Traduction
Translation

CR 2018/4 (traduction)

CR 2018/4 (translation)

Mercredi 21 février 2018 à 16 h 30

Wednesday 21 February 2018 at 4.30 p.m.

8 The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of France on its preliminary objections. I will continue in English for a few moments.

Avant d'entamer l'audience de ce jour, je voudrais rendre solennellement hommage, au nom de la Cour, à la mémoire de M. le juge Mohamed Shahabuddeen, ancien membre de la Cour, qui nous a malheureusement quittés samedi dernier.

Né le 7 octobre 1931 à Vreed-en-Hoop, au Guyana, M. Shahabuddeen étudia le droit à l'Université de Londres, avant d'être admis au barreau en 1954 ; il travailla ensuite dans un cabinet au Guyana, et devint *Queen's Counsel* en 1966.

Après avoir exercé dans le secteur privé, M. Shahabuddeen allait mener une brillante carrière au service de l'Etat du Guyana, occupant successivement les charges de magistrat, conseiller de la Couronne, *Solicitor General* (de 1962 à 1973), *Attorney General* (de 1973 à 1987) et ministre de la justice (de 1978 à 1987). Il fut aussi ministre des affaires étrangères par intérim à plusieurs reprises, entre 1980 et 1987. Entre 1983 et 1987, il exerça les fonctions de premier vice-premier ministre et de vice-président du Guyana. Il fut en outre membre de nombreuses délégations guyaniennes lors de missions bilatérales et de réunions internationales, notamment à l'Assemblée générale des Nations Unies en 1972, à la conférence des Nations Unies sur la succession d'Etats en matière de traités en 1977, et à l'Assemblée générale de l'Organisation des Etats américains en 1981.

En parallèle, M. Shahabuddeen trouva le temps de poursuivre ses études supérieures à l'Université de Londres, obtenant un doctorat de philosophie en 1970 et un doctorat de droit en 1986.

En 1987, le juge Shahabuddeen fut élu membre de la Cour internationale de Justice, où il siégea de 1988 à 1997, participant à l'examen de seize procédures contentieuses et de trois demandes d'avis consultatifs, et soumettant dans ce cadre dix-neuf opinions ou déclarations. Doué d'une faculté exceptionnelle de traiter de domaines du droit aussi disparates que complexes, il apporta une importante contribution au travail de la Cour, au cours d'une période où celle-ci fut appelée à connaître d'affaires concernant des questions extrêmement variées, allant de la

délimitation terrestre et maritime à l'autodétermination, en passant par les problématiques de l'emploi de la force et de la licéité de la menace ou de l'emploi d'armes nucléaires.

9 Après son passage à la Cour, il siégea jusqu'en 2009 au Tribunal pénal international pour l'ex-Yougoslavie en qualité de juge puis, à deux reprises, de vice-président. Il fut ensuite brièvement juge à la Cour pénale internationale.

Le juge Shahabuddeen a été membre de nombreuses organisations et associations professionnelles dans le domaine du droit international et comparé. Il a ainsi été élu à l'Institut de droit international en 1993, avant d'en devenir membre titulaire en 1997 et membre honoraire en 2011. Il est l'auteur de maints ouvrages et articles d'intérêt général. Il a en outre reçu plusieurs distinctions honorifiques dans son pays, dont l'ordre de Roraima et le *Cacique's Crown of Honour*.

Travailleur acharné doublé d'un juriste émérite, le juge Shahabuddeen était tenu en haute estime par ses pairs à la Cour. Ceux-ci voyaient en lui un homme de conviction, qui, néanmoins, restait toujours ouvert à la discussion et prêt à participer aux travaux collégiaux de l'institution. Sa disparition représente une perte immense pour la justice et le droit internationaux.

Je vous invite à présent à vous lever pour observer une minute de silence à la mémoire de M. le juge Shahabuddeen.

*

Merci beaucoup. Veuillez vous asseoir. We thus resume today's hearing and I now give the floor to Professor Alain Pellet. You have the floor.

Mr. PELLET: Thank you, Mr. President. Mr. President, before starting my presentation, allow me to express my great sorrow at the sad news you have just announced. I was very fond of Mohamed Shahabuddeen, for whom I had friendship, respect and admiration. We stayed in contact after he left the Court.

INTRODUCTORY REMARKS

1. Mr. President, Members of the Court, it falls to me to introduce our second round of oral argument. Hervé Ascencio and Pierre Bodeau-Livinec will then revisit the reasons why the Court

lacks jurisdiction on the basis of the Palermo Convention against Transnational Organized Crime and the Vienna Convention on Diplomatic Relations, respectively. After making a few, brief concluding remarks, our Agent will then read out the Republic's submissions, as well as France's response to the question put by Vice-President Xue.

10 2. Mr. President, I will begin by saying a few words on the subject-matter of the dispute submitted to the Court by Equatorial Guinea, before re-examining in a more systematic way than we have done to date the chronology relevant to understanding the facts at issue and determining the critical date (or period), which plays a decisive role in this case.

1. Return to the subject-matter of the dispute

3. Mr. President, Equatorial Guinea's Application defines its subject-matter in the following terms:

> "The dispute between Equatorial Guinea and France, arising from certain ongoing criminal proceedings in France, concerns the immunity from criminal jurisdiction of the Second [now sole] Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, and the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property."[1]

According to the Applicant, the contested criminal proceedings violate "the Vienna Convention on Diplomatic Relations of 18 April 1961, the United Nations Convention against Transnational Organized Crime of 15 November 2000, and general international law"[2].

4. A first remark, which we believed obsolete until yesterday's hearing: the Court has no jurisdiction to apply general international law in this case, and the Applicant appeared to agree[3]. Thus, we were somewhat surprised yesterday morning to hear Sir Michael Wood accuse us of "ignor[ing] the fact that [Equatorial Guinea's] claim on the merits is that the Vice-President of the Republic of Equatorial Guinea, in charge of National Defence and State Security, is entitled *under customary international law* to immunity *ratione personae*"[4]. This will clarify matters,

---

[1] AEG, para. 2.

[2] *Ibid*., para. 3.

[3] WSEG, pp. 21-22, para. 1.44; p. 24, para. 1.55, and p. 31, para. 1.71.

[4] CR 2018/3, p. 13, para. 9 (Wood); emphasis added.

Mr. President: suffice it to say, for the umpteenth time[5], that the Court's jurisdiction is strictly limited to the interpretation and application of the two conventions invoked in Equatorial Guinea's Application; however, as the Court noted in its Order of 7 December 2016, the Palermo

11 Convention (and Article 4 in particular, on which Equatorial Guinea relies) "does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities"[6]. Thus, on this aspect of the case, there should be no doubt: the Court cannot rule on the immunities allegedly enjoyed by Mr. Obiang Mangue, since, by Equatorial Guinea's own admission, those immunities could derive only from customary international law, which the Court cannot apply in the present proceedings.

5. Equatorial Guinea's distinguished Agent also mentioned general international law, in even broader terms, when he described the dispute's subject-matter as concerning fundamental principles, without the slightest reference to either of the conventions supposed to apply in this case. Sir Michael went even further:

> "these proceedings . . . involve fundamental principles of international law . . . A judgment of this Court on the scope of immunities *ratione personae* and on the receiving State's obligations as regards diplomatic premises would assist States in these sensitive areas of the law"[7].

Two remarks in response to this call for "clarification", which is not without appeal for a professor — but we are not at university:

— first, the role of the Court is to settle the disputes submitted to it by applying international law, not to make the law, or to give legal consultations, even if, of course, its decisions may incidentally help to clarify difficult judicial questions; however, the Court can only do so if it is validly seised;

— and this leads me to my second remark on the Sir Michael statement I have just read out; on the heels of that declaration, my opponent and friend said: "We note that in two other cases

---

[5] See POF, paras. 5, 54-55, 64. See also CR 2018/2, p. 15, para. 13, and p. 16, para. 17 (Alabrune); p. 17, para. 2 (Ascencio); pp. 32-33, para. 8 (Bodeau-Livinec); p. 45, para. 2 (Pellet).

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

[7] CR 2018/3, p. 12, para. 5 (Wood).

involving similar issues and African countries, not so long ago, France did indeed accept the jurisdiction of the Court. It did so on the basis of *forum prorogatum*."[8]

12 Yes, Mr. President, France did accept the jurisdiction of the Court in those two cases (those introduced by Djibouti[9] and the Republic of the Congo[10], respectively). For its own reasons, it has not done so here.

6. Among the fundamental principles that Equatorial Guinea urges the Court to uphold, however, is one to which it gives very little consideration: the principle of consenting to the Court's jurisdiction. Yet this is a condition *sine qua non* to the exercise of the Court's jurisdiction — even if there are other, just as essential, principles in play, as was clearly and emphatically stated by this Court in its Judgment of 3 February 2006 in the case between the DRC and Rwanda: the fact that a dispute relates to compliance with a norm, albeit a peremptory one, "cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties."[11]

7. Mr. President, these appeals to general international law and fundamental principles betray a lack of confidence on the part of our opponents in the conventional bases of jurisdiction on which they also rely. We can see why. Professors Ascencio and Bodeau-Livinec will come back to this in a few moments.

2. The teachings of the chronology

8. Mr. President, our opponents and friends have shown great discretion when it comes to establishing the chronology of the relevant facts for the purposes of this case. At no point do they use the expression "critical date", and they are careful not to advance one. Without doubt, it is Mr. Tchikaya who has proved the most audacious in this regard: he foolishly declared that "the criminal proceedings against Teodoro Nguema Obiang Mangue began when an arrest warrant was

---

[8] *Ibid.*

[9] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177.

[10] Case concerning *Certain Criminal Proceedings in France (Republic of the Congo* v. *France).*

[11] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64.

issued against him on 13 July 2012 by the French investigating judges"[12]. While this is certainly a

13 "prosecution measure", as our opponent observes[13], it does not mark the start of the criminal proceedings, and one must go much further back to respond appropriately to the questions of jurisdiction that arise in the present case.

9. Why? Because the central question in our case is from what date might the building at 42 avenue Foch possibly be considered as "Embassy premises"? Today, France guarantees the inviolability of that building pursuant to the 2016 Order on the indication of provisional measures, but this does not prejudge its status of diplomatic mission. The question, however, is not about the building's *current* status. It is (and is only) about its status at the time of its "disguise" — ah, I know that this term is a source of dismay to our friends on the other side of the Bar, so let me rephrase: it is about its status at the time the building on avenue Foch, private residence of Mr. Obiang Mangue, then Minister for Agriculture and Forestry, was allegedly transformed into premises "used for the purposes of the mission", in the hope of allowing it to benefit from the régime of inviolability provided for by Article 22 of the 1961 Convention. If it cannot be regarded as "diplomatic premises" at that time, that is the end of the question. What happened after that date is in any event irrelevant *for the purposes of the present case*. However, it is worth asking about the situation *before* that date, because, if the residence fitted out by Mr. Obiang Mangue was used in a "personal capacity" at that time, the Vienna Convention on Diplomatic Relations is clearly inapplicable and the Optional Protocol to that Convention cannot constitute a basis for the Court's jurisdiction.

10. What is the situation in fact?

[Slide 1: the beginnings of the criminal procedure]

11. We can see on this first slide at what stage the relevant facts — those which concern the start of the criminal proceedings — take place:

— the proceedings are initiated, further to the *Cour de cassation*'s judgment of 9 November 2010[14], by an application to open an investigation (*réquisitoire introductif*) of 1 December

[12] CR 2018/3, p. 19, para. 4.

[13] *Ibid*., para. 6.

[14] *Cour de cassation, Chambre criminelle*, 9 November 2010, No. 09-88272.

2010, and by the appointment on the same day of two investigating judges[15]; these decisions are widely publicized[16];

14 — from March 2011 onwards, the investigating judges proceed to interview a number of witnesses close to Mr. Obiang Mangue in one way or another;

— on 4 July 2011, the Public Prosecutor's Office files an application to extend the investigation (*réquisitoire supplétif*) to money laundering through the acquisition of immovable property;

— on 28 September of the same year, the investigators conduct a first on-site inspection at 42 avenue Foch and carry out an initial seizure of vehicles stored in the courtyard of the property — these luxury vehicles did not have diplomatic plates, and no such plates had ever been requested; this seizure is completed on 3 October 2011[17].

[End of slide 1 — slide 2: steps in the transformation of 42 avenue Foch into "mission premises"]

12. For 4 October 2011 — an eventful day — and beyond, I am relying on a slightly modified slide used during the oral proceedings on the request for the indication of provisional measures:

— on 4 October, then, the Embassy of Equatorial Guinea (located at rue de Courcelles in Paris) asserts in a Note Verbale addressed to the Protocol Department of the French Ministry of Foreign Affairs that "for a number of years" it has been making use of "a building located at 42 avenue Foch, Paris (16th arr.)"[18]; on the same day, representatives from the Embassy affix signs apparently notifying the building's use — as you can see on your screens — as "Premises of the Embassy" of the Republic of Equatorial Guinea;

— on 17 October 2011, 42 avenue Foch is presented, this time, as the residence of Equatorial Guinea's Permanent Delegate to UNESCO[19];

---

[15] See the judgment of the *Tribunal correctionnel* of 27 October 2017, p. 16.

[16] See, for example, http://www.jeuneafrique.com/183401/societe/biens-mal-acquis-deux-juges-d-instruction-pour-trois-pr-sidents/.

[17] See the judgment of the *Tribunal correctionnel* of 27 October 2017, p. 18.

[18] Note Verbale No. 365/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 4 October 2011 (document No. 1 of the additional documents communicated by France on 14 October 2016).

[19] Note Verbale No. 387/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 17 October 2011 (document No. 3 of the additional documents communicated by France on 14 October 2016).

— on 14 February 2012, in a Note Verbale addressed to UNESCO's protocol department, Equatorial Guinea informs the organization for the first time that "the official residence of the Permanent Delegate of Equatorial Guinea to UNESCO is located at 42 avenue Foch 75016
15 Paris, property of the Republic of Equatorial Guinea"[20], while on the same day, the President of the Republic of Equatorial Guinea informs his French counterpart that the building belongs to his son[21];

— a further search is carried out between 14 and 23 February 2012;

— on 21 May 2012, Mr. Obiang Mangue is appointed Second Vice-President of the Republic of Equatorial Guinea;

— on 13 and 19 July, I would remind you, an arrest warrant is issued and the building is attached (a measure without immediate material effect);

— finally, on 27 July 2012, the Embassy of Equatorial Guinea sends the Protocol Department of the French Ministry of Foreign Affairs a Note Verbale informing it that "*as from Friday 27 July 2012*, the Embassy's offices are located at 42 avenue Foch, Paris (16th arr.), a building which *it is henceforth using* for the performance of the functions of its diplomatic mission in France".

[End of slide 2]

13. "Henceforth" — the term is clear. As the *Petit Larousse* states, it "marks the starting point in time; from this time forth, from now on, from this moment"[22]. Conversely, this was not the case hitherto. Indeed, it could not be more clear: the Embassy's offices are located at 42 avenue Foch *as from Friday 27 July 2012*; thus, they were not located there before that date.

14. What can be deduced from all of this, Mr. President? Something quite simple, I believe: 42 avenue Foch could not be considered as diplomatic premises when the criminal proceedings were initiated; yet this is the date that must be used to ascertain whether there could be a question of immunities — be it those which the Applicant claims in respect of Mr. Obiang Mangue, or those

[20] Note Verbale from Equatorial Guinea to the protocol department of UNESCO, 14 February 2012, annexed to Note Verbale No. ERI/PRO/12/L.45 from UNESCO to the Ministry of Foreign Affairs of the French Republic, 15 February 2012 (document No. 8 of the additional documents communicated by France on 14 October 2016).

[21] Letter from the President of the Republic of Equatorial Guinea to the President of the French Republic, 14 February 2012 (document No. 5 of the additional documents communicated by France on 14 October 2016).

[22] http://www.larousse.fr/dictionnaires/francais/désormais/24586 *[translation by the Registry]*.

which it alleges are enjoyed by 42 avenue Foch. In the case of the first, it seems clear that there is
16 no rule of international law, whatever its source, that would grant a Minister for Agriculture immunities under international law. As for the building, Equatorial Guinea itself recognizes that it only began to use it "for the performance of the functions of its diplomatic mission in France" as from 27 July 2012.

15. Mr. President, on the critical date, when the criminal investigation was initiated (and this dates back to 1 December 2010), 42 avenue Foch bore not the slightest resemblance to a diplomatic mission and, moreover, Equatorial Guinea did not claim it as such. It was only as from 4 October 2011 — after the searches and seizure had taken place — that it began alleging that this was the case. The Court does not have jurisdiction on the basis of the 1961 Vienna Convention to settle a dispute between States concerning a private luxury hotel belonging to a Minister for Agriculture (or even to a Vice-President of the Republic for that matter).

16. As for the alleged violations of the Palermo Convention, I would merely observe that our opponents argue that France's objection to the Court's jurisdiction raises complex factual and legal questions and is thus not of a preliminary character. In support of this theory, Sir Michael advances the singular argument that Equatorial Guinea does not agree with our assertion that French law is in conformity with the provisions of the Palermo Convention[23]. This is to forget that, pursuant to the well-established jurisprudence of the Court, it is not sufficient for one of the parties to advance an argument, or even for that argument to be disputed by the other party; the Court "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"[24].

17. However, I suspect that by emphasizing the alleged factual complexity of the case, my wily opponent is trying above all to convince you, Members of the Court, to declare on the basis of Article 79, paragraph 9, of the Rules of Court "that the objection does not possess, in the

---

[23] CR 2018/3, p. 40, para. 42 (Wood).

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

17 circumstances of the case, an exclusively preliminary character". The Court needs good reasons to do so — however, these are lacking in the present case.

18. A party that raises a preliminary objection is entitled to have this objection answered[25], and only in exceptional circumstances can the Court deprive it of that right by obliging it to defend itself on the merits when its consent to the Court's jurisdiction is not established. In this case, the Court clearly has all of the factual elements needed to rule on the preliminary objection raised by France — particularly in view of the voluminous investigation file and the substantial amount of both factual and legal reasoning in the judgment of 27 October 2017. There is therefore no reason to postpone until later a decision that the Court is perfectly capable of taking at this stage.

19. Members of the Court, you cannot fail to have noticed our opponents' almost total, perhaps contrite, silence on the abusive — doubly abusive — nature of Equatorial Guinea's Application in this case[26]. In line with the recommendations made by the President to the Parties yesterday morning[27], we will not revisit this. It goes without saying that we fully stand by the positions we put forward in this regard — and which are, moreover, in my view, reinforced by the chronology of the case I have just set out.

20. Members of the Court, thank you for listening to these introductory remarks. Mr. President, could I ask you to call Professor Ascencio to the Bar?

The PRESIDENT: Thank you. I now give the floor to Professor Ascencio.

---

[25] See, for example, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51.

[26] See, in particular, CR 2018/2, pp. 44-59 (Pellet).

[27] CR 2018/3, p. 57.

18 Mr. ASCENCIO:

PALERMO CONVENTION

1. Mr. President, Members of the Court, my task is to respond to the arguments put forward yesterday by the Republic of Equatorial Guinea concerning the Palermo Convention. Those arguments call for a number of general comments, including about Article 4 of the Convention (I). I will then come back to the obligations specifically invoked by the Applicant (II).

I. General comments

2. The first general comment concerns the legal basis of the criminal proceedings against Mr. Teodoro Obiang Mangue. Mr. Tchikaya claimed that the placement under judicial examination and subsequent procedural measures must be regarded as resulting from the request for mutual legal assistance of 14 November 2013[28]. He appears to infer from this that the entire criminal proceedings accordingly fall within the scope of the Convention. This is a very crafty way of presenting things! What is more, he himself had to concede that the prosecution was based on provisions of French law[29].

3. It was, in fact, only the articles of the Criminal Code relating to money laundering and those of the Code of Criminal Procedure relating to procedural guarantees that were mentioned in the order for placement under judicial examination and the referral to the *Tribunal correctionnel*. The placement under judicial examination does not refer to the Palermo Convention and is not in any way based on that Convention, even indirectly or by reference. The prosecution was instituted solely under French criminal law, and it would be distorting that law to claim otherwise. Moreover, the placement under judicial examination could have occurred irrespective of any request for legal assistance, for example had Mr. Teodoro Obiang Mangue responded to the two summonses addressed to him by the investigating magistrates, or simply through the effects of the arrest warrant, which may be deemed to constitute placement under judicial examination at the end of the proceedings.

---

[28] CR 2018/3, p. 22, para. 20 (Tchikaya).

[29] *Ibid.*

19 4. The second comment concerns the interpretation of Article 4 of the Convention [start of slide 1: Article 4], which Sir Michael Wood strangely describes as an "overarching obligation"[30]. The proposed interpretation is, as he says himself, different from the Court's in its Order indicating provisional measures. Article 4, he claims, does not just relate to how the obligations contained in the other articles of the Convention are to be implemented, but has, in some way, a more eminent position and widens the scope of the Convention to cover a large number of broad customary principles. It is impossible to support this interpretation.

5. The French Republic, for its part, referred in its written pleadings and oral arguments on provisional measures to the *Oil Platforms* case for the interpretation of Article 4 of the Palermo Convention[31]. Equatorial Guinea's counsel expressed his astonishment. Yet Article 4 of the Palermo Convention, like Article 1 of the 1955 Treaty, is drawn up in general terms and cannot be interpreted in isolation from the object and purpose of the Convention in which it is included. Now, the object and purpose of the Palermo Convention is not to organize relations between States in general. Furthermore, none of its provisions spells out the conditions for the application of Article

4. Article 4 cannot therefore be interpreted as incorporating into the Convention all of the provisions of international law concerning relations between States[32]. Article 1 of the 1955 Treaty could not do this in respect of relations between two States; nor does Article 4 of the Palermo Convention do this for relations between the 189 Parties. In keeping with the Court's findings in the *Oil Platforms* case, this article "is thus not without legal significance" for interpreting the other provisions of the Convention, "but cannot, taken in isolation, be a basis for the jurisdiction of the Court"[33].

6. Thus, Article 4 does not incorporate all the rules of customary law and does not widen the scope of the Convention to include the principles of sovereign equality, territorial integrity and

20 non-intervention. Those principles are only able to take effect within the framework of the conventional obligations laid down by the other articles of the Convention. Any other interpretation

---

[30] CR 2018/3, p. 35, para. 23 (Wood).

[31] POF, p. 44, para. 99, and CR 2016/15, pp. 21-22, para. 12 (Pellet).

[32] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28.

[33] *Ibid.*, p. 815, para. 31.

would extend the Convention to virtually all general public international law. It would then be impossible to understand the link with the implementation of "obligations under this Convention".

7. Equatorial Guinea also argues that France's position would render Article 4 "meaningless"[34]. Yet it is easy to understand the effects produced by Article 4, particularly from a reading of paragraph 2, under which a State may not exercise jurisdiction in the territory of another State without its consent. We also know that Article 4 was copied from an equivalent provision of the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Commentary on this Convention gives some very enlightening examples of its effect: the conduct on the territory of another State without its consent "of inquiries or investigations, including covert operations" in relation to criminal offences established in accordance with the Convention[35], or the preclusion of a general right of hot pursuit across land boundaries[36]. This applies perfectly well to the Palermo Convention. [End of slide No. 1].

8. Furthermore, Equatorial Guinea's position on the necessary link between Article 4 and a specific obligation in the Convention is still ambiguous. In its oral argument on the Palermo Convention, Sir Michael Wood merely made a few very general references to the articles of the Convention. Above all, his argument is based on two mistaken ideas.

9. The first is that when France seeks to prosecute an alleged crime, it does so in implementation of the Convention[37]. It was demonstrated during the first round of oral argument that that does not correspond to the general characteristics of the Convention. There are a number of provisions, reproduced in your folder, which expressly recognize the role left to domestic law in effectively preventing and combating transnational organized crime. For example:

21

— Article 6 (1) provides for the criminalization of money laundering "in accordance with fundamental principles" of the Parties' domestic law;

— Article 11 (6) lays down the "principle" that offences shall be "prosecuted and punished in accordance with [the] law" of the States parties;

---

[34] CR 2018/3, p. 31, para. 11 (Wood).

[35] E/CN.7/590, 1988, para. 2.23.

[36] *Ibid.*, para. 2.24.

[37] CR 2018/3, p. 35, para. 24 (Wood).

— Article 12 (9) also lays down the "principle" that measures are to be "defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party";

— Article 14 (1) provides that a State shall dispose of confiscated property "in accordance with its domestic law and administrative procedures";

— Article 15 (6) provides that the Convention does not exclude any criminal jurisdiction established by a State "in accordance with its domestic law".

10. Continuing to claim that a prosecution instituted in a national context falls within the scope of the Palermo Convention amounts to disregard for both the letter and the spirit of that Convention.

11. The second mistaken idea is that immunities fall within the scope of the specific obligations laid down by the Convention. This second point was addressed by France in the first round of oral argument, but further comment is needed.

12. Sir Michael Wood claimed yesterday that the dispute with France concerning the Palermo Convention does indeed relate to the general context of French domestic law, covering both its legislation and the practice of the French courts. He even went as far as to talk about "serious failings"[38]! So what exactly are these serious failings? In actual fact he only mentions one in the whole of his argument: the absence in French law of suitable provisions on international immunities[39]. This supposed shortcoming is then repeated when he presents the alleged violations of Articles 6, 12, 14, 15 and 18 of the Convention.

13. So we have made not one inch of progress. As was explained in the French Republic's written pleadings and in the first round of oral argument, the Palermo Convention does not deal with international immunities at all. Whether in relation to legislation or the practice of the courts, the dispute about the alleged failure of French law to comply with the Convention is nothing but a

22

contrivance. It is entirely based on a mistaken *petitio principii*: that international immunities are covered by the Convention. If we were to take this reasoning to its logical conclusion, the States Parties would even be obliged to legislate on these immunities solely in the field of the offences

[38] CR 2018/3, p. 37, para. 30 (Wood).

[39] *Ibid.*, para. 31 (Wood).

concerned. It is unlikely that the Parties to the Palermo Convention intended it to have this legal effect.

II. The specific obligations invoked by Equatorial Guinea

14. Despite its extremely broad interpretation of Article 4, Equatorial Guinea has nevertheless invoked a number of specific conventional obligations in connection with that article, in an attempt to show that the dispute fell within the provisions of the Convention. This attempt has failed for the following four categories.

1. Criminal prosecution

15. On the subject of criminal prosecution, first of all, it is true that certain conventions on criminal matters contain an obligation to investigate and, where appropriate, prosecute the perpetrators of certain crimes. One example here is Article 7 (1) of the 1997 International Convention for the Suppression of Terrorist Bombings. This provides that a State must take measures "to investigate the facts contained in the information" it has received.

16. Manifestly, the Palermo Convention does not contain any provision of that type. Equatorial Guinea tries to give Article 11 (2) of the Palermo Convention[40] the same effect [start of slide No. 2: Article 11 (2)]. Clearly, however, the terms used are very different. As well as the lack of obligation, since it merely talks about "endeavour", the article refers to general criminal policy. If we were still in any doubt, we need look no further than paragraph 6 of the same article, which establishes the principle that offences are to be prosecuted in accordance with domestic law. [End of slide No. 2]

17. In its oral argument yesterday, Sir Michael Wood focused on Articles 3 and 16 (10) of the Convention to support the idea of an obligation to prosecute in Article 11. Yet those other articles do not say anything further about criminal prosecution.

18. [Start of slide No. 3: Article 3] Article 3, headed "Scope of application", states that the Convention applies to crime that "is transnational in nature" where it involves an "organized criminal group", while defining what "transnational" means. The words "prevention",

[40] CR 2018/3, p. 38, para. 35 (Wood).

"investigation" and "prosecution" are only used to introduce those expressions and briefly describe all the conventional provisions. Since the Convention also deals with mutual legal assistance, it is

23 hardly surprising to find the term "prosecution" here. It obviously does not mean that all the articles of the Convention relate to prosecution. [End of slide No. 3 — start of slide No. 4: Article 16 (10)]

19. As for Article 16 (10), this forms part of the section of the Convention on mutual legal assistance, since it relates to extradition. France has obviously not omitted to pay attention to it[41]. It was abundantly clear that it did not apply in the present dispute. This article talks about criminal prosecution at the request of the State seeking extradition, where a State refuses a request for extradition on the ground of the nationality of the presumed perpetrator of the offence. France has never sought the extradition of Mr. Teodoro Obiang Mangue, or, *a fortiori*, requested the Republic of Equatorial Guinea to prosecute him. [End of slide No. 4]

2. Criminalization of money laundering and corresponding establishment of jurisdiction (Arts. 6 and 15)

20. When it comes to establishing the jurisdiction of national courts to prosecute money laundering offences in accordance with Articles 6 and 15 of the Convention, the only criticism of France does not relate to criminalization or the establishment of jurisdiction, but to the supposed shortcomings of French law, or in the practice of the French courts, concerning immunities[42]. So there is nothing new here: Equatorial Guinea continues to claim that immunity is "inextricably linked" to jurisdiction[43], ignoring the Court's jurisprudence to the contrary. This point has already been discussed by France in the first round of oral argument.

24 **3. Confiscation and seizure (Arts. 12 and 14)**

21. The same goes for Articles 12 and 14 which deal with confiscation and seizure. Once again, the only claim made concerns the failure to respect immunities[44]. On this point, Sir Michael Wood has primarily relied upon the interpretative note to Article 12. However, his

---

[41] CR 2018/3, p. 38, para. 38 (Wood).

[42] *Ibid.*, p. 41, para. 48 (Wood).

[43] *Ibid.*

[44] CR 2018/3, p. 42, para. 51 (Wood).

arguments are striking for what they leave out: at no point does Equatorial Guinea take the trouble to explain on what grounds that note is invoked, even though France had raised the question during the first round of oral observations. Neither does the Applicant bother to apply the customary rules for the interpretation of treaties, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. However, the terms of Article 12 of the Convention are clear [slide 5: Art. 12, para. 1]: it merely requires States parties to adopt, "to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation". This is in conformity with the object and purpose of the treaty, which is to harmonize certain aspects of the criminal law of the States parties. There is nothing obscure, contradictory or ambiguous here which would warrant making reference to the *travaux préparatoires*. [End of slide 5]

22. What is more, the demonstrative value of the said note is particularly low. Evidence of this is to be found in the first paragraph of the official document of the United Nations General Assembly which contains that note and was provided to the Court by Equatorial Guinea itself. The document is in your files. In the words of the first paragraph, the document "is submitted to the General Assembly for information purposes only. The Ad Hoc Committee took no formal action on these notes and none is expected of the Assembly at its fifty-fifth session." It is thus hard to discern in that note, adopted by a committee of limited membership, a reflection of the will of the Parties to the Convention.

23. As for Article 14, Equatorial Guinea's counsel has bizarrely held that it referred to specific acts to be carried out in compliance with the rules on the immunities of the foreign State's property, whereas the provision refers solely, and indeed expressly, to the domestic law and the domestic administrative procedures of the State which has carried out the confiscation.

4. Judicial co-operation

25 24. It remains for me to respond to our opponents' arguments on the subject of judicial co-operation. Their claims concern, first, the information submitted by the Republic of Equatorial Guinea, and, secondly, the request for mutual judicial assistance of 14 November 2013.

25. First and foremost, it must be stated that these two claims do not fall within the scope of the dispute as circumscribed by Equatorial Guinea's Application. The Applicant is in a rather

awkward position, moreover, arguing yesterday that "[t]he scope of the dispute could not be clarified in greater detail before Equatorial Guinea submitted its Application and Memorial"[45]. Nonetheless, the Application clearly defines the subject-matter of the dispute and the Memorial of 3 January 2017 repeats it in exactly the same terms[46]. The dispute concerns, first, the immunity of Mr. Teodoro Obiang Mangue and, secondly, the status of the building at 42 avenue Foch[47]. There has never been any question of a dispute about judicial co-operation, whether in relation to the transmission of documents or to the request for judicial co-operation of 2013. In accordance with its settled jurisprudence, the Court cannot allow a dispute brought before it to be transformed by amendments made to the submissions of one of the parties into another dispute[48]. The rights of third parties must also be respected. The jurisdiction of the Court must be assessed strictly within the confines of the subject-matter of the dispute brought before it and these claims do not come within those confines. Consequently, the observations which follow are put forward in the alternative.

26. Firstly, it is alleged that there has been a violation of Article 15, paragraph 5 [slide 6: Art. 15, para. 5]. This is based on the place where the so-called "predicate" offence, one of the constituent elements of the autonomous offence of money laundering, was committed. According to Equatorial Guinea, the French authorities should have taken particular account of the information provided in this respect, since the Applicant, it argues, had exclusive jurisdiction to entertain the offence[49]. However, it is a straightforward matter to realise, merely by reading Article 15, paragraph 5, that the latter refers only to consultation and makes no suggestion of exclusive jurisdiction. [End of slide 6 — slide 7: Art. 15, paras. 1-2]

27. In addition to the points raised during the first round of oral arguments, it should be emphasized that Article 15, in paragraphs 1 and 2, clearly gives the lie to the notion that the

---

[45] CR 2018/3, p. 43, para. 57 (Wood).

[46] MEG, para. 0.2.

[47] AEG, para. 2.

[48] *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B n° 78*, p. 173; *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. 80 ; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, paras. 69-70 ; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 17, para. 36.

[49] CR 2018/3, p. 43, para. 56 (Wood).

Equatorial Guinean courts have exclusive jurisdiction. It has never been disputed that the acts of money laundering of which Mr. Teodoro Obiang Mangue stands accused took place on the territory of the French Republic. Article 15, paragraph 1, expressly provides for the establishment of a territorial basis of jurisdiction, including with regard to the autonomous offence of money laundering, since express mention is made therein of Article 6.

28. It should also be noted that Article 15, paragraph 2, which grants States parties the possibility of establishing other bases of jurisdiction, is the only one to mention Article 4. *A contrario*, this means that, for the drafters of the Convention, Article 4 was not intended to apply within the context of paragraph 1. Consequently, the principles of Article 4 cannot be brought into play with regard to the way in which territorial jurisdiction is established. [End of slide 7]

29. Finally, on the subject of the letter rogatory of 14 November 2013, Equatorial Guinea is now claiming that France was under the obligation not to transmit that request, and that merely transmitting it constituted a violation of the principles of Article 4 of the Palermo Convention[50]. France notes that Equatorial Guinea did not clearly link this assertion to a specific conventional obligation during the first round of oral argument, any more than it did in its written submissions. To be quite honest, this is hardly surprising, since Article 18 provides no basis for any purported obligation not to transmit such a request. By sending a request for mutual assistance to the Equatorial Guinean judicial authorities, France confined itself to exercising an option, rather than performing an obligation.

30. Yet the most extraordinary thing of all is the allegation that there is a dispute arising from the mere transmission of a letter rogatory, when the latter was drawn up at *the express request* of the Equatorial Guinean authorities. This request is spelled out very clearly in a Note Verbale of

27

6 July 2012 sent by the Equatorial Guinean Minister for Foreign Affairs to the French Minister for Foreign Affairs. I shall quote the text in Spanish before translating it:

> "Sin embargo, y al objeto de contribuir al esclarecimiento de los hechos y cooperar con la justicia francesa, el Gobierno de Guinea Ecuatorial considera pertinente el envió al País de una comisión rogatoria, para llevar a cabo las diligencias que estime oportunas."

[50] *Ibid.*, pp. 43-44, para. 58 (Wood).

> "However, in order to help clarify the facts and co-operate with the French courts, the Government of Equatorial Guinea considers it useful to send a letter rogatory to the country so that it might perform such tasks as are deemed appropriate."

If the Court wishes to read this document, which comes from the Equatorial Guinean side, we will be pleased to provide it.

31. All in all, it appears that none of the violations alleged by the Applicant come under the provisions of the Convention. Mr. President, this brings to a close my observations on the Palermo Convention. Would you please now give the floor to Professor Bodeau-Livinec.

The PRESIDENT: Thank you. I now give the floor to Professor Bodeau-Livinec.

Mr. BODEAU-LIVINEC:

I. Preliminary remarks on the subject of the dispute relating to the building at 42 avenue Foch

1. Thank you, Mr. President. Mr. President, Members of the Court, in his closing speech yesterday on the subject of the Court's jurisdiction on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations, Professor Kamto criticized us for being "unable to demonstrate the non-existence of a dispute between the Parties concerning the inviolability of the building at 42 avenue Foch in Paris"[51]. I find this criticism both unfounded and rather revealing.

28

2. It is unfounded because — whether it concerns the hypothetical régime of inviolability allegedly enjoyed by the building at 42 avenue Foch, or the prior and essential question of the building's status — the actual dispute between Equatorial Guinea and France is not capable of falling within the provisions of the Vienna Convention of 18 April 1961, as established by the jurisprudence in *Oil Platforms*[52]. Moreover, we were delighted to hear that Equatorial Guinea, which had previously clung to unsupported assertions, now acknowledges, at least in principle, that the Court's jurisdiction is dependent on "the requirement that [the Applicant's] claims in this case must fall within the provisions of the Vienna Convention on Diplomatic Relations"[53].

---

[51] CR 2018/3, p. 54, para. 41 (Kamto).

[52] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16. See CR 2018/2, pp. 34-37, 39-44, paras. 12-19, 25-35.

[53] CR 2018/3, p. 48, para. 15 (Kamto).

3. Alas, I must admit, this delight was short lived. That is because — if my honourable opponent is to be believed — it is in fact for France to satisfy this requirement before the Court, since it is France which is responsible for "demonstrat[ing] the non-existence of a dispute between the parties" concerning the Vienna Convention . . . This assertion is quite revealing of the approach taken by the Applicant throughout its written pleadings and, again, in yesterday's arguments: persistently invoking, almost like an incantation, "obvious" truths and presumed jurisdiction, leaving the Respondent with the burden of proving that, in law, there is no jurisdictional basis for the Application. In his overview of the case yesterday, Sir Michael Wood gave the following summary of the conclusions Equatorial Guinea seeks to draw from invoking the Optional Protocol to the Vienna Convention:

> "If France seriously questions whether the Embassy building even falls under the definition of mission premises; or the time from which the Embassy building was entitled to protection and inviolability; or the conditions to be fulfilled in connection with these questions, then there is most certainly a dispute as to the interpretation or application of the Convention. That seems obvious, and no amount of Cartesian argumentation, however subtle, can change that."[54]

4. Mr. President, I shall refrain from praising the virtues of Cartesian logic and its relative

29 merits. I shall simply note that none of the questions raised by Sir Michael are governed by specific provisions of the Vienna Convention and, therefore, none of them are capable of falling within the provisions of that instrument.

The PRESIDENT: Excuse me, Professor. I have just been informed that there is no interpretation in English; so I would like to ask the interpreters if there are any technical difficulties. It would appear that the interpretation has been restored; you may resume your presentation. Please continue.

Mr. BODEAU-LIVINEC: Thank you, Mr. President. Contrary to what Equatorial Guinea has suggested[55], France has never acknowledged, even in passing, that the Court could entertain Equatorial Guinea's claims on the basis of the Optional Protocol to the Vienna Convention. Given the Applicant's initial vagueness, France simply thought it might be useful to clarify that the

---

[54] *Ibid.*, p. 17, para. 21 (Wood).

[55] CR 2018/3, p. 17, para. 22 (Wood).

aspects of the Application relating to the hypothetical immunity of the property belonging to the State or to Mr. Teodoro Nguema Obiang Mangue had no connection with the aspects of diplomatic law codified in the 1961 Convention[56]. Equatorial Guinea expressly admitted as much yesterday[57], and we have taken note of this.

5. Apart from this, Equatorial Guinea's first round of oral argument failed to inform us as to how Equatorial Guinea's claims relating to the treatment of the building at 42 avenue Foch in Paris might constitute possible violations of the Vienna Convention. I shall thus be brief. I will simply point out that, contrary to the oral arguments presented by Equatorial Guinea, the Vienna Convention does not govern the actual issue dividing the Parties: that of the circumstances in which a particular building may benefit from the provisions of this treaty which derogate from ordinary law (II). Consequently, with regard to the building at 42 avenue Foch in Paris, there exists no dispute capable of falling within the provisions of Article 22 of the Convention (III). These are the two points I shall now discuss in turn.

30

II. The determination of a particular building's diplomatic nature does not fall within the provisions of the Vienna Convention

6. Mr. President, I would like to begin by clearing up an ambiguity which may have arisen in listening to our opponents' first round of oral argument. Professor Kamto first stated that France had "admitted . . . that there is a dispute between the Parties regarding the legal status of that building, although it denied that this dispute falls within the provisions of the Vienna Convention on Diplomatic Relations"[58]. Then, immediately afterwards, he oddly added: "I am delighted that France recognizes that there is a dispute between the Parties regarding the interpretation of Article 1 (i), of the Vienna Convention on Diplomatic Relations[59]. I believe Professor Kamto is aware of the esteem I hold him in, so he will not hold it against me for telling him now not to get ahead of himself. The references he cites in support of this assertion show in and of themselves that

[56] See POF, paras. 178-183.

[57] CR 2018/3, p. 17, para. 22 (Wood).

[58] CR 2018/3, p. 45, para. 5 (Kamto).

[59] *Ibid.*, p. 45, para. 6 (Kamto).

France has never admitted such a thing, and the arguments presented yesterday have done nothing to convince France to change its position on this point.

7. Nonetheless, Professor Kamto asserted that his proposed interpretation of Article 1 (i) of the Vienna Convention [start of slide 1 — Art. 1 (i)] "does not diverge from the canons of construction of Article 31 of the Vienna Convention on the Law of Treaties"[60]. A simple reading of Article 1 (i) shows, however, that the view proposed by Equatorial Guinea, as regards both the paragraph's silences and the freedom it is claimed to give the sending State, is a far cry from the ordinary meaning of the terms of the text as well as the text's intended object and purpose, which are simply to provide a definition.

8. I shall first discuss the idea that Article 1 (i) gives the sending State a unilateral right that can be invoked against the receiving State. In the view of Equatorial Guinea, "the fact that the Convention did not make provision for a procedure for establishing the diplomatic status of a building is an indication that its drafters wished to allow the sending State the freedom to choose its
31 diplomatic premises"[61]. This strenuously pleaded assertion reflects the "declaratory" position which the Applicant defends with confidence in its written statement[62]. However, it faces a serious obstacle which our opponents attempt to sidestep for want of being able to overcome it. If Article 1 (i) of the Convention does indeed grant such freedom of choice to the sending State, then how should one view the practice of States which have expressly restricted that freedom in their domestic law by making the consent of the receiving State a formal requirement? Should such domestic legislation, of which France cites several examples in its preliminary objections[63], be seen as conduct which is contrary to the Convention?

9. Equatorial Guinea refrains from supporting such a position, which would effectively discredit a widely used and well-established practice, and simply suggests that the freedom of choice it claims exists "when the receiving State has no applicable national legislation in this area"[64]. The inconsistency here is manifest; the Cartesian logic clearly deficient: according to this

---

[60] *Ibid.*, p. 49, para. 18 (Kamto).

[61] *Ibid.*, para. 19 (Kamto).

[62] See WSEG, para. 3.14; and see CR 2018/2, p. 36, para. 17 (Bodeau-Livinec).

[63] POF, paras. 163-164.

[64] CR 2018/3, p. 49, para. 19 (Kamto).

line of reasoning, a restriction laid down in a receiving State's domestic law would prevail over the freedom enshrined by a rule of international law. To conceal this paradox, Equatorial Guinea puts forward two arguments. The first relies on the fact that France has not "legislated on how buildings assigned as diplomatic premises by the sending States are recognized"[65]. Therefore, in Equatorial Guinea's view, it should of course be understood that, in the absence of specific legislation, France must submit to the sending State's freedom of choice. This is simply not the practice in France. Under its well-established practice, France requires States which are considering acquiring premises for their diplomatic missions to inform the Protocol Department in advance. If the Ministry of Foreign Affairs has no reason not to grant diplomatic status to the premises, they enjoy that status once the premises in question are effectively assigned for the purposes of the diplomatic mission. If, however, the Ministry considers that it cannot approve such a request, for example, because of the existence of criminal proceedings concerning the premises, it naturally informs the

32

State concerned of this. How could a State grant diplomatic status to a building at a time when searches are being conducted there by French investigating judges?

[End of slide 1 — Art. 1 (i)]

10. Furthermore, this practice is similar to that applied in other States which do not have specific legislation. As Professor Denza notes:

> "Generally speaking, a receiving State is likely to be notified of mission premises for the purpose of ensuring that it carries out its duties under Article 22 to protect those premises and ensure their inviolability. Challenge to such notification will usually take place only where there are grounds to suspect that the premises are not being used for purposes of the mission."[66]

This is exactly what France did in the circumstances of this case. Faced with the clear attempt to instrumentalize the Vienna Convention for the benefit of the building at 42 avenue Foch, its only option was in fact to reject the notifications Equatorial Guinea sent to it.

11. The second argument put forward by the Applicant in an attempt to convince the Court that Article 1 (i) gives freedom of choice to the sending State relies on Article 12 of the Convention. In this regard, Professor Kamto asserts that "[w]hen the Convention's drafters wanted

---

[65] *Ibid.*, p. 51, para. 26.

[66] E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, Oxford, 4th edition, 2016, p. 17.

to restrict the State's freedom to establish premises of the diplomatic mission, they did so explicitly"[67]. One need only re-read the text of Article 12 [start of slide 2 — Art. 12], which concerns the intent to establish diplomatic premises outside the usual site of the mission, to measure the irrelevance of such an interpretation. Where that is the case, Article 12 requires the "*express* consent" of the receiving State. Obviously, this does not mean that its consent is not required — or that it is quite simply barred from giving its consent — with regard to the choice of diplomatic premises in the capital. An *a contrario* reading of Article 12 could certainly suggest that, ordinarily, when a diplomatic mission is established in the capital, the receiving State need not expressly give its consent to the sending State [end of slide 2 — Art. 12]. In his *Manuel de droit diplomatique*, Professor Salmon notes, for instance, that

33

> "*the Vienna Convention contains no provisions on conflicts of classification*. While the mission is entitled to classify what it regards as premises used for the purposes of the mission, that classification is merely provisional and unilateral, and the receiving State, which may have the power to refuse the necessary authorizations, may dispute it . . . Agreement must be sought. In the absence of agreement, it seems to us that . . . the receiving State should have the last word."[68]

The author's caution here is noteworthy. Although basic logic leads to an acknowledgment of the prerogatives of the receiving State, what is truly important is to note that the Vienna Convention imposes no requirement on the receiving State — neither in Article 1 nor in any other provision — to unconditionally recognize the freedom of choice claimed by Equatorial Guinea. The Convention remains silent on this question, which means that it does not fall within the treaty's provisions.

12. In Equatorial Guinea's view, however, the

> "Convention's silence on the formalities for establishing premises of the diplomatic mission does not mean that the question of their status falls outside the Convention. The position adopted by France, which would like the Convention to contain an express provision governing the matter, is formalistic and completely disregards the Convention's object and purpose."[69]

Members of the Court, this much maligned "formalism" is in fact based on an objective reading of the Convention. Contrary to what the Applicant alleges, France has never claimed that the treaty's silence implies that "it is for it to determine the building's status of diplomatic mission"[70]. It simply

---

[67] CR 2018/3, p. 49, para. 20 (Kamto).

[68] *Manuel de droit diplomatique*, Bruylant, Brussels, 1994, p. 190, para. 286; emphasis added.

[69] CR 2018/3, p. 49, para. 21 (Kamto).

[70] *Ibid.*, p. 51, para. 28 (Kamto).

noted that this silence did not justify the conclusion that the determination of the conditions under which a building may acquire diplomatic status was a matter concerning the interpretation or application of the Convention. I endeavoured to demonstrate this on Monday, so I do not feel it would be useful to say any more about it now[71].

13. I shall simply note that, of the various definitions contained in Article 1, the definition in paragraph (i) is the only one that does not include conditions expressly specified in the rest of the Convention. In this sense, it remains purely "descriptive"[72]. This silence is fully offset by the last paragraph of the Convention's preamble — a paragraph with respect to which yesterday Equatorial
34 Guinea maintained a deafening silence. Making a provision, as the last paragraph of the preamble does, that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention" simply amounts to stipulating that such questions do not fall within the treaty's provisions. If that is indeed so, it cannot be claimed that a dispute exists between the Parties regarding the application of Article 22 of the Convention: its application is in fact entirely dependent on the determination of the building's status. I shall now briefly turn to this point.

III. Whether Article 22 of the Vienna Convention can be invoked is dependent on the prior determination of a given building's diplomatic character

14. Members of the Court, following Equatorial Guinea's presentations yesterday, it is clear that it has still not managed to demonstrate that a dispute exists between it and France concerning the application of Article 22 of the Vienna Convention, as the *Platforms* test nevertheless requires. Professor Pellet has just shown that there is still a distinct vagueness surrounding the timeline of the facts identified as relevant by the Applicant. That lack of chronological clarity is not insignificant. It is indicative of Equatorial Guinea's prevarication about the date on which it might claim, with any degree of conviction, that the building at 42 avenue Foch benefitted from the inviolability régime provided for by Article 22. In his general presentation yesterday, Sir Michael stated:

---

[71] CR 2018/2, pp. 34-35, 37, paras. 13, 19 (Bodeau-Livinec).

[72] *Ibid.*, p. 36, para. 16 (Bodeau-Livinec).

> "France has claimed, and continues to claim, that the building located at 42 Avenue Foch, owned by Equatorial Guinea and long housing its Embassy in France, never acquired the status of 'premises of the mission' within the meaning of the Vienna Convention. Despite admitting — as the Court noted in its Order on provisional measures — that at least 'from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear to have been transferred to 42 Avenue Foch', France has denied the building the protection to which it is entitled as diplomatic premises and, moreover, violated the inviolability and immunity owed to it under international law."[73]

That portrayal of France's position in the present case is inaccurate. First, because we have simply maintained — and obviously continue to do so — that throughout the period from the initiation of the criminal proceedings against Mr. Obiang Mangue in France to its attachment, the building at

35 42 avenue Foch was in no way used for the purposes of Equatorial Guinea's diplomatic mission[74]. Second, as Mr. Alabrune will recall in a moment, because France has complied fully with the Order made by the Court on 7 December 2016, and has granted the building concerned "treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure [its] inviolability"[75].

15. In fact, in the particular circumstances of this case, the actual question addressed to you does not concern the application of Article 22 [Slide 3: Art. 22]. France does not dispute that Equatorial Guinea's diplomatic premises on French territory, like those of any other foreign diplomatic mission in Paris, are capable of benefitting from the inviolability régime provided for by that article. But the wording of Article 22 is clear: it plainly only concerns the "premises of the mission". And France notes that the conditions under which such premises are identified are not governed by the Vienna Convention on Diplomatic Relations. When determining whether the Court may exercise jurisdiction in this case, that question is the only one that matters [end of slide 3: Art. 22].

16. Nevertheless, Mr. President, that question is crucial. As Professor Kamto pointed out, the Court's decision is "highly anticipated"[76]. It is indeed, and has been since the outset of the preliminary objections phase of the proceedings. It is by France, which is just as anxious to

---

[73] CR 2018/3, pp. 16-17, para. 20 (Wood) (fn. omitted).

[74] CR 2018/2, pp. 32-33, para. 8 (Bodeau-Livinec).

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

[76] CR 2018/3, p. 55, para. 46 (Kamto).

preserve its "sovereign rights"[77] as Equatorial Guinea. But it is also eagerly awaited by the other 69 States parties to the Optional Protocol to the Vienna Convention, which risk seeing their consent to the Court's jurisdiction swept aside if one of them goes down the route that Equatorial Guinea would have you follow today[78].

36 17. Mr. President, Members of the Court, thank you once again for your kind attention. Mr. President, may I request that you give the floor to Mr. François Alabrune, the Agent of the French Republic, who will present France's submissions to the Court.

The PRESIDENT: Thank you. I give the floor to Mr. Alabrune, the Agent of the French Republic. You have the floor, Sir.

Mr. ALABRUNE:

1. Mr. President, Members of the Court, in concluding our oral argument at this hearing, I would like to join, on behalf of the French Republic, in the tribute paid to Judge Shahabuddeen, of whose passing you have just informed us. Mr. President, Members of the Court, in this presentation I will first of all respond to certain points raised by the representatives of Equatorial Guinea. I will then reply to the question put by the Vice-President of the Court. Finally, I will read out the French Republic's submissions to the Court at the close of this hearing.

2. First, I believe it would be useful to return to three points raised by the representatives of Equatorial Guinea.

3. The first concerns France's refusal to accept proposals made by Equatorial Guinea to settle this matter amicably. We have already had occasion, during the hearings on provisional measures[79], to set out the reasons why France was not in a position to accept the proposals for the two States to reach an agreement to terminate the criminal proceedings in France, first and foremost among them being the principle of the independence of the judiciary that prevails in France. Furthermore, French law does not allow for criminal proceedings to be stopped by way of settlement, as is the case in the United States of America. This situation is not therefore due to an

[77] *Ibid.*, p. 8, para. 2 (Nvono Nca).

[78] See the website of the United Nations Treaty Collection (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&clang=_en).

[79] See CR 2016/17, p. 18, para. 2 (Pellet).

unwillingness by France to engage in dialogue with Equatorial Guinea, two States which, I repeat, maintain relations of friendship and mutual respect.

4. The second point regards Equatorial Guinea's assertion that the initiation of judicial
37 proceedings in France against Mr. Obiang Mangue has had repercussions in other countries[80], and even a knock-on effect in other States which is hindering Equatorial Guinea's ability to conduct its international relations. Such an assertion does not correspond to the facts, given that even before the proceedings in France began, proceedings had been initiated against Mr. Obiang Mangue in other States.

5. Mr. Obiang Mangue was the subject of proceedings in South African in 2006. He filed an affidavit with the South African High Court, in which he admitted that ministers in the Government of Equatorial Guinea would establish private companies which acted in consortium with foreign companies when government contracts were granted. He acknowledged that, in such cases, a sizeable part of the contract price ended up in the hands of government ministers[81].

6. In 2007, moreover, the French judicial authorities received a request for assistance from the United States Department of Justice[82] and thereby discovered that an investigation into Mr. Obiang Mangue had been opened in the United States of America with regard to acts of corruption and money laundering[83]. The proceedings conducted in the United States culminated in a settlement agreement between the United States Attorney General and Mr. Obiang Mangue. It emerged from that agreement that (i) Mr. Obiang Mangue had used his position as a government minister of Equatorial Guinea and was guilty of corruption and money laundering; and (ii) he had relinquished numerous assets to the United States in return for the proceedings being halted[84].

7. We are also aware that proceedings have been initiated against Mr. Obiang Mangue in Switzerland, where high-value assets belonging to him have been seized. All this goes to show that the French courts are far from the only ones to have looked into or to be looking into the conduct of Mr. Obiang Mangue.

---

[80] CR 2018/3, p. 8, para. 2 (Nvono Nca).

[81] See judgment of the Paris *Tribunal correctionnel*, 27 October 2017, pp. 38-39 and p. 72.

[82] *Ibid*., pp. 38-40.

[83] *Ibid*., p. 38.

[84] *Ibid*., pp. 38-40.

38 8. The third point I would like to return to concerns certain assertions made by the other Party regarding the criminal proceedings initiated in France. I will not address the insinuations that the time frame for the judicial proceedings was misrepresented to you by France during the hearings on provisional measures. I demonstrated in detail on Monday that, on the contrary, the time frame described to you by France had been fully borne out by events.

9. I believe it is more helpful to return to the scope of the judgment of the Paris *Tribunal correctionnel* dated 27 October 2017.

10. It is interesting to note, first of all, that the criticism levelled against that judgment here by the representatives of Equatorial Guinea is in stark contrast with the public position taken by the Equatorial Guinean authorities the day after the judgment was delivered. On 28 October 2017, a statement was published on the official website of the Government of Equatorial Guinea which hailed the judgment as a "clear victory", declaring that "[h]aving established no conviction or economic sanction for the Vice-President, the sentence . . . establishe[d] the full and complete innocence of . . . Teodoro Nguema Obiang Mangue"[85]. These words contrast with the assertion made by the other Party yesterday that the judgment had generated "deep indignation" in Equatorial Guinea[86].

11. Second, the assertion that that judgment is at odds with the Court's Order indicating provisional measures of 7 December 2016 does not stand up. Mr. Tchikaya maintained, *inter alia*, that the Paris *Tribunal correctionnel*'s measure to confiscate the building at 42 avenue Foch was "entirely at odds" with the provisional measure indicated by the Court[87] and that consequently "the judgment of 27 October 2017 contravened the Court's Order, since it is in fact the defendant's appeal . . . which provisionally prevents it from committing a manifest violation" of the Order[88].

39 This assessment misconstrues the terms of the Order. May I recall, Mr. President, that the provisional measure indicated by the Court requested France to take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at

---

[85] Text available at the following address: http://www.guineaecuatorialpress.com/noticia.php?id=10566.

[86] CR 2018/3, p. 8, para. 2 (Nvono Nca).

[87] *Ibid*., p. 26, para. 43 (Tchikaya). See also CR 2018/3, p. 16, para. 20 (Wood).

[88] *Ibid*., p. 27, para. 46 (Tchikaya).

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[89]. In the reasoning preceding the statement of this measure, the Court notes that there is a risk that the building might be confiscated before the date on which the Court reaches its final decision in the case and that therefore "the execution of any measure of confiscation is to be stayed until the Court takes that decision"[90]. Thus the Court did not indicate that no measure of confiscation should be issued; it stated that "the execution of any measure of confiscation" that might be decided on should "be stayed"[91]. Furthermore, the Paris *Tribunal correctionnel* took due account of the Court's Order when it noted that it "ma[d]e the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty"[92]. The main aim of the measure indicated by the Court is to ensure that the inviolability of the premises is not infringed. The French authorities continue to take all necessary measures to that end.

12. Mr. President, Members of the Court, I would now like to provide our answer to the question put by Vice-President Xue yesterday:

— France is strongly committed to respecting its international obligations relating to immunities.

— In France, as in many countries, customary international law on immunities is applied directly by the national courts, without there being any need to transpose it into domestic legal texts.

— Respect for the immunities of incumbent foreign heads of State has prevented criminal proceedings on a number of occasions, in particular in cases of money laundering. In the case of a former Head of State of Panama, General Noriega, the Paris *Tribunal correctionnel* took

40

the view, in a judgment of 7 July 2010, that his immunity could not cover acts of money laundering committed for private purposes and by purely personal means.

— At this time, the case involving Mr. Obiang Mangue is the only money-laundering case in which the immunity of a foreign "high-ranking official" has been invoked before the French courts and rejected by the *Cour de cassation*.

---

[89] *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.

[90] *Ibid.*, p. 1170, para. 95.

[91] *Ibid.*

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

— It is true that in other cases the French courts have not been faced with a situation that is really comparable to this one.

13. Mr. President, Members of the Court, in accordance with Article 60, paragraph 2, of the Rules of Court, I shall now read out the submissions of the French Republic:

> "For the reasons developed in its preliminary objections and set out by its representatives at the hearings on the preliminary objections in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, the French Republic respectfully requests the Court to decide:
>
> (i) that it lacks jurisdiction to rule on the Application filed by the Republic of Equatorial Guinea on 13 June 2016; and
>
> (ii) that the Application is inadmissible."

14. Mr. President, Members of the Court, I am very grateful for your attention. I would also like to give our warmest thanks to the Registrar and all the Registry staff, the interpreters and those responsible for producing the verbatim records. I thank the members of the delegation of Equatorial Guinea for the quality of our exchanges during these hearings, and in particular the Agent of the Republic of Equatorial Guinea, H.E. Mr. Carmelo Nvono Nca. And, if I may, I shall also thank the members of the French delegation.

15. Mr. President, Members of the Court, this concludes the presentation of the French Republic in this sitting. Thank you.

41 The PRESIDENT: Thank you Mr. Alabrune. The Court takes formal note of the final submissions that you have just read out on behalf of France. Equatorial Guinea will present its second round of oral argument on Friday 23 February, at 10 a.m.

The sitting is adjourned.

The Court rose at 6.10 p.m.

_____