Traduction
Translation

CR 2018/2 (traduction)

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Lundi 19 février 2018 à 10 heures

Monday 19 February 2018 at 10 a.m.

**8** The PRESIDENT: Please be seated. The sitting is open.

The Court meets today to hear the Parties' oral arguments on the preliminary objections raised by France in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France).*

I would like to begin by stating that, for reasons duly made known to me, Judge Tomka is unable to be present on the Bench this week.

Since the Court included upon the Bench no judge of Equatorial Guinean nationality, Equatorial Guinea availed itself of its right under Article 31, paragraph 2, of the Statute, and chose Mr. James Kateka to sit as judge *ad hoc* in the case. Mr. Kateka was installed as judge *ad hoc* in 2016, during the phase of this case that was devoted to the Request for the indication of provisional measures.

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

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

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

By an Order dated 1 July 2016, the Court fixed 3 January 2017 and 3 July 2017 as the respective time-limits for the filing of a Memorial by Equatorial Guinea and a Counter-Memorial by France. Equatorial Guinea's Memorial was filed within the time-limit thus fixed.

**9** On 29 September 2016, Equatorial Guinea, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court, submitted a Request for the indication of provisional

measures asking that France suspend all the criminal proceedings brought against the Vice-President of the Republic of Equatorial Guinea; that it 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 it refrain from taking any other measure that might aggravate or extend the dispute submitted to the Court.

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

By an Order of 7 December 2016, the Court, having heard the Parties, indicated the following provisional measures:

> "France shall, pending a final decision in the case, 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."

On 31 March 2017, within the time-limit fixed in Article 79, paragraph 1, of the Rules of Court, France raised a number of preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 5 April 2017, the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 31 July 2017 as the time-limit for Equatorial Guinea to file a written statement of its observations and submissions on the preliminary objections raised by France. Equatorial Guinea filed its written statement within the time-limit thus fixed, and the case became ready for hearing in respect of the preliminary objections.

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Pursuant to Article 53, paragraph 2, of its Rules, the Court decided, after ascertaining the views of the Parties, who had no objection, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. Furthermore, in

accordance with the Court's practice, all of these documents will be placed on the Court's website from today.

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I note the presence at the hearing of the Agents, counsel and advocates of the two Parties. In accordance with the arrangements on the organization of the procedure decided by the Court, the hearings will comprise a first and second round of oral argument. The first round of oral argument will begin today and will end tomorrow, Tuesday 20 February. Each Party will have one session of three hours. The second round of oral argument will open on Wednesday 21 February and will close on Friday 23 February. Each Party will have one session of one and a half hours.

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**Opening of France's first round of oral argument**

France, which will be heard first, may, if so required, in this first sitting of the first round of oral argument, avail itself of a short extension of time beyond 1 p.m., in view of the time taken up by my introductory words. I now give the floor to the Agent of the French Republic, Mr. François Alabrune. You have the floor, Sir.

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Mr. ALABRUNE:

1. Mr. President, Members of the Court, it is a great honour for me to represent France once more before you. As I begin the French Republic's oral argument in the present incidental proceedings, I would like to reaffirm the French Government's confidence in the Court's wisdom and recall the friendly relations and mutual respect that exist between France and Equatorial Guinea, whose representatives here I would like to greet, particularly my colleague and friend, Ambassador Carmelo Nvono Nca.

**11** 2. The French Republic would point out, however, that it has not accepted the Court's jurisdiction, on any basis, to entertain the matters on which the Republic of Equatorial Guinea wishes the Court to rule. France made this clear at the hearings on the request for provisional measures. And it is why it raised the preliminary objections on which the Court is requested to rule.

**Criminal proceedings instituted in France**

3. At this stage in the proceedings I think it would be useful to inform the Court of the developments that have taken place in the criminal proceedings in France since the Preliminary Objections were filed on 31 March 2017.

4. The hearings on the merits of the case before the Paris *Tribunal correctionnel*, initially scheduled for 2 to 12 January 2017, were deferred at the request of the defence lawyers and held from 19 June to 6 July 2017. The *Tribunal* delivered its judgment on 27 October 2017, in which it found Mr. Teodoro Nguema Obiang Mangue guilty of the money laundering offences of which he was accused and which were committed between 1997 and October 2011 in Paris and on French territory[1]. The *Tribunal* handed him a three-year suspended prison sentence, and a suspended fine of €30 million. The *Tribunal* also ordered the confiscation of all the assets attached during the investigation proceedings, in particular the building at 42 avenue Foch[2]. Following delivery of the judgment, Mr. Teodoro Obiang Mangue appealed against his conviction through his counsel. The Public Prosecutor then also lodged an appeal.

5. It should be recalled that an appeal, just like an appeal in cassation, has a suspensive effect, so that no steps may be taken to enforce the sentences handed down to Mr. Teodoro Obiang Mangue, including the confiscation decision. On the subject of this confiscation measure, I would point out that, in its judgment of 27 October 2017, the Paris *Tribunal correctionnel* took due account of the Court's Order. It made clear that "the . . . proceedings [pending before the International Court of Justice] make the execution of any measure of confiscation by the French
**12** State impossible, but not the imposition of that penalty"[3]. It should also be noted that, even should it become final, confiscation would simply transfer ownership of the building at 42 avenue Foch to

[1] Judgment of the Paris *Tribunal correctionnel*, 27 October 2017, p. 105.

[2] *Ibid.*, pp. 105-121.

[3] Judgment of the Paris *Tribunal correctionnel*, 27 October 2017, p. 86.

the State[4], without prejudice to the prevailing situation with regard to the occupation and use of the premises.

6. As regards the conduct of the proceedings before the French courts, I would draw your attention to the fact that France's presentation of those proceedings to the Court at the hearings on the request for provisional measures in October 2016 has been entirely borne out in practice:

— France first of all stated that the hearing scheduled for 24 October 2016 was a "purely procedural" hearing, not a "first hearing" on the merits marking the start of Mr. Nguema Obiang Mangue's trial, contrary to the description given by Equatorial Guinea, which it continues to maintain in its observations on the preliminary objections[5]. France's statement has proved to be correct, since the hearings on the merits were, as I said, not held until 19 June to 6 July 2017.

— It was also stated that "any first instance conviction of Mr. Nguema Obiang Mangue could not occur before the end of the first quarter of [the following year]", in other words 2017[6]. Here again the statement was correct, since it was in fact not until 27 October 2017, in other words the end of the second half of 2017, that the first instance judgment finding him guilty was delivered.

— It was also stated that any custodial sentence handed down would probably be suspended, since Mr. Obiang Mangue had never previously been convicted of a crime in France, and therefore "an arrest warrant could not be issued against him"[7]; this was borne out by the judgment of the

**13** Paris *Tribunal correctionnel*, which did indeed suspend the custodial sentence and therefore did not order Mr. Obiang Mangue's arrest.

— It was further stated that, should he be convicted, he would still be able to appeal by filing a simple statement in the Registry of the *Tribunal correctionnel*[8], and thus the decision could not

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[4] Article L1124-1 of the *Code général de la propriété des personnes publiques* (General Code of Public Property).

[5] See Written Statement of Equatorial Guinea (WSEG), para. 1.2.

[6] CR 2016-15, p. 15, para. 42 (Alabrune).

[7] *Ibid.*, p. 15, para. 43 (Alabrune).

[8] *Ibid.*, p. 15, para. 44 (Alabrune).

be enforced because of the suspensive effect of the appeal "throughout the duration of the appeal proceedings"[9]; this is precisely the current situation.

— Finally, it was stated that "it takes an average of 12 months to fix an appeal hearing, from the date of the decision of the court of first instance", and therefore, in the light of the proceedings in the present case, "in all likelihood, the hearings before the *Cour d'appel* would not take place until 2018"[10]; this should indeed be the case, though there is even a possibility that the hearings will not take place until 2019.

The procedural timetable which France presented to the Court at the hearings on the request for provisional measures has thus proved entirely accurate.

7. France has also fully complied with its obligation under the Order of the Court of 7 December 2016 to ensure that the premises at 42 avenue Foch "enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability"[11].

8. It should be noted here that the decision taken by the Paris *Tribunal correctionnel* on 2 January 2017 not to postpone examination of the merits of the case pending a final decision of the International Court of Justice does not reflect a failure by the French courts to observe the Court's Order, as has been suggested by Equatorial Guinea[12]. The continuation of the criminal proceedings in France does not conflict with the provisional measure ordered by the Court since the Court
**14** rejected Equatorial Guinea's request for the judicial proceedings instituted against Mr. Nguema Obiang Mangue in France to be suspended[13].

9. France would query the interpretation of the Order which Equatorial Guinea is trying to put forward here. On the day the Order was delivered, the spokesperson for the Government of the Republic of Equatorial Guinea declared that "there is clear recognition of the diplomatic nature of the building located at 42, Avenida Foch", that the Court had recognized that "the State of

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[9] *Ibid.*, p. 16, para. 46. See also Preliminary Objections of the French Republic (POF), p. 19, para. 41.

[10] CR 2016-15, p. 16, para. 47.

[11] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II),* p. 1171, para. 99.

[12] WSEG, para. 1.6.

[13] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II),* p. 1151, para. 9, and p. 1160, para. 50.

Equatorial Guinea is the legitimate owner of the building, with all the objects it contains", and that this therefore meant that "the French party [should] finally withdraw the accusation against the Vice-President of the Republic of Equatorial Guinea"[14]. One month after delivery of the Order, moreover, the President of the Republic of Equatorial Guinea wrote a letter to the President of the French Republic, dated 19 January 2017. In that letter he stated that

> "[i]n 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"[15].

This has also been the approach adopted by Equatorial Guinea in the Notes Verbales sent to the French authorities since the Court delivered its Order on 7 December 2016[16].

10. It goes without saying that France does not share this reading of the Court's Order. The Order did not recognize the diplomatic nature of the building at 42 avenue Foch; it merely required that, "pending a final decision in the case" the premises should enjoy "treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability"[17]. Furthermore, the Court gave no decision on the question of ownership of the
**15** building or its contents — contents with regard to which Equatorial Guinea has not submitted any claims in the present case. Finally, the point should be made once again that the Court's Order in no way implies that France should terminate the proceedings instituted against Mr. Obiang Mangue. That was one of the provisional measures requested by Equatorial Guinea[18], but it was rejected by the Court. In their replies to the letters and Notes Verbales sent by the Republic of Equatorial Guinea, the French authorities referred strictly to the terms of the Court's Order[19].

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[14] See POF, para. 73.

[15] Letter from the President of the Republic of Equatorial Guinea to the President of the French Republic, 19 January 2017, reproduced in Annex 4 to the WSEG, p. 144.

[16] Note Verbale from the Embassy of Equatorial Guinea in France No 069/2017, reproduced in Annex 6 to the WSEG, p. 151.

[17] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II),* p. 1170, para. 94.

[18] Request of Equatorial Guinea for the indication of provisional measures, 29 September 2016, para. 19.

[19] See Letter from the President of the French Republic to the President of the Republic of Equatorial Guinea, 16 February 2017, reproduced in Annex 5 to the WSEG, p. 147; Note Verbale No. 2017-158865/PRO/PIDC, 2 March 2017, reproduced in Annex 7 to the WSEG, p. 155; Note Verbale No. 2017-465600/PRO/PIDC, 18 July 2017, reproduced in Annex 10 to the WSEG, p. 167.

**Subject-matter of the dispute and jurisdiction of the Court**

11. Mr. President, Members of the Court, I should now like to make a general remark about Equatorial Guinea's approach to establishing the jurisdiction of the Court in the present case.

12. According to Equatorial Guinea, "[i]n the circumstances of the present case, once the question of its jurisdiction is settled, the Court is called upon to make a decision on the whole of the dispute between Equatorial Guinea and France and not just part of it"[20]. Equatorial Guinea thus appears already to be anticipating a later phase of the proceedings — relating to the merits — prejudging any decision which the Court might make on France's preliminary objections.

13. Before any discussion of the merits, a basis of jurisdiction must first be established. When the Court receives an application based on compromissory clauses, its jurisdiction is strictly confined to disputes falling within the provisions of the conventional instruments on which the applicant State seeks to rely. In accordance with its well-established jurisprudence, the Court thus

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cannot exercise jurisdiction until it has satisfied itself that this is indeed the case[21].

14. France's approach is thus entirely consistent with the jurisprudence of the Court. Equatorial Guinea's criticism that France has "an extraordinarily narrow view of the Court's jurisdiction"[22] is therefore unfounded.

15. It is thus unacceptable that allegations of violations of general principles of customary international law, such as the principles of sovereign equality and non-interference in internal affairs or the immunities of States, should be raised before the Court on the basis of contrived conventional connections. It is particularly unacceptable when such allegations are raised to serve private interests. Accepting such a step would, in the words of the Court, undermine "the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital . . . to ensure the ordered progress of relations between its members"[23].

16. None of the acts which Equatorial Guinea attributes to France falls within the provisions of the Vienna Convention on Diplomatic Relations or those of the United Nations Convention

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[20] WSEG, para. 1.47.

[21] See, in particular, *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I),* p. 137, para. 38; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 810, para. 16.

[22] See WSEG, para. 0.10.

[23] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980,* pp. 42-43, para. 92.

against Transnational Organized Crime. If Equatorial Guinea persists in invoking these two conventions, it is only so that it may rely on the compromissory clauses attached to them. However, it is not enough to rely, in an abstract way, on this jurisdictional connection between an applicant and a respondent; the applicant's claims must also reasonably fall within the provisions of the conventional instruments cited. That is not the case here.

17. The jurisdiction of the Court must be assessed within the strict confines of the subject-matter of the dispute before it. Even if Equatorial Guinea's submissions in its Memorial and its Written Statement on the preliminary objections seek to broaden the subject-matter of the
**17** dispute defined in the Application, as my colleagues will have the opportunity to point out, it must be recalled that the dispute concerns, first, whether Mr. Teodoro Nguema Obiang Mangue enjoyed immunity preventing him from facing criminal prosecution in France, and, secondly, whether Equatorial Guinea could require the building at 42 avenue Foch to be given diplomatic status without France's agreement[24]. Such a dispute does not fall within the provisions of the conventions relied on, whether the Convention against Transnational Organized Crime or the Vienna Convention on Diplomatic Relations.

18. This will be shown, with your permission, by Professor Hervé Ascencio, who will address the Court's lack of jurisdiction on the basis of the United Nations Convention against Transnational Organized Crime, and by Professor Pierre Bodeau-Livinec, who will address the Court's lack of jurisdiction on the basis of the Vienna Convention on Diplomatic Relations. To conclude the French Republic's first round of oral argument, Professor Alain Pellet will show that the filing of Equatorial Guinea's Application is the result of an abusive approach.

19. Mr. President, Members of the Court, thank you for your attention. I would now ask you to give the floor to Professor Ascencio.

[24] Application of Equatorial Guinea (AEG), para. 2.

Mr. ASCENCIO:

**The Palermo Convention**

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

2. In its Application instituting proceedings, the Republic of Equatorial Guinea invokes, as a basis for the Court's jurisdiction, Article 35, paragraph 2, of the United Nations Convention against
18 Transnational Organized Crime, also known as the Palermo Convention. France, for its part, contends that the Applicant's claims in no way concern the application or interpretation of that Convention; it has therefore raised a preliminary objection contesting the subject-matter jurisdiction of the Court on that basis.

3. The Applicant's recent Written Statement of 31 July 2017 continues in the same vein as its previous written pleadings. The arguments put forward seek to widen unduly the scope of the conventional obligations, so as to create an artificial link between the provisions of the Palermo Convention and the proceedings being conducted before the French courts, on the basis of French law, against Mr. Teodoro Obiang Mangue. The Republic of Equatorial Guinea thereby disregards the terms of the treaty, its object and its purpose.

4. In paragraph 48 of its Order of 7 December 2016, the Court very clearly set out the obligations arising from the Convention, in the following terms:

> "Under the terms of the Convention, the State parties must, if they have not already done so, legislate against the transnational offences set out in the said instrument and participate in the international co-operation mechanism referred to therein."

The Court concluded that, prima facie, the dispute did not fall "within the provisions of the Convention against Transnational Organized Crime"[25].

5. France shares this view. Once again, it would point out that the purpose of the dispute brought before the Court is not the inclusion in French legislation of the criminal offences mentioned in the Convention. As regards co-operation, it notes that Equatorial Guinea's claims in this regard are quite recent and amount to changing the very subject-matter of the Application.

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[25] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II),* p. 1160, para. 50.

Moreover, as we shall see, reference to an article or a combination of articles in the Convention does not suffice to lend plausibility to the existence of a legal dispute relating to them, nor to establish the jurisdiction of the Court.

6. In accordance with Practice Direction VI, this presentation will focus on the arguments set out by the Applicant in its latest written pleadings, whilst also recalling the key points of France's position. This will lead us, first, to revisit the general characteristics of the Convention (I), since the line of argument followed by the Republic of Equatorial Guinea largely consists in obscuring them.

**19** We will then turn to the specific obligations now being invoked by the Applicant and show that those obligations have no bearing on the dispute brought before the Court (II).

## I. EQUATORIAL GUINEA DISREGARDS THE GENERAL CHARACTERISTICS OF THE CONVENTION

7. First of all, it is worth calling to mind the general characteristics of the Convention, since they are disregarded by Equatorial Guinea.

8. The first of these characteristics is that the Convention against Transnational Organized Crime contains only obligations to legislate and a judicial co-operation mechanism. It is one of those criminal conventions whose purpose is not to criminalize specific conduct under international law, but to harmonize domestic criminal legislation in respect of certain offences and to enable proper co-operation between the judicial authorities of the States parties. This characteristic is shared by other conventions, particularly those dealing with the fight against corruption or terrorism. Legal writers use the term "transnational criminal law" to denote their common purpose[26]. Furthermore, each convention has its own object, circumscribed by the conduct which the States parties are required to criminalize in their domestic legal order. The Palermo Convention concerns the offences mentioned in its Article 3 and defined in Articles 2, 5, 6, 8 and 23. These constitute the object and purpose of the Convention.

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[26] Neil Boister, *An Introduction to Transnational Criminal Law*, Oxford University Press, Oxford, 2012; Neil Boister and Robert J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, Routledge, London/New York, 2015; Robert Cryer, Hakan Friman, Darryl Robinson, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 3rd ed., 2014, pp. 329-352 (Chap. 14); Jessica Simone Roher, Nicola Dalla Guarda, Maryam Khalid, *Transnational Crime: law, theory, and practice at the crossroads*, Routledge, London/New York, 2017.

9. Furthermore, the conventional obligations aimed at harmonization do not concern the entirety of domestic criminal law or of domestic criminal proceedings applicable to the conduct covered. They deal solely with offences and bases of jurisdiction. They require the States parties to ensure that their domestic law is in conformity with their provisions, i.e. that the relevant acts are criminalized under their legislation and that their courts have the requisite bases of jurisdiction. That is what should be understood from the recurrence in the Convention of the terms "such
20 legislative and other measures as may be necessary" or "such measures as may be necessary" which the States parties are to "adopt" or "establish". The international obligations are confined in this instance to requiring a particular situation in domestic law, which has to be brought into or kept in conformity with the provisions of the Convention. French law is in conformity with those provisions. Moreover, it should be recalled that the criminalization of money laundering pre-dated the Convention.

10. The second general characteristic of the Convention is that, apart from the provisions on judicial co-operation, the conventional obligations concern only the general legal framework and not the proceedings which national judicial authorities may initiate in respect of specific unlawful conduct. The Republic of Equatorial Guinea is not, however, taking issue with the general framework of French law; rather, it is seeking to draw the proceedings launched against Mr. Teodoro Obiang Mangue into the Convention's orbit. Those proceedings are not based on the Palermo Convention but on French law. They do not constitute the performance of a conventional obligation. When a State, within its domestic legal system, brings a prosecution for an offence mentioned in the Convention, it is not implementing the provisions of that convention: it is merely applying the rules of its own legal system in a specific case.

11. This is set out in the Convention itself, in Article 11, paragraph 6, in the following terms [slide 1: Art. 11, para. 6]:

> "Nothing contained in this convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law." [End of slide 1]

This characteristic is so fundamental that it appears again in Article 12, paragraph 9, with regard to confiscation and seizure. [Slide 2: Art. 12, para. 9]:

> "Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party."

12. The text of the Convention thus draws a very clear dividing line between international obligations, pertaining to the establishment of a general legal framework, on the one hand, and the

**21** application of those general rules in given cases, which is exclusively a matter of domestic law, on the other. This is entirely consistent with the object and purpose of the Convention. [End of slide 2]

13. Nevertheless, the Republic of Equatorial Guinea maintains that the implementation of French criminal law in particular cases constitutes an "execution" or an "application" of the Convention. The Applicant thus misconstrues the nature of the conventional obligations. It stretches them far beyond the text of the Convention, for the sole purpose of establishing a link with the ongoing judicial proceedings against Mr. Teodoro Obiang Mangue. This method permeates its entire line of reasoning and is exemplified by the following assertion, which appears in paragraph 2.19 of its Written Statement: "[W]hen prosecuting certain offences pursuant to the Convention, France must respect the principles of sovereign equality and non-intervention."[27]

14. There is a short cut in the Applicant's reasoning here, which disregards two crucial points in relation to the jurisdiction of the Court: first, the Convention contains no provision obliging a State party to prosecute in a specific case; secondly, when the French judicial authorities institute proceedings, they do so under French law and not in "execution" of the Convention. There is therefore no link between the institution of proceedings and the performance of obligations under the Convention.

15. The third general characteristic concerns the scope of the conventional obligations: that scope does not cover international immunities. In fact, this is a characteristic which the Convention has in common with most treaties whose main object is to define a criminal offence. As pointed out by Professor Sean Murphy, Special Rapporteur of the United Nations International Law Commission on Crimes against Humanity, in his third report:

> "Treaties addressing crimes typically do not contain a provision on the issue of immunity, leaving the matter to other treaties addressing immunities of classes of officials or to customary international law."[28]

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[27] See WSEG, para. 2.19.

[28] International Law Commission, 69th session, *Third Report on Crimes Against Humanity*, by Sean D. Murphy, Special Rapporteur, United Nations doc. A/CN.4/704, 23 Jan. 2017, p. 134, para. 281.

**22** To illustrate that characteristic, he expressly cites the Convention against Transnational Organized Crime, together with fourteen other conventions of the same type[29].

16. Even so, the Republic of Equatorial Guinea continues to sow confusion and seeks to enlarge the scope of the Palermo Convention to cover international immunities, through its interpretation of Article 4 of that Convention.

[Slide 3: Art. 4]

17. In its Order of [7 ] December 2016, the Court states that Article 4 is intended to cover only "the manner in which the States parties perform their obligations under that Convention"; and those obligations should be contained in other articles[30]. In its Written Statement, the Republic of Equatorial Guinea agrees, but only "in part", to use its own words[31]. It describes Article 4 as a provision related to other provisions of the Convention, but it does so with a considerable degree of ambiguity. In fact, it argues that Article 4 does not refer to principles but contains an obligation. This allows it to put that article on the same footing as the genuine obligations contained in the other articles of the Convention, and to highlight the potential for a conflict of obligations under certain circumstances. The solution, it adds, would be to refrain from performing a conventional obligation in a given case[32].

18. Such a reading is incompatible with the text of Article 4, paragraph 1. That article does not mention an "obligation", but principles, which do not relate to the application of the Convention in general but to the fulfilment of specific obligations listed in the other articles. The choice of words and the deliberate link to the "obligations" of the Convention demonstrate that the purpose of Article 4 is not to obstruct the performance of a conventional obligation. It can only apply within the framework of the obligations laid down by the other articles of the Convention, without extending their scope to issues that they do not cover. There is no conventional obligation

**23** concerning international immunities, however. International immunities are a different matter from

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[29] *Ibid.*

[30] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1160, para. 49.

[31] WSEG, para. 2.3.

[32] *Ibid.*

the definition of a criminal offence, different from the establishment of a basis of adjudicative jurisdiction, and different from a judicial co-operation mechanism. [End of slide 3].

19. Moreover, no provision in the Convention even mentions the immunities granted by international law to certain individuals by virtue of their official functions. The only immunities mentioned, in Articles 18 and 26, are of a different order. They are granted under domestic law to private individuals by virtue of their co-operation in an investigation or judicial proceedings. The immunity mentioned in Article 18, paragraph 27, is granted by a State to persons travelling in its territory to give evidence, a witness statement or another form of deposition, and only applies for the duration of their stay. The immunity mentioned in Article 26, paragraph 3, involves exempting from prosecution, in some legal systems, a person who has made a substantial contribution to an investigation or a prosecution. Neither of those two scenarios corresponds to the category of immunity invoked by Equatorial Guinea in the present case, namely international immunity.

20. The Republic of Equatorial Guinea also maintains that the question of establishing criminal jurisdiction is "inextricably linked" to that of international immunities[33]. That is conceptually inaccurate and contrary to the jurisprudence of the Court. In the Judgment of 14 February 2002 in the *Arrest Warrant* case, it is stated that "the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities"[34]. Immunity, to quote this Court's jurisprudence, "is procedural in nature"[35]. Contrary to the assertions of Equatorial Guinea, international immunity is not an "exception" to jurisdiction[36]; it is a ground of inadmissibility which may be raised in a specific case before a national court *which has jurisdiction*. The jurisdiction of a court and immunity are two separate and unconnected legal concepts. The Convention against Transnational Organized Crime deals with adjudicative jurisdiction, but does not deal with international immunities any more than it deals with aspects of criminal procedure other than judicial co-operation, or with general principles of criminal liability, or, for that matter, with penalties.

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[33] See WSEG, para. 2.59.

[34] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* pp. 25-26, para. 59.

[35] *Ibid.*, para. 60.

[36] See WSEG, para. 2.57.

## II. THE SPECIFIC OBLIGATIONS INVOKED HAVE NO BEARING ON THE DISPUTE SUBMITTED TO THE COURT

21. I shall now examine the specific obligations mentioned by the Applicant in connection with Article 4, which, in its view, establish the Court's subject-matter jurisdiction on the basis of the Convention. In its Written Statement of 31 July 2017, Equatorial Guinea divided them into four categories. We shall follow the same structure and demonstrate that none of those obligations has a bearing on the dispute submitted to the Court.

22. The first heading concerns "criminal proceedings" and refers only to Article 11, paragraph 2, of the Convention [slide 4: Art. 11, para. 2]. That provision calls on the States parties to exercise any discretionary legal powers in such a way as to maximize their effectiveness. Equatorial Guinea maintains that it obliges France "to submit cases to its competent authorities"[37]. The French Republic explained in its Preliminary Objections that the provision concerned made a *general* recommendation on penal policy with a view to guaranteeing the *overall* effectiveness of the law[38]. In so doing, it relied on the rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties. That meaning is confirmed by the *Legislative Guide* adopted by the United Nations for the implementation of the Convention[39] [end of slide 4].

23. The Republic of Equatorial Guinea does not really challenge those arguments. It merely refers to two further articles of the Convention: Article 3, which contains no obligation but specifies the scope of the Convention, and Article 16, which relates neither to adjudicative jurisdiction nor to offences, but to judicial co-operation. It draws entirely unexpected conclusions.

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In its view, "every time that a State party initiates criminal proceedings against an individual for the alleged commission of an offence covered by the Convention, it is fulfilling this obligation"[40]. We have already said that such a reading is not consistent with the general characteristics of the Convention. What is more, it is in direct contradiction with paragraph 6 of the same article, which has already been mentioned[41], and which establishes the principle that the offences are prosecuted

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[37] See WSEG, para. 2.28.

[38] POF, para. 121.

[39] *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.

[40] WSEG, para. 2.35.

[41] See para. [11] above.

under domestic law. Finally, there is no contradiction between France's written pleadings in the present dispute and the positions it has adopted in other forums in connection with other conventions, to which the Applicant refers in its Written Statement, where France was in fact describing the *general* rules of its domestic law relating to the powers of the public prosecutor.

24. The second category of obligations invoked by the Applicant concerns the criminalization of money laundering and the establishment of criminal jurisdiction in that area. They are contained in Articles 6 and 15 of the Convention [slides 5 and 6: Art. 6, para. 1].

25. Once again the Republic of Equatorial Guinea resorts to its usual technique of confusing different concepts. In its Written Statement it argues, at considerable length[42], that the adoption of the necessary measures refers to legislation "as interpreted and applied in practice"[43]. It then claims that such practice must extend not only to immunities in general, but also to the assessment made by the French authorities of the immunities alleged by Mr. Teodoro Obiang Mangue in ongoing judicial proceedings. The application of general rules to a specific case does not fall within the scope of the Convention, however, what is more, Articles 6 and 15 are silent about immunities [end of slides 5 and 6. Slide 7: Art. 15, para. 1 (extract)].

26. The Written Statement of the Republic of Equatorial Guinea is, moreover, inconsistent. It quite rightly describes the obligation in Article 15 as being "to establish criminal jurisdiction"[44]. That is indeed the content of the obligation invoked: to ensure that such jurisdiction, on account of the various different bonds of attachment, is indeed *established* in the internal legal order. That is as far as it goes. Neither Article 15 nor Article 6 relates to the initiation of proceedings in particular cases on the basis of the jurisdiction thus established. The role of international law is solely to criminalize money laundering in domestic law and to establish the corresponding bases of jurisdiction.

27. As well as attempting to stretch the conventional obligations, with scant regard for the terms of the Convention, the Applicant puts forward only one other argument to establish a link with immunities, and it does so solely in connection with Article 15. That argument is based not on

[42] WSEG, paras. 2.42-2.51.

[43] *Ibid.*, para. 2.42.

[44] *Ibid.*, para. 2.40.

an interpretation of the provision concerned, but on a report presented by the United Nations Secretary-General at the Conference of the Parties to the Palermo Convention[45]. The report takes no legal position. It merely describes the responses made by certain States to a questionnaire. The Republic of Equatorial Guinea explains neither the legal value of the report, nor on what basis it believes that it should be taken into consideration for the purposes of interpreting Article 15 of the Palermo Convention in accordance with the customary rules of treaty interpretation. The French Republic, for its part, abides by the general rule of interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties, in other words the ordinary meaning of the terms of Article 15, taken in their context and in light of the object and purpose of the treaty. Article 15 says nothing about immunities, and the Palermo Convention seeks merely to harmonize legislation relating to certain offences and to enable judicial co-operation [end of slide 7].

28. The Republic of Equatorial Guinea concludes its observations on the criminalization of money laundering and the establishment of criminal jurisdiction in that area with a cryptic comment on "the overextension of French criminal jurisdiction". It goes so far as to assert, entirely without foundation, that France recognizes the Court's jurisdiction in this regard[46]. It is worth recalling that in its Preliminary Objections France explicitly challenged the comments made by
27 Equatorial Guinea about the jurisdiction of the French courts. It is "patently clear", it wrote, that they go "far beyond the subject-matter of the dispute"[47]. Until then, Equatorial Guinea's remarks on this matter had been presented as being linked solely to Article 4, read independently. The fact that they are now being made in connection with Article 15 does not alter France's position: the jurisdiction of the French courts does not form part of the dispute submitted to the Court. As the Agent recalled, that dispute, as defined in Equatorial Guinea's Application, relates solely to the immunity of Mr. Teodoro Obiang Mangue and to the status of the building at 42 avenue Foch.

29. Thirdly, the Applicant invokes Articles 12 and 14 of the Convention [slide 8: Art. 12, paras. 1-2] regarding the confiscation, seizure and disposal of the building located at 42 avenue Foch. It claims that the conventional obligations establish the Court's jurisdiction to entertain the

[45] WSEG, para. 2.58.

[46] *Ibid.*, para. 2.60.

[47] POF, para. 45. See also para. 57.

claims relating to the diplomatic immunity of that building and to the immunity of State property [end of slide 8. Slide 9: Art. 14, para. 1]. By so doing, the Republic of Equatorial Guinea again creates confusion: Articles 12 and 14 provide solely for the establishment by the States parties of a general legal framework, enabling the seizure, confiscation and disposal of the proceeds of the offences covered by the Convention. French law has such a framework [end of slide 9].

30. In support of its contention that the scope of the conventional obligations should be extended to international immunities, the Republic of Equatorial Guinea also mentions an "interpretive note" on Article 12 proposed by the Ad Hoc Committee on the Elaboration of the Convention [slide 10: Art. 12, paras. 1-2 (again)][48]. This note, whose status is unclear, is not included in the text of the Convention. Its wording is rather convoluted, since it uses the conditional and relates not to the Convention itself but to the *travaux préparatoires*. It states that "[t]he *travaux préparatoires* should indicate" that the interpretation of the article "should" take account of a principle concerning the immunity of State property[49]. This element in the negotiations, concerning what the *travaux préparatoires* should be, admittedly mentions the immunity of certain property. Nevertheless, the text of the Convention was not modified and

28 Article 12 does not relate to immunities. One need look no further than the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties to be convinced of this. As Article 32 of that same Convention provides, when interpreting a text, recourse to supplementary means of interpretation is only justified if the methods in Article 31 leave the meaning ambiguous or obscure, or lead to a result which is manifestly absurd or unreasonable. That is not the case here: the clear meaning of the terms of Article 12 is a harmonization of the legal systems of the States parties to enable confiscation and seizure, nothing more [end of slide 10].

31. The violations of the Convention alleged by the Applicant in the fourth and final section of its Written Statement concern judicial co-operation. It is only in that Written Statement that any such violations are mentioned. No doubt the Republic of Equatorial Guinea, aware of the weaknesses of its arguments based on the Palermo Convention, was seeking to increase its chances

[48] WSEG, para. 2.65.

[49] United Nations doc. A/55/383/Add.1, para. 21.

by extending the list of violations supposedly committed by the French Republic. However, no link is established in this regard between the present dispute and the provisions of the Convention.

32. The first claim made is that France "failed to take account of information provided by the authorities of Equatorial Guinea since 2010, and more recently on 19 January 2017, according to which none of the predicate offences alleged against the Vice-President of Equatorial Guinea have been committed in Equatorial Guinea"[50]. By failing to take account of that information, France is said to have breached Article 4, Article 15, paragraph 5, and Article 18, paragraph 1, of the Convention [slide 11: Art. 15, para. 5].

33. What do these assertions have to do with the subject-matter of the dispute, namely the immunity of Mr. Teodoro Obiang Mangue and the status of the building at 42 avenue Foch? Nothing at all. Here too, the Republic of Equatorial Guinea is seeking to broaden the dispute, which in fact concerns neither the jurisdiction of the French courts to prosecute an offence of money laundering committed on French territory, nor the relationship between money laundering
**29** offences and so-called "predicate" offences, and still less the actions of a person in a given case. The argument therefore cannot be accepted.

34. Furthermore, Equatorial Guinea suggests that it was incumbent on the French judicial authorities to act in a certain way following that communication. Yet, Article 15, paragraph 5, speaks only of consultation "as appropriate"; in particular, it lays down no obligation to put an end to proceedings at the request of another State [end of slide 11. Slide 12: Art. 18, para. 1]. Article 18, paragraph 1, which is also mentioned, relates, for its part, to mutual legal assistance: we fail to see what this has to do with the jurisdiction of the French courts [end of slide 12].

35. A second claim relating to judicial co-operation between France and Equatorial Guinea is made for the first time in the Written Statement of 31 July 2017. It concerns France's request for mutual legal assistance of 14 November 2013, which is said to have been "made in a manner contrary to Article 4 of the Convention"[51]. In its Application, however, Equatorial Guinea never alleged that a dispute with France existed on that subject. It was in connection with the institution of the legal proceedings that it invoked an alleged "violation of the immunity" of

[50] WSEG, para. 2.70.

[51] WSEG, para. 2.71.

Mr. Teodoro Obiang Mangue[52]. The manner in which the request for mutual assistance of 14 November 2013 was made therefore falls outside the scope of the dispute submitted to the Court.

36. What is more, Equatorial Guinea refers only to Article 4 of the Convention, leading us into the realms of speculation: is that article invoked as an independent obligation, or in connection with Article 18? If it is the former, we know that Article 4 only applies to the performance of a specific obligation; if the latter, it would be necessary to state which specific obligation of Article 18 was at issue and formed the subject of an actual dispute. In fact, when the French judges sent a request for mutual legal assistance to the Equatorial Guinean judicial authorities they were not implementing any conventional obligation whatsoever: they were merely exercising their right

30 to use a tool of international judicial co-operation. For their part, the Equatorial Guinean judicial authorities had every opportunity to make known their position on Mr. Teodoro Obiang Mangue's possible immunity.

37. In conclusion, none of France's obligations under the Convention against Transnational Organized Crime is at issue in the dispute brought before this Court by the Republic of Equatorial Guinea. The Palermo Convention cannot establish the Court's subject-matter jurisdiction in the present case over any of the claims made.

Mr. President, this concludes my presentation. I would like to thank the Members of the Court for their attention and request that you give the floor to Professor Pierre Bodeau-Livinec, who will set out the position of the French Republic on the Vienna Convention on Diplomatic Relations.

The PRESIDENT : Thank you. Before calling on Professor Pierre Bodeau-Livinec, I think it is the appropriate time to take a 15-minute break. The sitting is suspended.

*The Court adjourned from 11.15 a.m. to 11.30 a.m.*

The PRESIDENT: Please be seated. The hearing is resumed and I give the floor to Professor Bodeau-Livinec.

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[52] AEG, para. 3.

Mr. BODEAU-LIVINEC:

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

2. Professor Ascencio has just demonstrated that the Court lacks jurisdiction to entertain Equatorial Guinea's claims on the basis of the Palermo Convention. It now falls to me to examine whether the Court has jurisdiction to adjudicate on the merits of the claims which Equatorial Guinea seeks to found on the Optional Protocol to the Vienna Convention on Diplomatic Relations. Article I of that Protocol provides[slide 1]:

> "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."

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3. In its observations on the preliminary objections, Equatorial Guinea describes France's reasoning as being "at best confused"[53] in respect of the question at hand, namely whether there is a dispute between the two States arising out of "the interpretation or application of the [1961] Convention", which falls, as such, "within the compulsory jurisdiction of the International Court of Justice"[54] pursuant to Article I of the Optional Protocol. I will cite the most critical passage of Equatorial Guinea's observations on this point:

> "On the one hand, France contends that the dispute must fall under the provisions of the [Convention]; on the other, it argues that the question of whether the building should enjoy immunity is excluded on the pretext that it is not the true subject-matter of the dispute. The criterion is either that the dispute must fall under the provisions of the Convention, or that it must be the 'real dispute', which is, moreover, undefined."[55]

4. In truth, there is neither confusion nor contradiction in France's argument. France simply reproduces and applies the Court's well-known jurisprudence. In the case concerning *Fisheries Jurisdiction*, the Court observed that, when "disagreements arise with regard to the real subject of the dispute with which [it] has been seised"[56], it is for the Court itself "to determine on an objective

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[53] See WSEG, para. 3.6.

[54] Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, 18 April 1961, *United Nations Treaty Series (UNTS)*, Vol. 500, p. 241.

[55] WSEG, para. 3.6.

[56] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29.

basis the dispute dividing the parties, by examining the position of both parties . . . The Court will itself determine the *real dispute* that has been submitted to it"[57].

5. Similarly, it is not France which "interprets the need for a connection between the dispute and the Convention as requiring the Applicant to prove that the dispute falls 'under the provisions of the Vienna Convention'"[58]. It is the Court's jurisprudence which requires it. Indeed, in its Judgment on the preliminary objection raised by the United States in the *Oil Platforms* case, the Court explained that, when

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> "the Parties differ on the question whether the dispute between the two States . . . is a dispute 'as to the interpretation or application' of [a] Treaty[,] . . . the Court 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"[59].

6. Thus, contrary to what is suggested by Equatorial Guinea, the "real dispute" criterion and the treaty "provisions" criterion are not mutually exclusive; they form a logical sequence: for the Court's jurisdiction *ratione materiae* to be established on the basis of the Protocol to the Convention of 18 April 1961, the "real dispute" between the Parties must fall "within the provisions" of that Convention. However, this is not the case here: first, the question actually dividing the Parties — namely the legal status of the building at 42 avenue Foch in Paris — is in no way governed by the Vienna Convention (I); second, and contrary to what the Applicant wants the Court to believe, there is no dispute between the two States regarding the inviolability of the premises of Equatorial Guinea's diplomatic mission in France (II). These, Mr. President, are the two points, that I now propose to address in turn [end of slide 1].

## I. THE REAL DISPUTE BETWEEN EQUATORIAL GUINEA AND FRANCE CONCERNING THE BUILDING AT 42 AVENUE FOCH DOES NOT FALL WITHIN THE PROVISIONS OF THE VIENNA CONVENTION

7. Members of the Court, what is the real subject-matter of the dispute between Equatorial Guinea and France with regard to the building at 42 avenue Foch in Paris? According to

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[57] *Ibid*., pp. 448-449, paras. 30-31; emphasis added.

[58] WSEG, para. 3.6.

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

well-established jurisprudence, which was cited again recently in the Judgment in the case concerning *Obligation to Negotiate Access to the Pacific Ocean*:

> "It is for the Court itself . . . to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim' (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30)."[60]

8. In the present proceedings, it is clear that the "real issue in the case" — and the only issue between Equatorial Guinea and France regarding the building at 42 avenue Foch — is whether that
**33** building should be considered as forming part of Equatorial Guinea's diplomatic premises during the critical period. Was it part of those premises when proceedings were initiated against Mr. Obiang Mangue in France, on 1 December 2010[61]? Or when the court-ordered searches were being conducted? Or when the building was attached on 19 July 2012? Equatorial Guinea claims that was, although the exact date on which it allegedly acquired that status has varied considerably. France, for its part, has consistently refuted this. There is thus indeed a dispute between the Parties on this point. But, for the Court to have jurisdiction over this dispute on the basis of the Optional Protocol to the 1961 Convention, the violation which France is said to have committed by not recognizing that hypothetical status must fall within the Conventions provisions. This is not so, Mr. President, as I will now attempt to show.

9. As I recalled at the start of my presentation, in the *Oil Platforms* case, the Court set out the criterion to be used to establish its jurisdiction when the parties differ on the question of whether the dispute between them relates to the interpretation or application of a treaty. In such cases, the Court cannot limit itself to noting the Parties' disagreement, but "must ascertain whether the violations of the Treaty . . . pleaded . . . do or do not fall within the provisions of th[at] Treaty"[62].

10. What is now commonly referred to as the "*Oil platforms* test" is well known and has also inspired other courts and tribunals. For example, the International Tribunal for the Law of the Sea

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[60] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26.

[61] See the judgment of the Paris *Tribunal correctionnel*, 32nd *Chambre correctionnelle*, 27 October 2017, p. 16.

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

applied it in the recent *Louisa* and *Norstar* cases, in order to assess its jurisdiction *ratione materiae*. The Tribunal thus explains that:

> "in order for [it] to determine whether a dispute between the two Parties in the present case concerns the interpretation or application of the Convention, the Tribunal must establish a link between the facts advanced by [the Applicant] and the provisions of the Convention referred to by it and show that such provisions can sustain the claims submitted by [the Applicant]"[63].

**34** In both of these cases, the Tribunal systematically applied this condition to each of the provisions expressly relied on by the Applicant. In the first, the *Louisa* case, it concluded that "no dispute concerning the interpretation or application of the Convention existed between the Parties at the time of the filing of the Application and that, therefore, it ha[d] no jurisdiction *ratione materiae* to entertain the present case"[64]. In the second, the *Norstar* case, the Tribunal considered that only two of the many provisions of the Convention invoked by Panama were relevant to the proceedings[65].

11. As these examples show, the *Platforms* test works perfectly well and should lead to a rigorous examination of the actual links between the alleged violations and specific provisions of the treaty in question. In its observations, however, Equatorial Guinea merely states that

> "[its] Memorial invokes the treaty basis of the Court's jurisdiction, as well as the relevant treaty provisions whose interpretation and application underlie the dispute between the two Parties. This is what is required of a party that seises the Court on the basis of a treaty clause"[66].

12. The *Platforms* test requires more than that, however: it is incumbent on the applicant to demonstrate that the alleged violations are capable of falling within the provisions of the treaty on which it relies, here the 1961 Vienna Convention on Diplomatic Relations. Equatorial Guinea never achieves this, because it fails to show how France, by refusing to recognize the diplomatic status of the building at 42 avenue Foch, might have violated a specific provision of the Vienna Convention.

13. At this stage, I think it would be useful to return to a somewhat revealing statement made by the Applicant in its observations. When recalling the definition of "premises of the mission" set

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[63] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, para. 110. See also *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 34, para. 99.

[64] *Ibid*., p. 46, para. 151.

[65] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, para. 132.

[66] WSEG, para. 3.3.

out in Article 1 (i) of the Convention, Equatorial Guinea states the following: "Although Article 1 (i) does not specify a procedure for establishing premises of a diplomatic mission, there is
35 by no means a legal void, as France would like to suggest"[67]. But, Mr. President, France has never sought to argue anything of the kind and, what is more, the Applicant is hard pressed to substantiate this claim with an adequate reference. We have neither said nor insinuated such a thing, for one simple and important reason: if the Convention does not set up a régime for establishing premises of a diplomatic mission — which Equatorial Guinea accepts — it is because it does not seek to govern that issue. Whether a particular building is reserved for diplomatic use is a question that remains outside the scope of the Convention. This does not mean that there is a legal void.

14. In fact, all that needs to be done to resolve the problem manufactured by Equatorial Guinea is to read the Preamble of the 1961 Convention. Codification treaties, such as the Vienna Convention on the Law of Treaties or, more recently, the United Nations Convention on Jurisdictional Immunities of States and Their Property, very often state in their preamble that "the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention"[68]. The 1961 Convention, like the 1963 Convention on Consular Relations, contains a similar introductory statement, albeit more precisely expressed [slide 2]: "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention"[69].

15. The distinction that is made is thus crystal clear; it leaves no legal void regarding the question at hand. Either the conditions under which a State must recognize the diplomatic purpose of a particular building are expressly governed by the provisions of the Convention, or they are not, and must therefore remain a matter of customary law. In the first instance, it would be natural to consider that a dispute between two States concerning the recognition of a building's diplomatic

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[67] *Ibid.*, para. 3.14.

[68] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, final paragraph of the Preamble. See also, by way of example, the final paragraphs of the Preambles of the Convention on Special Missions of 8 December 1969, the Vienna Convention on the Law of Treaties of 23 May 1969 and the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978.

[69] Vienna Convention on Diplomatic Relations, 18 April 1961, final paragraph of the Preamble.

status might fall within the provisions of the Convention; in the second, however, such a conclusion will prove impossible. [End of slide 2]

**36** 16. In an attempt to circumvent this obstacle, Equatorial Guinea proposes a reading of Article 1 (i) of the Vienna Convention which is audacious, to say the least. That final paragraph, which concludes an article devoted solely to the definition of the terms used in the treaty, reads as follows: [slide 3]

> "(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."

What we have here, Members of the Court, is a "descriptive"[70] provision, as noted by an eminent specialist in diplomatic law. Paragraph (i) has no prescriptive scope, in so far as it does not seek to establish a particular procedure that could be used to determine when and how buildings may acquire the status of "premises of the mission". As observed by Professor Eileen Denza, the author I have just cited, "[t]he one definition contained in Article 1 which is clearly objective in character is the definition of 'the premises of the mission'"[71].

17. However, Equatorial Guinea seeks to draw some quite unexpected conclusions from this simple, objective definition. After first arguing that paragraph (i) "*may* be understood as entitling the sending State to provide its own definition of the premises of its diplomatic mission"[72], it goes on to state more directly that, in its view, "Article 1 (i) of the [Convention] establishes that the premises used for diplomatic services are those that are designated as such by the sending State to the receiving State"[73]. Thus, it considers that Article 1 (i) fixes what it describes as a "declaratory"[74] régime for establishing premises of a diplomatic mission, a régime which should be understood as follows:

> "As soon as a building is designated for the purposes of a diplomatic mission by the sending State — at least in the absence of clear and undisputed conditions imposed

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

[71] *Ibid*.

[72] WSEG, para. 1.61; emphasis added. See also para. 3.15.

[73] *Ibid*., para. 1.63.

[74] *Ibid*., para. 3.14.

37 by the receiving State on all sending States, without discrimination — the receiving State must recognize its inviolability."[75]

For Equatorial Guinea, the conclusion is simple: since France does not agree with this "declaratory" theory, there is "undeniably a dispute between the Parties over the interpretation of Article 1 (i)"[76] of the Convention.

18. Members of the Court, this presentation of Article 1 (i) beggars belief. You need only re-read the wording of the provision in front of you to realize that it in no way sanctions that "declaratory" theory. In proposing such a ridiculous and implausible interpretation of paragraph (i), our distinguished opponents are simply seeking to manufacture a dispute capable of falling within the provisions of the Vienna Convention.

19. Mr. President, the question before us is anything but a problem of interpretation of the Vienna Convention. As I recalled earlier, there is indeed a dispute between the Parties concerning the legal status of the building at 42 avenue Foch. However, the Convention contains no provision establishing the conditions under which recognition of a particular building's diplomatic status should take place. The régime for identifying diplomatic premises is a question governed by State practice, outside the Convention. Consequently, the dispute between Equatorial Guinea and France regarding the building at 42 avenue Foch does not fall within the provisions of the 1961 Convention; it is not subject to the jurisdiction of the Court under the procedure provided for in Article I of its Optional Protocol. [End of slide 3]

20. What is more, that Protocol confers no jurisdiction on the Court to entertain alleged violations of customary obligations applicable to diplomatic relations. Therefore, I will not set about identifying such rules. I will simply recall that it is the sovereign prerogatives and powers normally exercised by the receiving State on its territory — and not those of the sending State — which are circumscribed and limited by the granting of diplomatic status to a particular building.

38 Under customary law, "[r]estrictions upon the independence of States cannot . . . be presumed"[77]: in the area we are discussing today, your predecessor's famous *dictum* still holds true. To claim

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[75] *Ibid.*

[76] *Ibid*., para. 1.63.

[77] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18.

otherwise is to commit an abuse of right. This is what Professor Pellet, whose presentation will follow mine, will show in due course.

## II. NO DISPUTE EXISTS BETWEEN EQUATORIAL GUINEA AND FRANCE CONCERNING THE REGIME OF INVIOLABILITY PROVIDED FOR BY THE VIENNA CONVENTION

21. Before I give the floor to him, I must also make it clear, Members of the Court, that there is no dispute between Equatorial Guinea and France concerning the other provisions of the Vienna Convention relied on by the Applicant. This is the second element of my statement to the Court this morning. In truth, Equatorial Guinea is a little vague when it comes to identifying the precise articles of the Convention which it intends to use to prove that France committed the violations it claims. I will do my best not to try to "psychoanalyse the statements or the silence of Equatorial Guinea"[78], as it rather oddly accused France of doing in its observations, and I will confine myself to citing the most significant passages of its argument on this point.

22. The Application instituting proceedings begins with a description of the subject-matter of the dispute. The relevant passage here is as follows:

> "The dispute between Equatorial Guinea and France, arising from certain ongoing criminal proceedings in France, concerns . . . the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission *and as State property* . . . To date, these proceedings have also resulted, *inter alia*, in the attachment of the building located at 42 Avenue Foch in Paris, which is the property of Equatorial Guinea and used for the purposes of its diplomatic mission in France. These proceedings *violate the Vienna Convention* on Diplomatic Relations of 18 April 1961"[79].

23. Mr. President, this statement seems to me to invite two comments straight away. First, the question of whether the building at 42 avenue Foch is or is not the property of the State of Equatorial Guinea is irrelevant in the light of the régime established by the Vienna Convention. As
**39** the Applicant itself points out in its observations: "neither the VCDR nor any other rule of international law provides that every State must own the premises of its diplomatic mission"[80]; there is thus no difference between the Parties on this point.

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[78] See WSEG, para. 3.23.

[79] See AEG, p. 1, paras. 2-3; emphasis added.

[80] WSEG, para. 3.24.

24. Secondly, Equatorial Guinea's written pleadings clearly show to what extent it links the fate of the building at 42 avenue Foch with the criminal proceedings in France against Mr. Teodoro Nguema Obiang Mangue. The sole purpose of the attempt to hastily disguise the building as diplomatic premises was to shield it from the consequences of this prosecution; Professor Pellet will come back to this in a few minutes. For now, all that needs to be said is that the Vienna Convention does not, any more than the Palermo Convention, provide a basis of subject-matter jurisdiction enabling the Court to assess the lawfulness of the French criminal proceedings.

25. Further reading of the Application instituting proceedings fails to provide any clearer idea of the legal basis for the claims against France. Equatorial Guinea simply says that:

> "by 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*"[81].

Equatorial Guinea is scarcely more forthcoming in its Memorial: it merely states that "[t]he 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"[82]. I will say no more about Article 1 (i), since it does not impose any obligation on France to recognize the diplomatic status of a given building and therefore is no help to the Applicant. Before turning to Article 22, however, I shall say a few words about the other provisions of the Convention, which are hinted at in the Memorial without ever being expressly identified. Equatorial Guinea's observations shed light on this mystery, in terms which are certainly worth quoting:

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> "As consistently maintained by Equatorial Guinea, this dispute concerns not only Article 1 (i) and Article 22 of the VCDR, but other provisions of the Convention as well. The question of whether premises constitute 'premises of the mission' is also relevant when it comes to applying provisions such as Article 20 (flag and emblem of the sending State), Article 21 (facilitation of the acquisition of premises) and Article 23 (exemption from taxes)."[83]

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[81] AEG, p. 11, para. 38; emphasis added.

[82] Memorial of the Republic of Equatorial Guinea ("MEG"), p. 78, para. 5.46; emphasis added. See also WSEG, para. 0.9.

[83] WSEG, para. 1.57.

26. Members of the Court, whatever next! Equatorial Guinea has never previously claimed to have a dispute with France over the interpretation or application of Articles 20, 21 and 23 of the Vienna Convention. The only mention of Article 20 is in the Memorial, to support Equatorial Guinea's assertion that it has "the freedom to place on a building any sign that enables officials of the receiving State to identify the premises of its diplomatic mission"[84]; it makes no claim anywhere that France contravened this. The same applies for Article 21, which is only mentioned in the Applicant's written pleadings to point out that the sending State does not have to own the premises of its diplomatic mission[85], which France has never disputed. As for Article 23, finally, we have not found any trace of this until it was suddenly mentioned — without any substantiation — in the passage of the observations which I have just cited. So even if Equatorial Guinea were seeking to widen the subject-matter of the dispute unreasonably, there is, on the basis of those three provisions, no alleged violation capable of falling within the provisions of the Vienna Convention. The dispute which Equatorial Guinea is trying to bring before you on those points quite simply does not exist.

27. In your Order indicating provisional measures, you simply and cautiously noted "that the rights apparently at issue may fall within the scope of Article 22 of the Vienna Convention, which
**41** guarantees the inviolability of diplomatic premises"[86] without considering other provisions of the Convention. It is this article that I shall now examine, and more particularly whether its application is really in dispute between the Parties. For the sake of clarity, the text of Article 22 is being shown on screen [start of slide 4]; it will not, however, be of any direct use since there is no dispute between the Parties that might fall within the provisions of this article either.

28. It is true, however, that Equatorial Guinea sets great store by Article 22 in its written pleadings. In its observations in particular, it states at the outset that "the Optional Protocol is of relevance to the dispute concerning the *inviolability* of the building located at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission in France"[87]. Further on, it states that

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[84] MEG, para. 8.18.

[85] *Ibid.*, para. 8.32.

[86] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II),* pp. 1164-1165, para. 67.

[87] WSEG, para. 0.6; emphasis added.

"[a]t this stage, however, the most important issue, and Equatorial Guinea's main concern, is the flagrant violation of Article 22 of the Convention"[88].

29. The Applicant's aim here seems clear: to persuade the Court that it is in dispute with France concerning the inviolability of premises associated with its diplomatic mission in Paris, a dispute which inherently relates to the interpretation or application of the Vienna Convention and, more specifically, Article 22 of that Convention. The strategy is to present the diplomatic nature of 42 avenue Foch as an established fact, as a way of drawing more attention to France's hypothetical violations of the régime of inviolability provided for by the Convention. What is more, this tactic is not peculiar to these present proceedings. To spell it out, it appears that Equatorial Guinea is now using the developments in the proceedings before the Court — even if this means shamelessly misusing them — to try to persuade people that the Article 22 régime applies to the building at 42 avenue Foch. Let me give you two examples, Mr. President. [End of slide No. 4]

30. I will start with the letter to which Mr. Alabrune, the French Republic's Agent, referred just now, which the President of the Republic of Equatorial Guinea sent to his French counterpart
**42** on 19 January 2017, just over a month after the Court's Order. I would refer, more specifically, to the "Note seeking a diplomatic resolution of the dispute" which accompanied this letter. Here is the full wording of the proposal it contains concerning 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."[89]

31. This proposal is strange, to say the least. In order to encourage France to give its much coveted recognition to 42 avenue Foch, Equatorial Guinea says that all it needs to do is to take note of the Order indicating provisional measures issued by the Court, as if that Order had established the diplomatic nature of the building. This odd idea now appears to have become part and parcel of Equatorial Guinea's strategy. Here, as evidence of this, is a second example taken from Equatorial

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[88] *Ibid.*, para. 1.57.

[89] Letter from the President of the Republic of Equatorial Guinea to the President of the French Republic, 19 January 2017, reproduced in Annex 4 to the WSEG, p. 144; emphasis added.

Guinea's official correspondence. In a Note Verbale which it sent to the Protocol Department of the French Ministry of Foreign Affairs on 6 July 2017 to protest against the continuation of the criminal proceedings in France against Mr. Obiang Mangue, Equatorial Guinea once again claims that the Court's Order, "which is binding on France, obliges it to ensure the protection and inviolability of the aforementioned building *as premises of the diplomatic mission of Equatorial Guinea*"[90]. So if I understand this correctly, it is the Court, and no longer just Equatorial Guinea, which demands that France recognize the diplomatic nature of the building at 42 avenue Foch.

32. This is clearly not true, Mr. President, and I apologize for the fact that, to prove it, I must cite the terms you referred to a short while ago, because these were the words used by the Court in its Order of 7 December 2016. The only provisional measure ordered reads as follows:

> "France shall, pending a final decision in the case, 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"[91].

**43**

33. This is the wording which the French authorities — whether the President of the Republic[92] or the relevant departments of the Ministry of Foreign Affairs[93] — used in their replies to the letter and Notes Verbales I have just mentioned. On that occasion, the Protocol Department of the Ministry noted 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"[94].

34. This goes to the very heart of the dispute between Equatorial Guinea and France. Trying to present it as a dispute about observing the inviolability of diplomatic premises is a ploy aimed at finding a conventional basis for the Court's jurisdiction. In support of this approach, the Applicant

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[90] Note Verbale No 300/2017, reproduced in Annex 9 to the WSEG, p. 163.

[91] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II),* p. 1171, para. 99; emphasis added.

[92] Letter from the President of the French Republic to the President of the Republic of Equatorial Guinea, 16 February 2017, reproduced in Annex 5 to the WSEG, p. 147.

[93] Note Verbale No 2017-158865/PRO/PIDC, 2 March 2017, reproduced in Annex 7 to the WSEG, p. 155, and Note Verbale No 2017-465600/PRO/PIDC, 18 July 2017, reproduced in Annex 10 to the WSEG, p. 167.

[94] Note Verbale No 2017-158865/PRO/PIDC, 2 March 2017, reproduced in Annex 7 to the WSEG, p. 155.

makes all manner of bald statements in its observations which it never takes the trouble to substantiate. According to the Applicant, "[t]he question of whether the building at 42 avenue Foch benefits from the Article 22 régime *can only fall* under the provisions of the VCDR. This is the dispute that Equatorial Guinea is submitting to the Court"[95]. Further on, Equatorial Guinea goes on to state that "[i]t *would be strange to conclude* that the question of whether a building constitutes the premises of the mission for the purpose of applying Article 22 does not arise out of the interpretation or application of the Convention"[96].

35. What I personally find strange, Mr. President, is the claim that a question which is not regulated by the Vienna Convention nevertheless falls within its provisions. As I said a few minutes ago, the preamble to the Convention is very clear [start of slide No. 5 (identical to slide
**44** No. 2)]: the Convention does not claim to govern all diplomatic law, and the questions which it does not "expressly" regulate remain governed by customary international law. That is the case with the conditions for establishing diplomatic premises: since these are not specified in the Convention, it is difficult to see how any failure to observe them could fall within its provisions. The only question that might fall within its scope, under Article 22, would be whether the régime of inviolability provided for has been correctly implemented by the receiving State in respect of premises of the sending State which are actually used for diplomatic purposes and recognized as such. But the building at 42 avenue Foch does not have that status. It is not sufficient to say, as Equatorial Guinea does, "that Article 22 of the VCDR applies to the building located at 42 avenue Foch, because that building forms part of the premises of its mission"[97], or to assert that the fact that the question of the building's status is preliminary to invoking Article 22 "is a matter of simple logic"[98]. The Court's jurisdiction *ratione materiae* must still be established, and it still has to be shown that the resolution of this particular question (of the status of the premises) does indeed come under the Vienna Convention. For all the reasons I have just described, this is clearly not the case. [End of slide No. 5]

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[95] WSEG, para. 3.7; emphasis added.

[96] *Ibid.*, para. 3.22; emphasis added.

[97] WSEG, para. 3.29.

[98] *Ibid.*, para. 3.31.

36. Mr. President, Members of the Court, thank you for your kind attention. Mr. President, I would ask you to give the floor to Professor Pellet, who will continue with the presentation of France's arguments.

The PRESIDENT: Thank you. I give the floor to Professor Alain Pellet. You have the floor.

## THE ABUSIVE NATURE OF THE APPLICATION

1. Mr. President, Members of the Court, at the hearings relating to the provisional measures requested by Equatorial Guinea, we showed:

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— that the activities of Mr. Teodoro Nguema Obiang Mangue which are at issue in this case could not, by any stretch of the imagination, be attached to the performance of any official functions[99];

— that these activities clearly did not fall within the scope of the 1961 Vienna Convention on Diplomatic Relations, and they could not benefit from any immunity thereunder[100];

— that this absence of immunity unquestionably extended to the movable and immovable property acquired in these circumstances[101] and,

— in particular, to the property at 42 avenue Foch[102].

2. Based on these observations, we came to the conclusion that not only did the Court lack jurisdiction to rule on Equatorial Guinea's claims considered one by one, but Equatorial Guinea's Application itself is inadmissible, it aims to cover activities which constitute an abuse of right, and the fact that Equatorial Guinea seised the Court for that purpose is a flagrant example of abuse of process[103]. In your Order of 7 December 2016, without expressly concluding that the seisin of the Court was abusive, you found that the Court did not have prima facie jurisdiction to rule on Mr. Obiang's immunity[104], while also considering that there existed between the Parties "a dispute

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[99] CR 2016/15, pp. 20-21, para. 9 (Pellet); CR 2016/17, pp. 8-11, paras. 3-9 (Pellet). See also POF, pp. 50-52.

[100] CR 2016/15, p. 19, paras. 4-15 (Pellet).

[101] CR 2016/15, pp. 26-28, paras. 19-23 (Pellet). See also POF, pp. 75-80.

[102] CR 2016/15, p. 10, para. 13 (Alabrune); p. 23, para. 16, p. 26, para. 19 (Pellet); CR 2016/17, pp. 12-13, paras. 11-12 (Pellet). See also POF, pp. 53-54.

[103] CR 2016/15, p. 31, paras. 29-31 (Pellet); CR 2016/17, p. 12, paras. 11-12 (Pellet).

[104] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II),* p. 1160, para. 50.

capable of falling within the provisions of the Vienna Convention and concerning the interpretation or application of Article 22 thereof"[105] — a position also taken prima facie. As the applicant State has maintained its claims in its Memorial[106], we in turn maintain both that the Court lacks jurisdiction to entertain the claims individually, as my colleagues and friends Hervé Ascencio and Pierre Bodeau-Livinec have shown, but also that, taken as a whole, the very Application by which Equatorial Guinea seises the Court constitutes an abuse of process. Equatorial Guinea feigns

**46** offence and, no doubt hoping to turn the tables, goes so far as to assert that "[i]n fact, presenting such arguments could in itself be considered an abuse of process"[107] — without actually considering any implications of this remark plucked out of the air.

3. Before recalling our position on the abusive nature of the seisin of the Court in these proceedings (II), I believe it is necessary to first clarify the substance and scope of the notions of abuse of rights and abuse of process, for which the conditions are fully satisfied in this case (I).

## I. THE CONDITIONS FOR TWO FORMS OF ABUSE — ABUSE OF RIGHTS AND ABUSE OF PROCESS — ARE SATISFIED IN THIS INSTANCE

4. First, Mr. President, to clear up a misunderstanding — be it genuine or it too plucked out of the air — I wonder how the interpreters are going to translate this word which seems to have no equivalent in English! — Equatorial Guinea is indignant that we have questioned its good faith[108]. I have always thought it rather futile to trade accusations of bad faith in your courtroom. In any event, in our oral arguments of October 2016, not once did we use the expression "bad faith". Nor will we use it today. Abuse of rights and abuse of process are both objective notions that can be inferred from the circumstances without it being necessary to make a value judgment on the intentions of those who commit them. The test is not good faith or bad, but whether or not the seisin of a court is reasonable in view of the full circumstances of the case. As one writer has put it, "[t]he 'reasonable judge' formulation is in itself sufficient"[109]. And therein lies our grievance

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[105] *Ibid*., para. 68.

[106] See MEG, pp. 181-182.

[107] WSEG, para. 1.69.

[108] WSEG, p. 4, para. 0.11, p. 30, para. 1.68.

[109] G.D.S. Taylor, "The Content of the Rule against Abuse of Rights in International Law", *British Yearbook of International Law*, Vol. 46 (1972-1973), p. 334.

against Equatorial Guinea: it is asking you to render a decision that no reasonable judge might be inclined to render[110].

47 5. This clarification having been made, I shall turn to two other matters which may appear to be essentially theoretical in nature but which have practical effects on our case and with regard to which our friends on the other side of the Bar have maintained some confusion:

— the first concerns the very definition of the notions of abuse of rights and abuse of process and how these notions relate to each other.

— The second concerns how the two notions are connected to our claim that the Court lacks jurisdiction.

### A. The confusion maintained by Equatorial Guinea with regard to the notions of abuse of rights and abuse of process

6. Mr. President, regarding definitions, one should note several things — which our opponents either seem to be unaware of or which they wish to ignore.

7. It should first be recalled that the notions of abuse of rights and abuse of process are not synonymous, even though they are closely related. According to the generally accepted definition, which I have taken from Salmon's *Dictionnaire*, an abuse of right 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"[111]. Abuse of process, however, is a particular form of abuse of rights; it occurs in the context of arbitral or judicial proceedings, when the holder of a right to institute proceedings or a procedural right[112] uses that right for a purpose other than that for which it was intended. Here, it is the seisin of the Court which is abusive.

8. Our case involves both notions (abuse of rights and abuse of process), but in different respects and at different moments: in sparing no effort to shield Mr. Obiang's conduct behind the cloak of immunity and in seeking to extend that immunity to the property he acquired by those

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[110] See *ibid.* citing Sir Gerald Fitzmaurice, p. 329.

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

[112] On the distinction, see Hervé Ascencio, "Abuse of Process in International Investment Arbitration", *Chinese Journal of International Law*, Vol. 13, 2014, p. 767.

means, the applicant State committed and continues to commit abuses of rights. Abuse of process,

**48** for its part, occurs with the seisin of the Court, whose mission is admittedly to settle the disputes brought before it; but such disputes must appear to be credible, and the basis invoked in support of the Court's jurisdiction must not be wholly artificial. Moreover, in the words of the "renowned public law specialist" which Equatorial Guinea delighted in quoting[113], "[t]he introduction of an action that has no chance to proceed, either because it clearly lacks a basis of jurisdiction or because the arguments on the merits are manifestly insufficient, may be viewed as an abuse of process"[114]. And that is precisely the case here. Equatorial Guinea's Application, submitted in the manifest absence of any legal remedy and with the aim of covering abuses of rights committed in other respects, constitutes an abuse of process[115].

9. By the same token — and I now return to the original abuses of rights, we certainly do not contest that the diplomats and diplomatic premises of a foreign State enjoy broad immunities; however, this applies to diplomats, which is clearly not the case of Mr. Obiang, whose assets are therefore also not covered by any diplomatic immunity. And this is all that matters, since, on the critical date (that of the first investigations), the building at 42 avenue Foch certainly could not be considered a diplomatic mission. On that date, no notification concerning the building's diplomatic nature had been sent to the Protocol Department of the French Ministry of Foreign Affairs. As the Paris *Tribunal correctionnel* noted in its judgment of [2]7 October 2017:

> "Findings made at the site confirmed that Teodoro NGUEMA OBIANG MANGUE enjoyed free disposal of the property.
>
> However, no official documents were discovered concerning the State of Equatorial Guinea or indicating that the building might serve as a venue for official representation."[116]

10. The attempt to quickly dress the building up as diplomatic premises was of course solely intended to avoid the consequences of these proceedings. The judgment of the Paris *Tribunal correctionnel* speaks volumes on this point: *18* luxury vehicles stored in the courtyard of the

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[113] WSEG, para. 1.75.

[114] Hervé Ascencio, "Abuse of Process in International Investment Arbitration", *Chinese Journal of International Law*, Vol. 13, 2014, p. 767.

[115] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 38.

[116] Paris *Tribunal correctionnel*, 32nd *Chambre correctionnelle*, 27 October 2017, p. 31.

**49** property and in nearby car parks were seized by the French judiciary on 28 September and 3 October 2011[117]; when the investigators returned to the site on 5 October, they discovered makeshift signs marked "*République de Guinée équatoriale — locaux de l'ambassade*" (Republic of Equatorial Guinea — Embassy premises). They had been affixed there the previous day[118].

11. There is one more element that the notions of abuse of rights and abuse of process share in common: it is assumed that abuse is not purely a question of fact; it appears only in the light of the circumstances in which it is committed.

12. In paragraph 1.69 of its written statement, Equatorial Guinea complains of the "variety" of arguments put forward by France in support of its argument of abuse of process. And it asserts that "[e]ach and every one of these arguments is wholly unfounded". We have shown, in our preliminary objections and in the presentations of the colleagues who went before me, that "each and every one of these arguments" is founded. But that is not what matters here; it is the accumulation, the conjunction, of these circumstances which makes it possible to claim abuse.

13. Likewise, contrary to Equatorial Guinea's rather oddly worded claim, we do not assert that there is an abuse of process "because France declined to accept the jurisdiction of the Court on the basis of *forum prorogatum* in 2012"[119], but we do note that there are many similarities between the Application filed on 13 June 2016 and the 2012 Application, which relied entirely on an appeal for *forum prorogatum*. And this is just one of the elements attesting to the strategy devised by Equatorial Guinea for the sole purpose of circumventing France's lack of consent to the Court's jurisdiction.

14. As Professor Ascencio has noted, the preoccupation with avoiding a systemic risk "is central in the concept of abuse of process"[120]. In attempting to abuse the diplomatic immunities guaranteed by the 1961 Convention, which, as the Court has had occasion to recall, are "of cardinal importance for the maintenance of good relations between States in the interdependent world of

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[117] See *ibid.*, p. 24.

[118] *Ibid.*, p. 31.

[119] WSEG, para. 1.73.

[120] H. Ascencio, "Abuse of Process in International Investment Arbitration", *Chinese Journal of International Law*, Vol. 13, 2014, p. 780.

**50** today"[121], and in submitting to your distinguished Court an artificial Application which flouts the principle of consent to jurisdiction, Equatorial Guinea generates a double systemic risk, not only to the law of diplomatic relations, but also to the law governing the judicial settlement of disputes. Since, as you have pointed out, "the seizing of the Court is one thing, the administration of justice is another"[122], which must be carried out with due consideration of the "inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore"[123].

### B. The false problems raised by Equatorial Guinea

15. Mr. President, Equatorial Guinea has repeatedly objected to France referring to an abuse of right or an abuse of process on the twofold (and rather inconsistent) pretext that, one, it is an issue for the merits and not a question of jurisdiction and, two, that in any event it concerns not the jurisdiction of the Court but the admissibility of the Application, which we have not explicitly contested in our preliminary objections. A false problem in both instances, Mr. President.

#### (a) *The distinction, immaterial in this instance, between jurisdiction and admissibility*

16. Let us begin with the second. In its Written Statement, Equatorial Guinea "recalled that France did not raise any preliminary objections regarding the admissibility" of its Application[124]. That statement is based on an extremely formalistic understanding of the rules on preliminary objections. It is true that Article 79, paragraph 1, of the Rules of Court currently in force, which concerns "preliminary objections", speaks of "[a]ny objection . . . to the jurisdiction of the Court or to the admissibility of the application, or other objection". However, for its part, Article 36, paragraph 6, of the Statute merely provides, with admirable concision, that, "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". "[W]hether the Court has jurisdiction": there is no question here of admissibility, even

**51** though that provision, Article 36, forms the legal basis of all preliminary objections, whether they relate to the Court's lack of jurisdiction, the inadmissibility of the application, or anything else. It is

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[121] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 42, para. 91.

[122] *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122.

[123] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.

[124] WSEG, para. 1.79.

that single provision which allows the Court to satisfy itself both of its own jurisdiction *stricto sensu* and of the validity of its seisin. Incidentally, the distinction between jurisdiction and admissibility was only introduced into the Rules of Court in 1972.

17. As the International Law Commission has rightly noted, "[t]he distinction between jurisdiction and admissibility is not always clear and the terms are sometimes used interchangeably"[125]. An examination of the Court's jurisprudence does not contradict that observation. As far back as the case concerning the *Mavrommatis Concessions*, the PCIJ held that it need "not consider whether 'competence' and 'jurisdiction', . . . and *fin de non-recevoir* should invariably and in every connection be regarded as synonymous expressions"[126]. And more recently, in the case of the *Northern Cameroons*, you did not find it "necessary to consider all the objections, nor to determine whether all of them are objections to jurisdiction or to admissibility or based on other grounds", observing that "[d]uring the course of the oral hearing little distinction if any was made by the Parties themselves between 'jurisdiction' and 'admissibility'"[127]. And that is entirely logical: whether you allow an objection to jurisdiction or to admissibility, the effect is the same: the consequence is that you may not rule on the merits, that you do not have "jurisdiction". Furthermore, the Court has consistently held that certain objections can be characterized as both

**52** objections to jurisdiction and objections to admissibility[128]. Moreover, whenever the problem has arisen in the past you have had no hesitation in recharacterizing the objection and examining its

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[125] Final report of the Study Group of the International Law Commission on the Most-Favoured-Nation clause, doc. A/70/10, *Yearbook of the International Law Commission*, 2015, Vol. II, p. [182], para. 167. See also: H. Thirlway, "The Law and Procedure of the International Court of Justice", *British Yearbook of International Law*, Vol. 71, 2000, pp. 80-81; R. Kolb, *La Cour internationale de Justice*, Paris, Pedone, 2010, pp. 227-231; C. Tomuschat, "Article 36", in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice. A Commentary*, Oxford, Oxford University Press, 2012, Second Edition, p. 647; M. Shaw, *Rosenne's Law and Practice of the International Court (1920-2015)*, Leiden/Boston, Brill/Nijhoff, 2016, Vol. II, pp. 873-874.

[126] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 10.

[127] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 27. See also *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 10; *Pajzs, Csáky, Esterházy, Judgment, 1936, P.C.I.J., Series A/B, No. 68*, p. 51; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 216, para. 43; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 23-24, para. 43.

[128] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 216, para. 43; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 23-24, para. 43. See also, for example, *Renée Rose Levy and Gremcitel S.A.* v. *Republic of Peru*, Award of 9 Jan. 2015, ICSID Case No. ARB/11/17, para. 181.

merits, without dwelling on any error of characterization which the objecting State may have committed[129]. Jurisdiction or admissibility, it makes virtually no difference to the conclusions that it behoves you to draw from the abuses of rights and process committed by the applicant State, or to the decision that they compel you to make: that the Court declines to hear the dispute on the merits.

18. Nor should you be detained further by another contention put forward by Equatorial Guinea, based on its apparent belief that the existence of an abuse of rights pertains exclusively to the merits of the case, and is irrelevant at this stage of the proceedings. Thus it asserts in its Written Statement that,

> "any allegation that Equatorial Guinea may have acted improperly in seeking to defend the rights conferred on it by international law . . . raises issues pertaining to the merits that cannot be addressed in these incidental proceedings"[130].

19. Were that the case, according to our opponents France would not be able to draw your attention, at this stage, for example, to the fact that Vice-President Obiang cannot benefit from diplomatic status[131], or to the chronicle of the alleged legal tribulations of the building at 42 avenue Foch[132]. These contentions demonstrate a failure to understand the very notion of an abuse of rights and its scope in two respects.

20. First, as I recalled a few moments ago[133], the existence of an abuse — be it of rights or of process — can only be confirmed by considering the circumstances in which it has been committed. In this instance, France requests you to find, in particular, that the bizarre circumstances in which the building located at 42 avenue Foch apparently became the Embassy of Equatorial Guinea in Paris make it impossible to take our opponents' assertions seriously in that regard. The act itself is abusive; Equatorial Guinea's line of argument is abusive; the referral of the case to this Court is also abusive.

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[129] See in particular *Interhandel (Switzerland* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 123, para. 48.

[130] WSEG, para. 1.76; see also paras. 1.81-1.82.

[131] CR 2016/16, pp. 8-9, paras. 5-8 [(Wood)], p. 24, paras. 7-8 [(Kamto)].

[132] WSEG, para. 1.83.

[133] See paras. 11-12 above.

21. In other words, it is not the individual elements which France has brought to this Court's attention, considered in isolation, that constitute an abuse of process. Taken as a whole, however, they establish that Equatorial Guinea's application to the Court is abusive, since it in fact forms part of a strategy to use the principle of diplomatic immunities as a contrivance for the benefit of an individual who is not a diplomat, and thereby to obstruct the criminal proceedings initiated against him in France and avoid the potential confiscation of the personal property he has acquired there[134].

22. In this context, I would also point out that in a letter, mentioned earlier, dated 19 January 2017 to his French counterpart, which has already been mentioned, the President of Equatorial Guinea expressed the view that the dispute that concerns us could be settled by applying the bilateral Agreement on the mutual protection of investments, which was concluded between the two countries in 1982[135]. There can be no clearer admission that the property in question is private property.

**(b)** ***The error made by Equatorial Guinea with respect to the consequences of an abuse of process***

23. Mr. President, the second error made by Equatorial Guinea concerns the effects of an abuse of process. By making this a question of substance, it intends to convince you that the penalty for such an abuse would not be a lack of jurisdiction on the part of the Court, but rather, it would seem, the engagement of the responsibility of the perpetrator of that abuse, with the attendant consequences, in particular with respect to reparation.

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24. That is not the case. France requests you to find that, by seising the Court, Equatorial Guinea has committed an abuse of process, the purpose of which is to have the Court provide cover for the applicant State's improper and abusive use of the law of diplomatic immunities. The penalty for such an abuse is not reparation, but in fact a lack of jurisdiction.

25. Admittedly, it so happens that hitherto this Court has not yet established an abuse of process; it has not therefore been able to draw practical conclusions from such a finding. However, you have never dismissed such an objection on the ground that it pertains to the merits of the case,

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[134] See para. 10 above.

[135] Letter from the President of the Republic of Equatorial Guinea to the President of the French Republic, 19 Jan. 2017, WSEG, Ann. 4, p. 144.

thereby acknowledging that an argument based on an abuse of process is admissible at the preliminary objections stage. If it is established, as it is in this case, it necessarily follows that the Court is without jurisdiction to entertain the Application[136].

26. More positively, in the field of investment law, where references to the notion of an abuse of process have become commonplace, the arbitral tribunals systematically conclude that they lack jurisdiction (or that the application is inadmissible) when they establish such an abuse. Professors Gaillard and Ascencio provide numerous examples of this in the studies which they have devoted specifically to this question[137]. By way of illustration, I shall cite the award handed down in 2009 by an ICSID tribunal in the case *Phoenix* v. *The Czech Republic*:

> "the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration.
>
> . . . . . .
>
> It follows from these findings that the Tribunal *lacks jurisdiction* over the Claimant's request"[138].

And more recently another ICSID tribunal, formed in the case *Renée Rose Levy* v. *Peru*, concluded that there was an abuse of process and held that "[t]herefore, the Tribunal *is precluded from exercising jurisdiction* over this dispute"[139].

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## II. EQUATORIAL GUINEA'S APPLICATION IS ABUSIVE IN TWO RESPECTS

27. Mr. President, Members of the Court, I have pointed out several times that the notion of abuse of rights was relevant in two respects in the context of this case. It is relevant because, by seising your Court, Equatorial Guinea is hoping that you will legitimize its stratagem of seeking to pass off 42 avenue Foch as diplomatic premises (A). It is also relevant because Equatorial Guinea

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[136] *Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957,* pp. 147-148; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 255, para. 38.

[137] E. Gaillard, "Abuse of Process in International Arbitration", *ICSID Review,* Vol. 32, 2017, pp. [17-37]; H. Ascencio, "Abuse of Process in International Investment Arbitration", *Chinese Journal of International Law,* Vol. 13, 2014, pp. 763-785.

[138] *Phoenix Action, Ltd.* v. *The Czech Republic,* Award of 15 Apr. 2009, ICSID Case No. ARB/06/5, paras. 144-145; emphasis added.

[139] *Renée Rose Levy and Gremcitel S.A.* v. *Republic of Peru,* Award of 9 Jan. 2015, ICSID Case No. ARB/11/17, para. 195; emphasis added.

has connected the case it has brought before you to artificial bases of jurisdiction, without a solid link to the facts of the case (B).

**A. Equatorial Guinea's Application seeks to consolidate an abuse of rights**

28. In actual fact, Mr. President, Equatorial Guinea has at no point attempted to rebut our position that its application to your distinguished Court seeks to consolidate an abuse of rights.

29. As France demonstrated in its Preliminary Objections, the use made by Equatorial Guinea of the provisions of the Palermo Convention and the Vienna Convention on Diplomatic Relations is abusive in this instance, whether in respect of the claim of immunity for Mr. Obiang or in respect of the building at 42 avenue Foch[140]. It is incumbent on the Court to call a halt to such an endeavour, which makes a mockery of the *raison d'être* of diplomatic immunities — and to do so at the preliminary objections phase, whose primary purpose is to prevent proceedings wrongly brought before it from being unduly prolonged[141].

30. As I had occasion to explain during the hearings on the request for the indication of provisional measures[142], and as France has shown in its preliminary objections[143], Equatorial Guinea is seeking to abuse its international rights and obligations in order to obstruct the judicial proceedings instituted in France or, in any event, to delay them for as long as is humanly possible.

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The sudden and unexpected conversion of a private residence to "premises of the mission" is an obvious example of this. The appointment of its owner to increasingly eminent political positions as the criminal investigation proceeded is also worthy of note. France is obviously not contesting these political decisions, which are purely domestic matters for Equatorial Guinea, but this contextual element is not entirely irrelevant. The comparative table showing the parallel developments in the French criminal investigation, Mr. Obiang's political career and the claimed uses of 42 avenue Foch are sufficiently concerning to constitute *(inter alia)* evidence of abuse which the Court should not tolerate. This table can be found at the last tab in your folder.

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[140] POF, pp. 37-39, paras. 80-86.

[141] See in particular *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, joint declaration of Judges Guillaume and Fleischhauer, pp. 141-142.

[142] See CR 2016/15, pp. 23-32, paras. 17-25 (Pellet).

[143] POF, pp. 37-40, paras. 80-88.

### B. Equatorial Guinea's Application is an abuse of the International Court of Justice

31. Mr. President, Equatorial Guinea's Application is abusive not merely because its purpose is abusive per se, but also because it is not founded on any reasonable legal basis. In this instance, the seisin of your Court is no more and no less than a means of using it as a sounding board, enabling the Applicant State to gain considerable publicity for its arguments, even though your lack of jurisdiction to entertain them is manifest — whilst doubtless harbouring the secret hope of slowing down the criminal proceedings brought in France, or even bringing them to a complete standstill.

32. Our opponents, who criticize France for having "an extraordinarily narrow view of the Court's jurisdiction"[144], make much of the existence of a dispute between the two States. And indeed, that is one thing about which there is no doubt whatsoever! But the fact that a dispute exists between two States does not suffice for the Court to have jurisdiction to settle it. The parties must also have given their agreement to this in one of the ways set out in Article 36 of the Statute. Might I venture to recall once again the famous phrase from the *Monetary Gold* case: "the Court can only exercise jurisdiction over a State *with its consent*"[145]? Without consent, there can be no jurisdiction . . .

57 33. However, neither of the conventions which Equatorial Guinea believes it can invoke in support of the Court's jurisdiction is able to establish the latter. All the less so because the applicant State disregards the very strong link which exists between what might at first glance appear to be two distinct chapters of our case: the criminal immunity claimed for Mr. Obiang, on the one hand, and the fate of the building at 42 avenue Foch, on the other.

34. In order to bring before the Court the first of these two chapters — which surely lies at the heart of the dispute opposing the Parties — Equatorial Guinea contrived to find a convention on which to hang its claim. For this purpose, it set its sights on the Palermo Convention. As the Court itself pointed out in its Order of 7 December 2016, it is quite plain that "the alleged dispute does not relate to the manner in which France performed its obligations under Articles 6, 12, 14 and 18

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[144] WSEG, para. 0.10 ; see also para. 0.12.

[145] *Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment, I.C.J. Reports 1954*, p. 32 ; italics added.

of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, appears to concern a distinct issue"; hence, your Court added, "*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"[146]. Of course, these are only *prima facie* findings, but nothing in the Written Statement or the oral arguments of Equatorial Guinea can lead you to reverse that position, which it is moreover not making any serious efforts to refute. Even in its Memorial, after recalling the terms of the Order, it confined itself to noting that "[t]his conclusion of the Court gave rise to differing views among the judges" and made the bald assertion, with no attempt to provide justification for this later on, that "[i]t does, however, consider that that provision incorporates rules of customary international law concerning such immunities"[147].

35. Equatorial Guinea appears to be slightly less cavalier in its Written Statement. Changing its mind, it states that it "agrees in part with what is stated in . . . paragraph [49 of the Order]", but it fails to conceal, as Hervé Ascencio has once again demonstrated[148], the extent to which the
58 invocation of the Palermo Convention as a basis of jurisdiction is contrived. I will not revisit this issue, except to point out that were one to follow Equatorial Guinea's rather convoluted reasoning, which hinges on Article 4, an infinite number of disputes, bearing no relation whatsoever to the Convention apart from the fact that they affect State sovereignty — if anyone knows what that actually means — would fall within the jurisdiction of the Court; that is most certainly not the meaning and scope of the provision in question. However, I should like to stress another point: as Equatorial Guinea itself acknowledges, that instrument is the only one it invokes in support of your Court's jurisdiction to entertain its claims in respect of Mr. Obiang's criminal immunity[149].

36. This much is indeed obvious: the 1961 Vienna Convention only concerns *diplomatic* immunities and, whatever his titles and however eminent his functions, Mr. Obiang is not a diplomat. There is no need to labour the point: the Optional Protocol, which provides that only

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[146] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 Dec. 2016, I.C.J. Reports 2016 (II),* paras. 49-50.

[147] MEG, pp. 63-64, paras. 5.9-5.10.

[148] See also POF, pp. 41-54.

[149] CR 2016/16, p. 10, para. 10 (Wood).

"[d]isputes arising out of the interpretation or application of the Convention"[150] may be brought before the Court, cannot provide any basis for the jurisdiction of your Court in this regard. Therefore, Members of the Court, you are not able to rule on the "criminal immunities" chapter of the case either.

37. Yet this is not the end of the matter, since it has a knock-on effect on the other "chapter", that concerning the building at 42 avenue Foch. The latter was acquired by Mr Obiang and that acquisition was one of the facts justifying the criminal proceedings brought against him. It is therefore impossible, and it is an abuse, to dissociate these two chapters: it was to evade the criminal proceedings brought against this individual, acting in a private capacity, that Equatorial Guinea sought to shield the building in question from the French judicial authorities by trying, against all reason, to pass it off as premises of its embassy. That is itself is an abuse. But in any event, you would be unable to rule on that aspect of the case without examining whether the proceedings are well-founded: you have no jurisdiction over those proceedings and yet they alone are at issue; the searches which took place at 42 avenue Foch are inseparable from them.

**59** 38. In paragraph 159 of our Preliminary Objections we stated that the Court's jurisdiction on the basis of the Vienna Convention (but this applies equally to the Palermo Convention) could only be established "if the Applicant were able to 'establish a reasonable connection between the Treaty and the claims submitted to the Court'". Equatorial Guinea reproaches us for introducing a "new criterion"[151] by so doing, one which is "irrelevant for establishing the Court's jurisdiction"[152]. However, we have not invented anything: all France has done is to quote the Judgment of the Court itself, on the subject of its jurisdiction, in the *Military and Paramilitary Activities in and against Nicaragua* case[153] . . .

39. Moreover, that criterion is entirely in line with the jurisprudence of this Court defining the limits within which it is possible to accept *prima facie*, at the preliminary objections phase, the

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[150] Art. 1.

[151] WSEG, para. 3.20.

[152] WSEG, para. 3.21.

[153] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 81. See also POF, p. 67, para. 159.

version of the facts given by an applicant[154]. However, in this case, the treaty provisions on which Equatorial Guinea would found its claims are patently not "of a sufficiently plausible character to warrant a conclusion that [Equatorial Guinea's] claim[s] [are] based on [the] Treat[ies]"[155] it invokes.

40. Mr. President, Members of the Court, it hardly matters whether the objection France has raised to the abuse of procedure committed by Equatorial Guinea relates to the jurisdiction of the Court or the admissibility of the application — or is perhaps even an objection which is not "strictly capable of classification" in either of those categories[156]. In any event, this objection prevents the Court from exercising jurisdiction in this case and is in addition to those presented by my two friends and colleagues, without overshadowing them.

**60** 41. Mr. President, Members of the Court, I should like to thank you for listening attentively to this presentation, which brings to a close the French Republic's first round of oral argument.

The PRESIDENT: And so, as you say, your presentation concludes France's first round of oral argument. The Court will meet again tomorrow, at 10 a.m., to hear Equatorial Guinea's first round of oral argument. The Court is adjourned.

*The Court adjourned at 12.55 p.m.*

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[154] See *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, , I.C.J. Reports 1996 (II)*, p. 810, para. 16 and separate opinion of Judge Higgins, pp. 856-857, paras. 32-35 ; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, pp. 140-141, para. 10.

[155] Cf. *Ambatielos (Greece* v. *United Kingdom), Merits, Judgment, I.C.J. Reports 1953*, p. 18.

[156] See *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 259, para. 22, and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p 463, para. 22. See also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 851, para. 49.