is an alternative action which presupposes that the corporate executive responsible for legally representing the company has failed to act (*Cass. crim.*, 12 December 2000, Appeal No. 97-83.470) and/or is implicated in the proceedings.

In the present case, the claimant is asserting his right to bring an action not, of course, in his capacity as a shareholder, but rather as a taxpayer. Nonetheless, in each of these situations, the complainants' standing arises from the contributions they have made (shares, ownership interests or mandatory withholdings) to the group whose legal representation they intend to ensure.

What is at issue, moreover, is not the harm caused to a private-law company but rather the harm caused to a State-society, a legal person governed by public law. Yet in both situations, the harm has been caused to an organized group that has legal personality.

This reasoning is not at variance with our own positive law, as Article L. 2132-5 of the General Code of Territorial Communities (CGCT) specifically allows taxpayers registered with a municipality to bring any action that they believe falls to the municipality and which the municipality has refused or neglected to take — which measure has also been extended to departmental taxpayers (Article L. 3133-1 of the CGCT) and regional taxpayers (Article L. 4143-1 of the CGCT) under the Act of 12 April 2000.

The term "action" refers equally to proceedings to obtain payment, actions for rescission based on inadequate consideration, and civil-party actions: the *Chambre criminelle* thus found that

Article L. 316-5 of the Municipalities Code (formerly Article L. 2132-5 of the CGCT) does not distinguish between the various actions the municipality may be entitled to bring and its provisions do not exclude civil-party actions seeking redress for an offence (*Cass. crim.*, 12 May 1992).

Accordingly, any taxpayer can apply to the administrative court, acting as an administrative authority in this instance, for the right to file a civil-party application in the place and stead of the municipality, in order to institute criminal proceedings and obtain redress for any harm the latter has incurred.

According to the jurisprudence of the *Conseil d'état* in this respect, authorization is subject to two conditions: authorization is granted if the action is of sufficient material interest to the municipality and the municipality has a prospect of success. In civil-party actions, the second condition is satisfied where the evidence in the case-file leads to the suspicion that a criminal offence has been committed (CE, 26 March 1999, Ville de Paris, Juris data No. 1999-050213).

These different measures provide a basis for solutions that can be readily applied to the facts which are the subject of this complaint:

— Gabon has suffered direct and personal harm as a result of the offences perpetrated on French territory;

— the legal representatives of Gabon have neglected to bring legal proceedings, and for good reason, since the misconduct at issue is specifically attributed to the highest ruling authority of the State of Gabon;

— the Public Prosecutor's Office refused to lend its support to the complainants;

— since the action brought by Mr. Grégory Ngbwa Mintsa is a subsidiary action, it aims to serve the pecuniary and moral interests of the body politic.

For all of these reasons, it would be deeply unfair to cite a lack of special authorization as grounds for denying the complainant the right to file a civil-party application aimed at seeking redress for the harm caused to the complainant's community.

With this in mind, the reasons given in the judgment of the Colmar *Cour d'appel* of 10 February 1977, cited above, bear mentioning. After recalling that the criminal courts had in two situations entertained civil-party actions brought by associations that did not have the legal authority to do so, the appeal judges decided that:

> "by analogy and *a fortiori* considering the interest at stake, the same should apply to the complaint filed by 'Aide à toute détresse' since, by definition, this group provides care only for individuals who are completely destitute, incapable of safeguarding their own rights and interests, and rejected by society, and to whom, as in the present case, the judicial and administrative authorities refuse to lend their support".

Accordingly, even though there was no law at that time which allowed an association to bring a collective civil-party action before the criminal courts, the appeal court nonetheless found the civil-party application of the association "Aide à toute détresse" admissible. In the absence of any grounding in written law, this solution is based on grounds of equity. Indeed, since the Public Prosecutor's Office refused to lend the victims its support, a finding to the contrary would have had the effect of depriving them of a judicial remedy and their right to redress. That is precisely the risk in the present case.

It follows from the foregoing that, as a result of the criminal misconduct committed by Mr. Omar Bongo and the members of his entourage, Gabon has suffered direct and personal harm

for which, in accordance with Article 2 of the Code of Criminal Procedure, it is entitled to seek redress by filing a civil-party application before the criminal courts, albeit through the intermediary of one of its citizens.

**The second ground: the harm suffered by Mr. Grégory Ngbwa Mintsa himself**

Secondly, there is no doubt that Mr. Grégory Ngbwa Mintsa himself suffered harm as a result of the misconduct claimed in this complaint.

The taxpayers of Gabon are the first to lose out as a result of the criminal operations asserted in this complaint:

— from a material standpoint, harm was caused by the fact that Mr. Grégory Ngbwa Mintsa's taxes were used for purposes other than those intended. The misappropriations that were committed resulted in him being deprived of public spending in the same proportion;

— from a moral standpoint, harm was caused by the fact that the misconduct undermined Mr. Grégory Ngbwa Mintsa's legitimate confidence in the integrity of the State apparatus.

Separate from the harm caused to the legal person of the State, the harm suffered by Mr. Grégory Ngbwa Mintsa is also distinct from the public interest. As noted above, it has been recognized that offences consisting in breaches of the duty of probity are liable to undermine the interests of individuals who could suffer personal harm for which "they have grounds for obtaining redress before the criminal courts" (*Crim.*, 1 December 1992).

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Lastly, it should be recalled that Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" (Right to an effective remedy).

Yet there is no doubt that depriving Mr. Grégory Ngbwa Mintsa of the right to file a civil-party application would violate Article 1 of the Protocol of 1952, which provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions — bearing in mind that the notion of "possessions" in European law covers assets of all kinds, regardless of their formal classification under domestic law.

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Under these circumstances, the undersigned complainants have the honour to file a complaint with the Senior Investigating Judge against the following natural persons, having regard to Article 121-1 of the Penal Code:

**As regards Mr. Omar Bongo and his entourage**

— Albert Bernard Bongo, known as Omar Bongo Ondimba, Head of State of Gabon;

— Edith Lucie Bongo, daughter of Denis Sassou Nguesso and wife of Omar Bongo;

— Pascaline Bongo, daughter of Omar Bongo and chief of staff of the Head of State;

— Ali Bongo Ondimba, son of Omar Bongo and Minister for Defence of Gabon;

— Arthur Ondimba Bongo, son of Omar Bongo;

— Omar Denis Junior Bongo Ondimba (born 19 July 1964), son of Omar Bongo;

— Omar Ben Bongo (born 1 February 1978), son of Omar Bongo;

— Jeff Thierry Arsène Jaffar Bongo, son of Omar Bongo;

— Yacine Queenie Bongo, daughter of Omar Bongo;

— Audrey Blanche Bongo Ondimba, daughter of Omar Bongo;

— Jean Ping, former State Minister, Chairperson of the African Union Commission;

— Nesta Shatika Bongo Ping, daughter of Jean Ping, granddaughter of Omar Bongo;

**As regards Mr. Denis Sassou Nguesso and his entourage**

— Denis Sassou Nguesso (born 1 January 1943), Head of State of Congo-Brazzaville;

— Antoinette Sassou Nguesso, wife of Denis Sassou Nguesso;

— Denis Christel Sassou Nguesso (born 14 January 1975), son of Denis Sassou Nguesso and CEO of Cotrade (subsidiary of the State-owned oil company SNPC);

— Denis Nguesso (born 8 March 1967), son of Denis Sassou Nguesso;

— Julienne Sassou Nguesso, daughter of Denis Sassou Nguesso;

— Maurice Nguesso, older brother to Denis Sassou Nguesso;

— Wilfrid Nguesso, son of Maurice Nguesso and nephew of Denis Sassou Nguesso;

— Edgar Serge Ruphin Nguesso, son of the late Eugène Nguesso (brother of Denis Sassou Nguesso);

— Jean-François Ndengue, former director of the Congolese police, implicated in the "Disappeared of the Beach" case;

— Claudia Carole Ikia Lemboumba (married name Sassou Nguesso), advisor to the Head of State;

— Marguerite Ambendet Nguesso;

**As regards Mr. Teodoro OBIANG and his entourage**

— Teodoro Obiang Mbasogo (born 5 June 1942), Head of State of Equatorial Guinea;

— Teodoro Nguema Obiang (born 24 June 1969), son of Teodoro Obiang, Minister for Agriculture and Forestry and chief executive of the company SOMAGUI FORESTAL;

For handling misappropriated public funds, offences provided for and punishable under Articles 321-1 and 432-15 of the Penal Code;

The investigating judge should also determine whether the bank accounts identified during the police investigation were funded through unlawful financial flows characteristic of the offence of handling misappropriated public funds;

Moreover, a close look should be taken at the role played by various intermediaries, be they natural or legal persons, which facilitated and/or benefited from the commission of the criminal acts — with regard to which the present complaint is also filed for complicity in handling misappropriated public funds, complicity in the misappropriation of public funds, money laundering, complicity in money laundering, misuse of corporate assets, complicity in misuse of corporate assets, breach of trust, complicity in breach of trust, and concealment of each of these offences, offences provided for and punishable under Articles 121-6, 121-7, 321-1 and 432-15 of the Penal Code (complicity in handling misappropriated public funds), Articles 121-6, 121-7 and 432-15 of the Penal Code (complicity in the misappropriation of public funds), Article 324-1 of the Penal Code (money laundering), Articles 121-6, 121-7 and 324-1 of the Penal Code (complicity in money laundering), Article 241-3 of the Commercial Code (misuse of corporate assets), Article 121-6 and 121-7 of the Penal Code and Article 241-3 of the Commercial Code (complicity in misuse of corporate assets); Article 314-1 of the Penal Code (breach of trust), Articles 121-6, 121-7 and 314-1 of the Penal Code (complicity in breach of trust) and Article 321-1 of the Penal Code (concealment);

For all of these reasons, a complaint is also filed against person(s) unknown.

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**ANNEX 2**

**Note Verbale No. 158/865 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea,**
**2 March 2017**

**Note Verbale No. 158/865 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 2 March 2017**

*[Translation]*

The Ministry of Foreign Affairs and International Development, Protocol Department, presents its compliments to the Embassy of the Republic of Equatorial Guinea and, with reference to its Note Verbale No. 069/2017 dated 15 February 2017, has the honour to advise it of the following:

The Protocol Department wishes to point out that the question of the status of the building located at 42 avenue Foch in Paris (16th arr.) is at the centre of the dispute which Equatorial Guinea has brought before the International Court of Justice. In keeping with its consistent position, France does not consider the building located at 42 avenue Foch in Paris (16th arr.) as forming part of the premises of the diplomatic mission of the Republic of Equatorial Guinea in France.

In accordance with the Order made by the International Court of Justice on 7 December 2016, and pending the Court's final decision in the case, France will ensure that the premises located at 42 avenue Foch receive treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability.

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**ANNEX 3**

**Note Verbale No. 628/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 19 September 2012**

**Note Verbale No. 628/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 19 September 2012**

*[Translation]*

The Embassy of the Republic of Equatorial Guinea in France presents its compliments to the Ministry of Foreign and European Affairs (Protocol Department, Diplomatic Privileges and Immunities Division) and, with reference to its Note Verbale No. 3345/PRO/PID of 25 July 2012, has the honour to request a special residence permit for H.E. Ms Mariola BINDANG OBIANG, Ambassador Extraordinary and Plenipotentiary of the Republic of Equatorial Guinea in France, and her family. The notification forms regarding the assumption of her duties and the members of her family are annexed hereto.

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MINISTERE DES AFFAIRES ETRANGERES

PROTOCOLE

MINISTÈRE DES AFFAIRES ÉTRANGÈRES

25 SEP. 2012

ARRIVÉE

## NOTIFICATION DE NOMINATION ET DE PRISE DE FONCTIONS D'UN TITULAIRE (4 exemplaires)

☒ Ambassade ☐ Consulat ☐ Organisation internationale ☐ Délégation permanente

De(s)/Du/D' GUINEE EQUATORIALE Ville PARIS

Titre ☐ M. ☒ Mme ☐ Mlle Situation familiale ☐ Célibataire ☒ Marié(e) ☐ Divorcé(e) ☐ Veuf(ve)

Nom de naissance BINDANG-OBIANG Prénoms MARIOLA

Nom marital Né(e) le 23/3/66

Lieu de naissance NLOAYONG-ESANGUI, AÑISOK Pays GUINEE EQUATORIALE

Nationalité GUINEE EQUATORIALE Acquise par ☒ Filiation ☐ Mariage ☐ Naturalisation

(fournir une fiche individuelle n° 1NP avec photo dûment complétée et signée en noir)

Fonction AMBASSADEUR EXTRAORDINAIRE ET PLENIPOTENTIAIRE Grade AMBASSADEUR

Service ☒ Chancellerie ☐ Défense ☐ Culturel ☐ Commercial ☐ Consulaire ☐ Résidence ☐ Autre

Remplace (*) FEDERICO EDIO OVONO Carte n° CMD/A-387148

(* préciser création de poste si c'est un emploi nouveau)

Passeport ☒ diplomatique ☐ de service ☐ officiel ☐ ordinaire

Autre ☐ Carte Nationale Identité ☐ Carte de résident

Numéro DDDD3342

Délivré à MALABO

Le 17.05.2012 Valable jusqu'au 16.05.2017

Visa

Type ☒ «D» ☐ «C» ☐ Autre

Délivré à MALABO

Le 22.08.2012

(joindre une photocopie du passeport avec le visa et le cachet de la date d'entrée en France ou de la C.N.I. ou de la carte de résident)

Date d'arrivée en France 09.06.2012 11/7/2012 Date de prise de fonctions 11.07.2012

Adresse en France (*) Code postal 75017 Ville PARIS

Rue 8 BIS AVENUE DE VERZY

(* à faire connaître impérativement au Protocole dans les meilleurs délais pour faciliter les opérations d'immatriculation de voiture)

Signature du titulaire

Signature de l'Ambassade mission et cachet

Fait à Le

| Cadre réservé au Protocole | Carte n° | Enregistrée le |
|---|---|---|

**ANNEX 4**

**Record of failure to appear before the Paris *Tribunal de grande instance*, 1 March 2012**

**Record of failure to appear before the Paris *Tribunal de grande instance*, 1 March 2012**

*[Translation]*

Paris *Cour d'appel*

Paris *Tribunal de grande instance*

Chambers of Roger Le Loire

Senior judge in charge of the investigation

**RECORD OF FAILURE TO APPEAR**

Prosecution No. 0833796017

Investigation No. 2292/10/12

**CRIMINAL PROCEEDINGS**
**1 MARCH 2012**

We, Roger LE LOIRE and René GROUMAN, senior judges in charge of the investigation at the Paris *Tribunal de grande instance*, sitting in chambers, assisted by Françoise LE MEST, clerk,

Note that **Mr. Teodoro NGUEMA OBIANG MANGUE, choosing as his address for service the offices of Mr. Emmanuel MARSIGNY, 100 rue de l'Université, 75007 PARIS,** who was summoned to appear in chambers today at 2.30 p.m. for questioning at first appearance, has failed to appear.

Done in chambers,

*(Signed)* Roger LE LOIRE

*(Signed)* René GROUMAN

Senior judges in charge of the investigation

*(Signed)* Clerk.

Paris *Cour d'appel*

Paris *Tribunal de grande instance*

CHAMBERS OF MR. ROGER LE LOIRE

SENIOR JUDGE IN CHARGE OF THE INVESTIGATION

RENÉ GROUMAN
JOINTLY ASSIGNED SENIOR JUDGE IN CHARGE OF THE INVESTIGATION

Prosecution No. 0833796017

Investigation No. 2292/10/1

**SUMMONS TO ATTEND A FIRST APPEARANCE**

The senior judges in charge of the investigation

to

**Mr. Teodoro NGUEMA OBIANG MANGUE**

State Minister for Agriculture and Forestry

Ministry of Agriculture

Malabo

Equatorial Guinea

Summons delivered to Mr. MARSIGNY on 24 January 2012

Received in person this 24 January 2012

Paris, 23 January 2012

Dear Sir,

In accordance with Article 80-2 of the Code of Criminal Procedure, please be informed that we are considering placing you under judicial examination. To that end, we are summoning you to attend a first appearance, in an investigation opened:

FOR HAVING IN PARIS AND ON NATIONAL TERRITORY DURING 1997 AND UNTIL NOVEMBER 2008, IN ANY EVENT FOR A PERIOD NOT COVERED BY PRESCRIPTION, ASSISTED IN MAKING HIDDEN INVESTMENTS OR IN CONVERTING THE DIRECT OR INDIRECT PROCEEDS OF A FELONY OR MISDEMEANOUR, IN THIS INSTANCE OFFENCES OF MISUSE OF CORPORATE ASSETS, MISAPPROPRIATION OF PUBLIC FUNDS, THE UNLAWFUL TAKING OF INTEREST AND BREACH OF TRUST, BY ACQUIRING A NUMBER OF MOVABLE AND IMMOVABLE ASSETS OUT OF THE FUNDS OF THE FIRMS EDUM, SOCAGE AND SOMAGUI FORESTAL, ACTS CHARACTERIZED AS LAUNDERING OF THE PROCEEDS OF THE ABOVE-MENTIONED OFFENCES, ACTS WHICH ARE DEFINED AND PUNISHABLE UNDER ARTICLES 432-12, 432-15, 324-1 AND 314-1 OF THE PENAL CODE AND ARTICLE 241-3 OF THE COMMERCIAL CODE.

Pursuant to a judgment of the *Cour de cassation* (*Chambre criminelle*) dated 9 November 2010,

**You are summoned to appear on 1 March 2012 at 2.30 p.m.**

In our chambers at the Paris *TRIBUNAL de GRANDE INSTANCE*, 5/7 rue des Italiens, 75009 Paris, Chambers No. 303

**VERY IMPORTANT**

You have the right to be assisted by a lawyer.

You may choose the lawyer who will assist you or request that the Chairman of the Bar choose a lawyer registered with the Bar for you.

You must inform me of your choice as soon as possible.

*(Signed)* Roger LE LOIRE

*(Signed)* René GROUMAN.

Senior judges in charge of the investigation

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**ANNEX 5**

**Summons to attend a first appearance, 22 May 2012**

**Summons to attend a first appearance, 22 May 2012**

*[Translation]*

**Paris *Cour d'appel***

**Paris *Tribunal de grande instance***

Chambers of Mr. Roger Le Loire
Senior Judge in charge of the investigation

(Mr. René Grouman, Jointly assigned Senior Judge in charge of the investigation)

Prosecution No.: **08 337 9601/ 7**
Investigation No.: **2292/10/12**

The investigating judge

to

**Mr. Teodoro NGUEMA OBIANG MANGUE**
State Minister for Agriculture and Forestry
Ministry of Agriculture
MALABO
**EQUATORIAL GUINEA**

Paris, 22 May 2012

Dear Sir,

In accordance with Article 80-2 of the Code of Criminal Procedure, please be informed that I am considering placing you under judicial examination. To that end, I am summoning you to attend a first appearance, in an investigation opened:

FOR HAVING IN PARIS AND ON NATIONAL TERRITORY, DURING 1997 AND UNTIL OCTOBER 2011, IN ANY EVENT FOR A PERIOD NOT COVERED BY PRESCRIPTION, ASSISTED IN INVESTING, CONCEALING OR CONVERTING THE DIRECT OR INDIRECT PROCEEDS OF A FELONY OR MISDEMEANOUR, IN THIS INSTANCE **OFFENCES OF MISUSE OF CORPORATE ASSETS, MISAPPROPRIATION OF PUBLIC FUNDS, THE UNLAWFUL TAKING OF INTEREST AND BREACH OF TRUST**, BY ACQUIRING A NUMBER OF MOVABLE AND IMMOVABLE ASSETS AND PAYING FOR A NUMBER OF SERVICES OUT OF THE FUNDS OF THE FIRMS EDUM, SOCAGE AND SOMAGUI FORESTAL, ACTS CHARACTERIZED AS LAUNDERING OF THE PROCEEDS OF THE ABOVE-MENTIONED OFFENCES,

ACTS WHICH ARE DEFINED AND PUNISHABLE UNDER ARTICLES 432-12, 432-15, 324-1 AND 314-1 OF THE PENAL CODE AND ARTICLE L 241-3 OF THE COMMERCIAL CODE.

Pursuant to a judgment of the *Cour de Cassation* (*Chambre criminelle*) dated 9 November 2010 and the Public Prosecutor's application to extend the investigation dated 31 January 2012,

**You are summoned to appear on 11 July 2012 at 3 p.m.**

In my chambers at the Paris *TRIBUNAL de GRANDE INSTANCE*, 5/7 rue des Italiens 75009 Paris, Chambers No. 303.

**VERY IMPORTANT**

You have the right to be assisted by a lawyer.

You may choose the lawyer who will assist you or request that the Chairman of the Bar choose a lawyer registered with the Bar for you.

You must inform me of your choice as soon as possible.

*(Signed)* Mr. René GROUMAN.

Senior Judge in charge of the investigation

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**ANNEX 6**

**Record of failure to appear before the Paris *Tribunal de grande instance*, 11 July 2012**

**Record of failure to appear before the Paris *Tribunal de grande instance*, 11 July 2012**

*[Translation]*

Paris *Cour d'appel*

Paris *Tribunal de grande instance*

Chambers of **Roger Le Loire**

Senior judge in charge of the investigation

**RECORD OF FAILURE TO APPEAR**

Prosecution No. **0833796017**

Investigation No. **2292/10/12**

*CRIMINAL PROCEEDINGS*

11 July 2012

We, Roger LE LOIRE, senior judge in charge of the investigation at the Paris *Tribunal de grande instance*, sitting in chambers, assisted by Françoise LE MEST, clerk,

Note that **Mr. Teodoro NGUEMA OBIANG MANGUE**, who was summoned to appear in chambers today at 3 p.m. for questioning at first appearance, has failed to appear.

Done in chambers,

*(Signed)* Senior judge in charge of the investigation

*(Signed)* Clerk.

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**ANNEX 7**

**Letter No. 140831 from the Registrar of the Court to the Minister for Foreign Affairs of the French Republic, 25 September 2012**

**Letter No. 140831 from the Registrar of the Court to the Minister for Foreign Affairs of the French Republic, 25 September 2012**

*[Translation]*

I have the honour to inform you that the Republic of Equatorial Guinea has today filed in the Registry of the Court a document with annexes, entitled "Application instituting proceedings including a request for provisional measures".

It is stated on page 18, point VI of the document that "the Republic of Equatorial Guinea seeks to found the jurisdiction of the Court, in accordance with Article 38, paragraph 5, of the Rules of Court, on the consent of the French Republic, which will certainly be given".

Article 38, paragraph 5, of the Rules of Court therefore applies. It provides:

> "When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case."

Please find enclosed herewith a duly signed copy of the document and its annexes.

As regards the "Request for provisional measures", the situation is as follows: as long as there is no prima facie jurisdiction, but only an invitation to accept jurisdiction, the provisions of the Rules of Court governing the procedure for registering requests for the indication of provisional measures are waived in favour of the above-mentioned Article 38, paragraph 5, which provides that no action shall be taken in the proceedings unless and until the jurisdiction of the Court has been accepted.

I also have the honour to transmit to you herewith a copy of a letter dated 22 September 2012 which accompanied the "Application", from H.E. Mr. Pedro Ela Nguema Buna, Minister for Foreign Affairs of the Republic of Equatorial Guinea, and a copy of a document dated 19 September 2012 in which H.E. Mr. Obiang Nguema Mbasogo, President of the Republic of Equatorial Guinea, gives full powers to H.E. Ms Mariola Bindang Obiang.

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**ANNEX 8**

**Article published in *Jeune Afrique*, 13 March 2015,**
**"*France – Guinée Equatoriale : porte de sortie en vue pour Teodorin ?*"**

Available at the following address:
http://www.jeuneafrique.com/226650/politique/france-guin-e-quatoriale-porte-de-sortie-en-vue-pour-teodor-n/ (site consulted 21 March 2017).

**Article published in *Jeune Afrique*, 13 March 2015**

*[Translation]*

## FRANCE V. EQUATORIAL GUINEA: EXIT IN SIGHT FOR TEODORIN?

Are we heading towards a dignified exit for Teodoro Nguema Obiang Mangue, who is facing prosecution in France for "ill-gotten gains"? His counsel would like to believe so.

Jean-Charles Tchikaya, counsel for Equatorial Guinea in the thorny "ill-gotten gains" case, hopes in the coming months to see an end to the two-year feud between France and Teodoro Nguema Obiang Mangue (Teodorin), Vice-President and son of the President of Equatorial Guinea.

Disappointed by the outcome of negotiations between Teodorin's defence team and the French judicial authorities — which purportedly called for his client to plead guilty, abandon attached property and pay a fine of up to €50 million — Mr. Tchikaya intends to rely on the International Court of Justice to recognize the Vice-President's diplomatic immunity and thus bring the proceedings to an end.

A solution made possible by Equatorial Guinea's ratification, in November 2014 at United Nations Headquarters in New York, of the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.

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**ANNEX 9**

**Press release of the spokesperson for the Government of the Republic of Equatorial Guinea, 7 December 2016, Malabo**

**Press release of the spokesperson for the Government of the Republic of Equatorial Guinea, 7 December 2016, Malabo**

(English version from the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9000&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9000&lang=es; site consulted on 24 August 2017)

## GOVERNMENT RESPONSE FOLLOWING RULING FROM INTERNATIONAL COURT OF JUSTICE IN THE HAGUE

The Minister for Information, Press and Radio, and Spokesperson for the Government of the Republic of Equatorial Guinea, Eugenio Nze Obiang, signed a communique in response to the ruling passed by the International Court of Justice, in The Hague.

Malabo, 7 December 2016

The Government of Equatorial Guinea has received the decision by the International Court in The Hague, regarding the complaint lodged by our country against France.

We recall that the process settled in the Court in The Hague, began as a result of the previous accusation against some African Heads of State and their families, in the case known as "dishonestly acquired goods". However, the case finally focussed solely on the person of the Vice-President of Equatorial Guinea, H. E. Nguema Obiang Mangue. For that reason, the State of Equatorial Guinea lodged a complaint against France before the International Court of The Hague, regarding attacks on the immunity of the Vice-President of Equatorial Guinea.

Following the ruling by the International Court in The Hague, the Government of Equatorial Guinea officially declares that:

The Government of Equatorial Guinea has always considered that the action by the French court is a unilateral, unjustified action, as a local court cannot seek to exercise extra-national judicial power over bodies, institutions and persons extraneous to France which fall completely outside its power and jurisdiction, especially when dealing with a senior representative of a State, as in this case is the Vice-President of the Republic of Equatorial Guinea. For that reason, our Executive entrusted the matter to the International Court of Justice, as an institution created by the United Nations to solve judicial disputes between different countries.

The Government of Equatorial Guinea is disappointed that the International Court in The Hague has not given a definitive ruling on the matter, which lacks a solid base and which, however, shows bad faith.

However, the Government of Equatorial Guinea is satisfied because, in the ruling given by the International Court of Justice in The Hague this 7th December 2016, there is clear recognition of the diplomatic nature of the building located at 42, Avenida Foch, in Paris, and as such, recognition that the property does not constitute "dishonestly acquired goods". The Equatoguinean State has reiterated its claim to ownership of this property, which was the property of the Equatoguinean State, but the French party refused to recognise this, refusing to yield on this point.

The recognition that the State of Equatorial Guinea is the legitimate owner of the building, with all the objects it contains, is thus recognition that it is not "dishonestly acquired goods", and it is also evidently proof of the judicial farce that French justice is unilaterally trying to serve up.

On demonstrating that the building is not "dishonestly acquired goods", the French party should have finally withdrawn the accusation against the Vice-President of the Republic of Equatorial Guinea, as it was unsupported by the basis of the main accusation, and thus recognise unambiguously the immunity of H.E. Nguema Obiang Mangue. To not act in this way would confirm the attempt to implement a destabilisation plan by the Government of France against the Republic of Equatorial Guinea.

In any case, the Government and the People of Equatorial Guinea, as a free, independent, sovereign State, will pursue its fight until the end, in defence of its legitimate interests and its honour, using to that end the resources of International Justice and Diplomacy between States that respect International Law, and advocated by the United Nations.

*(Signed)* His Excellency Eugenio NZE OBIANG

Spokesperson for the Government of the
Republic of Equatorial Guinea

Equatorial Guinea Press and Information Office.

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**ANNEX 10**

**Press release of the Representation of Equatorial Guinea in The Hague, 8 December 201[6]**

**Press release of the Representation of Equatorial Guinea in The Hague, 8 December 201[6]**

(English version from the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9002&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9002&lang=es)

## EQUATORIAL GUINEA WINS FIRST BATTLE AGAINST FRANCE IN THE INTERNATIONAL COURT OF JUSTICE

On the afternoon of 7th December, a press conference by the judicial leaders was called, after the International Court of Justice in The Hague presented its conclusions following the complaint lodged by Equatorial Guinea against France.

Our country was represented by a Commission made up of the Deputy Minister for Justice, Worship and Penitentiary Institutions, Juan Olo Mba Nseng, and the accredited Equatorial Guinea Plenipotentiary Extraordinary Ambassador to Belgium and the European Union, Carmelo Nvono-Ncá, together with the State lawyers, Francisco Evuy Nguema and Francisco Moro Mba, who have been dealing with the case for several years.

Strangely, the lawyers from the French party did not appear at this press conference, and their representatives left with their heads down. The acting President based his speech on various articles of the Convention against trans-national organised crime and the optional signing protocol for the Vienna Convention regarding diplomatic relations, and not only spoke of the noble motives why the Republic of Equatorial Guinea began this process, but finally, together with all these attorneys, imposed on France the following measures:

The International Court, through a unanimous decision by its members, calls on France to take all the necessary measures to guarantee security, respect and adequate treatment of everything relating to the diplomatic headquarters at 42, Avenida Foch, in Paris.

The French nations is also urged to abstain from practices of confiscation of goods and other objects belonging to Equatorial Guinea.

Likewise, the International Court rejects the petition brought by the French State to remove this case from the general list.

For the first time, an African country has brought a great European and world power before International Justice. This ruling by the highest body of International Justice has shown that neither the geographical size, nor the small population, nor the fact of being African, should stop the fight against harmful intentions against our countries.

Text: Deogracias Ekomo Ndong Asue (Presidential Press)
Source: Equatorial Guinea Representation in The Hague
Equatorial Guinea Press and Information Office

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**ANNEX 11**

**Press release of the Equatorial Guinea Press and Information Office, 9 December 2016**

**Press release of the Equatorial Guinea Press and Information Office, 9 December 2016**

(English version from the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9005&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9005&lang=es)

## EQUATORIAL GUINEA WINS FIRST ROUND AGAINST FRANCE

Following the presentation by the International Court of Justice in The Hague of their conclusions on 7 December, the media have viewed the ruling from various angles, but even the most strident opponents of Equatorial Guinea have had to recognise the overwhelming rulings by the Court in favour of the Equatoguinean complaint.

The decision adopted by the International Court which mentions the Diplomatic Mission is the one most clearly reflecting the justice of the demand by Equatorial Guinea. The verdict is clear that the building in Foch Avenue in Paris is part of the Equatorial Guinea Diplomatic Mission, and must be respected as such.

> "France is obliged, pending a final decision, to take all the necessary measures within their power to ensure that the Equatorial Guinea Diplomatic Mission building at No. 42 Foch Avenue, in Paris, receives the treatment outlined in article 22 of the Vienna Convention, guaranteeing its inviolability."

Furthermore, the French nation is also urged to abstain from practices of confiscation of goods and other objects belonging to Equatorial Guinea.

In addition, The Hague Court rejected the claim by France to shelve the case due to the lack of legal competence of the Court to rule on this litigation, as it considers to be within its jurisdiction, in virtue of article I of the Optional Protocol of the Vienna Convention, to hear the case.

As published in "*La Cuarta Columna*" and expressed through other media outlets, "Equatorial Guinea has won the first round against France".

Institutional Web Page General Directorate (DPGWIGE)
Equatorial Guinea Press and Information Office

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**ANNEX 12**

**Letter from the President of Equatorial Guinea to the French President,
19 January 2017**

**Letter from the President of Equatorial Guinea to the French President,**
**19 January 2017**

*[Translation]*

In the spirit of strengthening our political relations, I wish to advise you of the protracted judicial proceedings instituted by the French association "Transparency International" against the Vice-President of the Republic, in charge of Defence and State Security, which, in our view, are procedurally flawed and currently damaging the excellent relations of friendship and co-operation that our countries have long maintained.

Indeed, the proceedings in this dispute have failed to take into consideration the international conventions governing diplomatic relations to which our two countries are parties, not to mention the bilateral conventions concluded between the French Republic and the Republic of Equatorial Guinea.

The situation I am bringing to your attention has been ongoing for several years now, and I have always wished to discuss it with you personally since, as we see it, while respecting the independence of the French judges, Your Excellency, as guarantor of the interests of your Government, has the ability to mediate between the French courts and the Government of Equatorial Guinea in order to avoid pointless confrontation.

In a similar vein, I agree with Your Excellency that this dispute could be resolved diplomatically, if we relied on the Agreement on the protection of investments signed by our Governments. For this reason, I am sending to Your Excellency Mr. Miguel OYONO NDONG MIFUMU, Ambassador Extraordinary and Plenipotentiary of Equatorial Guinea, accredited to your Government, with a petition for Your Excellency to mediate in this case. This would lead us to suspend the proceedings instituted before the International Court of Justice, while safeguarding judicial independence.

I take this occasion to renew my wishes of happiness and prosperity in 2017, and please accept, Mr. President and dear friend, the assurances of my highest consideration.

_____

**Note seeking a diplomatic resolution of the dispute**

**Regarding the seat of the diplomatic mission of the Republic of Equatorial Guinea**

In response to the Order issued by the International Court of Justice on 7 December 2016, whereby France was unanimously ordered to ensure the inviolability of the building at 42 avenue Foch, it might be appropriate for France to notify the Embassy that it has taken note of the Order and that the address is now regarded by both States as being that of the seat of the mission of the Republic of Equatorial Guinea in France.

The Republic of Equatorial Guinea will then inform the International Court of Justice that it is therefore no longer necessary to rule on that aspect of the dispute to which the two States have found a permanent solution.

**Regarding the situation of the Vice-President of Equatorial Guinea**

The Agreement on the mutual protection of investments dated 3 March 1982, by which both States are bound, provides for inter-State disputes concerning its interpretation and application to be resolved by diplomatic means.

Since Equatorial Guinea has consistently maintained that the assets attached by the French courts were all acquired lawfully and do not represent the proceeds of misappropriated public funds or of an offence of any kind, consideration must be given to the question of their protection by France under the aforementioned Agreement.

That being the case, in the context of diplomatic discussions between the two States provided for under Article 11 of the said Agreement, and before any decision by the French courts on the substance of the dispute, the two States could agree to consider that the assets lawfully acquired in France meet the definition of "investments" within the meaning of Article 1 of the same Agreement and that, consequently, France has a duty to protect them.

Thus, a permanent solution to the dispute between the two States having been found, it will only remain for the Republic of Equatorial Guinea to end the proceedings pending before the International Court of Justice.

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**ANNEX 13**

**Letter from the President of the French Republic to the President of the Republic of Equatorial Guinea, 16 February 2017**

**Letter from the President of the French Republic to the President of the Republic of Equatorial Guinea, 16 February 2017**

*[Translation]*

Thank you for your letter, which I read with interest.

I share your view of the quality of the bilateral relationship that unites our countries and which is not altered by the dispute to which you referred. As I mentioned at the recent Africa-France summit in Bamako, I am committed to dialogue and co-operation between our countries, particularly with regard to regional security.

As regards the facts mentioned in your letter, they are the subject of court decisions in France and judicial proceedings are ongoing.

As the guarantor of judicial independence, I cannot challenge these decisions or influence the proceedings. I therefore regret that I am unable to accept the offer to settle the matter through the channels proposed by the Republic of Equatorial Guinea, which from a legal standpoint would subvert this independence.

Your country has, moreover, decided to bring the dispute before the International Court of Justice and request provisional measures.

In this regard, I can assure you that France will comply with the Order of 7 December 2016 of the International Court of Justice in the case concerning *Immunities and Criminal Proceedings* and that, pending the Court's final decision, it will ensure that the premises at 42 avenue Foch in Paris receive treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability.

In any event, I would like to assure you that I am committed to working with you to build a forward-looking partnership between our countries.

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