DISSENTING OPINION OF JUDGE DONOGHUE

Admissibility — Integrity of the judicial function of the Court — Abuse of process — Abuse of rights.

1. The Court today concludes that it has jurisdiction on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations (the "Optional Protocol") in respect of the Applicant's claim that the building at 42 Avenue Foch in Paris (the "Building") qualifies as premises of the mission entitled to the treatment required by Article 22 of the Vienna Convention on Diplomatic Relations (the "Vienna Convention"). I agree. However, I have voted against subparagraphs (3) and (4) of paragraph 154 because I consider that this claim is inadmissible and that the Application should have been dismissed.

2. In its third preliminary objection (which the Court properly characterizes as an objection to admissibility), France calls for dismissal of the entire Application on the ground of its "abusive nature". Because the Court has concluded that it lacks jurisdiction pursuant to the United Nations Convention against Transnational Organized Crime, I address here only the admissibility of the Applicant's claim in relation to the Vienna Convention. I take no position here on the merits of that claim, nor do I express any view on whether Mr. Teodoro Nguema Obiang Mangue is guilty of the crimes with which he has been charged in France, a matter that is not for this Court to decide.

3. France refers both to "abuse of process" and "abuse of rights" in support of its third preliminary objection. These notions may have established meanings in certain national legal systems. However, I am not aware of any authoritative definition of either term in the context of international adjudication. The Court offers its views of the scope of these terms today.

4. The Court finds that the Application is "not inadmissible on grounds of abuse of process or abuse of rights" (para. 153). The Judgment treats "abuse of process" and "abuse of rights" as two separate notions.

According to the Court, an abuse of process "goes to the procedure before a court or tribunal and can be considered at the preliminary phase" of proceedings. The Judgment states that an application can be found inadmissible on the basis of "abuse of process" only when there is "clear evidence" and only in "exceptional circumstances" (para. 150). It does not find the Application to present such exceptional circumstances.

The Court considers that the "abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits". It states that any argument regarding abuse of rights will be considered at the merits stage of the case (para. 151).

Thus, on the Court's reasoning, an allegation of abuse of process can be considered as a preliminary objection as to admissibility, but it is to be evaluated only with reference to procedure before the Court. On the other hand, according to the Court, an assertion of abuse of rights can have no bearing on the admissibility of a claim. It is only to be considered at the merits stage, when the Court decides whether the rights asserted by a party have been established.

The approach taken by the Court means that an applicant's conduct outside of this Court, on which it premises the assertion of certain rights, would not stand in the way of the admissibility of the application, no matter how abusive that conduct is.

5. By defining "abuse of process" and "abuse of rights" narrowly and by isolating each of these concepts from the other, I believe that the Court has overlooked the core of France's third preliminary objection:

> "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.
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> 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." (CR 2018/2, pp. 53-54, paras. 21, 24 (Pellet)[1].)

6. The Respondent refers to a "contrivance" by the Applicant that is part of a "strategy" that culminates in the seising of the Court. The Respondent's allegations raise this question: is the conduct in which the Applicant engaged as a predicate for the assertion of certain rights of such a character that the Court should not exercise its jurisdiction to determine whether the Applicant has those rights? This is a question of admissibility. Its answer does not call for a decision as to whether the rights asserted by Equatorial Guinea have been established (a matter for the merits).

7. Some questions of admissibility arise only when they are raised by a party. Other aspects of admissibility touch on the fundamental role and function of the principal judicial organ of the United Nations:

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both the parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

8. The allegations by France raise questions about whether the Court can consider the Application without compromising its judicial integrity. The Respondent's harsh words could perhaps be discounted as the hyperbole of oral advocacy, but the facts before the Court cannot be so easily set aside. The evidence that bears on the question of the admissibility (as framed in paragraph 6 above) is before the Court at this stage of the proceedings and is not in dispute. The relevant facts are evident on the face of documents submitted to the Court by the Applicant, including statements by representatives of the applicant State. I summarize those facts here.

9. Mr. Teodoro Nguema Obiang Mangue is the son of the President of Equatorial Guinea. In 2004, he became the sole shareholder of the Swiss companies that co-own the Building in Paris (Memorial of Equatorial Guinea, Vol. I, paras. 2.15-2.16). At that time, he was serving as Minister

[1] Footnotes omitted. All translations are by the Registry.

for Agriculture and Forestry of Equatorial Guinea (*ibid.*, Vol. I, para. 2.2). (As the Judgment notes, he was elevated to the position of Second Vice-President in charge of Defence and State Security in May 2012 (para. 29) and to Vice-President in charge of National Defence and State Security in June 2016 (para. 34).)

10. Mr. Teodoro Nguema Obiang Mangue is facing prosecution in France, triggered by a private complaint in 2008, to which investigating judges were assigned in December 2010 (Memorial of Equatorial Guinea, Vol. I, paras. 3.23, 3.29). The complaint alleges that various persons, including Mr. Teodoro Nguema Obiang Mangue, had acquired movable and immovable property in France using monies derived from the misappropriation of foreign public funds, including those of Equatorial Guinea (*ibid.*, Vol. I, paras. 3.19, 3.23, 3.30). In July 2011, the Public Prosecutor indicated to the investigating judges that "the facts under investigation . . . may be characterized only as money laundering or handling offences" and that "the laundering or handling in France of an asset obtained through an offense committed abroad by a foreign national and not subject to French law is punishable in France" (*ibid.*, Vol. II, p. 90 (Ann. 8)).

11. Beginning on 28 September 2011, in furtherance of these criminal proceedings, French authorities conducted a series of searches of the Building, during which they attached and took possession of a large amount of personal property (*ibid.*, Vol. I, para. 3.54). French authorities attached the Building itself on 19 July 2012 (*ibid.*, Vol. I, para. 4.24).

12. Also beginning in September 2011, the applicant State and Mr. Teodoro Nguema Obiang Mangue took a series of steps related to the Building:

(i) An agreement dated 15 September 2011 provides that Mr. Teodoro Nguema Obiang Mangue's shares in the Swiss companies that co-owned the Building were to be transferred to the State of Equatorial Guinea, which in turn was required to transfer the sum of €34 million into the bank account of EDUM S.L. in Malabo, Equatorial Guinea (*ibid*., Vol. I, paras. 2.17, 4.38; written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue at the public sitting held on 19 October 2016 at 5 p.m., Ann. 1, Arts. 1, 3 and 4). According to the judgment of the *Tribunal correctionnel de Paris* of 27 October 2017, EDUM S.L. is an Equatorial Guinean company through which Mr. Teodoro Nguema Obiang Mangue paid for his personal expenses (Judgment of the *Tribunal correctionnel de Paris* of 27 October 2017, p. 76).

(ii) Less than three weeks after the conclusion of the agreement transferring ownership of the Building, on 4 October 2011, the applicant State sent a diplomatic Note to the Foreign Ministry of France stating that it "has for a number of years owned" the Building (Memorial of Equatorial Guinea, Vol. III, p. 53 (Ann. 33); see also Vol. I, para. 4.4). That Note further asserted that the Building "forms part of the premises of the diplomatic mission," and thus is entitled to protection under Article 22 of the Vienna Convention (*ibid.*).

(iii) On 17 October 2011 Equatorial Guinea asserted in a Note Verbale to France that the Building was the official residence of the Permanent Delegate of Equatorial Guinea to UNESCO, Ms Mariola Bindang Obiang, who would also serve in the capacity of Chargée d'affaires *ad interim* of the diplomatic mission, also located at the Building (*ibid.*, Vol. III, p. 60 (Ann. 36); see also Vol. I, para. 4.9).

(iv) On 14 February 2012, in three communications to French authorities and one Note Verbale to UNESCO, Equatorial Guinea asserted that the Building was the residence of its Permanent Representative to UNESCO (*ibid.*, Vol. III, p. 62 (Ann. 37); Vol. III, p. 64

(Ann. 38); Vol. III, p. 66 (Ann. 39); Vol. III, p. 72 (Ann. 41); see also Vol. I, paras. 4.10-4.12).

(v) On 9 March 2012, the Embassy of Equatorial Guinea wrote to the Minister for Justice of France stating: "Since 15 September 2011 the Republic of Equatorial Guinea has been the owner of a property located at 40/42 Avenue Foch in Paris, assigned to its diplomatic mission and declared as such to the Ministry of Foreign and European Affairs by Note Verbale No. 365/11 of 4 October 2011" (*ibid*., Vol. III, p. 77 (Ann. 43)). Its 12 March 2012 Note Verbale to the Foreign Ministry was to the same effect (*ibid*., Vol. III, pp. 80-81 (Ann. 44)). Neither Note indicated that the Building was the residence of the Permanent Representative to UNESCO. (The Headquarters Agreement between UNESCO and France governs the privileges and immunities of personnel of permanent delegations to UNESCO and the status of buildings that serve as their residences or offices, and neither Party has suggested that the Court has jurisdiction to apply that Agreement in this case.)

(vi) In July 2012, eight days after French authorities issued an order of attachment *(saisie pénale immobilière)* in relation to the Building, Equatorial Guinea informed the Government of France 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". (*Ibid.*, Vol. III, p. 88 (Ann. 47); see also Vol. I, para. 4.25.)

13. The President of Equatorial Guinea stated the purpose of the above-described actions in a letter to his French counterpart dated 14 February 2012:

> "Your Excellency is not unaware of the fact that my son, Teodoro NGUEMA OBIANG MANGUE, lived in France, where he pursued his studies, from childhood until he reached adulthood. France was his preferred country and, as a young man, he purchased a residence in Paris; however, due to the pressures on him as a result of the supposed unlawful acquisition of assets, he decided to resell the said building to the Government of the Republic of Equatorial Guinea.
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> At this time, the building in question is a property that was lawfully acquired by the Government of Equatorial Guinea and is currently used by the Representative to UNESCO, who is in charge of the Embassy's property. The said property is afforded legal and diplomatic protection under the Vienna Convention and the bilateral agreements signed by the two States.
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> Unfortunately, that building is the subject of legal proceedings, apparently as a result of the unfounded complaints of certain NGOs, without any legal justification." (*Ibid.*, Vol. III, p. 66 (Ann. 39); see also Vol. I, para. 4.11.)

14. This evidence establishes that in 2004, Mr. Teodoro Nguema Obiang Mangue became the sole shareholder of the companies that co-own the Building, a valuable property in French territory. Since December 2010, he has been facing prosecution in France for money laundering (a means of shielding assets from law enforcement authorities). Thereafter, beginning in 2011, the applicant State has co-operated with Mr. Teodoro Nguema Obiang Mangue in a series of actions with respect to the Building. It has made a variety of assertions to French authorities about the use of the Building, on the basis of which it has invoked immunity and inviolability. If the steps taken by the Applicant are given effect, real property in France's territory that had been in the hands of an individual facing prosecution will be shielded from French authorities as inviolable mission premises that are "immune from search, requisition, attachment or execution" under Article 22 of

the Vienna Convention. The sum of €34 million that was paid in exchange for that property is also beyond the reach of French law enforcement authorities, having been transferred to a bank account in Equatorial Guinea.

15. The President of Equatorial Guinea made clear that the purpose of these actions is a personal one, to address difficulties faced by his son. Such a purpose is entirely at odds with the régime of privileges and immunities contained in the Vienna Convention, which states in its preamble that the purpose of privileges and immunities "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States".

16. During the hearing on provisional measures, France stated that "the judicial police officers who conducted the searches of the building in 2012 found no official documents belonging to Equatorial Guinea or to its diplomatic mission in France" (CR 2016/15, p. 29, para. 25 (Pellet))[2]. Equatorial Guinea has not refuted this statement, nor has it indicated to the Court that embassy archives or other government documents were among the possessions attached or taken into possession by French authorities in their searches of the Building.

17. As the Court has observed, "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979,* p. 19, para. 38). Despite their importance to the functioning of diplomacy, the immunity and inviolability of diplomatic personnel and missions exist in uneasy tension with other interests of States and private parties. Every day, foreign ministry lawyers are in dialogue with counterparts in other capitals regarding the application of the Vienna Convention to particular cases. Differences inevitably emerge. The parties to the Optional Protocol have recognized that the Court is a suitable forum for addressing these differences. If the Court declines to decide a dispute arising under the Vienna Convention, despite having jurisdiction to do so, there will be no judicial resolution of the merits, an outcome that may be unsatisfactory to both Parties. It is only in "exceptional circumstances" — to echo the words used by the Court today — that the Court should refuse to exercise its jurisdiction over such a dispute.

18. The present case is such an exceptional circumstance. The sequence of actions taken by the applicant State is established by the documents submitted by the Applicant. The purpose of those actions, which was stated by the President of the applicant State, is manifest. The evidence regarding the character of the Applicant's conduct is conclusive, easily meeting the heightened standards of proof that the Court has suggested in certain circumstances (e.g. "clear and convincing evidence" (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II),* p. 685, para. 132, quoting Arbitration on the *Tacna-Arica Question (Chile/Peru) (1925), RIAA*, Vol. II, p. 930)). The applicant State has told the Court nothing to suggest that its diplomatic functions were disrupted when French authorities entered the Building and initiated searches in September 2011, nor is there any indication that French authorities entered or attached the Building with such a purpose. The dismissal of this Application would pose no threat to diplomatic functions. On the other hand, the Court's decision today means that the applicant State will continue to benefit from the Court's Order on provisional measures of 7 December 2016 until the Court's Judgment on the merits.

[2] Footnotes omitted.

19. Despite conclusive evidence of the character of the conduct in which the Applicant engaged as a predicate for its assertion of rights in this Court, the Court allows the case to proceed to the merits, as if this is yet another disagreement about the nuances of the régime of diplomatic immunity. To preserve the integrity of its judicial function, I believe that the Court should not have allowed itself to be used to further this effort by the Applicant. It should instead have upheld the third preliminary objection. Accordingly, I dissent.

(Signed) Joan E. DONOGHUE.