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14697 Corr.

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

PRELIMINARY OBJECTIONS

OF THE

FRENCH REPUBLIC

30 March 2017

[Translation by the Registry]

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INTRODUCTION

1. Article 79, paragraph 1, of the Rules of Court provides that:

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial."

2. The French Republic (hereinafter "France") has decided to avail itself of this possibility and raise objections to the jurisdiction of the Court to entertain the case brought by the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") by an Application dated 13 June 2016. That is the subject of these written pleadings.

A. Procedural history

3. On 13 June 2016, Equatorial Guinea filed an Application against France before the International Court of Justice 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" in France. As basis for the jurisdiction of the Court in the case, Equatorial Guinea invoked Article 35 of the Convention against Transnational Organized Crime and the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.

4. On 29 September 2016, Equatorial Guinea submitted a Request for the indication of provisional measures, asking the Court "pending its judgment on the merits, to indicate the following provisional measures:

(a) that France suspend all the criminal proceedings brought against the Vice-President of the Republic of Equatorial Guinea, and refrain from launching new proceedings against him, which might aggravate or extend the dispute submitted to the Court;

(b) that France ensure that the building located at 42 avenue Foch in Paris is treated as premises of
6 Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability, and that those premises, together with their furnishings and other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition, attachment or any other measure of constraint;

(c) that France refrain from taking any other measure that might cause prejudice to the rights claimed by Equatorial Guinea and/or aggravate or extend the dispute submitted to the Court, or compromise the implementation of any decision which the Court might render".

5. After the public hearings which were held from 17 to 19 October 2016, the Court, by an Order dated 7 December 2016, rejected Equatorial Guinea's request for the legal proceedings before the French courts to be suspended, finding that it did not have prima facie jurisdiction to entertain Equatorial Guinea's request relating to the immunity from criminal jurisdiction which, according to the Applicant, Mr. Teodoro Nguema Obiang Mangue enjoys as Second Vice-President

of the Republic of Equatorial Guinea in charge of Defence and State Security[1]. The Court found that a dispute capable of falling within the scope of the Convention against Transnational Organized Crime did not exist between the Parties.

6. Regarding the building located at 42 avenue Foch, the Court considered that the conditions for indicating provisional measures were met and ordered France, pending a final decision in the case, to take "all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability"[2].

7. On 3 January 2017, Equatorial Guinea filed its Memorial in the Registry of the Court. Pursuant to the provisions of Article 79, paragraph 1, of the Rules of Court, and the Court's Order of 1 July 2016 fixing time-limits for the proceedings, France wishes to raise objections to the Court's jurisdiction.

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B. General presentation and structure of the preliminary objections

8. In the first chapter, France will make some general observations on the facts underlying the dispute submitted to the Court, the scope of that dispute, and the abusive nature of the Application.

9. In the second chapter, it will show, as the Court found prima facie in its Order of 7 December 2016, that a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime does not exist between Equatorial Guinea and France, and that, therefore, the Court lacks jurisdiction over that aspect of the case.

10. In the third chapter, France will argue that the Court does not have jurisdiction to entertain aspects of the dispute based on the Vienna Convention on Diplomatic Relations.

11. These preliminary objections will thus be structured as follows:

— Chapter 1: General Observations

— Chapter 2: The Court's lack of jurisdiction on the basis of the United Nations Convention against Transnational Organized Crime

— Chapter 3: The Court's lack of jurisdiction on the basis of the Vienna Convention on Diplomatic Relations.

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[1] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, Order of 7 Dec. 2016, para. 46.

[2] *Ibid*., para. 99.

9

CHAPTER 1

GENERAL OBSERVATIONS

12. As a preliminary matter, France would like to return to certain facts underlying the proceedings (I), the scope of the dispute (II), and the abusive nature of Equatorial Guinea's Application, which should lead the Court to decide that it lacks jurisdiction to entertain it (III).

I. Facts of the case

13. During the Court's consideration of the Request for the indication of provisional measures filed by Equatorial Guinea, the presentation by the Agent of France and the oral arguments of its counsel demonstrated that the facts of the case that gave rise to the dispute submitted to the Court were singular in nature and had been the subject of contradictory statements by Equatorial Guinea. France notes that those contradictions are once again reflected in the Memorial that Equatorial Guinea submitted to the Court on 3 January 2017.

14. As the Court has pointed out, "[t]he existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law to be resolved in the light of the relevant facts"[3]. Consequently, without going into any great detail, France wishes to return to certain factual elements underlying Equatorial Guinea's Application, which it was able to discuss only briefly at the hearings on the request for provisional measures.

15. The facts set out in Equatorial Guinea's Memorial that are not discussed in the present submission should, however, not be considered as accepted by France, which reserves the right to return to them as necessary.

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A. The origin of the criminal proceedings instituted before the French courts

16. The criminal proceedings instituted against Mr. Teodoro Nguema Obiang Mangue before the French courts originated with a complaint filed on 2 December 2008 by the French association Transparency International France against several African Heads of State and members of their families, including Mr. Teodoro Nguema Obiang Mangue, before the senior investigating judges of the Paris *Tribunal de grande instance*, for acts of handling misappropriated public funds, money laundering, misuse of corporate assets, breach of trust and concealment[4].

17. By a judgment dated 9 November 2010, the *Chambre criminelle* of the *Cour de cassation* found Transparency International France's civil-party application admissible[5].

18. On 4 July 2011, the Paris Public Prosecutor submitted an application for characterization, requesting that the investigation should concern only facts that could be characterized as money

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[3] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16.

[4] Complaint with civil-party application filed by Transparency International France and Mr. Grégory Ngbwa Minsta with the Paris *Tribunal de grande instance*, 2 Dec. 2008, p. 22 (Ann. 1).

[5] *Cour de cassation*, *Chambre criminelle*, 9 Nov. 2010 (No. 09-88272) (Ann. 4 of the Application of Equatorial Guinea, 13 June 2016 (hereinafter "AEG")).

laundering or handling offences, that is, acts committed on French territory in 1997 and up to October 2011. The criminal proceedings that were instituted do not therefore involve an extraterritorial extension of the jurisdiction of the French courts, contrary to what Equatorial Guinea claims[6].

19. In the course of the judicial investigation, the investigating judges had occasion to look into the Obiang family's assets in France, including, in particular, those accumulated by Mr. Teodoro Nguema Obiang Mangue.

B. The townhouse located at 42 avenue Foch in Paris

20. In its complaint filed on 2 December 2008, Transparency International France drew the attention of the French authorities to a building located at 42 avenue Foch in Paris, in the following terms:

11 "*(b)* As regards Mr. Teodoro OBIANG and his family:

Mr. Teodoro OBIANG is the President of Equatorial Guinea.

> According to the 12 April 2006 edition of *Le Figaro* (see article by Stéphane Bern, "*Drapeau rouge et billet vert*", 12 May 2006 — document 16), he acquired a townhouse located on avenue Foch. It is evident that Mr. Teodoro OBIANG took pains not to be named as the apparent owner of the property, but the verifications to be made in the forthcoming investigations will undoubtedly establish that he is."[7]

21. The investigation subsequently established that the building in fact belonged to Mr. Teodoro Nguema Obiang Mangue and was used in a personal capacity. The testimony gathered in the course of the proceedings and the records of the searches conducted by the French authorities speak for themselves[8]. On 19 July 2012, the judges attached the building (*saisie pénale immobilière*), as a provisional measure, to prevent it from being sold before the end of the judicial investigation[9].

22. Equatorial Guinea then engaged in a considerable amount of diplomatic correspondence in an attempt to block the criminal proceedings. Its contentions regarding the use of the building located at 42 avenue Foch thus varied as the judicial proceedings progressed: sometimes it was

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[6] Memorial of Equatorial Guinea filed on 3 Jan. 2017 (hereinafter "MEG"), p. 91, para. 6.26.

[7] Complaint with civil-party application filed by Transparency International France and Mr. Grégory Ngbwa Mintsa with the Paris *Tribunal de grande instance*, 2 Dec. 2008, p. 9 (Ann. 1).

[8] See Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), pp. 17-20 (Ann. 7 MEG).

[9] See Order of attachment of real property (*saisie pénale immobilière*), 19 July 2012 (No. 47 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

Teodoro's accommodation as a young student[10], and at other times it was the residence of Equatorial Guinea's Permanent Delegate to UNESCO[11] or the premises of its diplomatic mission[12].

12 23. Faced with these fluctuating and contradictory statements, France — through the Protocol Department of the Ministry of Foreign Affairs — consistently stated that it was unable to recognize Equatorial Guinea's claims in respect of the building located at 42 avenue Foch, recalling that there had been an order to attach the property and that judicial proceedings were pending[13]. This position was reiterated to the Equatorial Guinean authorities on multiple occasions, including quite recently[14].

1. Uncertainty about the date on which Equatorial Guinea claims to have acquired ownership of the building located at 42 avenue Foch in Paris

24. By a Note Verbale dated 4 October 2011, the Embassy of Equatorial Guinea in France drew the attention of the French Ministry of Foreign Affairs to the building located at 42 avenue Foch in the following terms:

> "The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs . . . and has the honour to inform it that the Embassy 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 the functions of its diplomatic mission, a fact which it has hitherto not formally notified to your Department.
>
> Since the building forms part of the premises of the diplomatic 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."[15]

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[10] Letter from the President of Equatorial Guinea to the French President, 14 Feb. 2012 (No. 5 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[11] Note Verbale No. 387/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 17 Oct. 2011 (No. 3 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures). See also Note Verbale No. 251/12 from the Ministry of Foreign Affairs of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 14 Feb. 2012 (No. 6 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 173/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 14 Feb. 2012 (No. 7 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[12] Note Verbale No. 249/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 12 Mar. 2012 (No. 16 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[13] Note Verbale No. 803 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 20 Feb. 2012 (No. 12 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[14] Note Verbale No. 158/865 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 2 Mar. 2017 (Ann. 2).

[15] NoteVerbale No. 365/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 4 Oct. 2011 (No. 1 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

25. Whereas on 4 October 2011 Equatorial Guinea had affirmed that it had "for a number of years had at its disposal" the building, in its response to the question put by Judge Bennouna at the
13 end of the oral proceedings on the request for provisional measures, it stated that it considered that it had "definitively acquired the title to the property located at 42 avenue Foch on 15 September 2011"; that is, less than a month before the aforementioned Note Verbale had been sent, not "a number of years". Compounding the uncertainty, the Embassy of Equatorial Guinea stated, in a Note Verbale dated 15 February 2012, that "[t]he title to the property is in the process of being transferred"[16].

26. On 5 October 2011, as part of the judicial investigation, investigators went to the address of the townhouse. As noted in the order for partial referral, "[a]t the entrance porch, [the investigators] noted the presence of two makeshift signs marked '*République de Guinée Équatoriale — locaux de l'ambassade*' (Republic of Equatorial Guinea — Embassy premises). The building's caretaker explained to them that, the previous day [the day the Embassy sent the Ministry of Foreign Affairs its Note Verbale stating that it had had the building at its disposal for a number of years], a driver and two employees of the Embassy of the Republic of Equatorial Guinea had come to the premises in a Mercedes with diplomatic plates and had affixed the signs . . ."[17]

2. Uncertainty about Equatorial Guinea's use of the building located at 42 avenue Foch in Paris

27. The Notes Verbales from the Embassy of Equatorial Guinea to the Protocol Department of the French Ministry of Foreign Affairs show contradictions in Equatorial Guinea's position regarding the status of the building located at 42 avenue Foch:

14 — On 4 October 2011, the Embassy claimed that the building had been "use[d] [for a number of years] for the performance of the functions of its diplomatic mission"[18].

— On 17 October 2011, the building was then described by the Embassy as housing the new official residence of the Permanent Delegate to UNESCO[19]. In its reply to the question put by Judge Donoghue at the end of the oral proceedings on the request for provisional measures, Equatorial Guinea admitted that it had not notified UNESCO of its Permanent Delegate's change of residence until 14 February 2012[20], that is, the first day of the searches and attachment of movable assets carried out at 42 avenue Foch. Yet, by a Note Verbale dated 31 October 2011, the French Ministry of Foreign Affairs had taken care to remind

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[16] Note Verbale No. 187/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 15 Feb. 2012 (No. 10 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[17] Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), p. 16 (Ann. 7 MEG).

[18] Note Verbale No. 365/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 4 Oct. 2011 (No. 1 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[19] Note Verbale No. 387/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 17 Oct. 2011 (No. 3 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[20] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, pp. 8-9, para. 27.

Equatorial Guinea that any such change of residence had to be notified not to France, but rather to UNESCO's protocol department[21].

— In this regard, Equatorial Guinea claims in its Memorial that "[o]n 17 October 2011, following the end of Ambassador Edjo Ovono Frederico's mission, the designated Chargée d'affaires *a.i.*, Ms Bindang Obiang, who is also the Permanent Delegate of Equatorial Guinea to UNESCO, was rehoused at 42 avenue Foch. The reason for this change in accommodation was that the dwelling at 46 rue des Belles Feuilles notified to UNESCO was unfit for habitation, and the dignity of Ms Bindang Obiang's new functions required a better residence"[22]. However, on 19 September 2012, in the Note Verbale from the Embassy of Equatorial Guinea requesting
15 that the Protocol Department issue a special residence permit to Ms Bindang Obiang in her capacity as Extraordinary and Plenipotentiary Ambassador, the address listed in the notification form regarding her appointment and the assumption of her duties is given as 8 bis avenue de Verzy in Paris (17th arr.), not 42 avenue Foch[23].

— On 16 February 2012, when Equatorial Guinea's Ministry of Foreign Affairs was seeking the approval of the French authorities for Ms Bindang Obiang's appointment as Equatorial Guinea's Ambassador to France, it was then stated in the curriculum vitae attached to the Note Verbale that she was residing at 46 rue des Belles Feuilles in Paris (16th arr.).

— Furthermore, in its reply to the question put by Judge Donoghue, Equatorial Guinea admitted, concerning its Embassy's request by Note Verbale dated 15 February 2012[24] for protection for two Equatorial Guinean ministers who had to go to the building at 42 avenue Foch, that "it was in fact in order to supervise preparations for the effective occupation of the building, which had been acquired for use as premises of the diplomatic mission of Equatorial Guinea"[25].

— On 27 July 2012, that is, eight days after the investigating judges had decided to order the attachment of the property, a new Note Verbale from the Embassy of Equatorial Guinea (its footer still showing the Embassy's address as 29 boulevard de Courcelles, Paris (8th arr.)) stated 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".

16 28. These contradictions are reflected in Equatorial Guinea's written pleadings in the present proceedings:

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[21] Note Verbale No. 5393 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 31 Oct. 2011 (No. 4 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[22] MEG, pp. 47-48, para. 4.9.

[23] Note Verbale No. 628/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 19 Sep. 2012 (Ann. 3).

[24] Note Verbale No. 185/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 15 Feb. 2012 (No. 9 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[25] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, p. 9, para. 28.

— In its Application instituting proceedings dated 13 June 2016, Equatorial Guinea claimed that the building located at 42 avenue Foch had been used by its diplomatic mission in France since 15 September 2011[26].

— In its reply to the questions put by Judge Bennouna and Judge Donoghue, dated 26 October 2016, Equatorial Guinea gave 4 October 2011 as the date marking the start of its use of the premises for the performance of its diplomatic mission in France[27].

— Furthermore, in its Memorial filed on 3 January 2017, Equatorial Guinea states that it protested against the first searches conducted in the building on 28 September and 3 October 2011, but acknowledges in the next line that it was not until 4 October 2011 that it informed the French Ministry of Foreign Affairs that the property was assigned to its diplomatic mission in France[28]. Equatorial Guinea thus protested against the search measures before it had even sent the first Note Verbale, dated 4 October 2011, informing the French authorities of the building's status.

29. In response to each of these Notes Verbales — which might be seen as so many reactions on the part of Equatorial Guinea to developments in the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue — France recalled, through the Protocol Department of the Ministry of Foreign Affairs, that the building located at 42 avenue Foch in Paris had never been recognized as forming part of the premises of Equatorial Guinea's diplomatic mission[29].

17 C. Mr. Teodoro Nguema Obiang Mangue's placement under judicial examination

30. When Transparency International France filed its complaint before the French courts, Mr. Teodoro Nguema Obiang Mangue was serving as Minister for Agriculture and Forestry of the Republic of Equatorial Guinea. As the criminal proceedings progressed, his functions changed.

31. On 23 January 2012, the judges in charge of the investigation summoned Mr. Teodoro Nguema Obiang Mangue to a first appearance to be held on 1 March 2012, informing him that they were considering placing him under judicial examination. Mr. Teodoro Nguema

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[26] AEG, p. 6, para. 20: "The building located at 42 avenue Foch in Paris was, until 15 September 2011, co-owned by five Swiss companies of which Mr. Teodoro Nguema Obiang Mangue had been the sole shareholder since 18 December 2004. On 15 September 2011, he transferred his shareholder's rights in the companies to the State of Equatorial Guinea. Since then, the building has been used by the diplomatic mission of Equatorial Guinea."

[27] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, p. 10, para. 32.

[28] MEG, p. 150, para. 8.49.

[29] See, in particular, Note Verbale No. 5007 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 11 Oct. 2011 (No. 2 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 5393 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 31 Oct. 2011 (No. 4 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 802 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 20 Feb. 2010 (No. 12 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 1341 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 28 Mar. 2012 (No. 18 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures); Note Verbale No. 158/865 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 2 Mar. 2017 (Ann. 2).

Obiang Mangue refused to appear[30]. Summoned a second time on 11 July 2012, Mr. Teodoro Nguema Obiang Mangue, again, failed to appear[31].

32. In the meantime, on 21 May 2012, Mr. Teodoro Nguema Obiang Mangue was appointed Second Vice-President in charge of Defence and State Security, by decree of the President of the Republic of Equatorial Guinea[32].

33. On 14 November 2013, the French judicial authorities sent a request for international mutual assistance in criminal matters to the judicial authorities of Equatorial Guinea, with a view to placing Mr. Teodoro Nguema Obiang Mangue under judicial examination.

18 34. This request was accepted and voluntarily executed, on 4 March 2014, by the Equatorial Guinean authorities, which did not therefore consider that the request conflicted with the principle of sovereign equality of States. On 18 March 2014, judges from the Supreme Court of Malabo, acting as investigating judges for the purpose of executing the mutual legal assistance, notified Mr. Teodoro Nguema Obiang Mangue that he was being placed under judicial examination:

> "for having in Paris and on national territory during 1997 and until October 2011, in any event for a period not covered by prescription, assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms EDUM, SODAGE and SOMAGUI FORESTAL, acts characterized as laundering of the proceeds of the above-mentioned misdemeanours which are defined and punishable under Articles 324-1; 432-15; 314-1 of the French Penal Code and Article L1241-3 of the French Commercial Code"[33].

35. On 23 May 2016, the National Financial Prosecutor sought the referral of Mr. Teodoro Nguema Obiang Mangue to the Paris *Tribunal correctionnel*[34]. Less than a month later, Equatorial Guinea filed its Application instituting proceedings before the Court.

36. The body of evidence accumulated over the course of the proceedings led the investigating judges, on 5 September 2016, to issue an order referring Mr. Teodoro Nguema Obiang Mangue to the Paris *Tribunal correctionnel* for the same offences that had prompted his

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[30] See Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), pp. 28 (Ann. 7 MEG) and Record of failure to appear before the Paris *Tribunal de grande instance*, 1 Mar. 2012 (Ann. 4).

[31] See Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), pp. 28 (Ann. 7 MEG), Summons to attend a first appearance, Paris *Tribunal de grande instance*, 22 May 2012 (Ann. 5) and Record of failure to appear before the Paris *Tribunal de grande instance*, 11 July2012 (Ann. 6).

[32] Decree of the President of the Republic of Equatorial Guinea No. 64/2012, 21 May 2012 (Ann. 3 MEG).

[33] Record of questioning at first appearance and placement under judicial examination, 18 Mar. 2014 (Ann. 20 MEG).

[34] Final submissions seeking separation of the complaints, and either their dismissal or their referral to the *Tribunal correctionnel*, 23 May 2016 (Ann. 1 AEG).

placement under judicial examination[35]. Less than a month later, Equatorial Guinea filed a Request for the indication of provisional measures with the Court.

37. On 21 June 2016, Mr. Teodoro Nguema Obiang Mangue was appointed Vice-President in charge of National Defence and State Security by decree of the President of the Republic of Equatorial Guinea[36].

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38. As the Agent of France explained during the oral proceedings on Equatorial Guinea's request for provisional measures, at a procedural hearing on 24 October 2016 the judges scheduled the hearings in the case from 2 to 12 January 2017[37].

39. On 2 January 2017, an initial hearing on the merits took place before the 32nd *Chambre* of the Paris *Tribunal correctionnel*, in the absence of Mr. Teodoro Nguema Obiang Mangue, who was represented by his counsel. The proceedings instituted by Equatorial Guinea before the International Court of Justice were mentioned. The President of the *Tribunal* noted, *inter alia*, that, pursuant to the Order of the Court dated 7 December 2016, any confiscation measure that might be directed against the building located at 42 avenue Foch could not be executed until the conclusion of the international proceedings.

40. By decision of 4 January 2017, in response to a request from Mr. Teodoro Nguema Obiang Mangue's counsel, who deemed they did not have enough time to prepare his defence, the President of the *Tribunal correctionnel* ordered the hearings in the case to be postponed and held from 19 June to 6 July 2017, to ensure the sound administration of justice.

41. As the Agent of France pointed out during the oral proceedings on the request for provisional measures[38], if Mr. Nguema Obiang Mangue were to be convicted at first instance, he would still be able to appeal by filing a simple statement with the Registry of the *Tribunal*. The appeal would have suspensive effect. The decision made on appeal could also be contested by means of a further appeal — which would itself also have suspensive effect — before the *Chambre criminelle* of the *Cour de cassation*, which could, if appropriate, decide to quash the decision and refer the case back to the lower appeal court.

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II. The subject-matter of the dispute

42. In both its Application and its Memorial, Equatorial Guinea describes its dispute with France as follows:

> "The dispute between Equatorial Guinea and France, arising from certain ongoing criminal proceedings in France, concerns the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, and the legal status of the building which

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[35] Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 Sep. 2016 (regularized by the order of 2 Dec. 2016), pp. 17-20 (Ann. 7 MEG).

[36] Decree of the President of the Republic of Equatorial Guinea No. 55/2016, 21 June 2016 (Ann. 6 MEG).

[37] CR 2016/15, 18 Oct. 2016, p. 14, paras. 35-37 (Alabrune).

[38] *Ibid.*, pp. 14-17, paras. 36-52 (Alabrune).

houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property."[39]

43. France will establish, in the following preliminary objections, that the Court lacks jurisdiction to rule on either the alleged immunity from criminal jurisdiction claimed by the Second Vice-President — now the sole Vice-President — of the Republic of Equatorial Guinea, or the legal status of the building at 42 avenue Foch. First, however, the subject-matter and scope of the Application need to be clearly defined.

44. Given that:

— the submissions in Equatorial Guinea's Memorial go far beyond its definition of the subject-matter of the dispute;

— and, more generally, Equatorial Guinea takes great liberties with the treaties on which it purports to base its claims.

45. First of all, it is patently clear that Equatorial Guinea's submissions in both its Application and its Memorial go far beyond the subject-matter of the dispute as Equatorial Guinea itself defines it[40]. They are identical:

"*(a)* With regard to the French Republic's failure to respect the sovereignty of the Republic of Equatorial Guinea,

(i) to adjudge and declare that the French Republic has breached its obligation to respect the principles of the sovereign equality of States and non-interference in the internal affairs of another State, owed to the Republic of Equatorial Guinea in accordance with international law, by permitting its courts to initiate criminal legal proceedings against the Second Vice-President of Equatorial Guinea for alleged offences which, even if they were established, *quod non*, would fall solely within the jurisdiction of the courts of Equatorial Guinea, and by allowing its courts to order the attachment of a building belonging to the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France.

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(b) With regard to the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security,

(i) to adjudge and declare that, by initiating criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, His Excellency Mr. Teodoro Nguema Obiang Mangue, the French Republic has acted and is continuing to act in violation of its obligations under international law, notably the United Nations Convention against Transnational Organized Crime and general international law;

(ii) to order the French Republic to take all necessary measures to put an end to any ongoing proceedings against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security;

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[39] AEG, para. 2; MEG, para. 0.2.

[40] See above, para. 42.

(iii) to order the French Republic to take all necessary measures to prevent further violations of the immunity of the Second Vice-President of Equatorial Guinea in charge of Defence and State Security and to ensure, in particular, that its courts do not initiate any criminal proceedings against the Second Vice-President of the Republic of Equatorial Guinea in the future;

(c) With regard to the building located at 42 avenue Foch in Paris,

(i) to adjudge and declare that, by attaching the building located at 42 avenue Foch in Paris, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations and the United Nations Convention [against Transnational Organized Crime], as well as general international law;

(ii) to order the French Republic to recognize the status of the building located at 42 avenue Foch in Paris as the property of the Republic of Equatorial Guinea, and as the premises of its diplomatic mission in Paris, and, accordingly, to ensure its protection as required by international law;

(d) In view of all the violations by the French Republic of international obligations owed to the Republic of Equatorial Guinea,

(i) to adjudge and declare that the responsibility of the French Republic is engaged on account of the harm that the violations of its international obligations have caused and are continuing to cause to the Republic of Equatorial Guinea;

(ii) to order the French Republic to make full reparation to the Republic of Equatorial Guinea for the harm suffered, the amount of which shall be determined at a later stage."[41]

22 46. Equatorial Guinea's first submission considerably broadens the scope of the dispute as defined in the Memorial: it concerns the alleged violation of very broad principles of international law, which Equatorial Guinea attempts to link artificially to the United Nations Convention against Transnational Organized Crime.

47. Most significantly, in examining Equatorial Guinea's request for provisional measures, the Court simply found "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"[42]. Of course, that was merely a prima facie finding and, for good measure, France will return to this point below, in Chapter 2 of these Preliminary Objections. It should be noted, however, that this basis of jurisdiction is so obviously artificial that Equatorial Guinea does not actually rely on the Palermo Convention of 15 December 2000 but rather on general international law, in the absence of any basis establishing the Court's jurisdiction in this regard.

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[41] AEG, para. 41; MEG, pp. 177-181, para. 9.42. See also Sir Michael Wood's oral argument during the hearings on Equatorial Guinea's request for the indication of provisional measures (CR 2016/14, 17 Oct. 2016, pp. 21-22, para. 5). See also CR 2016/15, 18 Oct. 2016, p. 19, para. 5.

[42] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 Dec. 2016*, p. 13, para. 50.

48. This is, moreover, characteristic of Equatorial Guinea's claims as a whole: Equatorial Guinea seeks to establish its case on principles of general international law rather than on treaty bases, of which there are none. It is striking here that Equatorial Guinea's Application contains a number of references to general — or customary — principles of international law, regardless of whether they relate to Article 4 of the Palermo Convention. This extensive and systematic reliance on general international law concerns both the allegation of violations, with regard to Equatorial Guinea, of the principles of sovereign equality and non-interference in internal affairs, and the questions of the immunity *ratione personae* allegedly enjoyed by Mr. Teodoro Nguema Obiang Mangue and the legal status of the building at 42 avenue Foch as State property.

49. Thus, regarding Mr. Teodoro Nguema Obiang Mangue's alleged immunity — and these are just some of several examples — it is stated:

23 — in paragraph 19 of the Application:

> "As the Republic of Equatorial Guinea has always maintained to France, the nature of the functions of the Second Vice-President, Mr. Teodoro Nguema Obiang Mangue, requires France to respect his personal immunity, *in accordance with customary international law*, in particular since he is called upon to travel abroad on behalf of Equatorial Guinea in order to perform those functions effectively." (Emphasis added)

— in paragraphs 7.23 and 7.24 of the Memorial:

> "In these proceedings, the legislation of States that have adopted laws on the immunity of holders of high-ranking office in a State constitutes a particularly important State practice. Generally speaking, such national legislation does not restrict the immunity *ratione personae* of holders of high-ranking office in a State to Heads of State, Heads of Government and Ministers for Foreign Affairs. Rather, it provides that such immunity should be granted *in accordance with general international law* . . .
>
> The decisions of national courts on the immunity of holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs, also constitute a particularly important State practice. They may equally be relevant by virtue of Article 38, paragraph 1 *(d)*, of the Statute of the Court. These decisions show that national courts also take the view that *customary international law* confers immunity *ratione personae* on certain holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs, and that they have interpreted the Court's Judgment in the *Arrest Warrant* case in that way. They also shed light on the criteria for determining which holders of high-ranking office fall within the small circle of beneficiaries of immunity *ratione personae*." (Emphasis added)

— in paragraph 7.42 of its Memorial:

> "As regards the work of the International Law Commission on the topic 'Immunity of State officials from foreign criminal jurisdiction', in 2013 it provisionally adopted a draft article entitled 'Persons enjoying immunity *ratione personae*'. The draft article provides that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction, but makes no reference to other holders of high-ranking office in a State. It is important to remember that the Commission's work is still at a relatively early stage, since it has not yet completed its first reading of the draft

articles on the subject. In any event, it cannot be argued that the provisionally adopted text reflects the *lex lata* on immunity *ratione personae*, which is enjoyed by a small circle of holders of high-ranking office in a State *under customary international law*." (Emphasis added)

— in paragraph 7.62 of its Memorial:

24 "Equatorial Guinea has consistently explained to France the nature of its Second Vice-President's functions, in particular that he has to travel abroad on behalf of Equatorial Guinea in order to perform those functions effectively, and has consistently required France to respect his personal immunity, *in accordance with customary international law*." (Emphasis added)

50. As regards the immunities it claims in respect of the building at 42 avenue Foch, Equatorial Guinea maintains:

— in paragraph 39 of its Application:

"France is also in breach of its obligations, *under general international law*, to ensure that no pre-judgment measures of constraint, such as attachment or arrest, are taken against the property of a State in connection with a proceeding before a court of another State, unless the State has consented to the taking of such measures. *The rules of customary international law* governing States' immunities in relation to the attachment of their property are reflected in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. These establish strict limitations on the attachment of State property, as the Court confirmed in its Judgment in the case concerning *Jurisdictional Immunities of the State*." (Emphasis added)

— in paragraph 8.63 of its Memorial:

"As we have amply demonstrated in Chapter 2, Section II, the building at 42 avenue Foch in Paris is used as the premises of Equatorial Guinea's diplomatic mission. It is therefore presumed to be State property used for government non-commercial purposes and must accordingly enjoy State immunity *under customary international law*." (Emphasis added)

— and in paragraph 8.66:

"France did not have the right to carry out measures of constraint against the building at 42 avenue Foch, since Equatorial Guinea has become its owner, uses it for government non-commercial purposes and has not waived the immunity *granted to it* in respect of such property *under customary international law*." (Emphasis added)

51. And, even more blatantly with regard to the violation of certain general principles of international law, we can refer — once again to one among several examples — to paragraph 9.40 of the Memorial:

"It also goes without saying that most of the obligations owed to Equatorial Guinea (inviolability of its diplomatic mission, immunity from execution of its property, non-interference in its internal affairs and sovereign equality) *are part of general international law — specifically, customary international law*. The continuing nature of the requirement to perform those obligations is reinforced by the fact that

they form part of *the fundamental rules governing relations between States*." (Emphasis added)

25 52. The same is true of the submissions themselves in the Application and the Memorial, which read:

> "*(a)* With regard to the French Republic's failure to respect the sovereignty of the Republic of Equatorial Guinea,
>
> (i) to adjudge and declare that the French Republic has breached its obligation to respect the principles of the sovereign equality of States and non-interference in the internal affairs of another State, owed to the Republic of Equatorial Guinea in accordance with international law, by permitting its courts to initiate criminal legal proceedings against the Second Vice-President of Equatorial Guinea for alleged offences which, even if they were established, *quod non*, would fall solely within the jurisdiction of the courts of Equatorial Guinea, and by allowing its courts to order the attachment of a building belonging to the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France"

And:

> "*(c)* With regard to the building located at 42 avenue Foch in Paris:
>
> (i) to adjudge and declare that, by attaching the building located at 42 avenue Foch in Paris, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations and the United Nations Convention against Transnational Organized Crime, *as well as general international law*."[43] (Emphasis added)

53. It should further be noted that in its submissions in support of its request for provisional measures, Equatorial Guinea included in its claims relating to the building an additional request to protect the furnishings or other property that were in the building at the time the first searches were conducted in the context of the criminal proceedings instituted before the French courts. Counsel for France drew the Court's attention to what appeared to be a new development in the requests made by Equatorial Guinea[44]. The Court merely noted this incongruity in its Order of 7 December 2016, which probably did not require any further commentary to justify rejecting the request[45]. Equatorial Guinea did not return to this point in the second round of oral argument or in its
26 Memorial, leaving the matter open. This uncertainty is symptomatic of Equatorial Guinea's approach in these proceedings: a fluctuating definition of the scope of the subject-matter of the dispute, unencumbered by reliance on a basis for compulsory jurisdiction, with a preference instead for general references to customary international law.

54. There is no need for a lengthy discussion recalling the self-evident principle that the Court's jurisdiction is strictly limited to disputes over which the Parties have conferred jurisdiction

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[43] AEG, submissions, p. 12, para. 41; MEG, submissions, pp. 181-182.

[44] CR 2016/15, 18 Oct. 2016, pp. 40-41, paras. 34-35 (Pellet).

[45] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 Dec. 2016*, para. 19.

on the Court. They can do this by subscribing to the optional clause for compulsory jurisdiction; in this instance, neither France nor Equatorial Guinea has made the declaration provided for in Article 36, paragraph 2, of the Statute of the Court. They can also do so by entering into a special agreement referring a specific dispute before the Court; this has not been done either. Lastly, they can confer jurisdiction on the Court in "all matters specially provided for . . . in treaties and conventions in force", as stated in the first paragraph of Article 36. This is what Equatorial Guinea claims to have done, by invoking two conventional bases of jurisdiction:

— first, "Article 35 of the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000";

— second, the "Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, done at Vienna on 18 April 1961"[46].

55. In such circumstances, the jurisdiction of the Court is strictly confined to disputes falling within the scope of the conventions on which the applicant State seeks to rely. In accordance with its well-established jurisprudence, the Court cannot exercise jurisdiction (be it prima facie or substantive) until it has satisfied itself that this is indeed the case[47].

56. Moreover, the Court has already dealt with this question in the present case. First, it recalled that:

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> ". . . 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 . . ."[48]

Then, adopting a more general stance, the Court took the firm view 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. 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 Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under

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[46] MEG, para. 5.1.

[47] See, in particular, *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 137, para. 38; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 16.

[48] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 Dec. 2016*, para. 47.

customary international law and, if so, whether France has violated that immunity by instituting proceedings against him."[49]

57.It is therefore within the strict limits of the subject-matter of the dispute, as described in Equatorial Guinea's Application and Memorial and as delineated by the conventions on which it seeks to establish the Court's jurisdiction, that such jurisdiction must be assessed.

III. The abusive nature of the Application

58. During the hearings on the request for the indication of provisional measures, counsel for France asserted that the proceedings initiated by Equatorial Guinea were abusive in two respects[50]. Equatorial Guinea links its claims to conventional provisions which, given the facts of the case, cannot be regarded as a credible basis for the exercise of the Court's jurisdiction (A) and may be construed as an abuse of rights (B).

28

A. Equatorial Guinea's claim is an abuse of the International Court of Justice

59. In its Order of 7 December 2016, the Court held that in the present case, there being no manifest lack of jurisdiction, it could not accede to France's request that the case be removed from the List[51]. Nonetheless, the case's referral to the Court is completely artificial and therefore appears to be an abuse of process.

60. Moreover, until now, Equatorial Guinea's treatment of the question of the Court's jurisdiction has been particularly cursory. In its introduction to the section of its Memorial devoted to this subject, Equatorial Guinea takes a rather odd stance, stating that "[since t]he Order indicating provisional measures dated 7 December 2016 was issued by the Court a few days before the text of this Memorial was finalized[, it] was unable to examine it in detail and reserves the right to address the jurisdiction of the Court in greater detail at a later date"[52]. Yet in the light of France's oral arguments on 18 and 19 October 2016[53], it might have been advisable for Equatorial Guinea to elaborate on this matter.

61. It is a "fundamental principle", recalled consistently by the International Court of Justice[54] and its predecessor[55], that "no State may be subject to its jurisdiction without its

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[49] *Ibid.*, para. 49.

[50] CR 2016/15, 18 Oct. 2016, p. 23, para. 17 (Pellet) and p. 35, para. 12 (Ascensio).

[51] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 70.

[52] MEG, para. 5.2.

[53] See CR 2016/15, 18 Oct. 2016, and CR 2016/17, 19 Oct. 2016.

[54] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment of 3 Feb. 2015,* para. 88, and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 32, para. 64.

[55] See, for example, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 16; *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20,* pp. 16-17; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 23.

consent"[56]. A basis of jurisdiction must be established before the merits of a case are addressed. Equatorial Guinea's approach in these proceedings is the reverse. The Applicant sets out its version of the facts underlying the dispute, alleges breaches by France of its international obligations, and requests the Court to make a finding to that effect, but remains evasive about the basis for the exercise of the Court's jurisdiction in the case.

29 62. Apart from the alleged diplomatic status of the building located at 42 avenue Foch, which is artificially linked to the Vienna Convention on Diplomatic Relations[57], all of Equatorial Guinea's claims in this case are based on customary international law, which it seeks to invoke through Article 4 of the Palermo Convention in respect of: the purported violations by France — *quod non* — of the principles of sovereign equality of States and non-intervention in the domestic affairs of other States; the personal immunity said to be enjoyed by Mr. Teodoro Nguema Obiang Mangue as Second Vice-President in charge of Defence and Security; as well as the status of the building located at 42 avenue Foch as property of Equatorial Guinea.

63. Regarding the Court's jurisdiction to entertain Equatorial Guinea's claims relating to the "failure to respect the immunity of the building at 42 avenue Foch in Paris as property of Equatorial Guinea used for government non-commercial purposes", the Applicant confines itself to the terse assertion that "[p]rotection of the property of foreign States from measures of execution by the forum State is based on customary international law, which is incorporated into the Palermo Convention"[58]. No specific provision of the Palermo Convention is mentioned, not even Article 4.

64. As France explained during the hearings on the request for provisional measures, there is a dispute between the Parties[59]. However, there is no provision binding the Parties that confers jurisdiction on the Court over that dispute. To circumvent France's lack of consent to the Court's jurisdiction, Equatorial Guinea uses compromissory clauses provided for in international agreements, to which France is a party, without ever establishing precisely which conventional provisions it is whose interpretation or application it in fact believes to be the subject of the present dispute.

65. In support of its claims, Equatorial Guinea repeatedly refers in its Memorial to a number
30 of cases brought before the Court in the past, and in particular to the cases concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*[60] and *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*[61]. Equatorial Guinea cites them in particular in its exposition of France's alleged violations of the principles of general international law, in respect of the immunities said to be enjoyed by Mr. Teodoro Nguema Obiang Mangue and the building located at 42 avenue Foch as diplomatic premises and as property of Equatorial Guinea. It is worth pointing out that in the *Arrest Warrant* and *Jurisdictional Immunities* cases the Court's jurisdiction was based on declarations by which the States parties had consented to the compulsory jurisdiction of the Court in

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[56] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 76, para. 76.

[57] See Chap. 3 below.

[58] MEG, para. 8.52.

[59] CR 2016/17, 19 Oct. 2016, pp. 8-9, para. 3 (Pellet).

[60] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

[61] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 99.

"all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation"[62].

66. The acceptance of such compromissory clauses authorizes the Court to examine claims relating to the application or interpretation of principles and rules of customary international law. The question of whether France has violated the alleged immunities of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and Security, and of the building located at 42 avenue Foch as State property, is most certainly within the purview of customary international law. Equatorial Guinea itself states as much[63]. The scope of Article 35, paragraph 2, of the Palermo Convention is much more limited. As the Court observed in its Order of 7 December 2016,

"[a]ccordingly, 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 Articles 6, 12, 14 and 18 of the Convention, invoked by Equatorial Guinea. The alleged dispute, rather, 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."[64]

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The Parties' consent to the exercise of the Court's jurisdiction expressed in the Palermo Convention is therefore much more strictly circumscribed than in the cases that Equatorial Guinea cites in support of its claims.

67. Equatorial Guinea also relies on the case concerning *Certain Questions of Mutual Assistance in Criminal Matters,* the only proceedings which have led to the Court ruling on the basis of *forum prorogatum.* On 9 January 2006, Djibouti filed an Application with the Court pursuant to Article 38, paragraph 5, of the Rules of Court. By letter dated 25 July 2006, France consented to the Court's jurisdiction to entertain the Application, being careful to limit that consent

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[62] In the *Arrest Warrant* case, the Court's jurisdiction was based on the declarations accepting the compulsory jurisdiction of the Court, in accordance with Article 36, paragraph 2, of the Statute of the Court. In the case concerning *Jurisdictional Immunities,* the Court's jurisdiction was based on the provisions of Article 1 of the European Convention for the Peaceful Settlement of Disputes.

[63] See, in particular, MEG, pp. 41-42, para. 3.64; p. 99, para. 7.8; p. 124, para. 7.62; p. 130, para. 8.3; p. 151, para. 8.52.

[64] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 49.

very strictly to the framework set by the Convention[65]. The Republic of Djibouti claimed, *inter alia*, violations by France of the principle of sovereign equality of States and of the immunities of representatives of the Djiboutian State, under customary international law, as a result of procedural steps taken by the French courts. This led France to raise objections to the Court's jurisdiction, since Djibouti had sought to extend the Court's remit to facts which did not fall strictly within the subject-matter of the dispute, as defined by the Application instituting proceedings[66]. The Court partly allowed France's objections[67].

68. By a letter dated 25 September 2012, the Registry of the Court informed France that Equatorial Guinea had filed an Application instituting proceedings on the basis of Article 38, paragraph 5, of the Rules of Court, including a request for provisional measures[68]. This Application reflected a degree of uncertainty about the possible bases of the Court's jurisdiction. France did not consent to the exercise of the Court's jurisdiction, and does not intend to do so in the present case, given that the facts which gave rise to the filing of the 2012 Application are the same as those underlying the present proceedings, namely, the initiation by the French courts of proceedings against Mr. Teodoro Nguema Obiang Mangue following the filing of a complaint by Transparency International France on 2 January 2008, and the searches and attachment of the building located at 42 avenue Foch in the context of those proceedings[69]. Equatorial Guinea's submissions are similar to those in its 2012 Application, in which it contended that:

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— "the opening of a judicial investigation in the French Republic with regard to the handling and laundering of misappropriated foreign public funds is contrary to international law, since it violates the principle of non-interference in the internal affairs of another State, the principle of the equality of States, and the sovereignty of the Republic of Equatorial Guinea;

. . . . . .

— the opening of that investigation and the issuance of an arrest warrant against the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security violate, at the very least, the most well-established principles of international law regarding the jurisdictional immunity enjoyed by foreign Heads of State and high-ranking representatives of the State;

— the searches undertaken and the attachment of the diplomatic mission of the Republic of Equatorial Guinea in the French Republic violate the immunity accorded to diplomatic premises and their furnishings"[70].

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[65] In his letter dated 25 July 2006, the French Minister for Foreign Affairs thus indicated that: "The present consent to the Court's jurisdiction is valid only for the purposes of the case, within the meaning of Article 38, paragraph 5, i.e., in respect of the dispute forming the subject of the Application and *strictly within the limits of the claims formulated therein by the Republic of Djibouti*" (emphasis added). See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* pp. 200-201, paras. 48-49.

[66] See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* pp. 201-213, paras. 59-95. See also the Counter-Memorial filed by the French Republic, 13 July 2007, pp. 8-16.

[67] *Ibid.*, pp. 209-213, paras. 85-95, and pp. 246-247, para. 205.

[68] Letter No. 140831 from the Registrar of the Court to the Minister for Foreign Affairs of the French Republic, 25 Sep. 2012 (Ann. 7).

[69] See paras. 13-29 above.

[70] Application of Equatorial Guinea, 22 Sep. 2012, p. 17.

69. The request for provisional measures accompanying the Application was also very similar to that of 29 September 2016. Equatorial Guinea requested the Court to order:

> "(i) the immediate suspension of the proceedings being conducted by the investigating judges of the Paris *Tribunal de grande instance* and (ii) the immediate suspension of the effects of the arrest warrant issued by the investigating judges of the Paris *Tribunal de grande instance* against Mr. Teodoro Nguema Obiang Mangue, and, in any event, (iii) the restitution of the movable and immovable property belonging to the Republic of Equatorial Guinea attached by the said judges in the context of the investigation"[71].

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70. Since France did not accept the exercise of the Court's jurisdiction, Equatorial Guinea devised a strategy to circumvent that lack of consent.

71. First, on 4 November 2014, Equatorial Guinea acceded to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, and publicly announced its intention to bring France before the Court[72]. As we will show below[73], Equatorial Guinea has still not specified, even at this advanced stage of the proceedings, which provisions of the Vienna Convention it is whose interpretation or application it believes to be at the origin of the dispute with France. The reason is very simple: the dispute which Equatorial Guinea wishes the Court to settle does not concern violations by France of the provisions invoked (in fact of *the single* provision invoked, Article 22) of the Vienna Convention.

72. Second, in order to bring before the Court the question of Mr. Teodoro Nguema Obiang Mangue's alleged immunity from foreign criminal jurisdiction — which undoubtedly lies at the heart of the dispute between the Parties — Equatorial Guinea sought to find another convention on which to hang its claim. It chose the Palermo Convention, to which France and Equatorial Guinea have been parties since 29 October 2002 and 10 September 2007 respectively (they were therefore already bound by that text when the Application of 25 September 2012 was filed, although Equatorial Guinea had relied on France giving its consent pursuant to Article 38, paragraph 5, of the Rules of Court, and had not invoked the Palermo Convention). As the Court itself observed in its Order, this case does not concern a question of interpretation or application of the provisions of that Convention[74]. And Equatorial Guinea makes no real attempt to convince us otherwise[75].

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73. Equatorial Guinea's manipulation of the proceedings before the International Court of Justice is notably reflected in the press releases that it publishes at each procedural step. For example, regarding the Court's Order of 7 December 2016, Equatorial Guinea stated in several press releases that:

> "[T]he Government of Equatorial Guinea is satisfied because, in the ruling given by the International Court of Justice in The Hague this 7th December 2016, there is clear recognition of the diplomatic nature of the building located at

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[71] *Ibid.*, p. 19.

[72] "France — Guinée Équatoriale: porte de sortie en vue pour Teodorín?", *Jeune Afrique,* 13 March 2015; available at: http://www.jeuneafrique.com/226650/politique/france-guin-e-quatoriale-porte-de-sortie-en-vue-pour-teodor-n/, in French only, site consulted on 21 March 2017 (Ann. 8).

[73] See Chap. 3 below.

[74] See para. 66 above.

[75] See para. 60 above.

> 42, Avenida Foch, in Paris, and as such, recognition that the property does not constitute 'dishonestly acquired goods'. The Equatoguinean State has reiterated its claim to ownership of this property, which was the property of the Equatoguinean State, but the French party refused to recognise this, refusing to yield on this point.
>
> The recognition that the State of Equatorial Guinea is the legitimate owner of the building, with all the objects it contains, is thus recognition that it is not 'dishonestly acquired goods', and it is also evidently proof of the judicial farce that French justice is unilaterally trying to serve up.
>
> On demonstrating that the building is not 'dishonestly acquired goods', the French party should have finally withdrawn the accusation against the Vice-President of the Republic of Equatorial Guinea, as it was unsupported by the basis of the main accusation, and thus recognise unambiguously the immunity of H.E. Nguema Obiang Mangue."[76]

74. It goes without saying that France does not share this rather surprising reading of the Court's Order on Equatorial Guinea's request for the indication of provisional measures. Nevertheless, this statement exposes Equatorial Guinea's strategy in this case: to use the Court as a means to obstruct the proceedings brought against Mr. Teodoro Nguema Obiang Mangue before the French courts.

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75. More generally, it is clear from the above that by invoking the provisions of the Vienna and Palermo Conventions on the compulsory settlement of disputes between States parties, Equatorial Guinea is seeking to circumvent the "fundamental principle that no State may be subject to [the] jurisdiction [of the Court] without its consent"[77]. Furthermore, it is seeking to shore up a situation founded on a manifest abuse of rights.

B. Equatorial Guinea's claim seeks to consolidate an abuse of rights

76. The timing of the events which gave rise to these proceedings is sufficient in itself to show that Equatorial Guinea's claim is an abuse of the rights and obligations invoked by it. According to the definition in the *Dictionnaire de droit international public,* an abuse of rights occurs when "a State exercises a right, power or jurisdiction in a manner or for a purpose for which that right, power or jurisdiction was not intended, for example to evade an international obligation or obtain an undue advantage"[78].

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[76] Press release of the spokesperson for the Government of the Republic of Equatorial Guinea, 7 Dec. 2016, Malabo (English version available on the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9000&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9000&lang=es; site consulted on 20 March 2017) (Ann. 9). See also press release of the Representation of Equatorial Guinea in The Hague, 8 Dec. [2016] (English version available on the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9002&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9002&lang=es) (Ann. 10); and press release of the Equatorial Guinea Press and Information Office, 9 Dec. 2016 (English version available on the official website of the Government of the Republic of Equatorial Guinea at http://www.guineaecuatorialpress.com/noticia.php?id=9005&lang=en; original text in Spanish available at http://www.guineaecuatorialpress.com/noticia.php?id=9005&lang=es) (Ann. 11).

[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 76, para. 76.

[78] J. Salmon (ed.), *Dictionnaire de droit international public,* Bruylant, Brussels, 2001, pp. 3-4. *[Translation by the Registry.]*

77. This is a "general principle of international law", and even a "general principle of law"[79]. The Court has recognized that it applies automatically in the international legal order, as a necessary corollary of the principle of good faith, in the form of both an abuse of process and an abuse of rights[80]. Numerous international conventions expressly recall that States parties must fulfil their obligations in good faith and not abuse the rights to which they are entitled[81]. It is, moreover,
36 the very essence of the law of treaties, which is dominated by the principle of *pacta sunt servanda*, whereby "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"[82].

78. Privileges and immunities are granted for a legitimate purpose, and help ensure the independence of foreign States, in accordance with the principle of the sovereign equality of States and the territorial sovereignty of the host State. Their very purpose, however, leaves them open to abuse. In light of the growing mistrust of privileges and immunities — which are nevertheless vital for States' external action — we must be vigilant about preventing attempts to abuse them, which may ultimately call into question the continued existence of those fundamental rights. It was with that risk in mind that the drafters of the Vienna Convention on Diplomatic Relations made a point of recalling, in the preamble to that text, that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"[83].

79. A large number of international agreements on privileges and immunities contain similar provisions[84]. The purpose of privileges and immunities is not to benefit the individuals who enjoy them, but to safeguard the independence of the State and its representatives abroad. The application of rules on immunities must not shield their beneficiaries — be they individuals or property —

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[79] DSB, *Shrimps,* Report of the Appellate Body (WT/DS58/AB/R), 12 Oct. 1998.

[80] See *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7,* p. 30. See also *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46,* p. 167; *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951,* p. 142; *Ambatielos (Greece* v. *United Kingdom), Merits, Judgment, I.C.J. Reports 1953,* p. 23; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970,* p. 39, para. 56; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 268, para. 46; *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,* p. 622, para. 46.

[81] See, in particular, the Convention on Rights and Duties of States of 26 Dec. 1933, Art. 3; the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1950, Art. [17] "Prohibition of abuse of rights"; the Convention on the High Seas of 29 Apr. 1958, Art. 2; the United Nations Convention on the Law of the Sea of 10 Dec. 1982, Arts. 294 and 300 "Good faith and abuse of rights"; the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Art. 34.

[82] Vienna Convention on the Law of Treaties, 23 May 1969, Art. 26. France is not a party to the Convention, but considers that, on this point, it reflects the state of customary international law.

[83] Vienna Convention on Diplomatic Relations, 18 Apr. 1961, fourth paragraph of the preamble.

[84] See, in particular, the Convention on the Privileges and Immunities of the United Nations of 13 Feb. 1946, Sections 20 and 21; Supplementary Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of the Organisation of 16 Apr. 1948, Art. 10; the 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 of 2 July 1954, Art. 21; the Convention on Special Missions of 8 Dec. 1969, seventh paragraph of the preamble; the Agreement on the Privileges and Immunities of the International Criminal Court of 9 Sep. 2002, Art. 24, para. 1, and Art. 25; the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea of 23 May 1997, Art. 19.

from ordinary legal proceedings brought for purposes other than those for which such protections have been granted.

37 80. As we shall demonstrate in these written pleadings[85], in this case, Equatorial Guinea's use of the provisions of the United Nations Convention against Transnational Organized Crime and the Vienna Convention on Diplomatic Relations is legally abusive, in its claim for immunities for Mr. Teodoro Nguema Obiang Mangue and for the building at 42 avenue Foch.

81. Moreover, in a letter to the French President dated 14 February 2012, the President of the Republic of Equatorial Guinea explicitly acknowledged that the reason for invoking the diplomatic nature of the building located at 42 avenue Foch was to protect the building from criminal proceedings:

> "Your Excellency is not unaware of the fact that my son, Teodoro NGUEMA OBIANG MANGUE, lived in France, where he pursued his studies, from childhood until he reached adulthood. France was his preferred country and, as a young man, he purchased a residence in Paris; however, due to the pressures on him as a result of the supposed unlawful acquisition of assets, he decided to resell the said building to the Government of the Republic of Equatorial Guinea."[86]

82. The "pressures" are the initiation of judicial proceedings. And both the resale of the property — the date of which varies from one declaration to the next[87] — and the invocation of its diplomatic status are designed to obstruct those proceedings.

83. The date of 14 February 2012 is none other than the first day of the searches conducted in the building by the French authorities. On the same day, Equatorial Guinea also issued three Notes Verbales:

— the first from the Ministry of Foreign Affairs of Equatorial Guinea to the French Ministry of Foreign Affairs regretting that "the residence of the Chargée d'affaires and Permanent
38 Representative of Equatorial Guinea to UNESCO in Paris is the subject of intervention by the investigating judge and the French police"[88];

— the second from the Chargée d'affaires of Equatorial Guinea, Ms Bindang Obiang, indicating that she was "presently in the residence belonging to the Government of Equatorial Guinea purchased on 19 September 2011, at 42 avenue Foch, in Paris, which is the place of residence of the Permanent Delegation of the Republic of Equatorial Guinea to UNESCO" and that a search was then underway "contrary to the Vienna Convention"[89];

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[85] See Chaps. 2 and 3 below.

[86] Letter from the President of Equatorial Guinea to the French President, 14 Feb. 2012 (No. 5 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[87] See paras. 24-26 above.

[88] Note Verbale No. 251/12 from the Ministry of Foreign Affairs of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 14 Feb. 2012 (No. 6 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[89] Note Verbale No. 173/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 14 Feb. 2012 (No. 7 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

— and the last one from the Permanent Delegation of Equatorial Guinea to UNESCO's Protocol Unit "informing them 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"[90].

84. On the day of the searches targeting the assets acquired in France by Mr. Teodoro Nguema Obiang Mangue, Equatorial Guinea (i) admitted, in a letter from its President, that the building at 42 avenue Foch was resold to protect him from judicial "pressures", (ii) protested against the searches carried out at the "official residence of the Permanent Delegate of Equatorial Guinea to UNESCO", (iii) and informed UNESCO, for the first time, that the building was now the official residence of the Permanent Delegate.

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85. A recent letter, dated 19 January 2017, from the President of Equatorial Guinea to the French President, contained an annex entitled "Note seeking a diplomatic resolution of the dispute". Surprisingly, it invoked the bilateral Agreement between France and Equatorial Guinea on the mutual promotion and protection of investments as an alternative means to resolve the dispute:

> "The Agreement on the mutual protection of investments dated 3 March 1982, by which both States are bound, provides for inter-State disputes concerning its interpretation and application to be resolved by diplomatic means.
>
> Since Equatorial Guinea has consistently maintained that the assets attached by the French courts were all acquired lawfully and do not represent the proceeds of misappropriated public funds or of an offence of any kind, consideration must be given to the question of their protection by France under the aforementioned Agreement.
>
> That being the case, in the context of diplomatic discussions between the two States provided for under Article 11 of the said Agreement, and before any decision by the French courts on the substance of the dispute, the two States could agree to consider that the assets lawfully acquired in France meet the definition of 'investments' within the meaning of Article 1 of the same Agreement and that, consequently, France has a duty to protect them."[91]

86. In keeping with its consistent position in this case, France indicated that the facts mentioned were the subject of judicial decisions and ongoing legal proceedings, and that consequently it was not possible to accept the offer to settle the dispute by the means proposed by Equatorial Guinea[92]. However, this initiative demonstrates Equatorial Guinea's willingness to invoke — with a blatant disregard for legal credibility — any conventional provision that provides for a dispute settlement mechanism and binds the Parties, in order to halt the ongoing judicial proceedings. And it assumes that its referral of the case to the Court will achieve precisely that:

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[90] Note Verbale No. 011/12 from the Embassy of the Republic of Equatorial Guinea to the UNESCO Protocol Unit, 14 Feb. 2012 (No. 8 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[91] Annex to the letter from the President of Equatorial Guinea to the French President, "Note seeking a diplomatic resolution of the dispute", 19 Jan. 2017 (Ann. 12).

[92] Letter from the French President to the President of Equatorial Guinea, 16 Feb. 2017 (Ann. 13).

> "Thus, [the Note concludes,] a permanent solution to the dispute between the two States having been found, it will only remain for the Republic of Equatorial Guinea to end the proceedings pending before the International Court of Justice."[93]

40 87. This has all the hallmarks of an abuse of rights. As France's counsel explained during the hearings on the request for provisional measures[94], in this case Equatorial Guinea is seeking to abuse its international rights and obligations in order to obstruct the proper administration of the judicial proceedings instituted in France, both by suddenly and unexpectedly transforming a private residence into "premises of the mission", and by appointing its owner to increasingly eminent political positions as the investigation instigated by Transparency International's complaint proceeds.

88. For the reasons set out above, in light of the abusive nature of the Application, France requests the Court to adjudge and declare that it lacks jurisdiction to rule on the Application filed by Equatorial Guinea on 13 June 2016. Furthermore, France raises the following objections regarding the Court's lack of jurisdiction on the basis of the Convention against Transnational Organized Crime (Chapter 2), and the Court's lack of jurisdiction on the basis of the Vienna Convention on Diplomatic Relations and its Optional Protocol concerning the Compulsory Settlement of Disputes (Chapter 3).

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[93] Annex to the letter from the President of Equatorial Guinea to the French President, "Note seeking a diplomatic resolution of the dispute", 19 Jan. 2017 (Ann. 12).

[94] See CR 2016/15, 18 Oct. 2016, pp. 23-32, paras. 17-25 (Pellet) and p. [35], paras. 11-12 (Ascensio).

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CHAPTER 2

THE COURT'S LACK OF JURISDICTION ON THE BASIS OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

89. In both the Application instituting proceedings and the Memorial of 3 January 2017, Equatorial Guinea contends that the Court has jurisdiction in the present case on the basis of the United Nations Convention against Transnational Organized Crime. To that end, it invokes Article 35, paragraph 2, of the Convention, pursuant to which a State party may refer any dispute between two or more States parties "concerning the interpretation or application of this Convention" to the International Court of Justice, if the parties to the dispute have been unable to settle it by negotiation or have not agreed on the organization of an arbitration within a period of six months.

90. The preliminary objection raised by France concerns the Court's lack of jurisdiction *ratione materiae* under the Palermo Convention, since the dispute submitted by Equatorial Guinea does not relate to "the interpretation or application" of that Convention.

91. The Court's jurisdiction *ratione materiae* was already discussed during the proceedings on the request for provisional measures. Equatorial Guinea's line of argument at that time failed to convince the Court, which held, in its Order of 7 December 2016, that it did not have prima facie jurisdiction in the present case on the basis of the Palermo Convention[95]. The Memorial filed by Equatorial Guinea on 3 January 2017 contains no arguments likely to be any more convincing about the existence of such a basis of jurisdiction.

92. To establish a link between the present case and the Palermo Convention, Equatorial Guinea contends that Article 4 of the Convention "incorporates rules of customary international law" concerning the immunities both "of holders of high-ranking office in a State" and the building
42 "as State property used or intended for use by the State for government non-commercial purposes", rules which it links to the principle of sovereign equality[96]. It goes on to state that this is a question of the interpretation and application of Article 4 "read in conjunction with other provisions of the Convention"[97].

93. France, for its part, is of the view that none of the provisions of the Palermo Convention invoked is at issue in the present case and that, therefore, the Court has no jurisdiction on that basis. This is clear from an examination of Article 4 (I) and the obligations laid down by the Convention (II).

I. Article 4 of the Convention

94. Article 4 of the Palermo Convention, entitled "Protection of sovereignty", is a general clause recalling several fundamental principles of international law. It reads as follows:

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[95] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 50.

[96] MEG, para. 5.10.

[97] MEG, paras. 5.10-5.11.

> "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."

95. The language of the first paragraph clearly establishes that sovereign equality, territorial integrity and non-intervention are "principles", not independent obligations, and that they concern the way in which States perform their "obligations under this Convention", which are set out elsewhere in the treaty.

96. The ordinary meaning of the words is perfectly consistent with the object and purpose of the treaty. The Convention is in no way intended to organize, in a general way, the legal relations between States in light of the principles mentioned, and, in particular, does not seek to create a system of immunities or establish the status of property belonging to the States parties. The Palermo Convention concerns transnational organized crime and its purpose, according to its first article, is "to promote cooperation to prevent and combat transnational organized crime more effectively". As the United Nations General Assembly explained at the time the Convention was adopted, the objective is to provide

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> "an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes"[98].

97. The Palermo Convention thus falls into the category of conventions whose objective is to combat transnational threats by harmonizing criminal legislation and facilitating judicial co-operation between States, in respect of specific offences[99]. Other conventions adopted during the same period have the same objective and adhere to a similar formula[100].

98. In its Memorial, Equatorial Guinea seeks to extend the object of the Convention unduly by maintaining confusion between the obligations themselves and the manner in which they must be performed. Despite acknowledging that Article 4 must be "read in conjunction" with the other provisions of the Convention, it contends that Article 4 contains an "independent obligation" to comply with customary international law in general[101]. In so doing, it attempts to ascribe to the Convention an object that it does not have, in order to broaden the scope of the consent in Article 35, paragraph 2, thereof[102].

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[98] Resolution 55/25 adopted by the United Nations General Assembly on 15 Nov. 2000, preamble.

[99] Neil Boister, "The concept and nature of transnational criminal law", in Neil Boister and Robert J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law,* London/New York, Routledge, 2015, pp. 16-18.

[100] The International Convention for the Suppression of Terrorist Bombings of 15 Dec. 1997 (*UNTS*, Vol. 2149, p. 256); the International Convention for the Suppression of the Financing of Terrorism of 9 Dec. 1999 (*UNTS*, Vol. 2178, p. 197); the United Nations Convention against Corruption of 31 Oct. 2003 (*UNTS*, Vol. 2349, p. 41); the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 Apr. 2005 (*UNTS*, Vol. 2445, p. 89).

[101] MEG, para. 5.18.

[102] See paras. 46-48 and 63-64 above.

44 99. The Court nevertheless stated very clearly, in its Order of 7 December 2016, that the purpose of Article 4 is not to create new obligations concerning the immunities of agents of the State, of any rank, or to incorporate the rules of customary international law concerning those immunities[103]. This observation is perfectly consistent with its jurisprudence on general clauses that refer to principles of general international law. In the *Oil Platforms* case, the Court similarly considered that a conventional formulation of this kind could not be interpreted "in isolation from the object and purpose of the Treaty" and that it must "be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied"[104].

100. Furthermore, in its Memorial, Equatorial Guinea supports the idea that each of the two paragraphs of Article 4 is independent, and that the second paragraph of Article 4 provides "additional protection for State sovereignty", without specifying its nature[105]. Yet the content of that provision quite obviously relates to the principles of sovereign equality, territorial integrity and non-intervention mentioned in the first paragraph. As a commentator notes:

> "This paragraph is the counterpoint of the first, stating what States Parties may *not* do if they are to observe the principle of territorial integrity. Of course the whole Convention seeks to improve international cooperation, which in many contexts will produce a situation in which agents of one State Party will perform functions within the territory of another State normally reserved to its own competent authorities. This activity will be consensual and so not in breach of the principle of territorial integrity."[106]

101. The second paragraph is therefore merely a reformulation, in a negative form, of the principle of territorial integrity mentioned in the first paragraph, in the context of judicial co-operation. It is therefore difficult to see how the present case could be connected in any way to the second paragraph of Article 4, since judicial co-operation is not the subject of the dispute
45 submitted to the Court by Equatorial Guinea, and since France has not exercised any jurisdiction or performed any function "within the territory" of Equatorial Guinea.

102. In support of its position, Equatorial Guinea cites yet more conventions and draws on the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 2 of which served as a model for Article 4 of the Palermo Convention[107]. The passage cited, however, confirms that the drafters of the Vienna Convention on Narcotic Drugs and Psychotropic Substances were merely seeking to reiterate the principles of sovereign equality and non-intervention. Above all, the Commentary provides some very revealing insights into what such a provision really means:

> "2.20. Paragraph 3 is conceptually linked to the preceding paragraph and is complementary to it insofar as practical implications are concerned. Whereas paragraph 2 lays down, in affirmative language, a code of conduct to which parties should conform in fulfilling their obligations under the Convention, paragraph 3 sets

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[103] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 49.

[104] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* pp. [813-814], paras. 27-28.

[105] MEG, para. 5.19.

[106] David McClean, *Transnational Organized Crime — A Commentary on the UN Convention and its Protocols,* Oxford University Press, 2007, p. 58.

[107] MEG, para. 5.21.

out, in negative language, what parties should not do if they are to comply with the accepted customary norms of international law.

. . . . . .

2.23. The conduct of inquiries or investigations, including covert operations, on the territory of another State without its consent, in relation to criminal offences established in accordance with article 3, is not permissible . . .

2.24. Similarly, there is no general right of hot pursuit across land boundaries."[108]

None of this is at issue in the present case.

103. Finally, the *travaux préparatoires* of the Palermo Convention make no mention of an independent obligation, in respect of either the first or second paragraph, both of which were borrowed from the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[109]. The Commentary on the latter Convention even explicitly notes that the equivalent article "has the import of a statement of guiding principles for a correct interpretation and proper implementation of the substantive articles of the Convention"[110]. The same is true of Article 4 of the Palermo Convention[111]. That the draft was restructured at some point during the negotiations to create Article 4, as Equatorial Guinea notes[112], is of no particular significance as regards the existence of an independent obligation.

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II. The obligations laid down by the Convention

104. Equatorial Guinea now concedes that, to be applicable, Article 4 of the Palermo Convention should be "read in conjunction" with other provisions of the Convention. Unless a link can be established between the subject-matter of the dispute and the conventional obligations provided for in other articles of the Convention, it must be concluded that the Court does not have jurisdiction *ratione materiae*.

105. As the Court noted in its Order of 7 December 2016, the obligations under the Convention mainly concern the adoption of the necessary measures, in domestic law, to criminalize certain transnational offences[113]. The other provisions seek to facilitate judicial co-operation between the States parties. Regarding the main category of obligations, one thing is clear: in the present case, Equatorial Guinea is certainly not accusing France of failing to criminalize the offences mentioned in the Palermo Convention in its domestic legislation, or of failing to establish the jurisdiction of its national courts over those same offences. Equally obviously, Equatorial

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[108] United Nations, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, New York, 2000, doc. E/CN.7/590, pp. [46-47].

[109] See United Nations, Economic and Social Council, Commission on Crime Prevention and Criminal Justice, doc. [E/CN.15/1998/5], 18 Feb. 1998, pp. 19-20.

[110] United Nations, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, New York, 2000, doc. E/CN.7/590, p. [41], para. 2.5.

[111] The Memorial also cites various texts relating to other conventions, which are not legally binding and cannot be treated as *travaux préparatoires* (para. 5.23). None of the citations speaks of an independent obligation.

[112] MEG, para. 5.22.

[113] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 48.

Guinea has never claimed to have a dispute with France about judicial co-operation. Consequently, no question of interpretation or application of a conventional obligation is at issue.

47 106. The link established by Equatorial Guinea between the present case and the Palermo Convention is in fact based on two contrivances. The first, which was partially dispelled in the Memorial, is to dissociate Article 4 from the other provisions of the Convention, by claiming that they should be read as independent obligations; this has already been addressed in Section I of this chapter. The second is to contend that the initiation of legal proceedings in the domestic courts of a State party to the Palermo Convention, relating to acts likely to fall within a domestic criminal classification corresponding to the offences mentioned in the Palermo Convention, amounts to implementing that Convention[114], or even to "apply[ing]" it[115]. That is absolutely not the case, as is shown by both the overall scheme of the conventional obligations (A) and a precise analysis of the provisions invoked by Equatorial Guinea (B).

A. The overall scheme of the obligations in the Palermo Convention

107. The purpose of the Palermo Convention is certainly not to provide a legal basis in itself for criminal proceedings. The international obligation consists merely of the adoption, where necessary, of rules criminalizing certain offences in domestic law. The State implements the Convention by ensuring that its legal system is in conformity with those provisions. Proceedings are conducted by the State's judicial authorities on the basis of criminal legislation that is specific to each State, in accordance with the model for all the conventions on transnational crime[116]. The State thus applies its own law.

108. In addition, it should be noted that the Palermo Convention contains no provision on the implementation of criminal legislation in specific cases, and in particular no obligation to investigate or prosecute. There is thus a notable difference between the Palermo Convention — and a number of others[117] — and those conventions on transnational offences which do provide for an
48 obligation to investigate and prosecute[118]. In the Palermo Convention, the only obligations likely to affect specific domestic procedures are those in Articles 16 to 18 concerning judicial co-operation in criminal matters.

109. The *Legislative Guide* prepared by the United Nations Secretariat following the adoption of the Convention confirms this analysis:

> "In essence, States parties must establish a number of offences as crimes in their domestic law, if these do not already exist. States with relevant legislation already in

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[114] MEG, para. 5.26.

[115] MEG, para. 5.27.

[116] Gerhard Werle, Florian Jessberger, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, 2014, p. 46; Neil [Boister], "The concept and nature of transnational criminal law", in Neil [Boister] and Robert J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law,* London/New York, Routledge, 2015, p. 15.

[117] That also applies, in particular, to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 22 Dec. 1988.

[118] For example, the International Convention for the Suppression of Terrorist Bombings of 15 Dec. 1997, Art. 7, paras. 1 and 2; the International Convention for the Suppression of the Financing of Terrorism of 9 Dec. 1999, Art. 9, paras. 1 and 2; the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 Apr. 2005, Art. 10, paras. 1 and 2. See Roger O'Keefe, *International Criminal Law*, Oxford University Press, 2015, p. 330.

place must ensure that the existing provisions conform to the Convention requirements and amend their laws, if necessary."[119]

110. Equatorial Guinea flagrantly disregards the content of the obligations when it claims that French law applies the Palermo Convention[120], and that any implementation of domestic law therefore falls within the scope of the Convention. Each of the two stages in its reasoning is erroneous.

111. First, the Memorial explains that "in the absence of an obligation to do otherwise, States remain free to choose how they give effect to their obligations"[121]. That is true, but, since the obligation consists of establishing criminal offences and bases of jurisdiction, the choice of the means relates to how the general rules of domestic criminal law and criminal procedure are adapted to the requirements of the Convention. That free choice reflects the fact that the Convention has no direct effect and seeks merely to harmonize the legal systems of the States parties. However, Equatorial Guinea does not claim that French law is not in harmony with the Convention.

112. Second, while it is true that the conventional obligations require domestic laws to be brought into conformity with the Convention, they do not require criminal proceedings to be
49 initiated in a particular case. The implementation of domestic legislation still falls under the criminal sovereignty of the States parties to the Convention. It makes this crystal clear, since Article 11, paragraph 6, expressly states: "Nothing contained in this Convention shall affect the principle . . . that such offences shall be prosecuted and punished in accordance with [the] law [of that State party]."

113. By virtue of this principle, the French judicial authorities commenced proceedings against Mr. Teodoro Nguema Obiang Mangue on the basis of French law[122]. That they did so regarding money laundering, an offence which the States parties to the Convention are also obliged to establish as a criminal offence in their domestic law, does not place those proceedings within the scope of the conventional obligations.

B. An examination of the provisions of the Convention invoked by Equatorial Guinea

114. The provisions of the Palermo Convention correspond perfectly to its object and purpose, which is to establish a "legal framework" to combat transnational organized crime, and not to govern the conduct of proceedings in specific cases. Notwithstanding the overall scheme of the conventional obligations, in its Memorial Equatorial Guinea cites several articles of the Convention, in addition to Article 4, in an attempt to justify the Court's jurisdiction. However, it rarely enters into detail, since a simple perusal of the provisions invoked reveals that they have no connection with the case submitted to the Court. Consequently, the purpose of the following observations is simply to provide a precise response to Equatorial Guinea's Memorial. We begin by examining the provisions invoked in respect of the proceedings against Mr. Teodoro Nguema

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[119] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto,* United Nations, New York, 2005, p. [17], para. 37.

[120] MEG, para. 5.29.

[121] MEG, para. 5.33.

[122] See Paris *Cour d'appel*, National Financial Prosecutor's Office, Final submissions seeking separation of the complaints, and either their dismissal or their referral to the *Tribunal correctionnel*, 23 May 2016 (Ann. 30 MEG); Order for partial dismissal and partial referral of proceedings to the *Tribunal correctionnel*, 5 Sep. 2016, regularized by an order of 2 Dec. 2016, p. 35 (Ann. 7 MEG).

Obiang Mangue (1) and continue with those invoked in respect of the building located at 42 avenue Foch in Paris (2).

50 **1. Provisions invoked in respect of the proceedings against Mr. Teodoro Nguema Obiang Mangue**

115. First, the Memorial mentions Article 3, interpreted in conjunction with Article 34, paragraph 1[123]. Article 3, however, is devoted to the scope of the Convention, and contains no obligation. While it refers to investigations and prosecution, it does so because of the conventional provisions relating to judicial co-operation. Article 34, paragraph 1, contains no specific obligation either, but recalls that the States must adopt the "necessary measures . . . to ensure the implementation of [their] obligations under this Convention". The conventional obligations said to be at issue therefore remain to be identified.

116. Second, Equatorial Guinea mentions Article 6, entitled "Criminalization of the laundering of proceeds of crime"[124]. Here, there is indeed an obligation incumbent on the States parties. It is to adopt "such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally"[125] certain acts listed as constituting the laundering of proceeds of crime. Each State party "shall seek to apply [this obligation] to the widest range of predicate offences"[126] and "shall furnish copies of its laws that give effect to this article . . . to the Secretary-General of the United Nations"[127]. France complies with that obligation, since money laundering is provided for and punishable under Articles 324-1 to 324-9 of the French Penal Code. As Equatorial Guinea itself points out in its Memorial, French legislation already included those offences before the Convention was adopted. And it does not claim that this legislation is not in conformity with Article 6.

117. Third, Equatorial Guinea claims that the criminal proceedings initiated in France constitute an implementation of Article 15[128]. Under that article, each State party "shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in
51 accordance [with the Convention]"[129], depending on the place of the offence, its perpetrator or its victim. Here too, the obligation incumbent on the States parties is to adopt the necessary rules in their domestic law — if they have not already done so — to establish the jurisdiction of their courts over those offences. Domestic French law complies with that provision[130]. Equatorial Guinea does not contend that France has not performed its obligations in that regard. Moreover, the provision

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[123] MEG, para. 5.28.

[124] MEG, para. 5.29.

[125] Art. 6, para. 1, of the Convention.

[126] Art. 6, para. 2 *(a)*, of the Convention.

[127] Art. 6, para. 2 *(d)*, of the Convention.

[128] MEG, para. 5.29.

[129] Art. 15, para. 1.

[130] Arts. 113-1 to 113-13 of the Penal Code; Art. 689 of the Code of Criminal Procedure. France has informed the Secretary-General of the United Nations of the domestic legislative measures giving effect to Art. 15 of the Palermo Convention (see https://www.unodc.org/cld/v3/sherloc/legdb/).

relates to the establishment of bases of jurisdiction, not to the exercise of one of them in a given case[131]. There is therefore no dispute regarding Article 15.

118. It should also be noted that Article 15 relates to adjudicative jurisdiction, and not to immunities. As the Court has already had occasion to explain, immunity is not a question of jurisdiction, but of the exercise of that jurisdiction[132], since it is "*procedural in nature*"[133]; the two questions must be carefully distinguished[134]. Article 15 therefore concerns neither the immunities of State representatives nor those of the property of foreign States.

119. Fourth, the Memorial refers at slightly greater length to Article 11, paragraph 2, of the Convention[135], which provides that:

> "Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences."

120. Here, Equatorial Guinea's reasoning is astonishing:

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> "By initiating criminal proceedings against the Vice-President of Equatorial Guinea for criminal offences which he allegedly committed, the French courts have sought to fulfil this obligation . . . This is a clear effort by France to exercise its jurisdictional authority and apply its criminal law to the maximum extent possible in order to deter money laundering. However, it cannot give effect to this obligation in disregard of Article 4 of the Convention."[136]

France is therefore not accused of violating this provision, but of applying it too well. That paradox aside, the flawed analysis of the provision deserves particular attention.

121. The wording of Article 11, paragraph 2 — "shall endeavour to ensure" — indicates that the provision is not legally binding, but a recommendation. That recommendation is of a general nature and relates to the States parties' penal policy. The aim of the negotiators was to ensure that the prosecuting authorities would bear in mind the need to give effect to the law as efficiently as possible — for example, without abusing mechanisms for granting concessions to the accused, be it in exchange for information or as part of a plea bargain[137]. This is also evident from the context of the provision, since under Article 11, paragraph 1, the States parties are required to "make the

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[131] David McClean, *Transnational Organized Crime — A Commentary on the UN Convention and its Protocols,* Oxford University Press, 2007, p. 167: "It is mandatory for States to 'establish' jurisdiction over the specified offences, but that does not carry with it an obligation to exercise that jurisdiction in any particular case."

[132] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 20, para. 46.

[133] *Ibid.*, p. 26, para. 60 (emphasis added).

[134] *Ibid.*, pp. 25-26, para. 59.

[135] MEG, paras. 5.30-5.31.

[136] MEG, para. 5.31.

[137] David McClean, *Transnational Organized Crime — A Commentary on the UN Convention and its Protocols,* Oxford University Press, 2007, p. 133.

commission of an offence [covered by the Convention] liable to sanctions"[138]. As the *Legislative Guide* adopted by the United Nations explains, the harmonization required by Article 11 seeks to ensure that the sanctions clearly outweigh "the benefits of the crime"[139]. The whole of the article therefore concerns the overall effectiveness of the law, and not measures relating to specific cases[140]. This is confirmed, if confirmation were needed, by the final paragraph of Article 11. This
53 provision thus has no bearing on the present case, since Equatorial Guinea does not claim that the French judicial authorities have pursued a penal policy that runs counter to it.

122. Immunity is a procedural aspect of the law applicable to a given case, which the judicial authorities do not have discretion to accept or reject. The subject-matter of this dispute therefore has no connection with Article 11, paragraph 2.

123. Fifth, Equatorial Guinea refers to Article 18 of the Palermo Convention, which concerns mutual legal assistance[141]. It is true that the Palermo Convention was mentioned in the request for international assistance sent by the French judges to the Equatorial Guinean authorities on 14 November 2013[142]. However, Equatorial Guinea, which made a sovereign decision to comply with that request, has never claimed to have a dispute with France in this regard[143]. Moreover, and contrary to what is stated in the Memorial[144], the simple fact that reference is made to the Convention in a request for mutual legal assistance in no way modifies the legal basis of the proceedings, which were initiated under French law alone.

2. Provisions invoked in respect of the building located at 42 avenue Foch in Paris

124. Equatorial Guinea's Memorial, while not always explicit, mentions three articles of the Convention in connection with the part of the dispute relating to the building at 42 avenue Foch in Paris. The reference to Article 18, which is common to the immunities and the building, has been examined above. Articles 12 and 14, for their part, get a particularly cursory mention[145].

125. Article 12 imposes an obligation on the States parties to adopt "such measures as may be necessary to enable confiscation of: *(a)* Proceeds of crime derived from offences covered by this Convention [and property used to commit them]". As with Article 6, that obligation is therefore
54 performed once the State party has adopted rules in its domestic law which enable the proceeds of

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[138] Art. 11, para. 1, of the Convention.

[139] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto,* United Nations, New York, 2005, p. [130], para. 262. To that end, the prosecution and sanctions must be "consistent with the harm [the perpetrators of the crimes] have caused and with the benefits they have derived from their criminal activities" (*ibid.*, p. [130], para. 261). Consequently, pursuant to Art. 11, "States parties [must] give serious consideration to the gravity of the offences covered by the Convention when they decide on the appropriate punishment and possibility of early release or parole" (*ibid.*, p. [131], para. 264).

[140] *Ibid.*, [p. 133], para. 275: States "must make an effort to encourage the application of the law to the maximum extent possible in order to deter the commission of the four main offences".

[141] MEG, paras. 5.32 and 5.33.

[142] Paris *Cour d'appel*, National Financial Prosecutor's Office, Final submissions seeking separation of the complaints, and either their dismissal or their referral to the *Tribunal correctionnel*, 23 May 2016, p. 29 (MEG, Ann. 30).

[143] AEG, para. 41. See also MEG, submissions, p. 181.

[144] MEG, para. 5.32.

[145] MEG, para. 5.32.

crime to be confiscated. The French Penal Code includes such provisions[146], and it is not alleged that they do not comply with the Convention.

126. Article 14 concerns the disposal of confiscated proceeds of crime and property. Its first paragraph provides that the State should dispose of them "in accordance with its domestic law and administrative procedures", thus recognizing States' freedom of action in this area. The remaining two paragraphs set out how States should co-operate for the purposes of returning or contributing the value of such proceeds of crime or property to international bodies, or sharing it with other States. None of this is at issue in the present dispute.

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127. In conclusion, it follows from the foregoing that the claims submitted to the Court regarding the criminal proceedings initiated against Mr. Teodoro Nguema Obiang Mangue, and the building located at 42 avenue Foch in Paris, in no way concern the application or interpretation of any of the provisions of the Palermo Convention. Article 4 refers to principles intended to guide the implementation of the conventional obligations, and there is no dispute between the Parties calling into question any of the obligations under that Convention. Consequently, the Court has no jurisdiction to entertain the dispute submitted by Equatorial Guinea on the basis of Article 35, paragraph 2, of the Palermo Convention.

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CHAPTER 3

THE COURT'S LACK OF JURISDICTION ON THE BASIS OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

128. In the chapter of its Memorial devoted to "[t]he jurisdiction of the Court", Equatorial Guinea deals only very briefly with the question of whether, in this instance, the Vienna Convention on Diplomatic Relations of 18 April 1961 enables the Court to entertain the submissions put forward in the Application on the basis of that treaty. Apart from a few citations recalling the preconditions for referral to the Court and a brief presentation of the position set out by France during the hearings on the request for provisional measures, the relevant passage of the Applicant's argument occupies just one paragraph, which reads as follows:

> "The dispute before the Court concerns the interpretation and application of several provisions of the VCDR, including but not limited to Article 1 *(i)* and Article 22. One of the fundamental aspects of the dispute is indeed to determine whether the building located at 42 avenue Foch in Paris forms part of the premises of Equatorial Guinea's diplomatic mission in France, and as from what date. This raises a number of factual and legal issues, which the Court is called upon to decide. Equatorial Guinea and France have different views on these matters, which is why there is no question that a dispute concerning the VCDR exists."[147]

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[146] Arts. 131-21 and 324-7 of the Penal Code (see https://www.unodc.org/cld/v3/sherloc/legdb/).

[147] MEG, p. 78, para. 5.46.

129. Such deliberate brevity is surprising in several respects, primarily because Equatorial Guinea had indicated during the exchanges on the request for the indication of provisional measures, and in a bid to play down the importance already accorded by France to the question of the Court's jurisdiction, that the latter would subsequently be the subject of "detailed written pleadings"[148]. Yet instead of producing a detailed argument, the Applicant confines itself here to making bald, unsubstantiated assertions, which it presents as self-evident truths. For the reasons given below, France considers that these cursory observations can, and must, be refuted. A mere reference to "different views" evidently cannot suffice to accept that "there is no question that a
56 dispute concerning the VCDR exists"[149]. As the Court clearly recalled in the Judgment delivered in the *Oil Platforms* case, it

> "cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty . . . pleaded . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain."[150]

130. Exactly the same is true in the present instance. Rather than upholding the Applicant's distinctly succinct reasoning[151], the Court prudently reserved its position on the matter during its examination of the request for the indication of provisional measures. That stance was no doubt dictated by the limits that such a claim traditionally places on the Court's power to assess its own jurisdiction. The Court thus recalled, as it does consistently in such circumstances, that at that stage it needed only to satisfy itself of the existence, prima facie, of a basis of jurisdiction, and did not need to "satisfy itself in a definitive manner that it ha[d] jurisdiction as regards the merits of the case"[152]; consequently, the decision rendered on 7 December 2016 "in no way prejudges the question"[153] considered here.

131. Nonetheless, the language used by the Court to establish its jurisdiction — even prima facie — on the basis of the Vienna Convention on Diplomatic Relations remains notably cautious. The Court observes, for example, 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"[154], before enjoining the Respondent to "take all measures at its disposal to ensure that the premises *presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris* enjoy *treatment equivalent to that* required by Article 22 of the Vienna Convention on Diplomatic
57 Relations, in order to ensure their inviolability"[155]. By choosing this form of words, the Court left unresolved the questions raised in this instance by the possibility of applying the Vienna Convention *ratione materiae,* particularly regarding the legal status of the building located at

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[148] CR 2016/16, 19 Oct. 2016, p. 10, para. 9 (Wood).

[149] MEG, p. 78, para. 5.46.

[150] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 810, para. 16.

[151] According to the Applicant, there is a "dispute 'arising out of the interpretation and application of the [Vienna] Convention' within the meaning of Article I of the Optional Protocol. As such, under Article II the Court has jurisdiction if certain conditions are met. Those conditions are met, as we explained in the Application instituting proceedings" (CR 2016/16, 19 Oct. 2016, p. 14, para. 20 (Wood)).

[152] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 31.

[153] *Ibid.*, para. 98.

[154] *Ibid.*, para. 67 (emphasis added).

[155] *Ibid.*, para. 99 (emphasis added).

42 avenue Foch in Paris (16th arrondissement). These are precisely the questions underlying the preliminary objection raised here.

132. Before examining them, and in the interests of the sound administration of justice, it should be recalled that France does not dispute that the formal conditions for relying on the Protocol are met in this instance[156] and, more specifically, does not consider Articles II and III of that instrument as obstacles to the Court's jurisdiction. Indeed, in the context of the request for the indication of provisional measures, France explained that respect for the principle of judicial independence, and the fact that French legislation does not allow for criminal proceedings to be stopped by means of a compromise agreement, meant that it was not in a position to pursue Equatorial Guinea's offer of conciliation and arbitration[157].

133. Careful examination of the elements of law and fact put forward in Equatorial Guinea's Application and Memorial, however, shows that the Court does not have jurisdiction *ratione materiae* to entertain Equatorial Guinea's claims on the basis of the Vienna Convention and Article I of its Optional Protocol, which reads as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

134. Thus, for the Court to have jurisdiction on the basis of that text, the dispute alleged by the Applicant must actually fall under the provisions of the Vienna Convention. While the Court has a degree of discretion to determine whether that is indeed so in the context of a case submitted
58 to it, it must clearly pay particular attention to the terms used by the Applicant to present the dispute[158].

135. According to the Applicant's Memorial, which uses a slightly more precise form of words than its Application[159],

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[156] France ratified the Vienna Convention on Diplomatic Relations and the Optional Protocol on 31 Dec. 1970; Equatorial Guinea acceded to the Convention on 30 Aug. 1976 and to the Protocol on 4 Nov. 2014.

[157] See CR 2016/17, p. 18, para. 2 (Alabrune) and *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 62.

[158] In its Judgment in the case concerning *Fisheries Jurisdiction*, the Court explains that it is for the Court itself, "while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties . . . The Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute . . . The Court will itself determine the *real dispute* that has been submitted to it (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995,* pp. 24-25). It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* pp. 262-263)" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 448-449, paras. 30-31, emphasis added).

[159] See AEG, para. 2.

"[t]he dispute between Equatorial Guinea and France regarding the building located at 42 avenue Foch in Paris concerns whether that building enjoys immunity, both as premises of the diplomatic mission of Equatorial Guinea and as the property of that State, under international law and the Vienna Convention on Diplomatic Relations"[160].

136. In France's opinion, however, that is not the subject of the "real dispute" brought before the Court, despite Equatorial Guinea's fluid and subjective presentations of it[161]. As regards reliance on the Vienna Convention, the dispute thus does not concern the protection which, under Article 22, the receiving State must grant to the premises of the sending State's diplomatic mission, in particular from search or attachment (I).

137. The dispute in fact relates to a separate question, which is preliminary to that of the protection which it is alleged should be offered to the building at 42 avenue Foch: the question of whether, at the time of the events of which Equatorial Guinea complains in its Application, that building should — or should not — have been regarded as being used for the purposes of Equatorial Guinea's mission in France. As recalled above, in this and in other respects, Equatorial Guinea's Application is abusive, which is sufficient to establish that the Court lacks
59 jurisdiction to entertain it[162]. Moreover, it is important to note that, if a dispute does exist between the Parties, it does not fall within the provisions of the Vienna Convention, which stipulates neither the means nor the methods for identifying the diplomatic purpose of buildings (II).

138. Alternatively, and assuming — *quod non* — that the Court were to agree that its jurisdiction was established on the basis of that instrument, it would only be able to address on that basis breaches of the Convention that are specifically alleged in the Application. In that instance, the Court's jurisdiction would therefore be limited to examining the lawfulness of the attachment of the building located at 42 avenue Foch in Paris in the light of the Vienna Convention (III).

I. The lack of a dispute between the Parties concerning the interpretation or application of Article 22 of the Vienna Convention

139. In its written pleadings, Equatorial Guinea is distinctly vague about the provisions of the Vienna Convention whose interpretation or application is said to lie at the root of the dispute between itself and France. After briefly indicating that "applicable in the present dispute are the provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961"[163], the Application instituting proceedings merely states that France "has breached its obligations owed to Equatorial Guinea under the Vienna Convention . . ., *in particular Article 22 thereof*"[164]. The submissions relating to the building at 42 avenue Foch, which are repeated verbatim in the Memorial[165], are barely more forthcoming, since they simply request the Court to adjudge and declare that France, by attaching the building, "is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations"[166].

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[160] MEG, pp. 19-20, para. 2.9.

[161] See paras. 13-41 above.

[162] See paras. 58-88 above.

[163] AEG, p. 10, para. 36.

[164] *Ibid.*, p. 11, para. 38 (emphasis added).

[165] MEG, p. 182, para. *(c)* (i).

[166] AEG, p. 13, para. 41 *(c)* (i).

140. Even more surprisingly, Equatorial Guinea's Memorial provides no further evidence of
60 the precise nature of the obligations under the Vienna Convention which France is alleged to have breached in this instance. As we have already noted, the section about the Court's jurisdiction simply states that the dispute "concerns the interpretation and application of several provisions of the VCDR, including but not limited to Article 1 *(i)* and Article 22"[167]. Equatorial Guinea does subsequently mention Article 1 *(i),* but solely to point out that the inviolability of diplomatic premises is not dependent on their being owned by the sending State[168] — a point which France does not dispute — and then, "[t]o recall"[169], it quotes the definition contained in that provision. However, as we shall demonstrate, in this instance Article 1 *(i)* is not capable of providing the legal basis for a dispute between the Parties[170].

141. As for the other provisions of the Convention to which Equatorial Guinea alludes, they in fact prove to be ineffective for the purposes of determining the nature of the supposed dispute between the Parties on the basis of the Convention. For example, Equatorial Guinea does not claim that France has failed to perform its obligations under Article 21 of the Convention; it merely notes that "[i]f inviolability were made dependent on the sending State's ownership of the building, it would deprive Article 21 of the Convention of its substance and considerably narrow the scope of protection offered by this principle"[171]. France does not disagree: in the context of the questions being examined here, it is not ownership of the building that matters, but rather, as we shall see, its possible status as "premises of the mission"[172].

142. Similarly, and even more obviously, Article 12 of the Convention plainly has no bearing on the definition of the dispute between the Parties. As the Applicant explains in its Memorial, "[t]his provision is irrelevant for the purposes of the present case, since Equatorial Guinea has neither established, nor sought to establish, offices forming part of its mission 'in [other] localities'"[173].

61 143. Consequently, only Article 22 of the Vienna Convention would appear, at least at first sight, to be capable of providing a legal basis on which it would be possible to establish that in this case a dispute exists concerning the interpretation or application of the Convention, which is likely to be subject to the compulsory jurisdiction of the Court. Indeed, it is the only provision which Equatorial Guinea mentioned in its request for provisional measures, in respect of the rights that it was seeking to protect on the basis of the Convention[174]. It is also the only one which the Court took into account in its Order of 7 December 2016, when it considered that "at [that] 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" was sufficiently established[175].

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[167] MEG, p. 78, para. 5.46.

[168] *Ibid.*, p. 142, para. 8.32.

[169] *Ibid.*, p. 143, para. 8.34.

[170] See paras. 160-169 below.

[171] MEG, p. 143, para. 8.32.

[172] See paras. 159-176 below.

[173] MEG, p. 144, para. 8.36, on the *"[a] contrario"* interpretation that the Applicant seeks to put forward on the basis of that provision.

[174] See CR 2016/14, 17 Oct. [2016], p. 32, para. 9 (Kamto).

[175] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 17, para. 68.

144. However, although it sufficed to acknowledge, for the purposes of the request for provisional measures, "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"[176], the Court noted that "the rights apparently at issue [might] 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[ed] to be capable of contravening such rights"[177]. In so doing, it relied not only on Equatorial Guinea's assertion that the building at 42 avenue Foch had been assigned for diplomatic use since 4 October 2011, but, above all, on the purely factual observation made by France "that, from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear[ed] to have been transferred"[178] to that address.

145. In other words, the possibility that, from the end of July 2012, the building concerned might have accommodated certain of Equatorial Guinea's diplomatic services was sufficient to render plausible the rights for which Equatorial Guinea was seeking protection, on the basis of Article 22 of the Convention, by requesting provisional measures. For the Court it was clearly not a
62 question of determining whether the searches and attachment of the building located at 42 avenue Foch — all of which took place prior to the end of July 2012[179] — might have contravened the rights invoked by the Applicant on the basis of Article 22, but rather, more simply, of preserving those possible rights until the end of the proceedings initiated before it.

146. Such an approach is not at all unusual. As the Court itself recalled at the provisional measures stage, it "is not called upon to determine definitively whether the right which Equatorial Guinea wishes to see protected exists"[180], *a fortiori* when the request for the indication of such measures precedes the examination of the Court's jurisdiction. At that point the allegations made by each of the Parties are undeniably important. However, at the stage of establishing jurisdiction, that provisional assessment of the apparent existence and plausibility of the rights at issue cannot suffice. In the words of an arbitral tribunal constituted under the United Nations Convention on the Law of the Sea, "in any . . . case invoking the compromissory clause of a treaty, the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty in point, as determined by the court or tribunal whose jurisdiction is at issue"[181].

147. Following that logic, it is for the Court to determine whether Equatorial Guinea's claims are capable of falling within the provisions of Article 22 of the Vienna Convention. They are certainly not in this case, since Equatorial Guinea has failed to demonstrate that the provision concerned is applicable to its dispute with France.

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[176] *Ibid.*, p. 19, para. 79.

[177] *Ibid.*, p. 17, para. 67.

[178] *Ibid.*, [p. 19, para. 79].

[179] See paras. 20-29 [above].

[180] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 19, para. 78. See also *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014,* p. 153, para. 26.

[181] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility,* Decision of 4 Aug. 2000, *RIAA,* Vol. XXIII, pp. 38-39, para. 48.

148. Article 22 of the Vienna Convention on Diplomatic Relations reads as follows:

"1. The *premises of the mission* shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

63 2. The receiving State is under a special duty to take all appropriate steps to protect the *premises of the mission* against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. 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."[182]

149. Article 22 thus sets out an inviolability régime protecting all buildings reserved for the use of diplomatic missions; at the same time, this conventional legal régime, which derogates from ordinary law, only applies to premises "used for the purposes of the mission", as defined by Article 1 *(i)* of the Convention.

150. France of course — and Equatorial Guinea does not claim otherwise — in no way disputes the fact that diplomatic premises are entitled to inviolability, as established by Article 22. To be even more specific, it fully accepts that the premises of the diplomatic mission of the Republic of Equatorial Guinea in France, located at 29 boulevard de Courcelles in Paris (8th arrondissement)[183], must benefit unconditionally from the legal régime of Article 22. On the other hand, it considers that the sending State's rights under Article 22 can only be applied and implemented if it has previously been established that the premises in question do indeed enjoy diplomatic status. Article 22 contains no reference to any criteria or procedure for determining the diplomatic purpose of a particular premises. It sets out the legal régime for diplomatic premises, but includes no provision on how such status is acquired.

151. An examination of the practice to which Article 22 of the Convention has given rise corroborates this interpretation, which, moreover, merely derives from the ordinary meaning of the words and phrasing used to set out the obligations contained in that provision. To take just one recent example, the High Court of Justice of England and Wales declined to extend the enjoyment of the protective legal régime of Article 22 to a building in London owned by the Federal Republic of Nigeria for the following reasons:

64 "45. Section 16 of the State Immunity Act preserves the immunities available to a state under the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968. The defendants rely on section 2 of the former Act together with Article 22 of the Vienna Convention on Diplomatic Relations of 1961.

46. Section 2 gives the force of law to certain articles of the Convention including Article 22 which provides that 'The premises of the mission shall be inviolable'. However, despite the terms of the Acting High Commissioner's certificate, I do not accept that the Fleet Street property forms part of the premises of the Nigerian High Commission. The Acting High Commissioner's certificate has no

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[182] Emphasis added.

[183] The address of the Embassy of Equatorial Guinea in France is listed in the "Annuaire des représentations étrangères en France" (see http://www.diplomatie.gouv.fr/fr/le-ministere-et-son-reseau/annuaires-et-adresses-du-maedi/ambassades-et-consulats-etrangers-en-france/, consulted on 17 Mar. 2017).

> special status for this purpose. A certificate from the Secretary of State would be conclusive on the question whether the property comprises diplomatic or consular premises (see section 1 (7) of the Diplomatic & Consular Premises Act 1987), but there is no such certificate."[184]

152. Thus, the issue of determining whether a building must be regarded as forming part of the premises of the mission must undoubtedly be addressed prior to invoking Article 22 for its benefit. As one of the most authoritative commentaries on the 1961 Vienna Convention indicates, in its observations on Article 22,

> "[a] question which cannot be clearly resolved from the text of the Convention or from the *travaux préparatoires* is when the inviolability of mission premises begins and ends. [. . .] In the Vienna Convention . . ., although there are elaborate provisions for notification of persons entitled to privileges and immunities and for determining the time when entitlement begins and ends, there are no analogous provisions for premises."[185]

153. Moreover, Equatorial Guinea seems to have the measure of the subject-matter and limits of Article 22. The only reference to that provision in the "[l]egal bases of Equatorial Guinea's Application" reads as follows:

> "[B]y the fact that its judicial authorities have seized a building used for the purposes of the diplomatic mission of Equatorial Guinea in France, and *by failing to recognize the building as the premises of the diplomatic mission*, the French Republic has breached its obligations owed to Equatorial Guinea under the Vienna Convention on Diplomatic Relations of 18 April 1961, in particular Article 22 thereof"[186].

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154. This line of argument would suggest that Article 22 was breached because of the failure by the French authorities previously to recognize the diplomatic status of the building at 42 avenue Foch. The wording of the submissions in the Application is equally illuminating on this point, since Equatorial Guinea requests the Court

> "to order the French Republic to recognize the status of the building located at 42 avenue Foch in Paris as the property of the Republic of Equatorial Guinea, and as the premises of its diplomatic mission in Paris, *and, accordingly, to ensure its protection as required by international law*"[187].

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[184] *L R Avionics Technologies Ltd* v. *The Federal Republic of Nigeria & Anor* [2016] EWHC 1761 (Comm), 15 July 2016; available at: http://www.bailii.org/ew/cases/EWHC/Comm/2016/1761.htm.

[185] E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations,* 4th ed., Oxford, Oxford University Press, 2016, p. 145. J. Salmon agrees: "The Vienna Convention does not specify at which point the premises acquire the status of 'premises of the mission'. There is no provision for a notification procedure for premises such as the one in Article 1[0] for people. Hence, for example, if a building or plot of land is purchased by a State to establish an embassy (or consulate), but is not yet assigned to it, the courts do not recognize the State's immunity from jurisdiction in connection with that acquisition. However, as soon as the premises are assigned, their protection is ensured" (J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, pp. 191-192, para. 287). *[Translation by the Registry.]*

[186] AEG, p. 11, para. 38 (emphasis added). "Memorandum No. 2 from the Republic of Equatorial Guinea to the French Republic. The case of the so-called 'ill-gotten gains': the Equatorial Guinean chapter" already indicated in the same vein: "[u]ltimately, because of the difference in positions between the two States regarding the legal status of the building in question, the diplomatic mission of Equatorial Guinea in France is being deprived of the protection to which it is entitled under Article 22 of the Vienna Convention on Diplomatic Relations and according to relevant practice" (Ann. 12, p. 1[0], para. 51, AEG).

[187] AEG, p. 13, para. 41 *(c)* (ii) (emphasis added).

155. The fact that the building at 42 avenue Foch is not recognized as forming part of the premises of the diplomatic mission of Equatorial Guinea thus appears, from the very wording it has chosen, to be the trigger for the alleged breaches of Article 22. Yet that article imposes no such obligation of recognition on the receiving State. Nevertheless, Article 22 is in fact the only specific provision of the Convention in respect of which Equatorial Guinea has asserted that a dispute exists between itself and France.

156. That last point alone would suffice to conclude that the Court has no jurisdiction to entertain the dispute alleged by Equatorial Guinea on the basis of the Vienna Convention of 18 April 1961. That dispute does not relate to the régime for the inviolability of diplomatic premises, but more directly and, as it were, upstream, to the legal status of a building which Equatorial Guinea claims to own and use. Consequently, to paraphrase the words used by the Court regarding the compromissory clause of another treaty, Equatorial Guinea "has not shown that there
66 [is] a question concerning the interpretation or application" of Article 22 of the Vienna Convention — the only article specifically invoked in the Applicant's Application and Memorial — "on which itself and [France have] opposing views, or that it [has] a dispute with that State in regard to this matter"[188].

157. No doubt consideration should also be given to the possibility open to the Court, when determining the subject of the "real dispute"[189], to remedy any formal defects in Equatorial Guinea's Application. However, that power is of necessity restricted and must be exercised with a narrow margin of appreciation, if only to preserve the rights and interests of the Defendant. As the Court itself has explained,

> "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to 'substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced' (*P.C.I.J., Series A, No. 7,* p. 35)."[190]

158. In this instance, Equatorial Guinea has failed to produce a scrap of evidence in support of its allegation that a dispute exists between itself and France concerning the interpretation or application of Article 22. That failure is an insurmountable barrier to establishing the jurisdiction of the Court on the basis of Article I of the Optional Protocol to the Vienna Convention. Moreover, in this case it appears to be all the more fatal, since that Convention in fact contains no provision under which the legal status of the building located at 42 avenue Foch could effectively be determined. The relevant rules are governed exclusively by customary norms, which the Court has no jurisdiction to apply in this case[191].

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[188] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 43, para. 99.

[189] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 449, para. 31.

[190] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974,* p. 466, para. 30; see also *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 262, para. 29.

[191] See paras. 150-156 above.

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II. The impossibility of linking the dispute alleged by Equatorial Guinea to the provisions of the Vienna Convention

159. The dispute between Equatorial Guinea and France does not concern the régime of inviolability of diplomatic premises provided for by Article 22 of the Vienna Convention. The Court's jurisdiction could nonetheless be established on the basis of that instrument, if the Applicant were able to "establish a reasonable connection between the Treaty and the claims submitted to the Court"[192]. In this case, however, no such "reasonable connection" can be established, since the Vienna Convention contains no rules specifying the modalities or procedure for identifying the premises of a diplomatic mission and, therefore, for determining whether the Article 22 régime applies to a given building. The Convention merely sets out the obligations resulting from the principle of inviolability of premises whose diplomatic status is established, but leaves States to identify buildings capable of enjoying protection under the Convention as they see fit.

160. The only provision relating to the status of certain buildings as diplomatic premises is in Article 1 of the Vienna Convention, which lists the definitions required "[f]or the purpose of the present Convention". It reads as follows: "(i) the 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission".

161. The object and meaning of that provision is clear from the Convention's *travaux préparatoires*. It did not appear in the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission in 1958[193], which do not specify how the status of diplomatic premises is acquired. The commentary on draft Article 20, on the "[i]nviolability of the mission premises" simply indicates in this regard that:

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> "The expression 'premises of the mission' includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented. The premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park."[194]

162. At the Vienna Conference, it was decided in the end to add "a somewhat shortened version of this descriptive Commentary"[195] to Article 1 of the Convention. And indeed, in both the brief passage in the Commission's commentary and the text of Article 1 *(i)* which it ultimately inspired, the definition of "premises of the mission" does appear to be essentially descriptive, above all because it does not stipulate the modalities or procedures for establishing that a building does indeed fall into the category of diplomatic premises[196]. In other words, the question of determining the legal status — or the diplomatic purpose — of a building for the purposes of the

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[192] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 427, para. 81.

[193] The text of the draft articles is reproduced in the *Yearbook of the International Law Commission (YILC)*, 1958, Vol. II, doc. A/CN.4/SER.A/1958/Add.1, pp. [89] *et seq.*, para. 53.

[194] *Ibid.*, p. 98 (commentary on Article 20, para. 2).

[195] E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations,* 4th ed., Oxford, Oxford University Press, 2016, p. 16.

[196] "The one definition contained in Article 1 which is clearly objective in character is the definition of 'the premises of the mission'" *(ibid.)*.

Vienna Convention is not settled by the Convention and remains entirely outside its scope of application[197].

163. The diversity of State practice alone is testimony to the fact that the question of how a particular building is recognized as having the legal status of "premises of the mission" is not covered by the Convention. Moreover, Equatorial Guinea does not seem to deny that fact, since it refers to the different ways in which States establish that a given building must be regarded as the premises of a diplomatic mission[198]. The statement that "[m]ost countries do not impose any particular formalities for the premises of a diplomatic mission to be recognized as inviolable"[199] is not in any way substantiated by the Applicant, which is nonetheless forced to concede that a "few States" — it goes on to cite South Africa, Canada, Spain, the United States, India, the United Kingdom, Switzerland and Sweden[200] — "require consent to the assignment of a building as premises of a diplomatic mission"[201].

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164. The practice of these States can also be instructive in that it reveals how they understand the extent of their international obligations, as regards giving their consent for a given building to be used for a diplomatic purpose. Under the United Kingdom's Diplomatic and Consular Premises Act of 1987, for example, the acquisition of the status of premises of a diplomatic mission is subject to the consent of the Secretary of State; the Act provides that "[t]he Secretary of State shall only give or withdraw consent or withdraw acceptance if he is satisfied that to do so is permissible under international law"[202]. Thus, while the official interpretation of the text makes it clear that the notion of "premises of the mission" has the meaning given by Article 1 *(i)* of the Vienna Convention[203], the lawfulness of the consent is not required to be evaluated under that Convention, but rather in the more general and non-specific context of "international law". In a similar vein, the United States Foreign Missions Act of 1982 lists as the first criterion for "determination concerning the location of a chancery", "[t]he international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital"[204]. Thus, American legislation does not make the consent of the federal authorities subject to compliance with any provisions in the Vienna Convention concerning recognition of the legal status of "premises of the mission", but solely and implicitly to those obliging the receiving State to help the sending State acquire or obtain in some other way the premises necessary for its mission (Article 21 of the Convention).

165. Furthermore, Equatorial Guinea does not contend that these national practices are contrary to international law or, more specifically, to the Vienna Convention, even though it seems to attach particular importance to the fact that "France has no legislation to which it could have

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[197] In this context it is significant that the notification obligations incumbent on the sending State under Article 10 of the Convention do not concern the premises of the mission; that silence indicates simply that the Convention does not seek to regulate the acquisition of the legal status of "premises of the mission".

[198] See MEG, pp. 146-148, paras. 8.42-8.44.

[199] *Ibid.*, p. 148, para. 8.44.

[200] *Ibid.*, pp. 146-147, para. 8.42. This list is not exhaustive.

[201] *Ibid.*, p. 146, para. 8.41.

[202] Diplomatic and Consular Premises Act, 15 May 1987, Section 1 (4); available at: http://www.legislation.gov.uk/ukpga/1987/46.

[203] See *ibid.*, the "Interpretation of Part I" appended to the Act.

[204] Foreign Missions Act (22 U.S.C. 4301-4316); available at: https://www.state.gov/documents/organization/17842.pdf, § 4306 *(d)* (1).

70 referred Equatorial Guinea"[205], unlike the States that it mentions elsewhere[206]. Quite clearly, such a circumstance is immaterial from the point of view of international law: the only important question is in fact whether the practice concerned, regardless of the form it takes, is capable of constituting an internationally wrongful act that is contrary to the Convention. As one author observes:

> "In States where no specific domestic legal framework controls the acquisition or disposal of mission premises, the definition of Article 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."[207]

166. The Vienna Convention, through its Optional Protocol, constitutes the only possible basis of jurisdiction in this case; it is also the only one invoked by Equatorial Guinea[208]. Since the Convention contains no provision under which it is possible to assess the lawfulness of France's conduct, as disputed by the Applicant, the Court cannot exercise jurisdiction over the dispute submitted by Equatorial Guinea.

167. Equatorial Guinea was reminded of France's constant practice in the clearest of terms, in reply to its assertion that "the mere designation of premises by any diplomatic mission is sufficient for those premises to be afforded the benefit of such protection as is provided for by Article 22 of the Vienna Convention of 18 April 1961"[209]. In the words of the Protocol Department of the Ministry of Foreign and European Affairs:

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> "In accordance with constant practice in France, an Embassy which envisages acquiring premises for its mission so notifies the Protocol Department beforehand and undertakes to assign the said premises for the performance of its missions or as the residence of its head of mission.
>
> Official recognition of the status of 'the premises of the mission' within the meaning of Article 1, paragraph (i), of the Vienna Convention on Diplomatic Relations of 18 April 1961 is determined on the date of completion of the assignment of the said premises to the services of the diplomatic mission, i.e., at the time that they are effectively moved into. The criterion of actual assignment must accordingly be satisfied.

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[205] MEG, p. 146, para. 8.41.

[206] In fact, as Equatorial Guinea itself notes, it is "legislation and/or guides and published guidelines" (*ibid.*, para. 8.42).

[207] E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations,* 4th ed., Oxford, Oxford University Press, 2016, p. 17. The author cites the even more explicit position adopted by J. Salmon, who considers that: "[c]ontrary to the attempt made with regard to the size of missions (Article 11), *the Vienna Convention contains no provisions on conflicts of classification.* While the mission is entitled to characterize what it regards as premises used for the purposes of the mission, that characterization is merely provisional and unilateral, and the receiving State, which may have the power to refuse the necessary authorizations, can contest it. The conflict resolution model provided for in Article 11 therefore seems to us to be equally apposite here. Agreement must be sought. In the absence of agreement, it seems to us that here too the receiving State should have the last word" (J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, p. 190, para. 286 (emphasis added). *[Translation by the Registry.]* See also Ph. Cahier, *Le droit diplomatique contemporain*, 2nd ed., Geneva, Droz, 1964, p. 198.

[208] See paras. 139-143 above.

[209] Note Verbale No. 249/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 12 Mar. 2012 (No. 16 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

> It is only as from that date, notified by Note Verbale, that the premises enjoy the benefit of appropriate protection as provided for by Article 22 of the Vienna Convention on Diplomatic Relations of 18 April 1961."[210]

168. It is striking that the section of the Applicant's Memorial devoted to the "violation of international law in respect of the building at 42 avenue Foch in Paris"[211], which focuses entirely on the "failure to respect the inviolability" of that building, provides no evidence in support of its conclusion that "France's refusal to recognize the diplomatic status of the building located at 42 avenue Foch in Paris is contrary to the provisions of the Vienna Convention on Diplomatic Relations and general international law"[212]. That silence is no doubt due to the difficulty of establishing such a fact under international law. As Chapter 1 of these preliminary objections recalled, in this instance the claim that the premises were used for diplomatic purposes at the material time is so implausible that it constitutes an abuse of rights and rules out the Court's jurisdiction *in limine litis*.

169. More fundamentally, that silence is explained above all by the fact that it is impossible for Equatorial Guinea to identify a norm within the Convention which is effective against France's
72 refusal to endorse its claims concerning the building at 42 avenue Foch[213] and, hence, to establish that there is a dispute between them about the interpretation or application of the Vienna Convention, which would indeed fall under the Court's jurisdiction *ratione materiae.* In this regard, it appears to be particularly significant that in the submissions in its Application, which are identical on this point in its Memorial, Equatorial Guinea mentions no international legal norm — *a fortiori* the Vienna Convention — to substantiate its claim that France has an obligation to "recognize the status of the building located at 42 avenue Foch in Paris . . . as the premises of its diplomatic mission"[214].

170. Furthermore, France's practice, like that of the other States mentioned above, is fully consistent with the principle of mutual consent and the pursuit of friendly relations which must characterize diplomatic relations. It would therefore be paradoxical, to say the least, for the receiving State to have no influence over the identification of the premises of a foreign diplomatic mission on its territory, when that status triggers the application of an inviolability régime that

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[210] Note Verbale No. 1341 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 28 Mar. 2012 (No. 18 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures). As the Protocol Department's reply to the questions of the investigating judges assigned to the "ill-gotten gains" case indicates,

> "[f]or reference, a building with diplomatic status must be declared as such to the Protocol Department, with a specific date of entry into the premises. Once it has been verified that the building is actually assigned to a diplomatic mission, the Protocol Department informs the French Government that it has been officially recognized in accordance with the relevant provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961 . . . The building at 42 avenue Foch has never been recognized by the Protocol Department as forming part of the diplomatic mission of the Republic of Equatorial Guinea" (Note Verbale No. 5009/PRO/PID, 11 Oct. 2011, Ann. 35 MEG).

[211] MEG, pp. 129-159.

[212] *Ibid.*, p. 159, para. 8.71.

[213] Equatorial Guinea only puts forward an *"a contrario"* interpretation of Article 12 of the Convention, to conclude "that the opening of offices of a mission in the same locality, or the transfer of premises within the same locality, is not subject to the consent of the receiving State" (MEG, p. 144, para. 8.36). The very wording of that provision unquestionably precludes such a radical conclusion: Article 12 merely establishes a formal and rigorous procedure — including the need to obtain "*the prior express consent* of the receiving State" (emphasis added) — for the particular circumstances to which it refers; it cannot reasonably be inferred from it that the Convention also rules out any form of intervention by the receiving State in the designation of the premises of the mission of the sending State.

[214] AEG, p. 13, para. 41 *(c)* (ii), and MEG, p. 182, *(c)* (ii).

derogates from ordinary law, and thus places an indeterminate limitation on its sovereign rights. Yet that is what Equatorial Guinea contended in its correspondence with the Protocol Department of the French Ministry of Foreign Affairs:

> "[T]he régime for the protection of diplomatic premises is declaratory in nature, such that the mere designation of premises by any diplomatic mission is sufficient for those premises to be afforded the benefit of such protection as is provided for by Article 22 of the Vienna Convention of 18 April 1961"[215].

171. If, as Equatorial Guinea thus maintains, the receiving State's role were confined to endorsing the designation of premises by the sending State, the risks of abuse would inevitably
73 increase. France already indicated in the hearings on the request for provisional measures that the consequences of such a scenario could reach the point of being "absurd"[216]. Equally worryingly, a sending State could choose to declare that a property formed part of the premises of its mission — even if it did not own it — in order to protect that property from the consequences of ongoing legal proceedings in the receiving State, and have recourse to the International Court of Justice if the latter refused to endorse that designation and allow an abuse of that kind. As the present proceedings demonstrate, such a scenario would appear to be entirely possible in practice.

172. It is precisely to counter the effects of that kind of abusive practice[217] that France has consistently refused to lend either credence or substance to Equatorial Guinea's claim that the building at 42 avenue Foch should be regarded as forming part of the premises of its mission. At this stage of examining the Court's jurisdiction there is no need to return in detail to those claims, which more often than not are driven by the developments in the judicial proceedings against Mr. Teodoro Nguema Obiang Mangue in France[218], in which a manifest abuse of the right to diplomatic immunities is evident[219]. Moreover, it is worth recalling that the French authorities have consistently refused to regard the building at 42 avenue Foch as forming part of the premises of Equatorial Guinea's diplomatic mission in France[220].

173. With a certain candour Equatorial Guinea states that, regarding "the legal status of the building located at 42 avenue Foch in Paris", it "has been consistent since the start of the said 'case'"[221]. The credibility of this version of events could be assessed on the basis of the present proceedings alone[222]: having maintained in its Application instituting proceedings that the building had been "used by the diplomatic mission of Equatorial Guinea"[223] since 15 September 2011, the Applicant stated — finally? — in reply to the question put by Judge Donoghue at the close of the

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[215] Note Verbale No. 249/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 12 Mar. 2012 (No. 16 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures). This Note, like all the correspondence sent from the Embassy of Equatorial Guinea to the Ministry between Sep. 2011 and Aug. 2012, gives the Embassy's address as 29 bd de Courcelles, Paris (8th arr.).

[216] CR 2016/17, p. 12, para. 11 (Pellet).

[217] See paras. 76-88 above.

[218] See paras. 30-41 above for the timeline of the relevant events, and the presentation of those developments made by the Agent of the French Republic during the hearings on the request for the indication of provisional measures (CR 2016/15, 18 Oct. 2016, pp. 9-12, paras. 11-28, in particular paras. 14-24).

[219] See paras. 76-88 above.

[220] See fn. 29 above.

[221] MEG, p. 57, para. 4.38.

[222] See paras. 27-29 above.

[223] AEG, p. 6, para. 20.

hearings on provisional measures that "the building at 42 avenue Foch in Paris acquired diplomatic
74 status as of 4 October 2011"[224], a position confirmed, albeit only imprecisely, in its Memorial of 3 January 2017:

> "As Equatorial Guinea explained in its reply to the question put by Judge Donoghue during the hearings on the request for provisional measures, the building at 42 avenue Foch acquired diplomatic status as of 4 October 2011. The diplomatic mission of Equatorial Guinea in France transferred all its offices there in July 2012 [*sic*], after allowing due time to prepare for that move."[225]

174. Further reading of the Memorial does not correct that oversight, since the precise date of the move is never specified[226]. According to the Note Verbale to the Protocol Department of the French Ministry of Foreign Affairs, the offices of the Embassy of Equatorial Guinea were located as from 27 July 2012 — namely a few days after the attachment of the building — at 42 avenue Foch, the address which the Embassy "is *henceforth* using for the performance of the functions of its diplomatic mission in France"[227].

175. France has consistently refused to confirm the successive versions of events relating to the building at 42 avenue Foch, either before or after 27 July 2012, for reasons which it has already fully explained to the Court[228]. In this regard, as the Court noted in its Order of 7 December 2016,

> "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
> **75** date the Application was filed, a dispute existed between the Parties as to the legal status of the building concerned."[229]

176. However, that dispute does not concern the interpretation or application of the Vienna Convention on Diplomatic Relations, the relevant provisions of which deal with the legal régime for premises of a diplomatic mission, but leave outside the conventional scope the prior question of how given buildings are recognized as enjoying that legal status[230]. In this instance, Equatorial Guinea has not fulfilled its obligation to establish the "legal right in respect of the subject-matter of

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[224] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, p. 5. See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 18, para. 77.

[225] MEG, p. 25, para. 2.30.

[226] See in particular *ibid.*, p. 58, para. 4.38, and p. 149, para. 8.48.

[227] Note Verbale No. 501/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 27 July 2012 (which gives the Embassy's address as 29 bd de Courcelles) (No. 22 of the additional documents communicated by France on 14 Oct. 2016 in connection with Equatorial Guinea's request for provisional measures).

[228] See para. 172 above; see also the comments of the French Republic on the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 31 Oct. 2016, paras. 17-32.

[229] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 17, para. 66.

[230] See paras. 152-156 above.

that which it claims"[231]. Consequently, the Court cannot exercise jurisdiction over the dispute between Equatorial Guinea and France on the basis of the Vienna Convention on Diplomatic Relations of 18 April 1961.

III. The limits of the Court's jurisdiction on the basis of the Vienna Convention on Diplomatic Relations

177. Even assuming, *ex abundanti cautela*, that the Court dismissed France's preliminary objection relating to the Vienna Convention on Diplomatic Relations, it would only be able to entertain, on that basis, those aspects of the dispute based on precisely alleged violations of the Convention. The only reference to that instrument in Equatorial Guinea's submissions appears in the section concerning the building located at 42 avenue Foch in Paris. There, Equatorial Guinea requests the Court:

> "(i) to adjudge and declare that, *by attaching the building located at 42 avenue Foch in Paris*, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the *Vienna Convention on Diplomatic Relations* and the United Nations Convention, as well as general international law"[232].

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178. According to the wording of the relevant part of the submissions, the only point that the Court is called upon to decide, on the basis of the Vienna Convention, is whether the attachment of the building on 19 July 2012 constituted a breach of the international obligations owed by France to Equatorial Guinea under that treaty. This interpretation is further confirmed by reading the "legal bases of . . . [the] Application", where Equatorial Guinea lists the alleged breaches of France's international obligations: the legal proceedings initiated against Mr. Teodoro Nguema Obiang Mangue[233], the attachment of the building at 42 avenue Foch[234] and, finally, the attachment of property belonging to the Equatorial Guinean State[235]. However, the Vienna Convention is only mentioned in connection with the second of the alleged breaches[236].

179. During the provisional measures proceedings, however, Equatorial Guinea seemed to want to extend the scope of its claims relating to the building at 42 avenue Foch, since it asked the Court to indicate

> "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, and that those premises, *together with their furnishings and*

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[231] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966,* p. 39, para. 64.

[232] AEG, p. 13, para. 41 *(c)* (i) and MEG, p. 182, *(c)* (i) (emphasis added). As has been pointed out, the second submission relating to the building, which seeks to have the Court order France to recognize its status as the premises of Equatorial Guinea's diplomatic mission, makes no reference to the Vienna Convention (see para. 169 above).

[233] AEG, p. 11, para. 37.

[234] *Ibid.*, para. 38.

[235] *Ibid.*, para. 39.

[236] "[B]y the fact that its judicial authorities have seized a building used for the purposes of the diplomatic mission of Equatorial Guinea in France, and *by failing to recognize the building as the premises of the diplomatic mission*, the French Republic has breached its obligations owed to Equatorial Guinea under the Vienna Convention on Diplomatic Relations of 18 April 1961, in particular Article 22 thereof" (*ibid.*, para. 38, emphasis added).

> *other property thereon, or previously thereon, are protected from any intrusion or damage, any search, requisition*, attachment or any other measure of constraint"[237].

77 180. Despite returning only very briefly to that point during the hearings on the request for the indication of provisional measures[238], Equatorial Guinea maintained that submission at the close of the hearings[239]. As one of France's counsel stated,

> "[i]n the view of the French Republic, the request relating to the furnishings and property that were in the building prior to its attachment is unrelated to the subject-matter of the dispute. In paragraph *(c)* of the submissions in the Application, the Applicant requests only the protection of the building located at 42 avenue Foch and the premises of its diplomatic mission in Paris. It did not at any point request the protection of furniture or other property — in particular the furniture or other property present before 27 July 2012, the date on which the Applicant officially declared that it was transferring its diplomatic premises to 42 avenue Foch."[240]

181. That observation, made during the examination of the request for provisional measures, applies *a fortiori* in considering the Court's jurisdiction. If its jurisdiction could be established on the basis of the Optional Protocol to the Vienna Convention, it would be strictly limited to an examination of the lawfulness of the attachment of the building at 42 avenue Foch — the only claim that appears in the submissions in the Application and Memorial[241] — to the exclusion of any question relating to the movable property present in the building before its attachment on 19 July 2012.

182. The same applies to Equatorial Guinea's other claims, which have no connection, not even a superficial one, to the Vienna Convention on Diplomatic Relations. This is true of the alleged failure to respect the immunities which Equatorial Guinea's property is said to enjoy "under general international law"[242]. The same conclusion must be drawn regarding the immunity of Mr. Teodoro Nguema Obiang Mangue. Equatorial Guinea itself confirmed during the hearings on the request for provisional measures that it was not seeking to extend the enjoyment of diplomatic
78 immunities to Mr. Nguema Obiang Mangue[243], a fact which the Court explicitly noted in its Order:

> "However, at the hearings, Equatorial Guinea relied only upon Article 35 in respect of its claim regarding the immunity of Mr. Teodoro Nguema Obiang Mangue. The Court will therefore proceed on the basis that the Optional Protocol to the Vienna Convention is invoked by Equatorial Guinea only in relation to the claim regarding the alleged inviolability of the premises at 42 avenue Foch."[244]

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[237] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 4, para. 9 (emphasis added).

[238] See CR 2016/14, 17 Oct. 2016, p. 30, para. 3 (Kamto). See para. 53 above.

[239] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 5, para. 17.

[240] CR 2016/15, 18 Oct. 2016, pp. 40-41, para. 34 (Ascensio). See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 18, para. 76.

[241] See paras. 177-178 above.

[242] AEG, p. 11, para. 39.

[243] CR 2016/16, 19 Oct. 2016, p. 10, para. 10 (Wood).

[244] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, p. 8, para. 32.

183. It is within the strict limits specified above that the Court could examine Equatorial Guinea's claims, if it decided that the Optional Protocol to the Vienna Convention on Diplomatic Relations gave it jurisdiction to consider the Application on the merits, *quod non.*

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184. In light of the foregoing, it would appear:

— that there is no dispute, within the meaning of Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations, between Equatorial Guinea and France concerning the interpretation or application of the inviolability régime for diplomatic premises set out in Article 22 of the Convention;

— that the real dispute between the Parties concerns a question which arises before Article 22 of the Convention can be invoked, regarding recognition of the building located at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission in France;

— that the provisions of the Vienna Convention on Diplomatic Relations do not cover that question;

— that, consequently, the Court has no jurisdiction to entertain the claims made by Equatorial Guinea on the basis of that Convention.

79 185. Very much in the alternative, and assuming, *quod non*, that the Court's jurisdiction could be established on the basis of the Optional Protocol to the Vienna Convention, such jurisdiction could only extend *ratione materiae* to the one question of whether the attachment of the building located at 42 avenue Foch in Paris is lawful under the Convention.

81 SUBMISSIONS

186. For the reasons set out in these preliminary objections, and for any such others as might be put forward in the subsequent proceedings or raised *proprio motu*, the French Republic respectfully requests the International Court of Justice to decide that it lacks jurisdiction to rule on the Application filed by the Republic of Equatorial Guinea on 13 June 2016.

Paris, 30 March 2017

(Signed) Mr. François ALABRUNE,

Agent of the French Republic.

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LIST OF ANNEXES