



INTERNATIONAL COURT OF JUSTICE

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Summary

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Immunities and Criminal Proceedings **(Equatorial Guinea v. France)**

Application and Request for the indication of provisional measures (paras. 1-19)

The Court begins by recalling that, by an Application filed in the Registry on 13 June 2016, Equatorial Guinea instituted 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”.

On 29 September 2016, Equatorial Guinea submitted a Request for the indication of provisional measures, asking, *inter alia*, that France suspend all the criminal proceedings brought against the Vice-President of Equatorial Guinea; that it ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea’s diplomatic mission in France and, in particular, assure its inviolability; and that it refrain from taking any other measure that might aggravate or extend the dispute submitted to the Court.

Further to a request by Equatorial Guinea, the Vice-President of the Court, acting as President in the case, drew the attention of France, in accordance with Article 74, paragraph 4, of the Rules of Court, “to the need to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects”.

Factual background (paras. 20-30)

The Court then presents the background to the case. It explains that, beginning in 2007, some 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 acts of “misappropriation of public funds in their country of origin, the proceeds of which have allegedly been invested in France”. The Court notes that 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 the handling of misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and complicity in misuse of corporate assets, and concealment of each of these offences. It adds 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 the son of the President of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangue, who was at the time Minister for Agriculture and Forestry of Equatorial Guinea.

The Court states that the investigations 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. It notes that, although he challenged the measures taken against him and invoked on a number of occasions the immunity from jurisdiction that he considered himself to enjoy in light of his functions, Mr. Teodoro Nguema Obiang Mangue was indicted. In addition, the building on avenue Foch was attached (saisie pénale immobilière), and various objects therein were seized.

Finally, the Court indicates that, at the end of the investigation, Mr. Teodoro Nguema Obiang Mangue was referred to the Paris Tribunal correctionnel to be tried for alleged offences committed between 1997 and October 2011. The trial is to be held from 2 to 12 January 2017.

I. Prima facie jurisdiction (paras. 31-70)

The Court first observes that, when a request for the indication of provisional measures is submitted to it, it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case before deciding whether to indicate the measures requested; it need only satisfy itself that the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded.

The Court states that Equatorial Guinea seeks to found the Court's jurisdiction, first, on Article 35 of the Convention against Transnational Organized Crime, in respect of its claim relating to the immunity of Mr. Teodoro Nguema Obiang Mangue, and, second, on the Optional Protocol to the Vienna Convention on Diplomatic Relations, in respect of its claim regarding the alleged inviolability of the premises at 42 avenue Foch. It notes that both Article 35, paragraph 2, of the Convention against Transnational Organized Crime and Article I of the Optional Protocol make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the Convention to which they relate. It will therefore ascertain whether, *prima facie*, such a dispute existed on the date the Application was filed, since, as a general rule, it is on that date, according to the jurisprudence of the Court, that its jurisdiction must be determined.

(1) The Convention against Transnational Organized Crime (paras. 41-50)

The Court observes that Equatorial Guinea asserts that a dispute exists between the Parties concerning the application of Article 4 of the Convention against Transnational Organized Crime. That provision, entitled "Protection of sovereignty", reads as follows:

"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 notes that according to Equatorial Guinea, Article 4 of the Convention is not merely a "general guideline", in light of which the other provisions of the Convention should be interpreted. The principles of sovereign equality and non-intervention to which that Article refers encompass important rules of customary or general international law, in particular those relating to

the immunities of States and the immunity of certain holders of high-ranking office in the State. In the Applicant's view, the rules in question are binding on States when they apply the Convention, since they are embodied in the above-mentioned principles. Equatorial Guinea thus claims that, when initiating proceedings against the Vice-President of Equatorial Guinea, France was obliged, in applying the Convention, to respect the rules relating to the immunity ratione personae of the Vice-President of Equatorial Guinea, deriving from Article 4 of that instrument.

For its part, France denies the existence of a dispute concerning the application of the Convention, and, consequently, that the Court has jurisdiction. In its view, the reference in Article 4 to the principles of sovereign equality and territorial integrity of States, and to that of non-intervention in the domestic affairs of other States, merely indicates the manner in which the other provisions of the Convention must be applied. It adds that the provisions of the Convention which Equatorial Guinea claims were not implemented in accordance with the principles set out in Article 4 of that instrument, for the most part, do nothing more than oblige States to legislate or regulate.

The Court observes that it is clear from the case file that the Parties have expressed differing views on Article 4 of the Convention against Transnational Organized Crime. Nonetheless, in order to determine, even *prima facie*, whether a dispute within the meaning of Article 35, paragraph 2, of the Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it. It must ascertain whether the acts complained of by Equatorial Guinea are *prima facie* capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain pursuant to Article 35, paragraph 2, of the Convention.

The Court notes that the obligations under the Convention consist mainly in requiring the States parties to introduce in their domestic legislation provisions criminalizing certain transnational offences and to take measures aimed at combatting these crimes. The Court indicates that the purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States. In its view, the provision does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities. Accordingly, any dispute which might arise with regard to "the interpretation or application" of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention. It appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under the articles of the Convention invoked by Equatorial Guinea; rather, it appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity ratione personae under customary international law and, if so, whether France has violated that immunity by instituting proceedings against him.

Consequently, the Court considers that, *prima facie*, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties. Thus, it does not have *prima facie* jurisdiction under Article 35, paragraph 2, of that instrument to entertain Equatorial Guinea's request relating to the immunity of Mr. Teodoro Nguema Obiang Mangue.

(2) The Optional Protocol to the Vienna Convention on Diplomatic Relations (paras. 51-70)

The Court recalls that Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations, invoked by Equatorial Guinea in relation to its claim regarding the alleged inviolability of the premises at 42 avenue Foch, confers jurisdiction on the Court over disputes

relating to the interpretation or application of the Vienna Convention on Diplomatic Relations. It further recalls that Equatorial Guinea claims that a dispute exists between the Parties regarding the application of Article 22 of the Vienna Convention, paragraph 3 of which provides that the “premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution”. The Court will accordingly ascertain whether, on the date the Application was filed, a dispute arising out of the interpretation or application of the Vienna Convention appeared to exist between the Parties.

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

In order to determine whether it has jurisdiction — even *prima facie* — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction ratione materiae on the basis of Article I of the Optional Protocol. In this regard, the Court notes that the rights apparently at issue may fall within the scope of Article 22 of the Vienna Convention, which guarantees the inviolability of diplomatic premises, and that the acts alleged by the Applicant in respect of the building on avenue Foch appear to be capable of contravening such rights. Indeed, the premises which, according to Equatorial Guinea, house its diplomatic mission in France were searched on several occasions and were attached (saisie pénale immobilière); they could also be subject to other measures of a similar nature.

The Court considers that the aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute capable of falling within the provisions of the Vienna Convention and concerning the interpretation or application of Article 22 thereof. Consequently, the Court considers that it has *prima facie* jurisdiction under Article I of the Optional Protocol to the Vienna Convention to entertain this dispute. It is of the view that it may, on this basis, examine Equatorial Guinea’s request for the indication of provisional measures, in so far as it concerns the inviolability of the building located at 42 avenue Foch in Paris. It adds that, since there is no manifest lack of jurisdiction, it cannot grant France’s request to remove the case from the List.

II. The rights whose protection is sought and the measures requested (paras. 71-81)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court thus first considers whether the rights claimed by Equatorial Guinea on the merits, and for which it is seeking protection, are plausible. Having found that it does not have *prima facie* jurisdiction to entertain the alleged violations of the Convention against Transnational Organized Crime, the Court addresses only Equatorial Guinea’s alleged right to “the inviolability of the premises of its diplomatic mission”, in respect of which Article 22 of the Vienna Convention is invoked.

The Court notes in this regard that Equatorial Guinea maintains that it acquired the building located at 42 avenue Foch on 15 September 2011 and has used it for its diplomatic mission in France as from 4 October 2011, which the Applicant claims to have indicated to the Respondent on several occasions. The Court further notes that Equatorial Guinea contends that, since that date, the building in question has been searched a number of times and has been attached (saisie pénale immobilière)— acts which, in the view of the Applicant, infringe the inviolability of those premises.

The Court is of the opinion that, given that the right to the inviolability of diplomatic premises is a right contained in Article 22 of the Vienna Convention, that Equatorial Guinea claims that it has used the building in question as premises of its diplomatic mission in France since 4 October 2011, and that France acknowledges that, from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear to have been transferred to 42 avenue Foch, it appears that Equatorial Guinea has a plausible right to ensure that the premises which it claims are used for the purposes of its mission are accorded the protections required by Article 22 of the Vienna Convention.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. In this regard, it considers that, by their very nature, these measures are aimed at protecting the right to the inviolability of the building which Equatorial Guinea presents as housing the premises of its diplomatic mission in France. It concludes that a link exists between the right claimed by Equatorial Guinea and the provisional measures being sought.

III. Risk of irreparable prejudice and urgency (paras. 82-91)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to rights in dispute, but that that power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights concerned.

Observing once again that the record before the Court shows that France does not accept that the building forms part of the premises of Equatorial Guinea's diplomatic mission in France, and that it refuses to grant it the immunity — and thus the corresponding protection — afforded to such premises under the Vienna Convention, the Court considers that there is a continuous risk of intrusion. It notes that while the Parties disagree as to whether any searches have been conducted recently, they recognize that such acts did indeed occur in 2011 and 2012. And, given that it is possible that, during the hearing on the merits, the Tribunal correctionnel may, of its own initiative or at the request of a party, request further investigation or an expert opinion, it is not inconceivable that the building on avenue Foch will be searched again. If that were to happen, and if it were established that the building houses the premises of Equatorial Guinea's diplomatic mission, the daily activities of that mission — the representation of a sovereign State — would risk being seriously impeded, as a result, for example, of the presence of police officers or the seizure of documents, some of which might be highly confidential.

The Court considers that it follows from the foregoing that there is a real risk of irreparable prejudice to the right to inviolability of the premises that Equatorial Guinea presents as being used as the premises of its diplomatic mission in France. Indeed, any infringement of the inviolability of the premises may not be capable of remedy, since it might not be possible to restore the situation to the status quo ante. Furthermore, that risk is imminent, in so far as the acts likely to cause such a prejudice to the rights claimed by Equatorial Guinea could occur at any moment. The criterion of urgency is therefore also satisfied in the present case.

The Court recalls that Equatorial Guinea also asks it to indicate provisional measures in respect of items previously located on the premises of 42 avenue Foch, some of which have been removed by French authorities. As to these items, the Court observes that Equatorial Guinea failed to demonstrate the risk of irreparable prejudice and the urgency that the Court has identified in respect of the premises at 42 avenue Foch. Accordingly, it finds no basis to indicate provisional measures in respect of these items.

IV. Conclusion and measures to be adopted (paras. 92-98)

The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures in respect of the building located at 42 avenue Foch in Paris have been met. It is of the view that, pending a final decision in the case, the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris should enjoy treatment equivalent to that required by Article 22 of the Vienna Convention, in order to ensure their inviolability. With regard to the attachment (saisie pénale immobilière) of the building at 42 avenue Foch and the risk of confiscation, the Court notes that there is a risk that such confiscation may occur before the date on which the Court reaches its final decision. It therefore considers that, in order to preserve the respective rights of either Party, the execution of any measure of confiscation is to be stayed until the Court takes that decision. Finally, although Equatorial Guinea has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute, the Court states that, in this case, given the measures it has decided to take, the Court does not deem it necessary to indicate additional measures of that nature.

Operative clause (para. 99)

The full text of the final paragraph of the Order reads as follows:

“For these reasons,

THE COURT,

I. Unanimously,

Indicates the following provisional measures:

France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability;

II. Unanimously,

Rejects the request of France to remove the case from the General List.”

Judge XUE appends a separate opinion to the Order of the Court; Judges GAJA and GEVORGIAN append declarations to the Order of the Court; Judge ad hoc KATEKA appends a separate opinion to the Order of the Court.

Separate opinion of Judge Xue

Judge Xue wishes at this preliminary stage to place on record her reservation to the Court's interpretation, albeit not yet definitive, of Article 4 of the United Nations Convention against Transnational Organized Crime (hereinafter "the Convention").

She recalls that the Court states in paragraph 49 of the Order that Article 4 does not create any new rules on immunities of holders of high-ranking office of a State. Accordingly, any dispute concerning the interpretation or application of Article 4 could relate only to the manner in which a State party performs its obligations under the Convention. The Court is of the view that the alleged dispute between the Parties appears to concern a distinct issue which is not capable of falling within the provisions of the Convention. Thus it does not have jurisdiction *prima facie* under Article 35, paragraph 2, of the Convention.

Judge Xue considers that this interpretation begs a number of questions. First, the intention of the States parties, as reflected in the travaux préparatoires of Article 4, not to create new rules of immunities of customary international law in the Convention cannot be interpreted to mean that the existing rules on the same subject-matter are precluded in the application of the Convention. On the contrary, as a guideline, Article 4 provides a legal framework within which the other provisions are to be implemented. What is governed under the principle of sovereign equality of States under general international law should remain intact and applicable, when circumstances of a case so require. Rules of jurisdictional immunity of State and its property and jurisdictional immunity of high-ranking officials in foreign courts are, among others, two relevant régimes that directly derive from that principle.

Secondly, the question of jurisdictional immunity ratione personae bears on "the manner" in which a State party performs its obligations under the Convention. It is no less relevant to the principle of sovereign equality than an operation being conducted in a foreign territory. In the present case, Mr. Teodoro Nguema Obiang Mangue is a foreign national holding high-ranking office in his country. Although all the acts alleged by Equatorial Guinea were carried out in the French territory and under the French internal law, the essence of the dispute between the Parties is the applicability of the Convention.

Thirdly, whether an incumbent President or a Vice-President of a State enjoys jurisdictional immunity in foreign courts under customary international law is not a "distinct issue" that does not fall within the provisions of the Convention. In implementing its obligations under Article 6 (criminalization of laundering of the proceeds of crime), Article 12 (measures to enable confiscation and seizure), Article 14 (disposal of confiscated proceeds of crime or property), and Article 18 (mutual legal assistance), a State party may have to act differently if rules of jurisdictional immunities apply. The dispute in the present case appears to concern that very question.

Given the above considerations, she maintains the view that the Court has, *prima facie*, jurisdiction under Article 35, paragraph 2, of the Convention.

Declaration of Judge Gaja

In its orders on provisional measures the Court, when it indicates some measures, does not state in the operative part (dispositif) that it rejects some other requests. In the present case, no reference is made in the dispositif to the request concerning the immunity of Mr. Teodoro Nguema Obiang Mangue, even if a large part of the Order discusses that issue. In the interest of greater transparency, the dispositif of orders on provisional measures should include the decision on all the main issues and the names of the judges who voted in favour and against.

Declaration of Judge Gevorgian

Judge Gevorgian concurs with the conclusions and reasoning of the Order. At the same time, with regard to paragraph 49 of the Order, he finds it necessary to clarify that the rules on the immunity of State officials from foreign criminal jurisdiction derive from the principle of sovereign equality mentioned in Article 4 of the Palermo Convention. In his view, this is supported by the recent work of the International Law Commission and the Court's case law.

Separate opinion of Judge ad hoc Kateka

1. While Judge Kateka is in favour of the provisional measure granted by the Court, his opinion differs from the Court's Order in two main aspects. First, while he acknowledges the Court's jurisprudence on the prima facie jurisdiction of the Court, he considers that the threshold for prima facie jurisdiction is low. As such, Judge Kateka is unable to agree with the Court's interpretation of Article 4 of the United Nations Convention against Transnational Organized Crime (the Palermo Convention) and its conclusion that it has no prima facie jurisdiction under Article 35 (2) of the said Convention. Specifically, he takes issue with the finding of the Court that a dispute capable of falling within the provisions of the Palermo Convention, and therefore concerning the interpretation or application of Article 4 of that Convention, does not exist between the Parties.

2. Judge Kateka disagrees with the Court that Article 4 relates only to the manner in which States parties perform their obligations under the Palermo Convention and that it does not incorporate any rules of customary international law concerning the immunities of holder of high-ranking office in the State, considering that the Court did not examine Article 4 in its proper context. Judge Kateka compared the legislative history of Article 4 of the Palermo Convention, in conjunction with that of Article 2 (2) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, which is similarly drafted in order to demonstrate that Article 4 of the Palermo Convention is self-standing and can create obligations for States parties.

3. After considering the arguments of both Equatorial Guinea and France on Article 4 of the Palermo Convention, Judge Kateka points out that the Vice-President of Equatorial Guinea is prosecuted in France for a series of crimes, including money laundering, criminalization of which is required by Article 6 of the Palermo Convention. This crime falls within the scope of the Palermo Convention, under Article 3 (1), because it is not only a "serious crime" that is "transnational in nature", but also it is an offence listed under Article 6 of the Convention. In his view, the requirement of an "organized criminal group" is met because some of the charges brought against the Vice-President of Equatorial Guinea include "complicity", which by definition requires the involvement of others.

4. Concluding on his first point of divergence with the Court's Order, Judge Kateka argues that the procedural conditions set out in Article 35 (2) of the Palermo Convention are met due to the refusal of France to negotiate with Equatorial Guinea for the settlement of the dispute. In sum, a dispute exists between the Parties, which concerns the interpretation and application of Article 4 of the Palermo Convention, therefore meeting the prima facie jurisdiction threshold and as such the Court should have entertained the request by Equatorial Guinea relating to the immunity ratione personae of the Vice-President. Moreover, Judge Kateka is of the view that the right of Equatorial Guinea to the immunity of its Vice-President, who is number two in the Government, plausibly exists under the Palermo Convention. The criterion of urgency is met given that real and imminent risk will be caused to the right of Equatorial Guinea in light of the fact that a criminal trial will be conducted before the Paris Tribunal correctionnel in January 2017 against the Vice-President, whose functions would be compromised.

5. Secondly, Judge Kateka finds the provisional measure indicated by the Court inadequate. He criticizes the wording adopted by the Court, namely that France shall 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”. He disagrees with the use of the term “equivalent”, pointing out that the requirements of Article 22 are clear: the premises of the mission shall be inviolable. The Court should therefore have issued an unequivocal measure as requested by Equatorial Guinea, namely that “France ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea’s diplomatic mission in France and, in particular, assure its inviolability . . .”.
