

DISSENTING OPINION OF VICE-PRESIDENT XUE

1. Regrettably, I disagree with the decision rendered by the Court in this case. As a judicial duty, I shall explain the reasons for my position.

1. The issue involved in the present case

2. My departure from the majority primarily derives from my position on the question of jurisdiction (see *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment, I.C.J. Reports 2018*, joint dissenting opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka, p. 340). This case, as an example, highlights the importance of the identification of the subject-matter of a dispute and its close relationship with the question of jurisdiction. As is illustrated in the factual background of the Judgment, the status of the building at 42 avenue Foch in Paris (also referred to as “the building”) is one, and an inseparable, part of the dispute between Equatorial Guinea and France in relation to the immunities of the high-ranking official of Equatorial Guinea and its State property from the jurisdiction of the French courts. In narrowing down the scope of its jurisdiction to the interpretation and application of the Vienna Convention on Diplomatic Relations (also referred to as “the Vienna Convention” or the “Convention”), the Court has placed itself in a position where it is unable to give a thorough and sufficient examination of the evidence adduced before it and all the relevant issues in the case, and thus fails to provide a sound judicial resolution to the dispute.

3. In essence, the status of the building at 42 avenue Foch in Paris concerns immunities of State property from criminal jurisdiction of foreign courts. In this regard, two issues are relevant. One is the transaction of the building between Mr. Teodoro Nguema Obiang Mangue, the Vice-President of Equatorial Guinea, and the Republic of Equatorial Guinea. The other is Equatorial Guinea’s right to designate it as the premises of its diplomatic mission. On the first issue, evidence adduced by Equatorial Guinea shows that the transaction was legally carried out under the French law. Two pieces of evidence are pertinent and probative.

4. The first document, a form entitled “*Cession de droits sociaux non constatée par un acte à déclarer obligatoirement* (Uncertificated transfer of shareholder rights subject to mandatory declaration)”, dated 17 October 2011, demonstrates that on 15 September 2011, Mr. Teodoro Nguema Obiang Mangue transferred to the Republic of Equatorial Guinea, at a price of €6,353,428, the shareholder rights in the five Swiss companies representing ownership in real property. For this registration, a *droit d’enregistrement* (registration duty) in the amount of €317,672 was collected by the French tax authority in Noisy-le-Grand (Annex 5 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 October 2016).

5. The second document, entitled “*Déclaration de plus-value sur les cessions de biens meubles ou de parts de sociétés à prépondérance immobilière* (Declaration of capital gains on the transfer of movable assets or shares in companies investing primarily in real property)”, dated 20 October 2011, records that an *impôt sur le revenu afférent à la plus-value* (tax on capital gains) in the amount of €1,145,740 was collected by the French tax authorities for the transfer — on 15 September 2011, between Mr. Teodoro Nguema Obiang Mangue and the Republic of Equatorial Guinea — of the shares in the five Swiss companies that invested primarily in real property (Annex 6 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 October 2016).

6. Although France contends that these deeds did not suffice to transfer the title of the building to Equatorial Guinea, as the building was still registered under the name of the five Swiss companies, this position was not consistent with the finding of the French courts in respect of the ownership of the building. According to the latter's view, the building was owned by Mr. Teodoro Nguema Obiang Mangue through the five Swiss companies since 20 December 2004 (see judgment rendered on 10 February 2020 by the Paris *Cour d'appel* in the case concerning Mr. Teodoro Nguema Obiang Mangue, p. 62). Logically, if Equatorial Guinea could not own the building through the five Swiss companies, the building could not have belonged to Mr. Teodoro Nguema Obiang Mangue, either.

7. Equatorial Guinea's representations with France in regard to the building were carried out not only at diplomatic level. On 14 February 2012, the President of Equatorial Guinea wrote to the French President a letter, in which it was stated that the building at 42 avenue Foch

“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”.

France did not accept any of Equatorial Guinea's representations.

8. These documents demonstrate that in the present case, the dispute between the Parties goes well beyond the designation of the premises of a diplomatic mission. It is evident from the facts that France's persistent objection to Equatorial Guinea's request to designate the building at 42 avenue Foch in Paris has little to do with the circumstances and conditions under which a property may acquire diplomatic status. With the controversy between the Parties over the ongoing criminal investigation against Mr. Teodoro Nguema Obiang Mangue, France, being the receiving State, has every means at its disposal to make sure that the said building would not acquire the legal status as desired by Equatorial Guinea; there is no way for Equatorial Guinea to obtain France's consent to the designation of the building as the premises of its diplomatic mission. Equatorial Guinea's relocation of its Embassy into the building, to a large extent, served as a means to prevent the building, which it deemed as its State property, from being confiscated. Both Parties were fully aware of these facts.

9. In respect of the second issue whether Equatorial Guinea has the right to use the building for its diplomatic mission, the public acts of the French authorities on the registration of the transfer of shareholder rights in relation to the building and the collection of capital gains tax gave rise to a reasonable belief by Equatorial Guinea that it has acquired the ownership of the building. If France wished to maintain the assets within the private domain, it should have stopped these deeds at the outset of the transaction so as to leave no doubt to Equatorial Guinea on the status of the building. In addition to these public acts of its authorities, France does not claim at any time during the proceedings that the transfer of the building between Mr. Teodoro Nguema Obiang Mangue and Equatorial Guinea was not genuine.

10. The dispute between the Parties over the status of the building hinges on the ownership of the building. In the first place, the reason given by France for its objection to Equatorial Guinea's request directly relates to the ownership of the building. In the Note Verbale dated 11 October 2011 addressed to the Embassy of Equatorial Guinea, the Protocol Department of the French Ministry of Foreign Affairs stated that the building at 42 avenue Foch “does not form part of the premises of Equatorial Guinea's diplomatic mission. It falls within the private domain and is, accordingly, subject

to ordinary law.” This statement indicates that France would not recognize that the building had become the public property of Equatorial Guinea.

11. Secondly, the question of ownership has consequential effects on the conduct of France in handling the building. Although the ownership is irrelevant to the status of the premises of a diplomatic mission, if owned by the sending State, however, the premises would enjoy the protection of the Vienna Convention as well as customary rules on jurisdictional immunities of a State and its property. As is stated in the Preamble of the Convention, customary rules continue to govern matters that are not expressly provided in the Convention. In the present case, such rules may come into play in the examination of the lawfulness of the measures of search, attachment and confiscation imposed on the building by the French courts, if the issue of the ownership of the building were duly considered.

12. In short, by narrowing down its jurisdictional basis in the present case, the Court eschewed some crucial aspects of the dispute between the Parties. Whether or not the building at 42 avenue Foch in Paris became the State property of Equatorial Guinea through the transfer of ownership is not a purely legal issue under the French law in the present case; it ultimately boils down to the issue of the rights and obligations of a State under international law in handling criminal cases concerning a foreign State and its property.

2. Interpretation of the Vienna Convention

13. I agree with the majority that the provisions of the Vienna Convention on Diplomatic Relations do not lay down at which point of time and under what conditions a property acquires the status of “premises of the mission” as defined in Article 1 (*i*) of the Convention and starts to enjoy the privileges and immunities as provided for therein. In light of the object and purpose of the Convention, the sending State cannot unilaterally impose its choice of premises on the receiving State. I disagree, however, with the reasoning of the Court which implies that the receiving State, by its persistent objection to the sending State’s designation, would unilaterally dictate the outcome of the matter. This interpretation, in my view, is neither in line with the object and purpose of the Vienna Convention, nor reflective of State practice in diplomacy.

14. According to the majority’s view, a building cannot acquire the status of the premises of the mission on the basis of the unilateral designation by the sending State, if the receiving State objects to its choice. The receiving State, on the other hand, has the power to object to the sending State’s assignment of a building to its diplomatic mission, thus preventing the building in question from acquiring the status of premises of the mission. Their rationale for this conclusion is threefold. First, by virtue of Article 2 of the Vienna Convention, the establishment of diplomatic relations between States and of permanent diplomatic missions is based on mutual consent. Unilateral designation by the sending State of a building for its diplomatic mission against the objection of the receiving State is contrary to this consensual basis. Secondly, to achieve the Convention’s object to “contribute to the development of friendly relations among nations”, the receiving State is obliged to afford significant privileges and immunities to the diplomatic mission of the sending State. Such weighty obligations, however, have to be balanced by the power of the receiving State to object to the sending State’s choice of the premises of its mission. Thirdly, the Convention’s immunity and inviolability régime for diplomatic missions imposes restrictions on the sovereignty of the receiving State, but without providing any mechanism to counterbalance potential misuse or abuse of such treatment. To overcome this vulnerability of the receiving State, the régime should recognize its power to object (see Judgment, paragraphs 63-67).

15. I agree with the majority that international law of diplomacy, as a self-contained régime, does not provide a unilateral right for the sending State to designate the premises of its diplomatic mission, but to put the restriction on the sending State in such categorical terms, as if the matter can only be decided by the receiving State, is apparently not a correct interpretation of the Vienna Convention. The fundamental principle of international law contained in the Preamble of the Convention, i.e. the principle of sovereign equality, is the legal basis of international diplomacy law. Diplomatic privileges and immunities, “significant” or “weighty” as they may be, are not accorded unilaterally by the receiving State to the sending State. The diplomatic mission that the receiving State establishes in the sending State enjoys the same treatment in the latter’s territory. That is to say, diplomatic privileges and immunities are mutually granted and mutually beneficial. This reciprocity is a pivotal element that keeps the stability of the diplomatic relations between States. The establishment of permanent diplomatic missions, if it is to serve the purposes of maintaining peace and security and fostering friendly relations among nations, must be based on mutual respect for sovereignty and equal treatment of States.

16. State practice relating to designation of the premises of diplomatic missions, as the Court finds in this case, varies greatly; the matter is left largely to the practice of States in light of the specific circumstances of each country. This state of affairs nevertheless does not mean that there exists no principle to follow in practice. The Parties in the present case both acknowledge that, as reflected in its object and purpose, the Convention is rooted in the need to promote friendly relations between two sovereign States. In order to achieve that aim, State parties must co-operate from the very beginning of their diplomatic relations. By virtue of the principle of sovereign equality, the sending State has the right to choose the location of its diplomatic mission in the capital city of the receiving State, while the latter maintains its discretion to accept, or oppose to, such designation. In accordance with Article 21 of the Vienna Convention, notwithstanding its right to object, the receiving State remains obliged to facilitate the sending State to acquire its diplomatic premises. Obviously, neither unilateral designation by the sending State nor persistent objection of the receiving State could be the end of the story in practice, because neither way could lead to the establishment of a diplomatic mission. Co-operation and consultation are the only way that can produce a mutually acceptable solution.

17. In the present case, what is relevant for the determination of the dispute between the Parties in relation to the status of the building is the consistent practice of France. The Court should first look at whether France has adopted any legislation or official guidance regulating the matter. If there exists no such regulation, France’s established practice should govern. In refuting Equatorial Guinea’s argument that it had followed the normal course of procedure, France did not produce convincing evidence to show that, in France’s practice, prior consent is consistently required for a building to acquire diplomatic status. Moreover, its repeated refusal of Equatorial Guinea’s assignment is related more to the disputed criminal proceedings than to the procedure itself.

18. As is pointed out above, Equatorial Guinea’s designation of the building at 42 avenue Foch as the premises of its diplomatic mission is not a normal case. The building in question is not the first premises that Equatorial Guinea assigned for its Embassy; it is a relocation site for the mission. Its status is the very subject of the dispute relating to the immunities of State property between the Parties. Under any circumstances, so long as France maintains its position on the criminal proceedings in question, it would not recognize the status of the building as the premises of Equatorial Guinea’s Embassy. Therefore, a general examination of the circumstances under which a property acquires the diplomatic status does not address the real issue in the present case. The key question in the present context is not whether France as the receiving State enjoys the sovereign right to object to Equatorial Guinea’s choice of its diplomatic premises, but whether it has wrongfully exercised jurisdiction by imposing measures of constraint on the State property of Equatorial Guinea.

3. The criteria applied by the Court

19. In the Judgment, the Court recognizes that the power of the receiving State to object to a sending State's designation of its diplomatic premises is not unlimited. To exercise such a power reasonably and in good faith, the Court considers that the receiving State must raise its objection in a timely, non-arbitrary and non-discriminatory manner. It states that

“where the receiving State objects to the designation by the sending State of certain property as forming part of the premises of its diplomatic mission, and this objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character, that property does not acquire the status of ‘premises of the mission’ within the meaning of Article 1 (i) of the Vienna Convention, and therefore does not benefit from protection under Article 22 of the Convention. Whether or not the aforementioned criteria have been met is a matter to be assessed in the circumstances of each case.” (Judgment, paragraph 74.)

These three criteria for the manner in which the receiving State raises its objection, i.e. timely, non-arbitrary and non-discriminatory, in principle do not give rise to any questions. What should be examined is how to apply them in practice.

20. On the first criterion of timely objection, there is no doubt that each time when Equatorial Guinea notified the Protocol Department of the French Ministry of Foreign Affairs of its designation or use of the building as the premises of its diplomatic mission, the latter objected without delay. Given the factual background of the case, the timely replies from France to Equatorial Guinea's requests are self-explanatory; the Parties were holding opposing views on the status of the building. Silence or a delayed reply on the part of France might have been perceived or taken as France's acquiescence to Equatorial Guinea's position.

21. In assessing whether France's objection to Equatorial Guinea's designation of the building as its diplomatic premises was arbitrary, the Court unavoidably refers to the criminal proceedings in question. Its reasoning, however, is predicated on the assumption that the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue and measures of constraint on the building were not in dispute between the Parties. Apparently, that is wrong.

22. First of all, with regard to the Note Verbale of 11 October 2011, which stated that the building at 42 avenue Foch in Paris “falls within the private domain”, the Court states that,

“[s]een as a response to that notification, the French Note Verbale cannot be interpreted as referring to the ownership status of the building: the object of the Note Verbale was to contest Equatorial Guinea's assertion that the building was used for diplomatic purposes, and hence that it fell within the ‘public domain’”. (Judgment, paragraph 106.)

In the Court's view, France's position was justified by the fact that the French authorities, in the context of the ongoing criminal investigation, had conducted on-site inspections and searches of the building and found that it was not used and not being prepared for use as premises of Equatorial Guinea's diplomatic mission.

23. Moreover, the Court considers that France's objection is further supported by the reason that the French authorities, for the purposes of the criminal proceedings, may need to conduct more searches of the building, or impose other measures of constraint on it, and therefore, to accede to Equatorial Guinea's assignment of the building to its diplomatic mission, "might have hindered the proper functioning of its criminal justice system" (Judgment, paragraph 109).

24. Regarding Equatorial Guinea's argument that France should have sought to co-ordinate with it before refusing its claim that the building enjoyed the status of premises of the mission, the Court takes the view that France was not obliged under the Vienna Convention to consult with Equatorial Guinea before communicating its decision of objection to it.

25. This line of reasoning is totally one-sided. It reveals that the issue of France's objection to Equatorial Guinea's designation of the building as the premises of its diplomatic mission cannot be separated from the question of immunities of State property in the criminal proceedings. At the time when Equatorial Guinea first requested to assign the building for its diplomatic mission, whether the building was used or being prepared for use for its diplomatic mission was an irrelevant factor for France's objection, because that condition of the building did not in any way affect Equatorial Guinea's designation. To maintain the building under measures of constraint for the purpose of the criminal proceedings is the very reason for France's objection.

26. As the Court observes, the dispute between the Parties over the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue had been going on for a number of years before the transfer of the building took place. When Equatorial Guinea decided to designate the building for its diplomatic premises, to say that there is no obligation under the Vienna Convention for France to consult with Equatorial Guinea is contrary to the object and purpose of the Convention to "contribute to the development of friendly relations among nations". The dispute involves not only the high-ranking official of Equatorial Guinea, but also a substantial amount of its State assets. The fact that Equatorial Guinea took over the building and used it as the premises of its diplomatic mission cannot be considered "to benefit individuals".

27. On the criterion of non-discrimination, the Court's reasoning is rather simple: there are no comparable circumstances as those in the present case to determine whether France has acted in a discriminatory manner. In assessing France's conduct, one does not have to rely on any comparable case in France's practice, but just to inquire whether, under the same circumstances, France would have treated any other State, or whether any other State would have accepted to be treated, in the same way.

28. Evidence shows that Equatorial Guinea had made several notifications or statements to the French Ministry of Foreign Affairs, informing it that it designated or used the building for its diplomatic mission (among which the Note Verbale dated 4 October 2011 (Memorial of Equatorial Guinea, Annex 33), and the Notes Verbales dated 17 October 2011 (Annex 36), 14 February 2012 (Annex 37), 12 March 2012 (Annex 44), 27 July 2012 (Annex 47)). Even after the official communications of Equatorial Guinea to that effect, the French authorities nevertheless conducted several searches of the building, in the course of which various items were seized and removed and personal belongings of Mr. Teodoro Nguema Obiang Mangue were taken away and auctioned. Official protests of Equatorial Guinea against such actions were to no avail. For almost four years, i.e. from 27 July 2012, the date when Equatorial Guinea actually moved its mission into the building, until it instituted proceedings against France before this Court on 13 June 2016, the Embassy of Equatorial Guinea used the building for the performance of the official functions of

its diplomatic mission, but without proper status and protection. Meanwhile, measures of constraint such as attachment and confiscation were imposed on the building. This kind of situation cannot be deemed normal in diplomatic relations; nor does it resemble the relationship between two sovereign equals. These facts, per se, demonstrate that undue emphasis on the power of the receiving State to object would upset the delicate balance established by the Vienna Convention between the sending State and the receiving State.

(Signed) XUE Hanqin.
