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Summary

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Immunities and Criminal Proceedings (Equatorial Guinea v. France)

History of the proceedings (paras. 1-22)

The Court begins by recalling that, on 13 June 2016, Equatorial Guinea filed an Application instituting proceedings against France with regard to a dispute concerning

“the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security [Mr. Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property”.

In its Application, Equatorial Guinea seeks to found the Court’s jurisdiction, first, on Article 35 of the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter the “Palermo Convention”), and, second, on Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes of 18 April 1961 (hereinafter the “Optional Protocol to the Vienna Convention”).

The Court further recalls that, following the filing of a Request for the indication of provisional measures by Equatorial Guinea on 29 September 2016, it instructed France, in an Order dated 7 December 2016, “pending a final decision in the case”, to

“take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 Avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability”.

Finally, the Court recalls that, on 31 March 2017, France raised preliminary objections to the jurisdiction of the Court.

FACTUAL BACKGROUND (PARAS. 23-41)

The Court explains that, beginning in 2007, a number of associations and private individuals lodged complaints with the Paris public prosecutor against certain African Heads of State and members of their families in respect of allegations of misappropriation of public funds in their country of origin, the proceeds of which had allegedly been invested in France. One of these complaints, filed on 2 December 2008 by the association Transparency International France, was declared admissible by the French courts, and a judicial investigation was opened in respect of

“handling misappropriated public funds”, “complicity in handling misappropriated public funds, complicity in the misappropriation of public funds, money laundering, complicity in money laundering, misuse of corporate assets, complicity in misuse of corporate assets, breach of trust, complicity in breach of trust and concealment of each of these offences”. The Court observes that the investigation focused, in particular, on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including Mr. Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who was at the time Ministre d’Etat for Agriculture and Forestry of Equatorial Guinea. The investigation more specifically concerned the way in which Mr. Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 Avenue Foch in Paris. In 2011 and 2012, that building was the subject of an attachment order (saisie pénale immobilière) and various objects found on the premises were seized, following a finding by the French courts that the building had been wholly or partly paid for out of the proceeds of the offences under investigation and that its real owner was Mr. Teodoro Nguema Obiang Mangue. Equatorial Guinea systematically objected to those actions, claiming that it had previously acquired the building in question and that it constituted part of the premises of its diplomatic mission in France.

The Court notes that Mr. Teodoro Nguema Obiang Mangue, who became Second Vice-President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012, challenged the measures taken against him and on several occasions invoked the immunity from jurisdiction to which he believed he was entitled on account of his functions. Nevertheless, he was indicted by the French judiciary in March 2014. All the legal remedies taken by Mr. Teodoro Nguema Obiang Mangue against that indictment were rejected, as were Equatorial Guinea’s diplomatic protests. At the end of the investigation, Mr. Teodoro Nguema Obiang Mangue — who had been appointed as the Vice-President of Equatorial Guinea in charge of National Defence and State Security in June 2016 — was referred for trial before the Tribunal correctionnel de Paris for alleged money-laundering offences committed in France between 1997 and October 2011.

The Court observes that the hearings on the merits of the case before the Tribunal correctionnel de Paris were held from 19 June to 6 July 2017. The tribunal delivered its judgment on 27 October 2017, in which it found Mr. Teodoro Nguema Obiang Mangue guilty of the offences. He was sentenced to a three-year suspended prison term and a suspended fine of €30 million. The tribunal also ordered the confiscation of all the assets seized during the judicial investigation and of the attached building at 42 Avenue Foch in Paris. Regarding the confiscation of this building, the tribunal, referring to the Court’s Order of 7 December 2016 indicating provisional measures, stated that “the . . . proceedings [pending before the International Court of Justice] make the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty”. Following delivery of the judgment, Mr. Teodoro Nguema Obiang Mangue lodged an appeal against his conviction with the Cour d’appel de Paris. This appeal having a suspensive effect, no steps have been taken to enforce the sentences handed down to Mr. Teodoro Nguema Obiang Mangue.

SUBJECT-MATTER OF THE DISPUTE (PARAS. 48-73)

The Court notes that the dispute between the Parties arose from criminal proceedings instituted in France against Mr. Teodoro Nguema Obiang Mangue and that those criminal proceedings were ongoing in French courts on 13 June 2016, when Equatorial Guinea filed its Application with the Court. The facts of the case and submissions of the Parties indicate that there are several distinct claims over which the Parties hold opposing views and which form the subject-matter of the dispute. For convenience, these are described under the bases of jurisdiction that Equatorial Guinea invokes for each claim.

Equatorial Guinea's claims based on the Palermo Convention

The Court notes that the aspect of the dispute for which Equatorial Guinea invokes the Palermo Convention as the title of jurisdiction involves various claims on which the Parties have expressed differing views in their written and oral pleadings. First, they disagree on whether, as a consequence of the principles of sovereign equality and non-intervention in the internal affairs of another State, to which Article 4 of the Palermo Convention refers, Mr. Teodoro Nguema Obiang Mangue, as Vice-President of Equatorial Guinea in charge of National Defence and State Security, is immune from foreign criminal jurisdiction. Second, they hold differing views on whether, as a consequence of the principles referred to in Article 4 of the Palermo Convention, the building at 42 Avenue Foch in Paris is immune from measures of constraint. Third, they differ on whether, by establishing its jurisdiction over the predicate offences associated with the offence of money laundering, France exceeded its criminal jurisdiction and breached its conventional obligation under Article 4 read in conjunction with Articles 6 and 15 of the Palermo Convention.

The Court states that it will ascertain whether this aspect of the dispute between the Parties is capable of falling within the provisions of the Palermo Convention and whether, as a consequence, it is one which the Court has jurisdiction to entertain under the Palermo Convention.

Equatorial Guinea's claims based on the Vienna Convention

The Court further observes that the aspect of the dispute for which Equatorial Guinea invokes the Optional Protocol to the Vienna Convention as the title of jurisdiction involves two claims on which the Parties have expressed differing views. First, they disagree on whether the building at 42 Avenue Foch in Paris constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment afforded for such premises under Article 22 of the Vienna Convention. They also disagree on whether France, by the action of its authorities in relation to the building, is in breach of its obligations under Article 22. The Court states that it will ascertain whether this aspect of the dispute between the Parties is capable of falling within the Vienna Convention and, consequently, whether it is one which the Court has jurisdiction to entertain under the Optional Protocol to the Vienna Convention.

THE FIRST PRELIMINARY OBJECTION: JURISDICTION UNDER THE PALERMO CONVENTION (PARAS. 74-119)

As a preliminary matter, the Court notes that Article 35 of the Palermo Convention lays down certain procedural requirements before a State party may refer a dispute to the Court. States parties are required to attempt to negotiate settlement of the dispute for a reasonable time, then to proceed to arbitration should one of the States parties involved so request, and to attempt, for a period of six months from the request to arbitrate, to organize that arbitration. The Court is satisfied that these procedural requirements have been complied with.

The Court states that it will first proceed to examine Article 4 to determine whether the claim by Equatorial Guinea relating to the immunities of States and State officials falls within the provisions of Article 4. Unless the Court finds that this is the case, the aspect of the dispute between the Parties in relation to the asserted immunities of the Vice-President of Equatorial Guinea and the building at 42 Avenue Foch in Paris as State property cannot be said to concern the interpretation or application of the Palermo Convention.

Second, the Court explains, it will consider Equatorial Guinea's argument that France has violated Article 4 of the Convention by failing to carry out its obligations relating to the criminalization of money laundering and the establishment of its jurisdiction over that offence (pursuant to Articles 6 and 15) in a manner consistent with the principles of sovereign equality and

non-intervention referred to in Article 4. The Court will determine whether the actions by France of which Equatorial Guinea complains are capable of falling within the provisions of the Palermo Convention. Unless the Court finds that this is the case, the aspect of the dispute between the Parties in relation to France's alleged overextension of jurisdiction cannot be said to concern the interpretation or application of the Palermo Convention.

The alleged breach by France of the rules on immunities of States and State officials

The Court begins by recalling that, pursuant to customary international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the provisions of the Palermo Convention must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in light of the object and purpose of the Convention. To confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse may be had to the supplementary means of interpretation which include the preparatory work of the Convention and the circumstances of its conclusion.

The Court next turns to Article 4 of the Palermo Convention, which provides as follows:

“Protection of sovereignty

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”

The Court considers that Article 4 (1) imposes an obligation on States parties and that it is not preambular in character and does not merely formulate a general aim. However, Article 4 is not independent of the other provisions of the Convention. Its purpose is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States. The Court notes that Article 4 does not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself. Article 4 refers only to general principles of international law. The Court considers that, in its ordinary meaning, Article 4 (1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules. With regard to context, it notes that none of the provisions of the Palermo Convention relates expressly to the immunities of States and State officials. With regard to the object and purpose of the Convention, the Court observes that the interpretation of Article 4 advanced by Equatorial Guinea, whereby the customary rules relating to immunities of States and State officials are incorporated into the Convention as conventional obligations, is unrelated to the stated object and purpose of the Convention, set out in Article 1, which is the promotion of co-operation to prevent and combat transnational organized crime more effectively.

The Court concludes that, in its ordinary meaning, Article 4, read in its context and in light of the object and purpose of the Convention, does not incorporate the customary international rules on immunities of States and State officials. This interpretation is confirmed by the travaux préparatoires of the Palermo Convention.

In light of the above, the Court concludes that Article 4 does not incorporate the customary international rules relating to immunities of States and State officials. Therefore, the aspect of the dispute between the Parties relating to the asserted immunity of the Vice-President of Equatorial Guinea and the immunity claimed for the building at 42 Avenue Foch in Paris from measures of constraint as State property does not concern the interpretation or application of the Palermo Convention. Consequently, the Court lacks jurisdiction in relation to this aspect of the dispute. The Court notes that its determination that Article 4 does not incorporate the customary international rules relating to immunities of States and State officials is without prejudice to the continued application of those rules.

The alleged overextension of jurisdiction by France

The Court is of the opinion that, in assessing whether France was implementing the Convention in taking action against Mr. Teodoro Nguema Obiang Mangue, it is relevant to note that the Palermo Convention recognizes that the definition of offences and related legal rules and procedures is a matter for the domestic law of the prosecuting State. In accordance with that general principle, the Convention helps to co-ordinate but does not direct the actions of States parties in the exercise of their domestic jurisdiction. The scope of action taken in the implementation of the Convention is therefore limited.

The Court then turns to the issue of France's alleged overextension of jurisdiction in relation to the predicate offences of money laundering. It notes that Article 2 (h) of the Palermo Convention defines "predicate offence" as "any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention". Article 6 (2) imposes an obligation on States parties to "seek to" establish criminal offences as set out in Article 6 (1) in relation to the "widest range of predicate offences", including offences committed outside the jurisdiction of the State party. The obligation is limited by Article 6 (2) (c). Pursuant to that provision, predicate offences committed outside the jurisdiction of a State party may only relate to conduct that is a criminal offence under the domestic law of the State where the conduct occurs. That conduct must also constitute a criminal offence under the domestic law of the State party adopting the measures pursuant to Article 6, had the conduct occurred there.

The Court observes that Article 6 (2) (c) is not concerned with the question whether any particular individual has committed a predicate offence abroad, but with the distinct prior question whether the alleged conduct abroad constitutes a criminal offence under the domestic law of the State where it occurred. The Court further observes that Article 6 (2) (c) of the Palermo Convention does not provide for the exclusive jurisdiction of the State on whose territory such an offence was committed. It is for each State party to adopt measures to criminalize the Convention offences as required by Article 6, including "the widest range" of predicate offences inside and outside the jurisdiction of that State party. It is also for each State party to adopt such measures as may be necessary to establish their jurisdiction over Convention offences pursuant to Article 15. This is in accordance with the principle stated in Article 15 (6) of the Palermo Convention, which provides that "[w]ithout prejudice to norms of general international law", the Convention does not exclude the exercise of any criminal jurisdiction established by a State party in accordance with its domestic law.

For these reasons, the Court finds that the alleged violations complained of by Equatorial Guinea are not capable of falling within the provisions of the Palermo Convention, notably Articles 6 and 15. The Court therefore lacks jurisdiction to entertain the aspect of the dispute relating to France's alleged overextension of jurisdiction.

Having analysed the aspect of the dispute in respect of which Equatorial Guinea invoked the Palermo Convention as a basis of jurisdiction, the Court concludes that this aspect of the dispute is not capable of falling within the provisions of the Palermo Convention. The Court therefore lacks

jurisdiction pursuant to the Palermo Convention to entertain Equatorial Guinea's Application and must uphold France's first preliminary objection. In the Court's view, its conclusion in relation to France's first preliminary objection makes it unnecessary for it to make any further determinations regarding the scope or content of the obligations on States parties pursuant to Article 4 of the Palermo Convention.

**THE SECOND PRELIMINARY OBJECTION: JURISDICTION UNDER THE
OPTIONAL PROTOCOL TO THE VIENNA CONVENTION
(PARAS. 120-138)**

The Court recalls that the aspect of the dispute between the Parties, in respect of which Equatorial Guinea invokes the Optional Protocol to the Vienna Convention as the title of jurisdiction, concerns whether the building at 42 Avenue Foch in Paris constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment provided for under Article 22 of the Vienna Convention. It also concerns whether France, by the actions of its authorities in relation to the building, is in breach of its obligation under Article 22. Equatorial Guinea seeks to found the Court's jurisdiction under Article I of the Optional Protocol to the Vienna Convention.

The Court further recalls that Articles II and III of the Optional Protocol to the Vienna Convention provide that parties to a dispute arising out of the interpretation or application of the Vienna Convention may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but rather to arbitration or conciliation. After the expiry of that period, either party may bring the dispute before the Court by an application.

The Court observes that Equatorial Guinea proposed to France to have recourse to conciliation or arbitration. However, France did not express its readiness to consider that proposal and, instead, expressly stated that it could not pursue it. Thus, Articles II and III of Optional Protocol to the Vienna Convention in no way affect any jurisdiction the Court might have under Article I thereof.

In order to establish jurisdiction over this aspect of the dispute, the Court is required to determine whether this aspect of the dispute is one that arises out of the interpretation or application of the Vienna Convention, as required by the provisions of Article I of the Optional Protocol to the Vienna Convention. Making that determination requires an analysis of the relevant terms of the Vienna Convention in accordance with the rules of customary international law on the interpretation of treaties.

The Court notes that Article 1 (i) of the Vienna Convention is prefaced by the following sentence: "For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them." Article 1 (i) of the Vienna Convention thus does no more than to define what constitutes "premises of the mission", a phrase used later in Article 22. For the purposes of the Vienna Convention, a building or part of a building "used for the purposes of [a diplomatic] mission", including the residence of the head of mission, is considered "premises of the mission", regardless of ownership.

The Court next notes that Article 22 of the Vienna Convention provides a régime of inviolability, protection and immunity for "premises of [a diplomatic] mission" by obligating the receiving State, *inter alia*, to refrain from entering such premises without the consent of the head of mission, and to protect those premises against intrusion, damage or disturbance of the peace of the mission by agents of the receiving State. The Article also guarantees immunity from search, requisition, attachment or execution for the premises of the mission, their furnishings and other property thereon, as well as means of transportation of the mission.

According to the Court, where, as in this case, there is a difference of opinion as to whether or not the building at 42 Avenue Foch in Paris, which Equatorial Guinea claims is “used for the purposes of its diplomatic mission”, qualifies as “premises of the mission” and, consequently, whether it should be accorded or denied protection under Article 22, this aspect of the dispute can be said to “aris[e] out of the interpretation or application of the Vienna Convention” within the meaning of Article I of the Optional Protocol to the said Convention. The Court therefore finds that this aspect of the dispute falls within the scope of the Vienna Convention and that it has jurisdiction under Article I of the Optional Protocol to the Vienna Convention to entertain it.

It then remains for the Court to determine the extent of its jurisdiction. Although the Court has held that an applicant may not introduce, during the course of the proceedings, a new claim which would have the effect of transforming the subject-matter of the dispute originally brought before it, it is not persuaded that Equatorial Guinea, in advancing its argument regarding movable property seized from the premises at 42 Avenue Foch in Paris, has introduced a new claim into the proceedings. It notes that, under Article 22 (3) of the Vienna Convention, it is not only the premises of the mission but also “their furnishings and other property thereon and the means of transport of the mission” that are immune from search, requisition, attachment or execution. The Court concludes that any claims relating to movable property present on the premises at 42 Avenue Foch in Paris and resulting from the alleged violation of the immunity to which the building is said to be entitled, fall within the subject-matter of the dispute and that, as such, the Court is competent to entertain them. The Court thus concludes that it has jurisdiction to entertain the aspect of the dispute relating to the status of the building, including any claims relating to the furnishings and other property present on the premises at 42 Avenue Foch in Paris. France’s second preliminary objection is consequently dismissed.

**THE THIRD PRELIMINARY OBJECTION: ABUSE OF PROCESS AND
ABUSE OF RIGHTS (PARAS. 139-152)**

The Court recalls that, in its Preliminary Objections, France denies that the Court has jurisdiction, *inter alia*, on the ground that Equatorial Guinea’s conduct was an abuse of rights and that its seisin of the Court was an abuse of process. In the oral proceedings, France contended that, regardless of whether the Court viewed its argument relating to abuse of rights and abuse of process as a matter of jurisdiction or admissibility, the Court should decline to hear the dispute between the Parties on the merits. As to abuse of rights, France refers to inconsistencies in correspondence sent and statements made by Equatorial Guinea regarding the date of acquisition by Equatorial Guinea of the building at 42 Avenue Foch in Paris and the use to which it was put. As to abuse of process, France argues that Equatorial Guinea’s Application by which it seised the Court constitutes an abuse of process because it was submitted “in the manifest absence of any legal remedy and with the aim of covering abuses of rights committed in other respects”.

The Court explains that it will consider France’s objection only in relation to the Vienna Convention, since it has found that it lacks jurisdiction under the Palermo Convention.

In the Court’s view, France’s third preliminary objection is properly characterized as a claim relating to admissibility. This is reflected in the final submissions of France, which refer not only to lack of jurisdiction but also to the inadmissibility of the Application.

Relying on the case law of the Court and its predecessor, the Court observes that an abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings. In this case, the Court does not consider that Equatorial Guinea, having established a valid title of jurisdiction, should be barred at the threshold without clear evidence that its conduct could amount to an abuse of process. Such evidence has not been presented to the Court. It is only in exceptional circumstances that the Court should reject a claim based on a valid

title of jurisdiction on the ground of abuse of process. The Court does not consider the present case to be one of those circumstances.

As to the abuse of rights invoked by France, the Court states that it will be for each Party to establish both the facts and the law on which it seeks to rely at the merits phase of the case. The Court considers that 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. Any argument in relation to abuse of rights will be considered at the stage of the merits of this case.

For these reasons, the Court does not consider Equatorial Guinea's present claim inadmissible on grounds of abuse of process or abuse of rights. France's third preliminary objection is therefore dismissed.

GENERAL CONCLUSIONS (PARA. 153)

The Court concludes that it lacks jurisdiction pursuant to the Palermo Convention to entertain Equatorial Guinea's Application. The Court further concludes that it has jurisdiction pursuant to the Optional Protocol to the Vienna Convention to entertain the submissions of Equatorial Guinea relating to the status of the building at 42 Avenue Foch in Paris as diplomatic premises, including any claims relating to the seizure of certain furnishings and other property present on the above-mentioned premises. Finally, the Court finds that Equatorial Guinea's Application is not inadmissible on grounds of abuse of process or abuse of rights.

OPERATIVE CLAUSE (PARA. 154)

For these reasons,

THE COURT,

(1) By eleven votes to four,

Upholds the first preliminary objection raised by the French Republic that the Court lacks jurisdiction on the basis of Article 35 of the United Nations Convention against Transnational Organized Crime;

IN FAVOUR: President Yusuf; Judges Owada, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Bhandari, Crawford, Gevorgian, Salam;

AGAINST: Vice-President Xue; Judges Sebutinde, Robinson; Judge ad hoc Kateka;

(2) Unanimously,

Rejects the second preliminary objection raised by the French Republic that the Court lacks jurisdiction on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes;

(3) By fourteen votes to one,

Rejects the third preliminary objection raised by the French Republic that the Application is inadmissible for abuse of process or abuse of rights;

IN FAVOUR: President Yusuf; Vice-President Xue; Judges Owada, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam; Judge ad hoc Kateka;

AGAINST: Judge Donoghue;

(4) By fourteen votes to one,

Declares that it has jurisdiction, on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, to entertain the Application filed by the Republic of Equatorial Guinea on 13 June 2016, in so far as it concerns the status of the building located at 42 Avenue Foch in Paris as premises of the mission, and that this part of the Application is admissible.

IN FAVOUR: President Yusuf; Vice-President Xue; Judges Owada, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Judge ad hoc Kateka;

AGAINST: Judge Donoghue.

Vice-President XUE, Judges SEBUTINDE, ROBINSON and Judge ad hoc KATEKA append a joint dissenting opinion to the Judgment of the Court; Judge OWADA appends a declaration to the Judgment of the Court; Judge ABRAHAM appends a separate opinion to the Judgment of the Court; Judge DONOGHUE appends a dissenting opinion to the Judgment of the Court; Judges GAJA and CRAWFORD append declarations to the Judgment of the Court; Judge GEVORGIAN appends a separate opinion to the Judgment of the Court.

Joint dissenting opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge ad hoc Kateka

In this opinion, Vice-President Xue, Judges Sebutinde and Robinson and Judge ad hoc Kateka explain their vote against point (1) of paragraph 154 of the Court’s Judgment. They take the view that a dispute concerning whether the prosecution of a high-ranking State official, the Vice-President of a State party to the United Nations Convention against Transnational Organized Crime (the “Palermo Convention”) in a foreign State that is also a State party to this Convention which makes explicit reference in Article 4 (1) to the principle of “sovereign equality of States” — a term which necessarily encompasses the issues of foreign State immunity — is a dispute concerning the interpretation or application of the Palermo Convention.

They outline four reasons for their disagreement with the Court’s decision. First, that the majority have failed to recognize the overarching and pervasive effect of the obligations contained in Article 4 (1) of the Palermo Convention. Second, that the principle of “sovereign equality of States” in Article 4 (1) of the Convention has a function within the conventional framework, that is separate from and additional to the other two principles enshrined in Article 4, namely, territorial integrity of States and non-interference in the domestic affairs of other States. Third, they question the majority’s finding that issues relating to the asserted immunities of the Vice-President of Equatorial Guinea and of the building at 42 Avenue Foch, Paris do not fall within the provision of the Palermo Convention, as this would deprive the term “sovereign equality of States” of its appropriate effect and not be in conformity with the relevant rules of treaty interpretation. Fourth, they indicate that the Court has not precisely identified the subject-matter of the dispute in the case, which the Court has identified in previous cases as being an integral part of its judicial function.

According to the minority, the subject-matter of the dispute is whether France — by prosecuting the Vice-President of Equatorial Guinea for the offence of money laundering and by imposing measures of constraint on the building at 42 Avenue Foch, Paris which Equatorial Guinea claims is State property — acted in a manner consistent with the principles of sovereign equality of States territorial integrity and non-intervention in the internal affairs of another State.

They rely, in part, on a previous Judgment of a Chamber of the Court in Elettronica Sicula (United States of America v. Italy) in support of the view that in the interpretation and application of Article 4 (1) of the Palermo Convention, since there are no express words which clearly show an intention to dispense with the customary rules on foreign State immunity, those rules remain applicable through the reference in Article 4 (1) to “sovereign equality of States”.

Further, they emphasize that the object and purpose of the Convention is the promotion of co-operation to prevent transnational organized crime and that there is a relationship between this object and purpose and the principle of sovereign equality of States. Mutual respect for the principle of sovereign equality of States, and the rules on State immunity derived therefrom, creates and maintains the conditions necessary to efficiently implement the co-operative framework that the Convention aims to establish and operationalize to combat transnational organized crime. Accordingly, they recognize Article 4 (1) as creating an overarching obligation that has a pervasive effect on other obligations that the States parties have agreed to undertake under the Palermo Convention.

In support of their arguments, they trace the development of the principle of sovereign equality from the time of its inclusion in Article 2 of the United Nations Charter, and subsequently the Friendly Relations Declaration of 1970, and emphasize the intrinsic linkage between this principle and the rules of foreign State immunity. This is a link that has been recognized by the Court in its decision in Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening) and by the European Court on Human Rights in Al-Adsani v. United Kingdom. In the particular context of the Palermo Convention, the minority find evidence for this linkage between

the customary rules on foreign State immunity and the principle of sovereign equality in the travaux préparatoires of the Palermo Convention, which expressly declare that “it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations”.

They also refer to other international treaties which contain provisions that are similar or identical to Article 4 of the Palermo Convention, namely the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism and the 2003 United Nations Convention against Corruption.

The minority also elaborate on how the pervasive effect of the principle of sovereign equality enshrined in Article 4 impacts the implementation of the treaty obligations by States parties to the Palermo Convention and the role this plays in constraining these States’ freedom of action in enacting and implementing domestic legislation.

The minority also examine Equatorial Guinea’s claims that the present case concerns the interpretation and application of Article 4 of the Palermo Convention read in conjunction with several provisions of the Convention, namely Articles 6, 11, 12, 14, 15 and 18. They conclude that a dispute arises between the Parties with respect to each of these provisions read in conjunction with Article 4 as the Parties hold opposing views on these issues. Further, the applicability of the customary rules of foreign State immunity is necessarily entailed by a proper interpretation of the principle of sovereign equality under Article 4. They also observe that Article 15 (6), in its reference to “norms of general international law” can be read to include these customary rules on immunity. The actions of a State party that seeks to exercise jurisdiction over offences criminalized under its domestic law in accordance with the Convention must not prejudice these well-recognized norms of general international law.

Thus, contrary to the findings of the Court, they conclude that a dispute concerning the interpretation or application of the Convention has arisen between the Parties and that the Court has jurisdiction. Consequently, they would have found that the Court has jurisdiction to hear the dispute under the Palermo Convention. They conclude by noting that the joint dissent is an expression of their views on the Court’s jurisdiction in the case and that it is not to be seen as in any way reflecting their views on the merits of the case instituted against Mr. Teodoro Nguema Obiang Mangue by the French authorities.

Declaration of Judge Owada

Judge Owada agrees with all the dispositifs as contained in paragraph 154 of the Judgment, but he wishes to elaborate his views: (a) on the relevance of Article 4 of the Palermo Convention to the alleged violations by France of other provisions of the Convention; and (b) on the treatment of France’s third preliminary objection based on alleged abuse of rights.

While Judge Owada agrees with the Judgment that Article 4 of the Palermo Convention does not incorporate the rules of customary international law relating to immunities of States and State officials, he is of the view that Article 4 continues to be relevant in interpreting other provisions of the Convention such as Articles 6, 8, 9 and 15. From this perspective, Judge Owada arrives at the conclusion that the acts of France complained of by Equatorial Guinea cannot fall within the scope of these provisions read in conjunction with Article 4. This is because, according to Judge Owada, these provisions of the Convention essentially relate to the establishment of criminal jurisdiction by States parties over offences in their respective domestic legal systems, as distinct from the actual exercise of such jurisdiction in concrete cases.

With respect to France's third preliminary objection, Judge Owada elaborates his view on the reasons why the Court did not choose the option to declare that the objection based on alleged abuse of rights does not possess an exclusively preliminary character as envisaged in Article 79, paragraph 9, of the Rules of Court. According to Judge Owada, the Respondent was arguing that the Applicant's claim has an essential legal flaw so that it cannot be regarded as a "valid claim". Judge Owada is of the view that such objection is not "preliminary" in its nature and, consequently, cannot fall within the mechanism of preliminary objections as provided by Article 79 of the Rules of Court. It then follows that the Court did not have the option to declare that France's objection based on alleged abuse of rights does not possess an exclusively preliminary character pursuant to paragraph 9 of Article 79.

Separate opinion of Judge Abraham

In his separate opinion, Judge Abraham states that although he voted in favour of all the paragraphs of the operative part of the Judgment, he nonetheless disagrees with the Court's reasoning in finding that the dispute submitted to it does not fall within the scope ratione materiae of Article 4 of the Palermo Convention and, consequently, does not fall within the provisions of the compromissory clause of Article 35 of that instrument.

Judge Abraham is of the view that, while the Court was right to conclude that "Article 4 does not incorporate the customary international rules relating to immunities of States and State officials", it could and should have reached that conclusion without making any distinction between the rules relating to immunities and other rules of customary international law deriving from the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States referred to in Article 4, paragraph 1, of the Palermo Convention. In Judge Abraham's opinion, instead of focusing its reasoning on the customary international rules relating to the immunities of States and State officials, as it does in paragraphs 92 to 102 of the Judgment, the Court should have concluded that Article 4 does not incorporate into the Convention any of the principles to which it refers, nor any customary international rule deriving from those principles.

For Judge Abraham, Article 4, as a whole, is a saving clause, which aims neither to create conventional obligations for States parties, nor to incorporate, by reference, pre-existing rules of customary law into the Convention. The aim of that Article is rather to state that nothing in the Convention derogates from the rules of customary international law relating to certain fundamental principles that it sets forth. According to Judge Abraham, that interpretation of Article 4, paragraph 1, is supported both by the object and purpose of the Convention, as stated in Article 1 of that instrument, and by a reading of Article 4 as a whole. It is further substantiated by the travaux préparatoires of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, certain provisions of which inspired Article 4 of the Palermo Convention. Judge Abraham observes that, if the Court had adopted what he considers to be the correct interpretation of Article 4, it would have rejected with briefer and less questionable reasoning Equatorial Guinea's claim whereby France had also violated that Article in overextending the jurisdiction of its criminal courts, by the way in which it criminalized the offence of money laundering in its domestic law and defined the jurisdiction of its courts to entertain it.

Dissenting opinion of Judge Donoghue

Judge Donoghue has voted against subparagraphs (3) and (4) of paragraph 154. She agrees that the Court has jurisdiction over the Applicant's claim regarding the building at 42 Avenue Foch, pursuant to the Option Protocol to the Vienna Convention on Diplomatic Relations, but she believes that this claim is inadmissible.

Judge Donoghue considers that France's third preliminary objection raises a serious question — whether the conduct in which Equatorial Guinea engaged as a predicate for the assertion of certain rights is of such a character that the Court should not exercise its jurisdiction to determine whether Equatorial Guinea has these rights. This is a question of admissibility that should have been answered at the present stage of the proceedings. It does not call for a decision on the existence of such rights, which is a matter for the merits. The relevant facts are not in dispute. They are evident on the face of documents submitted to the Court by Equatorial Guinea, including formal statements of its representatives.

According to Judge Donoghue, there is clear evidence of the sequence of actions that Equatorial Guinea took with respect to the building at 42 Avenue Foch and of the purpose for which they were taken. If those actions are given effect, real property in the territory of France that had been in the hands of an individual facing prosecution will instead 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 President of Equatorial Guinea made clear that the purpose of the Applicant's actions was to address difficulties faced by his son, a personal purpose which is entirely at odds with that of the Vienna Convention. There is no suggestion that Equatorial Guinea's diplomatic functions were threatened by the measures taken by French authorities. Judge Donoghue finds conclusive evidence of the character of the conduct in which the Applicant engaged as a predicate for its assertion of rights in this Court. She considers that, to preserve the integrity of its judicial function, the Court should not allow itself to be used to further this effort by the Applicant State and therefore that it should have declared the Application inadmissible.

Declaration of Judge Gaja

The Judgment does not specify that the issue concerning the ownership of the building located at 42 Avenue Foch in Paris is not covered by the Optional Protocol to the Vienna Convention on Diplomatic Relations. The relevant provisions of the Vienna Convention do not imply that, once a building has been used for a diplomatic mission, the sending State is entitled to continue to use it indefinitely for that purpose. Ownership of the premises may change over time. Issues concerning the ownership of buildings used for a mission are regulated by the municipal law of the host State.

Declaration of Judge Crawford

Judge Crawford agrees with the Judgment of the Court that Article 4 of the Palermo Convention does not incorporate the customary international rules relating to the immunities of States and State officials. Moreover, he agrees that Equatorial Guinea's argument based on exclusive jurisdiction should be rejected. He therefore is of the view that, strictly speaking, it is not necessary for the Court to decide whether Article 4 (1) gives legal effect, for the purposes of the application of the Palermo Convention, to the principles of customary international law to which it refers.

However, it has been suggested that Article 4 (1) is merely a without prejudice clause which does not impose an obligation on States parties to act in conformity with sovereign equality, territorial integrity and non-intervention. Judge Crawford disagrees with this interpretation. In his opinion, Article 4 (1) imposes an obligation; it is in mandatory language (“States Parties shall carry out their obligations”) and the principles of sovereign equality, territorial integrity and non-intervention are established legal principles with a determinate content.

Judge Crawford discusses the legislative history of Article 4 of the Palermo Convention and of Article 2 of the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic

Substances, from which Article 4 was transposed. He argues that this legislative history tends to confirm the conclusion to be drawn from the actual text of Article 4 (1), namely that Article 4 (1) imposes an obligation on States parties in accordance with its terms.

Separate opinion of Judge Gevorgian

In his separate opinion, Judge Gevorgian clarifies his position on certain elements of the reasoning supporting the Court's findings.

His main concern relates to the consequences of the Court's interpretation of Article 4 of the Palermo Convention, which justifies the conclusion on the lack of jurisdiction ratione materiae to deal with France's alleged violations of the immunities of States and State officials.

Judge Gevorgian stresses that the Court's jurisdiction is based on Article 35, paragraph 2, of the Palermo Convention, which, as any other compromissory clause, is limited to the substantive content of the treaty to which it refers. In the present case, the central question is whether such a jurisdictional clause entitles Equatorial Guinea to invoke the immunities of States and State officials before the Court. While the present Judgment answers this question in the negative, it bases its conclusion on the premise that "Article 4 [of the Palermo Convention] does not incorporate the customary international rules relating to immunities of States and State officials". In Judge Gevorgian's opinion, the reference to sovereign equality made in Article 4 of the Palermo Convention was intended to include the protection of such immunities, but does not fall within the scope of the provisions covered by the compromissory clause.

Judge Gevorgian further opines that the scope of the compromissory clause is not as broad as the Applicant pretends. Given the broad nature of the principles of sovereign equality, territorial integrity and non-intervention mentioned in Article 4 of the Palermo Convention, incorporating all the customary rules encompassed by such principles may have the effect of circumventing the principle of consent to the Court's jurisdiction.

Finally, Judge Gevorgian underlines that the Court's Judgment should not be read as in any way undermining the obligations regarding the protection of immunities that are binding on States parties to the Palermo Convention, including those of certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs. In his view, such obligations are reaffirmed in paragraph 102 of the present Judgment.
