

SEPARATE OPINION OF JUDGE SEBUTINDE

The disputed building acquired the status of “premises of the mission” of Equatorial Guinea within the meaning of Article 1 (i) of the Vienna Convention on Diplomatic Relations (VCDR) on 27 July 2012 when Equatorial Guinea effectively moved its mission into that building — With effect from that date, France had an obligation to extend to the disputed building the protection guaranteed under Article 22 of the VCDR — Under the VCDR, ownership of a building is immaterial in determining whether it is capable of forming part of the premises of a mission — France’s refusal to recognize the disputed building as premises of Equatorial Guinea’s mission after 27 July 2012 was based on factors to do with the ownership of the building rather than its use by the Applicant for purposes other than its mission — The evidence regarding the prerequisite for consent of a receiving State before a building can be recognized as premises of a mission points to France’s practice of “no objection” whereby the receiving State will not unreasonably object on grounds other than that the building is not being used for the purposes of the mission stipulated in Article 3 of the VCDR — Since the building only attained the status of “premises of the mission” on 27 July 2012, the actions of French authorities in relation to that building before that date, including searches, seizures and order of attachment (saisie pénale immobilière) cannot be considered as being in violation of Article 22 of the VCDR — The order of confiscation of the disputed building of 27 October 2017, confirmed on 10 February 2020, does not violate Article 22 of the VCDR since it concerns the transfer of ownership of the building and does not necessarily implicate its use as premises of Equatorial Guinea’s mission — There are no exceptional and compelling circumstances pointing to abuse of rights by Equatorial Guinea and the Court should have expressly said so in the Judgment.

I. SCOPE OF THE DISPUTE, JURISDICTION
AND ADMISSIBILITY

1. I have voted against paragraph 126 (1) of the Judgment because I disagree with the finding of the majority that the building at 42 avenue Foch in Paris (hereinafter the “disputed building”) has never acquired the status of “premises of the mission” of Equatorial Guinea within the meaning of Article 1 (i) of the Vienna Convention on Diplomatic Relations, 1961 (hereinafter the “VCDR” or the “Convention”). As I explain in this opinion, the disputed building did acquire that status on 27 July 2012. Furthermore, although I have voted in favour of paragraph 126 (2) along with the majority, I do so for reasons other than those expressed by

the majority in the Judgment. I express those reasons later on in this separate opinion. Lastly, while France argued at length about Equatorial Guinea's alleged "abuse of rights" in the present case, the Judgment says little on the issue, simply alluding in paragraph 66 to the fact that the purpose of the diplomatic privileges and immunities under the VCDR are not meant to benefit individuals, without explaining how this statement relates to Equatorial Guinea's claims or conduct. I offer a few thoughts on this issue in this separate opinion. But first I wish to remind the reader of what the Court found, in 2018, to be the dispute between the Parties in the present case.

2. In paragraph 70 of its Judgment of 6 June 2018¹, the Court described the dispute between the Parties as follows:

- (a) First, as a disagreement regarding 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 VCDR.
- (b) Secondly, as a disagreement regarding whether France, by the actions of its authorities in relation to the building, breached its obligation under Article 22 of the VCDR².

3. The Court also stated that it has jurisdiction, on the basis of the Optional Protocol to the VCDR concerning the Compulsory Settlement of Disputes, to entertain Equatorial Guinea's Application only 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 admissible³.

4. It is clear from the facts of this case that France's refusal or reluctance to recognize the disputed building as part of the diplomatic mission of Equatorial Guinea is, in large part, due to the fact that in its view, the building is privately owned by Mr. Teodoro Nguema Obiang Mangue and is subject to ongoing criminal processes in France, including an order of attachment and confiscation. On the other hand, France also agrees that, for purposes of implementing the régime of inviolability under the VCDR, ownership of a building per se is to be distinguished from assignment and use of that building as premises of a diplomatic mission.

5. In my view, the Court should have distinguished the question of ownership of the disputed building from its assignment and use as premises of the mission and should have entertained Equatorial Guinea's Application only in so far as it concerns the status of the disputed build-

¹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 292.

² *Ibid.*, p. 315, para. 70, and p. 328, para. 120.

³ *Ibid.*, pp. 337-338, para. 154 (4).

ing as “premises of the mission”. This is because under Article 1 (*i*) of the VCDR, ownership is not a prerequisite for determining whether a building qualifies for protection under Article 22 of the VCDR as “premises of the mission”. The only prerequisite thereunder is that the building, or parts thereof and the land ancillary thereto, are “used for the purposes of the mission including the residence of the head of mission”. In that regard, I do not agree with the Court’s interpretation of Article 1 (*i*) of the VCDR in paragraph 62. In my view, that provision is more than a mere definition. In the ordinary meaning of that paragraph, the “premises of the mission” comprise:

- buildings or parts of buildings and land ancillary thereto;
- that are used for the purposes of the mission including the residence of the head of the mission; and
- it is irrelevant who actually owns the building or land upon which the mission is situated.

6. However, the VCDR sheds no light as to whether before using a building as “premises of its mission” the sending State needs to obtain the prior consent (or non-objection) of the receiving State to such use. I examine this aspect later on in this opinion.

II. STATUS OF THE BUILDING AT 42 AVENUE FOCH IN PARIS

A. *Criteria for Qualifying a Building as “Premises of the Mission”*

7. In determining whether the disputed building qualifies as “premises of the mission” of Equatorial Guinea within the meaning of Article 1 (*i*) of the VCDR, the Court has to determine, first, if and when Equatorial Guinea started using the building for purposes of its mission and, secondly, whether such use is subject to the consent of France as the receiving State as a necessary prerequisite for extending the régime of inviolability in respect of that building under Article 22 of the VCDR.

8. In determining if and when the disputed building qualifies as “premises of the mission”, I have examined three possible dates on which Equatorial Guinea claims the building was assigned for use as the premises of its mission, namely *4 October 2011*, *17 October 2011* and *27 July 2012*.

(i) *Assignment of the building as premises of the mission on 4 October 2011*

9. Equatorial Guinea refers to 4 October 2011, the day following the search of the disputed building and seizure by French authorities of several luxury vehicles belonging to Mr. Teodoro Nguema Obiang Mangue

from parking lots located near the disputed building on 3 October 2011, as the date when it first assigned the disputed building for use as its diplomatic mission. On that date, Equatorial Guinea officially notified the French Ministry of Foreign Affairs, for the first time, that

“Equatorial Guinea . . . has for a number of years had at its disposal a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of its diplomatic functions, a fact which it has hitherto not formally notified to your [Protocol] Department.

Since the building forms part of the premises of the mission, pursuant to Article 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Republic of Equatorial Guinea wishes to give you official notification so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention.”⁴

10. In my view, however, Equatorial Guinea has not adduced sufficient proof that the disputed building was, prior to or with effect from 4 October 2011, actually used as premises of its mission within the meaning of Article 1 (*i*) of the VCDR. It is not sufficient that Equatorial Guinea merely “had the disputed building at its disposal”. In that regard, I have taken the following factors into account:

- (a) First, according to Equatorial Guinea itself, the disputed building belonged to Mr. Teodoro Nguema Obiang Mangue in his private capacity until 15 September 2011 (one month before the above official notification) when he allegedly transferred his shares in the five Swiss companies to the Government of Equatorial Guinea. In those circumstances, it is unlikely that the State of Equatorial Guinea had “had the building at its disposal for a number of years” or that it used the privately owned building “for the performance of its diplomatic functions” prior to 4 October 2011, as alleged in their official notification.
- (b) Secondly, Equatorial Guinea did not specify what diplomatic functions were being carried out at the disputed building prior to or as at 4 October 2011. In paragraph 22 of its reply to a question put by a Member of the Court, Equatorial Guinea asserted that “[p]rior to 4 October 2011, the building had been used to accommodate Equatorial Guinea’s diplomatic staff or other officials on special missions”, but adduced no evidence to prove this claim, nor did the Applicant consider it necessary to request from the receiving State diplomatic

⁴ Memorial of Equatorial Guinea (MEG), para. 2.30; see also written replies of Equatorial Guinea to questions put by two Members of the Court, 26 October 2016, para. 21.

status or tax exemptions in respect of the disputed building during that period⁵.

- (c) Thirdly, during several searches of the disputed building conducted by French investigators prior to 4 October 2011, the Applicant did not even once complain or assert diplomatic immunity of the building. In the Note Verbale of 28 September 2011 delivered personally to Mr. Alain Juppé, Minister of State for Foreign Affairs, Equatorial Guinea bitterly complained about the investigations and criminal charges levelled against Mr. Teodoro Obiang Mangue and against the interference of France in the internal affairs of Equatorial Guinea. However, the Note Verbale was silent about the status of the building at 42 avenue Foch, Paris, the ownership of which had by then, allegedly, been transferred to the Government of Equatorial Guinea. The first time a complaint was ever raised in this regard was by Ms Mariola Bindang Obiang (UNESCO Representative) in respect of the searches and seizures of 14-23 February 2012⁶.
- (d) Fourthly, on-site inspections of the disputed building carried out by French authorities on 5 October 2011 and in February 2012 found no evidence that it was either occupied by the Embassy of Equatorial Guinea, or used as a residence by Ms Bindang Obiang, UNESCO Representative⁷. All they found was a signpost at the entrance reading: “Republic of Equatorial Guinea — Embassy Premises”. Equatorial Guinea itself recognizes that the items seized by the French Authorities on those occasions did not belong to its mission⁸.

11. For all the above reasons, I am not convinced that the disputed building acquired the status of “premises of the mission” within the meaning of Article 1 (*i*) of the VCDR on or about 4 October 2011.

(ii) *Move of the UNESCO Delegate’s residence to the building on 17 October 2011*

12. On 17 October 2011, Equatorial Guinea officially notified the French Ministry of Foreign Affairs of the end of the mission of H.E. Mr. Frederico Edjo Ovono, the Ambassador Extraordinary and Plenipotentiary of the Republic of Equatorial Guinea, and that, pending his replacement, Ms Mariola Bindang Obiang, Permanent Delegate to UNESCO, would head the Embassy as *Chargée d’affaires ad interim*. The Applicant’s Note Verbale further indicated that “the official residence of Ms Bindang Obiang was located on the premises of the diplomatic mis-

⁵ Rejoinder of France (RF), para. 1.7.

⁶ MEG, Ann. 42.

⁷ Additional documents communicated by France, No. 33, Record of on-site inspection and attachment of vehicles of Mr. Teodoro OBIANG NGUEMA located at 42 avenue Foch, 75016 Paris, 28 September 2011 [*translation*].

⁸ Reply of Equatorial Guinea (REG), para. 4.12.

sion located at 42 avenue Foch, 75016 Paris, which is at the disposal of the Republic of Equatorial Guinea”⁹. France responded on 31 October 2011, rejecting the appointment of Ms Bindang Obiang as Chargée d’affaires *ad interim* as being contrary to Article 19 of the VCDR¹⁰; insisting that France had never recognized the disputed building as part of the premises of Equatorial Guinea’s mission; and indicating that any change in address of Ms Obiang’s residence from 46 rue des Belles Feuilles, Paris (16th arr.) to the disputed building should be officially notified by UNESCO’s protocol department and not by the Applicant’s Embassy¹¹.

13. It was four months later, on 15 February 2012, that the Permanent Delegation of Equatorial Guinea to UNESCO transmitted to the French Ministry of Foreign Affairs a Note Verbale stating that “the official residence of the Permanent Delegate of Equatorial Guinea to UNESCO is located at 42 avenue Foch, 75016 Paris, property of the Republic of Equatorial Guinea”¹². On 16 February 2012 the Applicant sought the *agrément* of French authorities pursuant to Article 4 of the VCDR regarding the appointment of Ms Bindang Obiang as Ambassador of Equatorial Guinea to France, stating that she resided at the disputed building¹³.

14. In March 2012, Equatorial Guinea issued several Notes Verbales to the French Ministry of Foreign Affairs in which it asserted the immunity of the building, not as “premises of its mission” but as “Government property”¹⁴.

15. In my view, Equatorial Guinea has not adduced convincing and consistent evidence that as from 17 October 2011, the disputed building was actually used as “premises of the mission” within the meaning of Article 1 (*i*) of the VCDR, including as the “residence of its head of mission”. In that regard, I have taken the following factors into account:

(a) First, in nominating Ms Mariola Bindang Obiang, the UNESCO Permanent Delegate, as Chargée d’affaires *ad interim* and head of

⁹ MEG, Ann. 36.

¹⁰ According to France’s Note Verbale of 31 October 2011, only a member of the mission’s diplomatic, administrative or technical staff may under Article 19 of the VCDR be designated chargé d’affaires *ad interim* by the sending State.

¹¹ MEG, Ann. 40.

¹² *Ibid.*, Ann. 41.

¹³ Article 4 of the VCDR provides:

“1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of mission to that State.

2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.”

¹⁴ MEG, Anns. 43, 44 and 45.

mission of Equatorial Guinea on 17 October 2011, the Applicant did not secure the *agrément* of the receiving State as required by Article 4 of the VCDR, since France subsequently rejected the appointment of Ms Mariola Bindang Obiang as being contrary to Article 19 of the VCDR.

- (b) Secondly, even if the official residence of Equatorial Guinea's Permanent Representative to UNESCO had shifted from 46 rue des Belles Feuilles, Paris (16th arr.) to the disputed building, Article 20 of the Host Agreement between France and UNESCO requires that the notification of such change of address should have been sent by the protocol department of UNESCO to the French Ministry of Foreign Affairs and not by the Embassy of Equatorial Guinea. In any event that notification only took place four months later on 15 February 2012¹⁵.
- (c) Thirdly, approximately four months after Ms Mariola Bindang Obiang had allegedly moved into the disputed building, French authorities carried out several searches of the disputed building between 14 and 23 February 2012 and seized various items comprising the personal effects, furniture and documents of Mr. Teodoro Obiang Mangue¹⁶. Based on those searches and the testimony of employees of Mr. Teodoro Obiang Mangue, there were neither diplomatic documents nor property or items belonging to a female resident found in the disputed building, despite a formal protest by Equatorial Guinea and Ms Bindang Obiang against the searches¹⁷.

16. For all the above reasons, Equatorial Guinea has not proved that the disputed building acquired the status of "premises of the mission" within the meaning of Article 1 (*i*) of the VCDR on or about 17 October 2011.

- (iii) *Move of Equatorial Guinea's Embassy offices to the disputed building on 27 July 2012*

17. On 19 July 2012, the Paris *Tribunal de grande instance* issued an order (*saisie pénale immobilière*) attaching the disputed building with a view to its confiscation¹⁸. On 27 July 2012, the Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that "as from Friday 27 July 2012, the Embassy's offices are located at 42 avenue Foch Paris (16th arr.), a building which it is *henceforth* using for the performance of the functions of its diplomatic mission in France"¹⁹. On

¹⁵ Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory.

¹⁶ Order of attachment of the Paris *Tribunal de grande instance*, MEG, Ann. 25.

¹⁷ *Ibid.*, Anns. 37 and 38.

¹⁸ *Ibid.*, Ann. 25.

¹⁹ *Ibid.*, Ann. 47 (emphasis added).

2 August 2012, Equatorial Guinea sent another notification to the French Ministry of Foreign Affairs to the effect that “further to its preceding Notes Verbales, it hereby confirms that its chancellery is indeed located at the following address: 42 avenue Foch, Paris (16th arr.), a building that it uses as the official offices of its diplomatic mission in France”²⁰.

18. In response, the French Ministry of Foreign Affairs wrote to the Applicant on 6 August 2012 indicating its refusal to recognize the disputed building as the new premises of Equatorial Guinea’s diplomatic mission, pointing out that the building was the subject of an order of attachment and stating that the seat of the Chancellery remains at 29 boulevard de Courcelles, Paris (8th arr.)²¹. France reiterated its position in subsequent communication²².

19. On 12 May 2016, Equatorial Guinea responded reiterating the fact that its Embassy offices were located at the disputed building since it was so assigned on 11 October 2011 and pointing out the mixed messages that the French Government and its Ministry of Foreign Affairs were sending. In that regard Equatorial Guinea noted that

- (a) 42 avenue Foch, Paris (16th arr.) is the address at which requests for visas to enter Equatorial Guinea are submitted by members of the French Government, such as the State Secretary for Development and Francophone Affairs, who made an official visit to Equatorial Guinea from 8 to 9 February 2015;
- (b) a law enforcement unit went to the same address on 13 October 2015 to provide protection for the diplomatic mission during protests by members of the Equatorial Guinean opposition in France.

20. The Applicant observed that this contradiction should not be to the detriment of the Republic of Equatorial Guinea²³.

21. It is clear from the above narrative of events that Equatorial Guinea effectively moved the offices of its diplomatic mission in France into the building at 42 avenue Foch in Paris on or about 27 July 2012, eight days after the order of attachment (*saisie pénale immobilière*) was issued by the Paris *Tribunal de grande instance*. Thereafter Equatorial Guinea used every opportunity to reiterate its position to the French authorities despite the consistent refusal of the French Ministry of Foreign Affairs to recognize the disputed building as the Applicant’s diplomatic mission or Chancellery. France’s refusal to recognize the building as premises of Equatorial Guinea’s mission was clearly based on the fact

²⁰ MEG, Ann. 48.

²¹ *Ibid.*, Ann. 49.

²² See Note Verbale of 27 April 2016 (*ibid.*, Ann. 50).

²³ *Ibid.*, Ann. 51.

that the disputed building was privately owned and has been placed under an order of attachment and confiscation. Each Party is thus entrenched in its position, except in 2015 when on a few occasions French authorities obtained their visas to Equatorial Guinea and gave protection to diplomatic staff at that building.

22. In my view, there is sufficient evidence to show that the disputed building has since 27 July 2012 been effectively used as premises of Equatorial Guinea's mission. In my view, although the orders of attachment and confiscation could ultimately affect ownership of the disputed building, they should not, at this stage, prevent Equatorial Guinea from effectively using the building as premises of its mission. As earlier pointed out, France itself admits that the ownership of the disputed building is immaterial in determining whether the property is capable of forming part of the premises of Equatorial Guinea's mission²⁴.

*B. Is Prior Consent of the Receiving State
a Necessary Prerequisite?*

23. The VCDR is silent on whether the consent of the receiving State is required before a building can qualify as "premises of a mission". By contrast for example, Article 11 speaks of agreement between the sending and receiving States as to the size of the mission; while Article 12 forbids a sending State from establishing additional offices of its mission "in localities other than those in which the mission itself is established". The *travaux préparatoires* of the VCDR does not shed light on this issue. The answer may lie in the practice of France, as receiving State, towards all sending States that establish diplomatic relations with it.

24. The Parties are agreed that France has no written laws or guidelines requiring prior consent. However, its practice appears to indicate the existence of a practice of a "no-objection" régime. In other words, for purposes of establishing premises of a diplomatic mission, it is enough for the sending State to notify France as the receiving State of the location of the mission premises and for the latter to raise no objection thereto. It is also expected that the receiving State will not unreasonably object, on grounds other than that the building is not being used for the purpose of the mission. This approach has been adopted by commentators of the Convention:

"In States where no specific domestic legal framework controls the acquisition or disposal of mission premises, the definition of Arti-

²⁴ Counter-Memorial of France (CMF), paras. 2.1-2.21; RF, paras. 0.11-0.15 and 2.1-2.4.

cle 1 (*i*) falls to be applied by agreement between sending and receiving State. Generally speaking, a receiving State is likely to be notified of mission premises for the purpose of ensuring that it carries out its duties under Article 22 to protect those premises and ensure their inviolability. Challenge to such notification will usually take place only where there are grounds to suspect that the premises are not being used for purposes of the mission. Article 3, which describes the functions of the mission, may be relevant in this context.”²⁵

25. In the present case, France’s persistent refusal to recognize the disputed building as premises of Equatorial Guinea’s mission was not based on the fact that it is being used for purposes or functions *other than* those stipulated in Article 3 of the VCDR. Rather, France’s objection to the disputed building being used by Equatorial Guinea as diplomatic premises is persistently based on the fact that the building is “privately owned” and is “subject to orders of attachment and confiscation”. Ironically, France has consistently also maintained that the question of ownership of the building does not affect its potential use as diplomatic premises. In particular, France has argued that the order of attachment affects only “the free disposal of the title to the building” not its use²⁶. In this regard I agree with France’s interpretation of Article 1 (*i*) of the VCDR.

26. Consequently, I am of the considered view that once it was established that Equatorial Guinea had effectively moved its mission offices into the disputed building on 27 July 2012, that was sufficient for the building to acquire the status of “premises of Equatorial Guinea’s mission” and for France as the receiving State to accord the building the protection provided under Article 22 of the VCDR, regardless of who owns the building or the fact that it is under orders of attachment and confiscation. This brings me to the question whether France in fact breached its obligations under the VCDR.

III. WHETHER FRANCE VIOLATED ITS OBLIGATIONS UNDER THE VCDR

27. The obligation imposed upon the receiving State and its agents by Article 22 of the VCDR is twofold. First, the receiving State has a duty to ensure that its authorities do not enter the premises of the mission of a sending State without the consent of the head of mission. Secondly, it has a duty to protect such mission against intrusion, damage, disturbance of

²⁵ See E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, 4th edition, 2016, p. 17.

²⁶ RF, paras. 4.5-4.6.

the peace or impairment of dignity, and against measures of constraint including search, requisition, attachment or execution.

28. Given my conclusions reached above that the disputed building only attained the status of “premises of Equatorial Guinea’s mission” on 27 July 2012, the building could not enjoy diplomatic protection under Article 22 of the VCDR before that date. It follows that the searches and seizures carried out by the French authorities in relation to the building before that date cannot be considered as violations of the VCDR. The same is true regarding the order of attachment of the building (*saisie pénale immobilière*) issued on 19 July 2012.

29. However, the question is what consequences should arise from the *order of confiscation* of the disputed building issued by the Paris *Tribunal de grande instance* on 27 October 2017, a decision confirmed by the Paris *Cour d’appel* on 10 February 2020. As both these decisions were issued in relation to the building after it became the premises of Equatorial Guinea’s diplomatic mission, could they be interpreted as tantamount to a violation of Article 22 of the VCDR?

30. As Equatorial Guinea itself pointed out during the oral hearings on the preliminary objections raised by France, “in French criminal law, confiscation is a penalty which involves transfer of the ownership of the asset in question, to the benefit of the French State”²⁷. As such, an order of confiscation per se does not imply a violation of the mission premises, in the sense that it essentially impedes the free disposal of the title to the building but need not necessarily affect its use as premises of the mission. Equatorial Guinea expressed concern that confiscation carries “an ever-present risk of expulsion” of its mission from the building²⁸. However, my view is that the Court would be engaging in speculation if it took that approach, given that confiscation does not automatically lead to eviction. Considering that the Court should steer clear of issues to do with the ownership of the disputed building, it is not up to the Court to speculate about what measures the French authorities may adopt following the confiscation, particularly if the Court were to find that the building did enjoy diplomatic status from 27 July 2012 and is therefore immune from execution. In other words, it is possible for the disputed building to have changed ownership in any number of ways and for Equatorial Guinea to choose to continue housing its mission there, subject to negotiation with the new owners. As long as Equatorial Guinea’s mission continued to be housed there, the receiving State would be obligated to extend to that mission the régime of inviolability guaranteed under Article 22 of the VCDR, regardless of the new owners.

²⁷ CR 2018/3, p. 21, para. 43 (Tchikaya).

²⁸ REG, para. 2.54.

31. For all the above reasons, I am of the view that France is not in violation of Article 22 of the VCDR, as the building did not enjoy the inviolability régime when searches and seizures were carried out or when the order of attachment was issued. Furthermore, there was no violation under Article 22 of the VCDR since the order of confiscation does not automatically lead to eviction. This brings me to the last issue in the case, namely whether by bringing its claim to the Court, the Applicant abused its rights, as claimed by the Respondent.

IV. WHETHER EQUATORIAL GUINEA COMMITTED ABUSE OF RIGHTS

32. In its third preliminary objection to the jurisdiction of the Court in the present case, France argued that Equatorial Guinea “suddenly and unexpectedly” transformed a private residence into premises of its mission and appointed Mr. Teodoro Nguema Obiang Mangue to increasingly eminent positions. It further alleges that Equatorial Guinea’s objective in bringing the case before the Court was to shield both Mr. Teodoro Nguema Obiang Mangue and the building at 42 avenue Foch from pending criminal proceedings that were underway in France. France concludes that Equatorial Guinea’s Application constitutes an abuse of process because it was submitted in the manifest absence of any legal remedy and with the aim of covering up abuses of rights committed in other respects.

33. In its 2018 Judgment on preliminary objections, the Court characterized France’s third preliminary objection as an objection to admissibility²⁹. The Court also overruled the objection in relation to the alleged abuse of process³⁰. In relation to the alleged abuse of rights, the Court stated:

“As to the abuse of rights invoked by France, 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.”³¹

34. Abuse of rights is a controversial claim, which should only be made in exceptional and compelling circumstances. Judge Hersch Lauterpacht observed that abuse of rights is said to occur when “a State avails itself of

²⁹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 335, para. 145.

³⁰ *Ibid.*, p. 336, para. 150.

³¹ *Ibid.*, p. 337, para. 151.

its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage”³². The Court has in its jurisprudence³³ recognized abuse of rights as a necessary corollary to the principle of good faith³⁴. However, as France rightly observes, the threshold for a finding of abuse of rights is high, as a court or tribunal will obviously not presume an abuse and will affirm the evidence of an abuse only in very exceptional circumstances³⁵. In this case the Court is called upon to determine whether by claiming diplomatic protection under Article 22 of the VCDR for the disputed building as “premises of its mission”, Equatorial Guinea abused its rights under the VCDR to the detriment of the rights of France as receiving State.

35. There is little doubt that in seeking to divest himself of the ownership of the disputed building and transferring the shares in the five Swiss companies to the State of Equatorial Guinea in mid-September 2011, Mr. Teodoro Nguema Obiang Mangue acted under pressure of the criminal proceedings that were already underway against him in France. His father, the President of Equatorial Guinea, disclosed as much to President Sarkozy of France in an official communication in February 2012³⁶.

36. I have expressed the view that in my opinion the Applicant effectively moved the offices of its mission into the disputed building on 27 July 2012 and that, with effect from that date, the building was entitled to the protection guaranteed by Article 22 of the VCDR. Can it be said that when Equatorial Guinea availed itself of its right to bring this case before the Court, it did so “in an arbitrary manner in such a way as to inflict upon France an injury which cannot be justified by a legitimate consideration of the Applicant’s own advantage”? The answer must be in the negative. In moving the offices of the mission to the disputed building, the Applicant genuinely believed (rightly or mistakenly) that they were

³² L. Oppenheim, *International Law: A Treatise*, Vol. 1: Peace, ed. by H. Lauterpacht, London, New York, Toronto: Longmans, Green and Co., 8th edition, p. 354.

³³ See *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, p. 473, para. 49; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, *I.C.J. Reports 1992*, p. 255, paras. 37-38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, *I.C.J. Reports 1996 (II)*, p. 622, para. 46.

³⁴ Other authors have observed:

“Good faith in the exercise of rights . . . means that a State’s rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must reasonably be exercised. The reasonable and bonafide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State.” (See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 1953, reprinted in 1987, pp. 131-132.)

³⁵ CMF, para. 4.9.

³⁶ MEG, Ann. 39.

moving into a building then owned by the State of Equatorial Guinea. The fact that the President of Equatorial Guinea did not hide the reason behind the “transfer” of the building from the French authorities, coupled with the Applicant’s various attempts to settle the dispute regarding the status of the building diplomatically, are, in my view, indicative of the Applicant’s desire to maintain a transparent and fraternal relationship with the Respondent, rather than an indication of bad faith.

37. At France’s own admission, its refusal to recognize the disputed building as premises of the Applicant’s mission is not based on the Applicant’s misuse of the building for purposes other than the mission, but rather because the building was “privately owned” and “under orders of attachment and confiscation”. In my view, France’s right to proceed with the criminal processes against Mr. Teodoro Obiang Mangue or the disputed building is not prejudiced by Equatorial Guinea’s Application before the Court as the orders of attachment and confiscation concern ownership of the building and not its use as premises of the Applicant’s mission.

38. Furthermore, when ruling on allegations of violations of provisions of the VCDR in the *United States Diplomatic and Consular Staff in Tehran* case³⁷, the Court held that the VCDR, as a self-contained régime, provides to States parties the means to address what they could consider as abuses of the rights and privileges conferred by the Convention. The Court in its *obiter dictum* stated as follows:

“84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide

‘Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.’”

39. In the long run, a finding by this Court of abuse of rights against the Applicant may not be useful and may only serve to further undermine the strained relations between the two States. In line with the object and

³⁷ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, *I.C.J. Reports 1980*, p. 39, para. 84.

purpose of the VCDR, which is to “contribute to the development of friendly relations amongst nations”, the Court should have made an express finding that France has not proved the Applicant’s alleged abuse of rights.

(Signed) Julia SEBUTINDE.
