Traduction
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CR 2016/15

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Mardi 18 octobre 2016 à 10 heures

Tuesday 18 October 2016 at 10 a.m.

8 The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today to hear the first round of oral observations of France on the request for the indication of provisional measures submitted by Equatorial Guinea.

I invite Mr. François Alabrune, Agent de la France, to the Bar. You have the floor.

Mr. ALABRUNE:

1. Mr. President, Members of the Court, it is a great honour for me to appear before the Court today in my capacity as Agent for the French Republic. I take this opportunity to reaffirm the importance that France attaches to respect for international law and the role played by the principal judicial organ of the United Nations in ensuring the peaceful settlement of disputes between States.

2. Allow me also to recall that France maintains excellent relations with the Republic of Equatorial Guinea. The dispute which Equatorial Guinea has referred to you in no way calls into question the quality of our bilateral relations and the strong ties of friendship that bind our countries. I take this opportunity to greet the representatives of Equatorial Guinea who are here today and to extend a particularly warm greeting to my counterpart, His Excellency Mr. Carmelo Nvono Nca.

3. I would add that, yesterday, Equatorial Guinea spoke of its willingness and the efforts it has made to resolve the dispute through negotiation and conciliation, as well as the refusal of the French authorities to do so. Equatorial Guinea appeared to be surprised at the French authorities' inability to put an end to the criminal proceedings. It is true that under the principle of the independence of the judiciary, as enshrined in Article 64 of the French Constitution, the Government cannot instruct French judges on how to perform their duties. There is nothing unusual about this, Mr. President; it is a reflection of the principle of separation of powers, which is common to States governed by the rule of law.

4. Mr. President, Members of the Court, the time has not yet come to address the merits of the case. However, it may be useful for you to have a brief presentation of the facts that are at the origin of this dispute, and of the subsequent stages likely to occur in the French criminal proceedings.

9 5. These proceedings have already been particularly long drawn out. Whereas in cases involving economic and financial crimes, the average time between a complaint and the trial-court decision is six years, in the present case more than nine years elapsed between the filing of the first complaints in 2007 and the end of the investigation, which precedes the trial phase.

6. The investigation that opened in 2007 revealed that France was not the first country whose judicial authorities had taken an interest in the activities of Mr. Nguema Obiang Mangue.

7. The French investigators found that, starting in 2006, Mr. Nguema Obiang Mangue had been the subject of proceedings in South Africa. He had filed an affidavit with the High Court of South Africa, in which he admitted that cabinet ministers in Equatorial Guinea formed private companies which acted in consortium with foreign companies when obtaining government contracts. He admitted that, in these situations, a sizeable part of the contract price went to cabinet ministers[1].

8. In 2007, the French authorities were also informed of the existence of an investigation opened against Mr. Nguema Obiang Mangue in the United States in connection with the assets that he had accumulated in that country[2].

9. Subsequent to the investigation conducted by the United States judicial authorities, a settlement agreement dated 9 October 2014 was signed between the United States Department of Justice and Mr. Nguema Obiang Mangue. In signing the agreement, he relinquished a substantial portion of his United States assets — worth some US$30 million[3].

10. Under the rules of criminal procedure in France, there is no provision for stopping a criminal investigation if the person being investigated consents to sell some of his or her assets.

11. It should be recalled that the criminal proceedings initiated in France, starting in 2007, concerned private activities carried out by Mr. Nguema Obiang Mangue in French territory — activities suspected of being related to money laundering offences.

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[1]See Request for the indication of provisional measures, Ann. 1, Order for partial dismissal and partial referral to the *Tribunal correctionnel* (5 September 2016), p. 22.

[2]*Ibid*., p. 22.

[3]*Ibid*., pp. 22-23.

10 12. These investigations confirmed that Mr. Nguema Obiang Mangue had, in particular, acquired in France objects of exceptional value, such as jewellery, works of art and luxury vehicles[4].

13. The invoices for these luxury goods were all addressed to Mr. Nguema Obiang Mangue himself, at 42 avenue Foch. It was soon established that the building did indeed belong to him. Moreover, the President of the Republic of Equatorial Guinea, Mr. Nguema Obiang Mangue's father, acknowledged as much in a letter sent to the President of the French Republic on 14 February 2012[5].

14. However, on 4 October 2011, the French Ministry of Foreign Affairs received a Note Verbale from the Embassy of Equatorial Guinea stating that it "ha[d] for a number of years owned a building located at 42 avenue Foch, Paris (16th arr.), which it use[d] for the performance of the functions of its diplomatic mission"[6].

15. It was surprising, to say the least, that the Protocol Department of the Ministry of Foreign Affairs, which is the main point of daily contact for diplomatic missions based in France, had no previous knowledge of these purported premises of the Equatorial Guinean diplomatic mission. Not a single piece of correspondence relating to the Embassy was ever sent from that address. Nor did the Embassy of Equatorial Guinea request any particular measures — concerning protection, in particular — in relation to these premises. No requests for tax exemption were ever made, as was the case for the only Embassy premises known to the French authorities, and which are located at another address: 29 boulevard de Courcelles[7].

16. The Ministry of Foreign Affairs consequently gave notice to the Embassy, on 11 October 2011, that it did not consider the building to form part of the premises of the diplomatic mission[8].

17. A few days later, on 17 October 2011, the Embassy sent the Ministry of Foreign Affairs another Note Verbale, which no longer presented the townhouse as forming part of the diplomatic

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[4] *Ibid*., pp. 9-10.

[5] See documents produced by the French Republic on 14 October 2016, Ann. 5.

[6] *Ibid*., Ann. 1.

[7] *Ibid*., Ann. 29.

[8] *Ibid*., Ann. 2.

11 mission. This time, the building at 42 avenue Foch was presented as the residence of the Permanent Delegate to UNESCO, Ms Bindang Obiang[9].

18. This was also surprising, because less than a month earlier, on 11 September 2011, Ms Bindang Obiang had sent notification of her appointment as a delegate to UNESCO, stating that she was taking up her duties as such, but declaring her residence at another address, located at 46 rue des Belles Feuilles in the 16th arrondissement of Paris, and not at 42 avenue Foch.

19. This explains why, by a Note Verbale of 31 October, the Ministry of Foreign Affairs contested the Embassy's new description of the status of the building at 42 avenue Foch[10].

20. It should also be noted that UNESCO — despite being directly concerned — was not informed of the sudden and purported change in residence of the Permanent Delegate of Equatorial Guinea until four months later, on 14 February 2012[11].

21. And two days after that, on 16 February 2012, Equatorial Guinea's Ministry of Foreign Affairs sought the French authorities' approval of Ms Bindang Obiang's appointment as Ambassador of the Republic of Equatorial Guinea in France, and she was again presented as residing at 46 rue des Belles Feuilles in the 16th arrondissement of Paris, not at 42 avenue Foch[12].

22. On 19 July 2012, an order of attachment under the Code of Criminal Procedure was issued by the investigating judges in respect of the building located at 42 avenue Foch[13]. Such an attachment has only a provisional effect; it was motivated by the fact that the investigations had revealed that the townhouse at 42 avenue Foch had, in all likelihood, been wholly or partly paid for out of the proceeds of the offences under judicial investigation.

12 23. A week later, Equatorial Guinea sent the Ministry a Note dated 27 July 2012, stating that, as from that same date, the Embassy offices would henceforth be based at 42 avenue Foch "for the performance of the functions of its diplomatic mission". The Ministry of Foreign Affairs responded by a Note of 6 August 2012 that it could not officially recognize that building as the seat

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[9] *Ibid*., Ann. 3.

[10] *Ibid*., Ann. 4.

[11] *Ibid*., Ann. 8.

[12] *Ibid*., Ann. 11.

[13] *Ibid*., Ann. 47. See also Request for the indication of provisional measures, Ann. 1, Order of partial dismissal and partial referral of 5 September 2016, p. 20.

of the Embassy, and recalled that the building had been attached under the Code of Criminal Procedure[14].

24. In the meantime, Mr. Nguema Obiang Mangue, who was Minister for Agriculture and Forestry at the time, had received a summons from the investigating judges to attend a first appearance to be held on 1 March 2012, informing him that they were considering placing him under judicial examination. Mr. Nguema Obiang Mangue did not appear.

25. Summoned a second time to appear on 11 July 2012, Mr. Nguema Obiang Mangue, again, did not appear. Over a year later, on 14 November 2013, the French judicial authorities sent the judicial authorities of Equatorial Guinea a request for international mutual assistance in criminal matters, seeking his judicial examination.

26. This request for mutual legal assistance was accepted on 4 March 2014 and then executed by the Equatorial Guinean authorities, which apparently did not find that the request conflicted with the principle of sovereign equality between States.

27. On the contrary, it was judges from the Supreme Court of Malabo, acting as investigating judges for the purpose of executing the request for mutual legal assistance with the French authorities, who notified Mr. Nguema Obiang Mangue, on 18 March 2014, of his placement under judicial examination.

28. It was thus the entire body of evidence accumulated over the course of the proceedings — of which I have given a particularly brief summary — which led the French investigating judges, on 5 September 2016, to adopt an order referring Mr. Nguema Obiang Mangue to the *Tribunal correctionnel.*

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13 29. Mr. President, Members of the Court, I shall now outline the current status of the criminal proceedings in France and the possible developments in those proceedings in the future. Such clarification would seem particularly useful in view of counsel for Equatorial Guinea's insistence yesterday that there was a real and imminent risk of Mr. Nguema Obiang Mangue being

[14]Documents produced by the French Republic on 14 October 2016, Ann. 24.

definitively convicted. However, in actual fact, if Mr. Nguema Obiang Mangue were to exercise the rights of recourse available to him, it would be a number of years before any final judgment could be delivered.

30. I would like to return to the order handed down by the investigating judges on 5 September 2016, which calls for a number of comments.

31. The first thing to note is that this order includes only the offence of money laundering committed on French territory. The order therefore confirms that the French criminal proceedings are the result of France exercising its sovereignty, and do not constitute an attack on the sovereignty of Equatorial Guinea.

32. Second, the adoption of this order in no way constitutes a speeding up of the proceedings, nor does it signal a willingness to aggravate the dispute, contrary to what was suggested by counsel for Equatorial Guinea yesterday. I would recall that eight months, a particularly long time, elapsed between the order of 11 August 2015, whereby the investigating judge transmitted the file to the Prosecutor's Office, and the Prosecutor's final submissions of 23 May 2016 seeking the referral of Mr. Nguema Obiang Mangue to the *Tribunal correctionnel*. It then took a further three and a half months following those submissions for the investigating judges in charge of the case to hand down their order, which is a perfectly usual amount of time. In total, there is a year between the end of the investigation and the decision to refer Mr. Nguema Obiang Mangue to the *Tribunal correctionnel*.

33. Finally, it should be noted that, far from wishing to precipitate the opening of the trial of Mr. Nguema Obiang Mangue before the *Tribunal correctionnel*, the Prosecutor's Office, which guarantees respect for the rights of the defence, has in fact taken action which has resulted in delaying the proceedings. Having noticed an omission in the order of 5 September, namely that it failed to cite the relevant criminal law and procedural texts, the Prosecutor's Office initiated proceedings aimed at correcting the omission.

14 34. It requested a hearing, scheduled for 24 October 2016. Contrary to what Equatorial Guinea argued in its Request for the indication of provisional measures, this hearing will not mark the start of Mr. Nguema Obiang Mangue's trial. Accordingly, it cannot result in the

pronouncement of a measure depriving Mr. Nguema Obiang Mangue of his liberty or in the confiscation of the townhouse located at 42 avenue Foch.

35. The purely procedural character of the hearing on 24 October is attested to by a document from the Financial Prosecutor's Office, dated 3 October 2016, which has been communicated to the Court[15]. The Court has also received copies of e-mail exchanges between the Financial Prosecutor and the lawyers responsible for Mr. Nguema Obiang Mangue's defence. These exchanges show that his lawyers were informed verbally of the subject of the hearing on 21 September, and that on 22 September they themselves confirmed that they had understood what the subject-matter was, before it was confirmed to them in writing in a message dated 26 September[16], several days before Equatorial Guinea submitted its request for the indication of provisional measures to the Court.

36. At the hearing on 24 October, the judges will have to note the irregularity of the referral order and send the file back to the Prosecutor's Office, which in turn must refer it to the investigating judges, with a view to the adoption of a new order — this time without procedural defect — referring Mr. Nguema Obiang Mangue to the *Tribunal correctionnel*.

37. And it is only once this new order has been issued that the first hearings to examine the merits of the case can be fixed, in consultation with counsel for Mr. Nguema Obiang Mangue, as Mr. Tchikaya recalled yesterday. In all probability, the first hearings on the merits will not be held before next year.

38. Moreover, it is important to make it clear that Mr. Nguema Obiang Mangue will not be obliged, in principle, to attend the hearings in person. Indeed, he can choose to be represented by his lawyers, by sending a letter to the *Tribunal* to that effect.

39. It is true that in the hearings on the merits, the *Tribunal correctionnel* will have the
15 power to issue a warrant requiring the individual in question to appear in person. It is for the *Tribunal* to decide to exercise that power. However, it is highly unlikely to do so in the case of Mr. Nguema Obiang Mangue, for three reasons: first, he may be tried *in abstentia*; second, he may be legally represented at the hearings by his lawyers; and, finally, in order for such a warrant

[15]Documents produced by the French Republic on 14 October 2016, Ann. 50.

[16]*Ibid*., Ann. 51.

to operate effectively, Mr. Nguema Obiang Mangue would have to be arrested and handed over to the judicial authorities for the duration of the hearings, but those hearings should not last more than a few days.

40. During those hearings, the *Tribunal* may, of its own initiative or at the request of a party, request further investigation or an expert opinion, if it deems such action to be justified. The trial would then be postponed to a later date.

41. The first judgment of the *Tribunal* will be rendered at the end of the hearings or, more likely, at a subsequent date announced by the President of the *Tribunal*. This is referred to as a reserved judgment.

42. Thus, in any event, any first instance conviction of Mr. Nguema Obiang Mangue could not occur before the end of the first quarter of 2017.

43. The question may arise as to whether the *Tribunal correctionnel* could issue an arrest warrant against Mr. Nguema Obiang Mangue alongside any potential conviction, as suggested by Equatorial Guinea yesterday. Pursuant to Article 465 of the Code of Criminal Procedure, such a warrant could be issued only if the *Tribunal* sentenced Mr. Nguema Obiang Mangue to at least one year of imprisonment, not suspended, that is to say, a custodial sentence. However, a suspended sentence is the preferred solution of the French courts for defendants with no criminal record. Since Mr. Nguema Obiang Mangue has never been convicted of a crime in France, if he were to be found guilty and given a custodial sentence, that sentence should be suspended. For that reason, an arrest warrant could not be issued against him.

44. Should he be convicted at first instance, Mr. Nguema Obiang Mangue would still be able to appeal by filing a simple statement in the Registry of the *Tribunal* which had handed down the disputed decision, within ten days of that decision.

16 45. Appeal is one of the forms of review which has the broadest effects. It is a corrective remedy which challenges the first instance *res judicata* with a view to obtaining a new ruling on fact and law. This is referred to as the devolutive effect of the appeal.

46. Most significantly, an appeal has suspensive effect. This is automatic in criminal proceedings. It means that the disputed decision cannot be enforced, not only during the time-limit for appeal, but also throughout the duration of the appeal proceedings.

47. It is important to point out that, in France, it takes an average of 12 months to fix an appeal hearing, from the date of the decision of the court of first instance. Thus, if the *Tribunal correctionnel* were to render a judgment during 2017, in all likelihood, the hearings before the *Cour d'appel* would not take place until 2018. During the time-limit for appeal and the appeal proceedings, the enforcement of the first instance judgment would therefore be suspended.

48. The decision made on appeal could also be contested by Mr. Nguema Obiang Mangue by means of an appeal lodged with the *Chambre criminelle* of the *Cour de cassation*. In that event, the enforcement of the judgment rendered by the *Cour d'appel* would also be put on hold, the suspensive effect applying in principle to the entire criminal procedure.

49. For an appeal in cassation, the case would be referred to the highest French court. If the *Cour de cassation* found there to be a violation of law, it would "quash" the judgment of the *Cour d'appel*, which would thus be annulled in whole or in part.

50. However, the *Cour de cassation* would not rule on the merits of the case. If the judgment of the *Cour d'appel* was annulled, the *Cour de cassation* would, in principle, refer the case to a *Cour d'appel* other than the one originally seised.

51. Criminal trials in France are thus lengthy procedures, conducted with respect for the rights of the defence. Without prejudice to the filing of a potential application for a priority preliminary ruling on an issue of constitutionality, which could further delay the proceedings, a final decision cannot therefore be expected until 2019.

52. Consequently, any sentence depriving Mr. Nguema Obiang Mangue of his liberty or
17 confiscating the townhouse could not be enforced for several years. And I would repeat that a custodial sentence is highly improbable given that if Mr. Nguema Obiang Mangue were to be found guilty, it would be his first conviction.

53. Mr. President, Members of the Court, France is therefore contesting the validity of the request for the indication of provisional measures submitted to the Court. Indeed, it is of the view that the said request lacks any basis.

54. First, the request in no way demonstrates that the Court has prima facie jurisdiction to entertain Equatorial Guinea's request. This is what Professor Alain Pellet will establish.

55. Nor does the request prove that the proceedings to take place before the French courts would cause irreparable prejudice to the alleged rights. And it is no more convincing with regard to the urgency of the situation. This is what Professor Hervé Ascensio will establish.

56. In conclusion, Mr. President, Members of the Court, two points seem to me to be of particular importance for the decision you will have to take on this request for provisional measures:

— first, supposing that Mr. Nguema Obiang Mangue enjoys personal immunity on account of his functions — *quod non* — and that he is exposed, before your Judgment on the merits, to the effects of a measure affecting his liberty — which is very unlikely — there is no basis for prima facie jurisdiction enabling the Court to take cognizance of Mr. Nguema Obiang Mangue's status, which is solely a matter of customary international law;

— furthermore, with regard to the building located at 42 avenue Foch, supposing that the Court has prima facie jurisdiction to consider this point — which again is not the case — there is no real and imminent risk of irreparable prejudice, and thus no urgency justifying the indication of provisional measures.

57. Mr. President, Members of the Court, thank you for your attention; I would ask you now to give the floor to Professor Pellet so that he may continue our presentation. Thank you.

18 The VICE-PRESIDENT, Acting President: I would like to thank Mr. François Alabrune, Agent of France. I give the floor to Professor Alain Pellet. Professor Pellet, you have the floor.

The VICE-PRESIDENT, Acting President: I would like to thank Mr. François Alabrune, Agent of France. I give the floor to Professor Alain Pellet. Professor, you have the floor.

Mr. PELLET: Thank you, Mr. President.

THE COURT'S LACK OF PRIMA FACIE JURISDICTION

1. Mr. President, Members of the Court, yesterday our opponents were noticeably guarded when it came to the Court's jurisdiction: citing the Court's Order of 3 March 2014 in the case between Timor-Leste and Australia, Sir Michael simply recalled that, I quote, "[t]he Court may

indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded"[17]. Having cited this excerpt, Sir Michael merely referred to Equatorial Guinea's Application and its Request for the indication of provisional measures[18].

2. In its written pleadings, the applicant State seeks merely to found the jurisdiction of the Court on Article 35 of the Convention on Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000, a treaty commonly referred to as the "Palermo Convention", and on the Optional Protocol to the Vienna Convention on Diplomatic Relations of 18 April 1961[19]. Yet neither of these instruments can be regarded as providing a credible basis for the exercise of the Court's jurisdiction.

3. Of course, a cursory perusal of those texts might lead one to think the opposite, at least in respect of part of Equatorial Guinea's Application. But, first, the Court cannot take a global approach and it is evident that the applicant State's claims with regard to the immunities to which Mr. Teodoro Nguema Obiang Mangue might be entitled are not covered by the provisions of those
19 instruments (I.). And, second, regarding other aspects of the Application, or rather *the other aspect*, since it concerns solely the status of the so-called diplomatic mission of Equatorial Guinea in Paris, the mere mention of a jurisdiction clause does not suffice to establish the Court's jurisdiction, even if it is prima facie: in the circumstances of this case, these requests are not only improbable, they are very clearly frivolous (II.).

I. The evident lack of a basis of jurisdiction for Equatorial Guinea's requests with regard to the immunities of Mr. Obiang

4. Mr. President, I will start with the textual facts — and since these are obvious facts, it is possible, indeed necessary, to be brief. And I will be.

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[17] *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. 151, para. 18.

[18] CR 2016/14, p. 23, paras. 9-12 (Wood).

[19] Application of Equatorial Guinea (13 June 2016), paras. 4-10, and Request for the indication of provisional measures, para. 5.

5. Allow me to make a preliminary remark nonetheless: the subject-matter of the dispute that Equatorial Guinea seeks to bring before the Court was described yesterday morning by Sir Michael as follows:

> "The case concerns the application, as between Equatorial Guinea and France, of fundamental principles and rules of international law, among them the sovereign equality of States, non-intervention in the internal affairs of States, the immunity of certain holders of high-ranking office in the State and the status of the premises of diplomatic missions and of State property. All of these principles and rules are essential for the conduct of peaceful relations among States."[20]

6. Members of the Court, your jurisdiction cannot depend on the importance of the principles at issue. The mere fact that rights and obligations *erga omnes*, or even peremptory norms of general international law, are "at issue in a dispute would not give the Court jurisdiction to entertain that dispute". "Under the Court's Statute that jurisdiction is always based on the consent of the parties. . . . [T]he Court has jurisdiction in respect of States only to the extent that they have consented thereto"[21].

7. While Equatorial Guinea seeks to base the Court's jurisdiction on the two instruments I have just cited (the Protocol to the Convention on Diplomatic Relations of 1961 and the Palermo Convention), it also relies on the 2004 United Nations Convention on the Jurisdictional Immunities

20 of States[22], which it has neither signed nor ratified, and which, moreover, has not yet entered into force. Besides, it is of no matter whether (or not) the latter instrument reflects "[t]he rules of customary international law governing States' immunities in relation to the attachment of their property"[23], as Equatorial Guinea asserts in its Application: there is no basis for the Court, in these proceedings, to apply the general international law on which Equatorial Guinea so abundantly relies.

8. It explicitly acknowledges this, moreover. Having cited the principle of sovereign equality[24], which appears to be one of the mainstays of its complaints, and having cited the two

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[20]CR 2016/14, pp. 21-22, para. 5 (Wood).

[21]*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, paras. 64-65, citing the Order of 10 July 2002, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 241, para. 57.

[22]Application of Equatorial Guinea, para. 39 or CR 2016/4, pp. 24-25, para. 15 (Wood).

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

[24]Application of Equatorial Guinea, para. 35.

conventions I have just mentioned, Equatorial Guinea states, in paragraph 36 of its Application and in its oral arguments: "[a]lso applicable in the present dispute [is] . . . general international law"[25]. Indeed, it refers to it abundantly in its initial Application, in its Request for the indication of provisional measures and in its arguments yesterday, and it does so in particular in support of two of its claims[26].

9. First of all, Equatorial Guinea seeks to extend application of the jurisdictional immunity of diplomats to Mr. Obiang, on the pretext that in customary international law such immunity is enjoyed by "certain holders of high-ranking office in a State"[27]. Mr. President, I do not know about that — and I do not want to know. What I do know is that the Court does not have jurisdiction to pronounce on the matter: neither the 1961 Protocol nor the 2000 Convention has the slightest relevance in this regard — yet they are the sole bases of jurisdiction relied on in these proceedings. And I would like to stress this point, Mr. President, since it is particularly important — and I would even say decisive. The essence of Equatorial Guinea's case rests on this: the acts of which it accuses France are internationally unlawful because they violate the jurisdictional immunity of the Vice-President. But he is not a diplomat — he is . . . the Vice-President, a post that does not fall
21 within the scope of the 1961 Vienna Convention, and this consequently renders the Protocol inoperative, the first article of which states that only "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice". Nor is it any more relevant to pose the question of whether Mr. Obiang, as Vice-President, might enjoy the immunities of the "troika": those afforded to the Head of State, Head of Government and Minister for Foreign Affairs. He is none of these, and it seems extremely dubious to apply such an extension. But, in any event, the question is irrelevant: if it were to arise, it could only be considered in the light of customary international law — which Equatorial Guinea does indeed invoke in this regard. There is thus no basis of jurisdiction on which it can rely that would enable the Court to pronounce on this point (and indeed it claims none).

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[25] *Ibid.*, para. 36.

[26] See in particular Application of Equatorial Guinea, p. 11, paras. 37-39; Request for the indication of provisional measures, p. 3, para. 7; CR 2016/4, p. 19, para. 14 (Tchikaya); pp. 24-25, para. 15 (Wood); p. 26, para. 21 (Wood) or pp. 31-32, para. 9 (Kamto).

[27] See Application of Equatorial Guinea, paras. 13, 19 *in fine*, 25 or 41. *(b)* (i) (Submissions); see also Request for the indication of provisional measures, para. 7.

10. Secondly, the applicant State asks the Court to ensure respect for "the principles of the sovereign equality of States and non-interference in the internal affairs of another State"[28]; the alleged lack of respect for these principles is the subject of the first submission in Equatorial Guinea's Application[29] and is also mentioned in the Request for the indication of provisional measures[30]. This request meets with the same objection as the previous one: there is *no* jurisdiction clause on which Equatorial Guinea can rely that would enable the Court to pronounce on these claims.

11. It is true that our opponents attempt to tie this request to the Palermo Convention[31], Article 4 of which is entitled "Protection of sovereignty" and provides: "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."

12. This is a general guideline, however, which clarifies the *manner* in which the other provisions of the treaty should be implemented, but which does not impose on States any specific obligation, the violation of which the other parties to the Convention could invoke before this

22 Court. As the Court stated in respect of the first article of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, the object and purpose of that instrument "was not to regulate peaceful and friendly relations between the two States in a general sense. Consequently, Article I cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations"[32].

The same applies here: the object and purpose of the Palermo Convention is not to protect the sovereignty of the States parties in a general sense; nor is it to codify the prohibition of intervention in the internal affairs of other States. The reference to these principles in Article 4

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[28]Application of Equatorial Guinea, para. 35; see also Request for the indication of provisional measures, para. 13.

[29]*Ibid.*

[30]Request for the indication of provisional measures, para. 13.

[31]See CR 2016/14, pp. 21-22, para. 5 (Wood). See also Request for the indication of provisional measures, pp. 4-5, para. 13.

[32]*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28.

indicates the manner in which the other provisions must be applied; it can be used to interpret them, but in no way can it serve as an autonomous basis of the Court's jurisdiction[33].

13. But to interpret does not mean to neutralize or prevent the realization of the object and purpose of the Convention. To achieve its object and purpose, the Palermo Convention requires States parties to adopt the necessary legislation to criminalize and make punishable the transnational offences that it defines — money laundering in particular — when such offences are committed on their territory. But the Convention, in itself, cannot and does not constitute a jurisdictional basis for the exercise of criminal jurisdiction. What is more, the proceedings against Mr. Obiang were not initiated on the basis of that Convention. And I defy our opponents to cite *a single* provision that is applicable in this case.

14. It thus seems very clear that the Court has no jurisdiction to entertain the claims of Equatorial Guinea with regard to:

— the alleged violation of sovereignty or the equally alleged interference by France in its internal affairs;

— the violation of the 2004 Convention on the Jurisdictional Immunities of States, even if its provisions were deemed to reflect customary rules; or

23 — violations of the jurisdictional immunities claimed by Mr. Obiang, which are guaranteed neither by the 1961 Convention on Diplomatic Relations — he is not a diplomat — nor, even less so, by the United Nations Convention against Transnational Organized Crime.

15. In all these respects, Members of the Court, the only possible finding is that the Court lacks prima facie jurisdiction, which of course means that the corresponding provisional measures sought by Equatorial Guinea must be rejected. And that applies to the entire "immunities and criminal proceedings" chapter of the case (to use the title you have given it), and therefore the first of the requested provisional measures must be rejected.

16. This finding that the Court lacks prima facie jurisdiction to rule on Equatorial Guinea's requests with regard to the alleged immunities of Mr. Obiang "impacts", so to speak, on the fate of the requests in respect of the building at 42 avenue Foch. As my distinguished colleague and friend

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[33]See *ibid.*, p. 815, para. 31; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 137, paras. 273.

Maurice Kamto said, "the fate of the building located at 42 avenue Foch is inextricably linked to that of the Vice-President of Equatorial Guinea"[34]. And my equally very good friend — though not colleague — Sir Michael went one step further: "The request that the inviolability and immunity of the building at 42 avenue Foch be respected is . . . intimately linked to the rights at issue in this case regarding the building."[35] Indeed, as the Agent of France explained a few moments ago, there is no risk of the building being confiscated or sold until Mr. Obiang has been definitively convicted of money laundering. Since the second request depends on the first, in respect of which the Court very clearly lacks prima facie jurisdiction, it also lacks jurisdiction over the second, to which, moreover, there is no urgency, as Hervé Ascensio will demonstrate shortly.

II. Equatorial Guinea's request with regard to 42 avenue Foch is implausible and frivolous

17. Members of the Court, that you lack jurisdiction to entertain the "42 avenue Foch" chapter of the case that Equatorial Guinea saw fit to submit to you can be established more directly:

24 Equatorial Guinea's request in this regard is, per se, implausible and frivolous.

[Slide 2: Chronological record of an abuse of process]

18. Mr. President, I believe that a chronology of events, which I shall go through more quickly than that given by the Agent of France, will be more telling than a long speech:

— 2007, an investigation is opened into the handling of misappropriated public funds, money laundering, misuse of corporate assets, breach of trust and concealment; (ultimately, only the charge of money laundering was retained in the order for partial dismissal and partial referral to the *Tribunal correctionnel* of 5 September 2016);

— 3 December 2010: two judges are assigned to the investigation[36];

— in September 2011, Ms Bindang Obiang is appointed Permanent Delegate to UNESCO; she resides at 46 rue des Belles Feuilles in Paris — also a grand address and not too far from 42 avenue Foch, but . . . it is not 42 avenue Foch;

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[34]CR 2016/14, p. 35, para. 17 (Kamto).

[35]*Ibid.*, p. 25, para. 19 (Wood).

[36]Request for the indication of provisional measures, Ann. 1, Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 September 2016, p. 6.

— on 28 September and 3 October, 18 vehicles, including two Ferraris, two Bentleys, a Maserati, three Bugattis, a Porsche and a couple of Aston Martins or Mercedes belonging to Mr. Obiang are seized from the garden of 40-42 avenue Foch;

— in September, the building appears to have been hastily transferred to the Republic of Equatorial Guinea, following the initiation of proceedings against Mr. Teodoro Obiang[37]; however, it was not until 4 October that the Ministry of Foreign Affairs would be notified of this apparent change in the use of the building[38];

— **[slide showing sign]** again on 4 October, Embassy staff members go to 42 avenue Foch to put up "makeshift signs" somewhat pathetically indicating "République de Guinée équatoriale — locaux de l'ambassade" (Republic of Equatorial Guinea — Embassy premises)[39], wording apparently suggested by the legal experts that Equatorial Guinea must have consulted;

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— in a Note Verbale of 17 October 2011, the townhouse is no longer presented by the Embassy as being part of the diplomatic mission. The building at 42 avenue Foch is now described as the residence of Ms Bindang Obiang, Permanent Delegate to UNESCO[40];

— on 18 October 2011, there is a handover of duties between the Ambassador of Equatorial Guinea in France, recalled suddenly to Malabo, and Ms Mariola Bindang Obiang, who takes up the role on an interim basis — an ad interim position that France is unable to validate because it is not in accordance with Article 61 [*sic*] of the Vienna Convention on Diplomatic Relations; the handover does not take place at 42 avenue Foch, but at 29 boulevard de Courcelles[41], the usual address — as the Agent noted — of Equatorial Guinea in Paris;

— UNESCO, which was nonetheless directly concerned, would not be informed of the sudden and purported change in residence of Ms Bindang Obiang until 14 February 2012, the first day on

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[37]See *ibid.*, p. 20.

[38]See Application of Equatorial Guinea, Ann. 8, Note Verbale from the Embassy of Equatorial Guinea to the Ministry of Foreign and European Affairs of the French Republic.

[39]Request for the indication of provisional measures, Ann. 1, Order for partial dismissal and partial referral to the *Tribunal correctionnel*, 5 September 2016, p. 16.

[40]Documents produced by the French Republic on 14 October 2016, Ann. 3.

[41]See "Comment le président Obiang démine ses affaires à Paris . . .", "La Lettre du Continent" (20 October 2011) (available on the website of the Association France-Guinée équatoriale http ://www.france-guinee equatoriale.org/News/540.html).

which the searches ordered by the French judicial authorities were conducted at 42 avenue Foch[42];

— 14 February 2012: President Obiang states, in a letter addressed to President Sarkozy, that the building is indeed owned by his son[43];

— searches are conducted in the townhouse on avenue Foch on 14, 15 and 16 February 2012[44];

— on 15 February, by Note Verbale the Embassy of Equatorial Guinea in France informs the Ministry of Foreign Affairs that it owns the property, for which it would like police protection[45];

26 — on 16 February 2012, the Ministry of Foreign Affairs of Equatorial Guinea seeks approval from the French authorities for the appointment of Ms Bindang Obiang as Ambassador of the Republic of Equatorial Guinea in France. In the CV attached to this request, the stated place of residence is 46 rue des Belles Feuilles, Paris (16th arrondissement)[46];

— Ms Bindang Obiang is appointed Ambassador of Equatorial Guinea in France on 21 March 2012;

— on 27 July, the Protocol Department at the Quai d'Orsay receives a Note from the Embassy of Equatorial Guinea stating that "*as from 27 July 2012*, the Embassy offices are located at 42 avenue Foch, Paris (16th arrondissement), a building which it is *henceforth* [*that is as from 27 July 2012*] using for the performance of the functions of its diplomatic mission in France"[47];

— from the summer of 2012, the Embassy offices of Equatorial Guinea appear to have been effectively transferred to this address[48].

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[42]Documents produced by the French Republic on 14 October 2016, Ann. 8.

[43]Documents produced by the French Republic on 14 October 2016, Ann. 5.

[44]Record of the on-site inspection and search of the townhouse located at 42 avenue Foch, 75016 Paris, of 14 February 2012 (item D.555) ; Record of the on-site inspection and search of the townhouse located at 42 avenue Foch, 75016 Paris, of 15 February 2012 (item D.556); Record of the on-site inspection and search of the townhouse located at 42 avenue Foch, 75016 Paris, of 16 February 2012 (item D.557).

[45]Note Verbale No. 185/12 of 15 February 2012 from the Embassy of Equatorial Guinea in Paris (item D543/2 in the investigation file).

[46]Documents produced by the French Republic on 14 October 2016, Ann. 11.

[47]Note Verbale No. 501/12 from the Embassy of the Republic of Equatorial Guinea addressed to the Ministry of Foreign Affairs of the French Republic, 27 July 2012; emphasis added.

[48]See Note Verbale No. 501/12 of 27 July 2012 from the Embassy of Equatorial Guinea in Paris.

I would add — though the Agent of France has already mentioned this — that, during this period, while Equatorial Guinea requested the tax exemptions to which it was entitled under the Vienna Convention on Diplomatic Relations in respect of its Embassy located on the boulevard de Courcelles, it never made any such request in respect of 42 avenue Foch at that time.

[End of slide 1]

19. Mr. President, I believe this chronology is sufficient in itself: it is clear that the building on avenue Foch was not, on the critical date, part of the "premises of the [diplomatic] mission" of Equatorial Guinea in Paris and that it was "disguised", in haste and with a certain amount of improvisation, either as the residence of the Permanent Delegate to UNESCO, or as the Embassy of Equatorial Guinea in France. But this cannot hide the fact that it never legally acquired the status
27 of "premises of the mission". Just like the movable assets that were seized there, the building at 42 avenue Foch is private property — and property that is suspected of being the product of money laundering.

20. Mr. President, as I have already recalled, the Court, with its hallmark polite care when it comes to naming a case that has been brought before it, gave this one the title of "Immunities and Criminal Proceedings". This is good "judicial diplomacy" and we do not fault it. However, as we all know, the language of diplomacy consists in the art of not antagonizing people; the Court has good reason to treat the Parties with tact. But the press, which is less encumbered with terminological scruples, refers to this case by a name that is not as politely neutral; they call it the "biens mal acquis" (ill-gotten gains)[49]; they use this name to show that the case concerns assets that the investigating judges consider to have been acquired by means of laundering dirty money, which led them to the conclusion that the charges against Mr. Obiang are sufficiently serious to seek his referral to the *Tribunal correctionnel* — his referral to the *Tribunal correctionnel* but nothing more: France is a State governed by the rule of law and it respects the presumption of innocence.

[49] "Biens mal acquis : l'enquête empêchée", *Le Monde*, 9 June 2011; "Biens mal acquis : Le jeu trouble de la Société générale en Afrique", *Le Monde*, 14 February 2014; "Biens mal acquis: Les dépenses astronomiques de Teodorin Obiang", *Le Monde*, 27 May 2016; or "Pièces A Conviction, Reportage Sur Les Biens Mal Acquis Des Présidents Africains" *(M6)*, available for viewing on https ://www.youtube.com/watch?v=Qwl-7GkB0T8 (consulted on 13 October 2016).

[Slide 2: Ill-gotten gains

21. But what remains clear is that, whether they were well- or ill-gotten, the assets seized on the premises of 42 avenue Foch are not, in any conceivable way, the assets of a diplomatic mission, whether they be:

— **Slide 2-1:** works of art;

— **Slide 2-2:** countless high-end designer suits; or

— **Slide 2-3:** extremely expensive cars.

— **Slide 2-4:** a Maserati, a Ferrari or a Bugatti Veyron (between one and two million apiece — there were three of them) kept in the garden — no request was ever made, moreover, for diplomatic plates for these cars.

— **Slide 2-5:** The same goes for the 4,000 square metre townhouse on avenue Foch — the most expensive avenue in Paris.

28 **[Gradually show slides 2-6 to 2-12 + golden room, until the end of para. 23]**

22. All these possessions — whether the movable property or the building you can see in the photographs on the screen — have the same function: to satisfy the compulsive buying disorder which has taken hold not of Minister Obiang, not of Vice-President Obiang — First or Second — but of Mr. Teodoro Nguema Obiang Mangue, because it is plain to see that none of this spending has *the least thing to do* with the eminent functions he occupies or has occupied. They are purely private purchases made for purely private ends and financed — officially — by private funds, albeit funds that may come from "money laundering", which the French Penal Code defines as "the act of assisting in investing, concealing or converting the direct or indirect proceeds of a felony or misdemeanour" [*translation by the Registry*][50]. However, in any event, that does not transform these private assets into public ones. The townhouse on avenue Foch was acquired by Mr. Obiang in a private capacity, through the intermediary of Swiss companies, as was clearly established during the investigation[51]. At the time the investigation was launched, this building was evidently

[50] Article 324-1 of the French Penal Code.

[51] See the order for partial dismissal and partial referral to the *Tribunal correctionnel* of 5 September 2016, Request for the indication of provisional measures, Ann. 1, p. 13 (items D.434 to 493 of the investigation file, D.762, D.765).

not entitled to the protection accorded by the 1961 Convention to premises of a diplomatic mission. To claim that it was is a very gross abuse of right.

23. It is also equally evident that it did not become a building for diplomatic use: a nightclub with a cinema screen, a bar, a 100 square metre bedroom, a sports room, an oriental room, a hair salon[52] — none of this lends itself to the typical activities of an Embassy and is fairly unusual even for an Ambassador's residence, although, in any event, Equatorial Guinea no longer claims 42 avenue Foch as such[53].

[End of slide 2]

29 24. Of course, under Article 22 of the Convention on Diplomatic Relations, the "premises of the mission", their furnishings and other property thereon enjoy immunity from jurisdiction and enforcement. But the premises in question must be "premises of the mission", which Article 1 *(i)* of the Vienna Convention defines as 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". This was clearly not the case before Equatorial Guinea attempted to carry out its legal makeover, rushing to appoint Mr. Obiang as Deputy Permanent Representative at UNESCO (even if he remained Minister . . . for Agriculture and Forestry), although that appointment does not appear to have been formalized — at least, the Protocol Department at Quai d'Orsay has never received a notification to that end (even though such notification is obligatory). However, the simple fact of that appointment — or attempted appointment — clearly attests to Equatorial Guinea's wish to disguise a private building as a piece of public property for diplomatic use. This is known as an abuse of process. The makeshift signs are one of many other episodes which reinforce this conclusion.

25. Furthermore, the judicial police officers who conducted the searches of the building in 2012 found no official documents belonging to Equatorial Guinea or to its diplomatic mission in

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[52]See Ministry of the Interior, Overseas Territories and the Regions, photographic file, 24 February 2012 (item D.584).

[53]See in particular: 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); Note Verbale No. 517/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic (2 August 2012); Note Verbale No. 227/15 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic (13 March 2015); Note Verbale No. 230/2016 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic (21 April 2016); Note Verbale No. 316/2016 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic (11 May 2016).

France[54]. Statements gathered during the investigation show that in fact that vast building was never home to any documents or activities of a diplomatic nature before the summer of 2012.

26. Mr. President, it is quite clear — it is prima facie clear — that the alleged transformation of the building at 42 avenue Foch into a diplomatic mission is sheer "legal window-dressing", to use the very apt expression of the investigating judges in the order of 5 September 2016[55]. This attempt, which was made after the dispute had arisen, cannot, of course, alter the nature of the

30 building. And the seisin of this Court is, if I may say so, a "fraud (a great fraud) against your jurisdiction", which you cannot exercise prima facie, except to confirm a clear abuse of judicial process.

27. Mr. President, it is not sufficient to invoke treaty provisions constituting vaguely conceivable bases of jurisdiction for the Court; they must be plausible. In the case concerning *Oil Platforms*, the Court firmly established the *fumus boni juris* principle in a Judgment ruling on a preliminary objection[56]. It then extended the requirement to the requests for the indication of provisional measures in its Orders of 2 June 1999 in the cases concerning *Legality of Use of Force* between Yugoslavia and ten NATO States:

> "[I]n order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and . . . in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are 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 IX"[57].

28. This plausibility test is now firmly rooted in the Court's jurisprudence on provisional measures — I shall cite the Court again, this time from the 2009 Order on the *Obligation to Prosecute or Extradite*:

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[54]Record of the on-site inspection and search of the townhouse located at 42 avenue Foch, 75016 Paris, of 14 February 2012 (item D.555); record of the on-site inspection and search of the townhouse located at 42 avenue Foch, 75016 Paris, of 15 February 2012 (item D.556); record of the on-site inspection and search of the townhouse located at 42 avenue Foch, 75016 Paris, of 16 February 2012 (item D.557).

[55]Request for the indication of provisional measures, Ann. 1, order for partial dismissal and partial referral to the *Tribunal correctionnel* of 5 September 2016, p. 20.

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

[57]*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 137, para. 38.

> "a link must therefore be established between the provisional measures requested and the rights which are the subject of the proceedings before the Court as to the merits of the case;
>
> . . . [T]he power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible"[58].

Equatorial Guinea does not disagree with the principle[59]. But its application to the present case? That is another matter entirely.

31 29. It is thus evident that the rights invoked by Equatorial Guinea have not a whiff of legitimacy or an ounce of credibility to them:

— as I have shown: the 1961 Vienna Convention on Diplomatic Relations and its Protocol apply to diplomats; Mr. Obiang is not a diplomat;

— similarly, the Vienna Convention concerning the "premises of the diplomatic mission" applies to diplomatic missions, and it is indisputable that the building at 42 avenue Foch did not fall into this category on the date of its attachment; and to recognize it today as an "office of the mission" would be to sanction a fait accompli resulting from a clear and flagrant abuse of right;

— the 2004 Convention on Jurisdictional Immunities of States is not in force;

— the 2000 Convention against Transnational Organized Crime does not contain an immunity clause and, in any event, is not designed to allow for the initiation of legal proceedings;

— nor does it offer a basis of jurisdiction for one State party to institute proceedings against another with regard to alleged violations of its sovereignty or the principle of non-intervention.

30. Using a request for the indication of provisional measures to slow down or halt criminal proceedings, over which the Court has neither credible prima nor secunda facie jurisdiction, is a clear abuse of the provisional measures process.

31. Under these circumstances, the Court can reach only one conclusion: not only does it lack prima facie jurisdiction to rule on the request submitted to it by Equatorial Guinea, but the

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[58] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, paras. 56-57; see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53, or *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 545, para. 33.

[59] See CR 2016/14, p. 21, para. 2, and pp. 23-24, paras. 13-15 (Wood); p. 31, para. 7 and pp. 31-32, paras. 9-10 (Kamto).

very fact that it submitted the request is a flagrant example of abuse of process, which must lead to the removal of the case from the Court's List[60].

32. Members of the Court, there is no doubt that you enjoy a certain margin of discretion where provisional measures are concerned, in terms of both their indication and, if indicated, their substance. This emerges clearly from the text of Article 41 of the Statute, which confers on the Court "the power to indicate . . . any provisional measures which ought to be taken to preserve the
32 respective rights of either party", "*if it considers* that circumstances so require". Article 75 of the Rules confirms the Court's considerable discretion in this regard by authorizing it to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures, and to indicate "measures that are in whole or in part other than those requested". And this is also attested to by your jurisprudence: the Court has never hesitated to reject the measures requested by the parties or to indicate measures of its own choosing.

33. Members of the Court, we are convinced that if the impossible were to happen, and you were to decline to remove the case from the List and were to agree to rule on Equatorial Guinea's requests, it could only be to reject them. You would want, in the exercise of your discretionary power, to balance, on the one hand, the — inexistent — benefits to Equatorial Guinea of indicating the provisional measures it has requested and, on the other, the very grave difficulties that France would encounter in implementing them, for the reasons set out by the Agent of the Republic at the start of his presentation — it being recalled that, when ruling on a request for the indication of provisional measures, it falls to the Court to protect the respective rights of *both* parties — of *each* of the two parties[61]. There is absolutely no threat to the rights of Equatorial Guinea — not in the immediate future at least, and certainly not before the delivery of your Judgment.

34. Mr. President, I am well aware that law and morality are two distinct things. But there are limits. In our case, they have been exceeded. I am sure that the Court will not lose sight of this.

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[60] *Legality of Use of Force (Yugoslavia* v. *Spain)* and *(Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 769 *et seq*., para. 22 *et seq*., and p. 923, para. 19.

[61] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 257, para. 35; *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, pp. 14-15, para. 22; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 89, para. 49.

35. Members of the Court, thank you for your renewed attention. Mr. President, may I ask you to give the floor to Professor Ascensio, who will show that the other requisite conditions for the indication of provisional measures, namely the risk of irreparable prejudice and the urgency to address that risk, have also not been met.

33 VICE-PRESIDENT, Acting President: Thank you, Professor Alain Pellet. I give the floor to Professor Hervé Ascensio. Professor Ascensio, you have the floor.

MR. ASCENSIO:

1. Mr. President, Members of the Court, it is a great honour for me to appear before your Court this morning on behalf of the French Republic.

2. Professor Pellet has just demonstrated that your Court does not have prima facie jurisdiction in the present case, that the rights claimed by the Republic of Equatorial Guinea are not plausible, and that the request for provisional measures constitutes an abuse of process. For good measure, I would recall that the indication of provisional measures is subject to other conditions which are well-known and long established in the Court's jurisprudence: urgency and the risk of irreparable prejudice.

3. However, an analysis of the circumstances of the present case clearly shows that neither of these two conditions has been satisfied. This is true for all of Equatorial Guinea's requests, which concern:

— first, the suspension of the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue;
— second, the treatment of the building located at 42 avenue Foch as premises of the diplomatic mission; and
— third, the preservation of other rights and the non-aggravation of the dispute.

4. I will examine the issues of both urgency and irreparable prejudice in respect of each of these three requests, taking them in the order in which they appear in the Request for the indication of provisional measures of 29 September 2016. In the course of this presentation, it will also become apparent that some of them are unrelated to the requests appearing in the Application dated 13 June 2016, and that, for this reason, they should be rejected. So, I first turn to:

I. THE ABSENCE OF URGENCY AND IRREPARABLE PREJUDICE IN THE CRIMINAL PROCEEDINGS INITIATED AGAINST MR. TEODORO NGUEMA OBIANG MANGUE

5. In its request for the indication of provisional measures, the Republic of Equatorial Guinea insists on "the imminence of criminal proceedings" to justify the urgency of its request. In this regard, it cites the order for referral to the *Tribunal correctionnel* of 5 September 2016 and the summons for Mr. Nguema Obiang Mangue to appear before that same court on 24 October. It further stresses that the referral order was not subject to appeal, and concludes that the defendant could be given a custodial sentence at any time.

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6. Contrary to what the Republic of Equatorial Guinea claims, a final conviction is in no way imminent.

7. The Agent of the French Republic explained earlier that the hearing of 24 October is not intended to be a trial on the merits. Its purpose is to rectify the fact that there was no reference to the criminal law and procedural texts in the referral order, thus ensuring full respect for the rights of the defence. Consequently, the hearing of 24 October does not create any urgency, and it does not engender a prejudice of any kind. On the contrary, France is concerned that Mr. Nguema Obiang Mangue's rights should be fully respected during the French criminal proceedings.

8. Given the usual time frame for proceedings before French criminal courts, the case in which Mr. Teodoro Nguema Obiang Mangue has been summoned is not expected to be heard and tried until next year. And contrary to what was suggested yesterday, the defendant is not necessarily required to attend the hearings before the *Tribunal correctionnel*. Under Article 411 of the Code of Criminal Procedure, the defendant may request to be tried *in absentia*, while being represented by his counsel. Of course, the *Tribunal* may consider it necessary for the defendant to appear, but, given the circumstances of the case, that scenario is highly unlikely. It is, indeed, difficult to imagine the *Tribunal correctionnel* suspending its hearings to wait for the arrival of a defendant residing abroad.

9. Furthermore, the existence of avenues of appeal is an essential factor to take into consideration with regard to the criterion of urgency. As the Agent for the French Republic explained earlier, any custodial sentence that might be given would not become final for several

years, taking into account the possibility of appeal followed by judicial review. This deprives the Republic of Equatorial Guinea's request of any urgency.

35 10. Nor is there any risk of irreparable prejudice to the Republic of Equatorial Guinea's rights. In this regard, the arguments raised by the Applicant remain very general, namely, an impediment to Mr. Teodoro Nguema Obiang Mangue travelling abroad and the non-recognition of immunity. No details have been provided and no evidence has demonstrated that Mr. Nguema Obiang Mangue has actually been prevented, on one or more occasions since 2012, from performing his functions.

11. What is more, all of these arguments are highly questionable from both a legal and a factual standpoint.

12. From a legal perspective, the idea that Mr. Teodoro Nguema Obiang Mangue enjoys international immunity, including for acts carried out in a private capacity, is based on an unreasonable analogy between his function and the functions of the three authorities who traditionally enjoy *personal* immunity under international law: the Head of State, the Head of Government and the Minister for Foreign Affairs. They are also referred to as the "triad" or "troika".

13. In its jurisprudence on provisional measures, this Court has never found that ongoing criminal proceedings concerning a State official other than these three persons would risk causing a grave and irreparable prejudice. In the case concerning the *Arrest Warrant*, the Court found that irreparable prejudice was not established on the basis of the fact that an arrest warrant had been issued against Mr. Yerodia, the Minister of Education of the Democratic Republic of the Congo[62]. In the case concerning *Certain Criminal Proceedings in France*, you dismissed the idea that such prejudice resulted from the *mandat d'amener* (warrant for immediate appearance) issued against General Dabira, Inspector-General of the Congolese Armed Forces[63]. You also dismissed it with

[62]*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 201, para. 72.

[63]*Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003*, p. 111, para. 38.

regard to the summons in the investigation of General Oba, Minister of the Interior, Public Security and Territorial Administration[64].

36 14. What is more, at present there is no arrest warrant against Mr. Teodoro Nguema Obiang Mangue. The arrest warrant issued on 13 July 2012 ceased to have effect the day after he was placed under judicial examination, on 18 March 2014. As the Agent explained earlier, the possibility of a new arrest warrant being issued before the end of the proceedings is highly unlikely. Consequently, there is no real and imminent risk of irreparable prejudice, within the meaning of the jurisprudence of your Court[65].

15. Furthermore, Mr. Nguema Obiang Mangue's official activities, as presented by the Republic of Equatorial Guinea, are not such that the criminal proceedings initiated in France constitute an irreparable prejudice to that State. It should be recalled here that his functions have evolved over time. When a preliminary investigation was opened in 2007 with regard to his private activities, he was Minister for Agriculture. On 21 May 2012, he was appointed Second Vice-President of the Republic of Equatorial Guinea, and then Vice-President on 21 June 2016, shortly after the Application was filed before your Court. And yet, the scope of his functions has not evolved since 2012: he is in charge of national defence and State security.

16. That being said, Mr. Teodoro Nguema Obiang Mangue is not the only member of the executive responsible for these areas. Indeed, the Government of the Republic of Equatorial Guinea also includes a Minister for National Security, a Minister for National Defence, a Minister Delegate at the Presidency of the Republic in charge of External Security, a Minister Delegate for National Security and a Vice-Minister for National Defence.

17. So I wonder: if one were to recognize the immunity *ratione personae* of a Vice-President or a Second Vice-President because he is in charge of national defence and State security and because he may be led to travel abroad, would this also apply to the other members of the executive who have responsibility in that regard? The Republic of Equatorial Guinea's request,

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[64] *Ibid*., p. 111, para. 37.

[65] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 152-153, para. 62; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21, para. 64.

as we can see, actually raises a considerable risk of an expansion of the scope of personal immunities, whereas customary international law has always adhered to the troika. Current work
37 on this subject at the United Nations International Law Commission confirms this, and there are no provisions for an expansion of any kind. At the very least, proceedings for the indication of provisional measures are ill-suited to settling such a sensitive and complex issue.

18. Furthermore — it should be emphasized again — Mr. Nguema Obiang Mangue is not prevented from travelling abroad as a result of the ongoing criminal proceedings in France. There is no arrest warrant currently issued against him, and, as has been explained to you, it is highly unlikely that a new measure of constraint will be ordered before the end of the proceedings, that is, before any future conviction becomes final after all available remedies have been exhausted.

19. Moreover, and in any event, he is perfectly free to travel in an official capacity in the context of a special diplomatic mission, since, in that case, he would enjoy immunity in accordance with international law.

20. Lastly, the Republic of Equatorial Guinea has requested your Court to order the French Republic to refrain from "launching new proceedings" against Mr. Teodoro Nguema Obiang Mangue. Clearly, that request is in no way urgent and does not raise any risk of irreparable prejudice, in the absence of any shred of evidence suggesting that the French authorities are preparing to open an investigation in another case implicating the same person. Because of its generality and highly hypothetical nature, this request is unrelated to the case brought before this Court.

21. Mr. President, Members of the Court, I now turn to the second point.

II. THE ABSENCE OF URGENCY AND IRREPARABLE PREJUDICE REGARDING THE TREATMENT OF THE BUILDING AT 42 AVENUE FOCH AS PREMISES OF THE DIPLOMATIC MISSION OF EQUATORIAL GUINEA IN FRANCE

22. Contrary to what the Republic of Equatorial Guinea claims, the confiscation of the building by the courts and an expulsion as a result of its sale are certainly not imminent. It should be noted that, in French procedure, attachment of property under the Code of Criminal Procedure has only a provisional effect. The owner of the building cannot sell it, but, he may continue to use
38 it freely until the courts have issued a final ruling on the merits of the case. Accordingly, the

explanations as to the course of the proceedings with regard to Mr. Nguema Obiang Mangue also apply to the building at 42 avenue Foch. Supposing that, next year, the *Tribunal correctionnel* were to order a confiscation measure, that measure could be the subject of an appeal, and then judicial review, with suspensory effect. The Republic of Equatorial Guinea, if it so wishes, could also assert any rights it might have with regard to ownership of the building before the trial courts. A final decision of confiscation — were it ultimately to be confirmed — would not be rendered for several years.

23. Equatorial Guinea also invokes a risk of intrusion which prevents it from carrying out its day-to-day activities. And yet, it has not produced any specific evidence demonstrating such a risk. In particular, it has not put forward a single argument concerning any form of intrusion, or any new measure of constraint that is imminent and attributable to the French authorities. The circumstances are thus completely unrelated to those which led your Court to order provisional measures in the case concerning the *United States Diplomatic and Consular Staff in Tehran*, following the taking of hostages[66]. It would be going too far to draw any parallels, and it would be advisable to keep to the circumstances of the present case.

24. First, the searches at 42 avenue Foch were conducted at the request of the French judicial authorities, in the context of a lawful procedure. They took place only in 2011 and 2012, not — as Professor Maurice Kamto[67] stated yesterday — over a period running from 2011 to *2016*. Since that time, that is, for over four years, no measures of constraint have been ordered in connection with that building. There has been no intrusion either, to the French authorities' knowledge.

25. What is more, the French Republic has provided protection for the premises at 42 avenue Foch, at the same time as recalling its consistent position that the diplomatic mission of the Republic of Equatorial Guinea was still located at 29 boulevard de Courcelles. Such protection was notably provided on 13 October 2015, owing to a demonstration by members of the Equatorial
39 Guinean opposition in France, and, more recently, during elections on 24 April 2016, since a polling station was set up there.

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[66] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19.

[67] CR 2016/14, p. 36, para. 21 (Kamto).

26. Clearly, the condition of urgency required for provisional measures to be ordered has not been satisfied. Neither has the condition relating to the risk of irreparable prejudice.

27. As we have seen, the building is currently attached under the Code of Criminal Procedure. The sale of the building certainly could not take place until the ongoing criminal proceedings have ended — supposing that a judicial decision ordering its confiscation is rendered, and not until that decision becomes final. In the *Interhandel* case, which also concerned assets seized for provisional purposes in ongoing criminal proceedings, your Court did not order any provisional measures[68]. It attached the utmost importance to the fact that the sale could not take place until the judicial proceedings had ended, dismissing any risk of irreparable prejudice until that point in time. Similarly, there is no such risk in the present case.

28. Moreover, the attachment of the building has the effect of protecting the rights of all of the persons concerned by the case before the French courts. This measure also protects France's right to ensure compliance with its criminal legislation and to prosecute and punish offences committed in its territory. According to the jurisprudence of this Court, in considering a request for the indication of provisional measures, all of the rights at issue must be preserved[69]. The attachment measure actually maintains the balance between the different rights at issue, both in the French judicial proceedings and in the proceedings before your Court.

29. One other circumstance is also worth mentioning: the applicant State's requests relating to the building at 42 avenue Foch are particularly contentious given the fact that the State itself helped create the situation of which it now complains.

30. The Agent of the French Republic recalled earlier that the Republic of Equatorial Guinea's declarations regarding the use of the building had varied considerably between 2011 and 2012. One point is clear, however: Equatorial Guinea's diplomatic mission in

40 France was officially declared to be located at that address only as from 27 July 2012. This critical date appears with absolute clarity in the Note Verbale sent that same day by its Embassy to the French Ministry of Foreign and European Affairs — a Note which was also quoted by

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[68] *Interhandel (Switzerland* v. *United States of America), Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957*, p. 105.

[69] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 30.

Professor Pellet. Given its importance, I will quote it again: "as from Friday 27 July 2012, the Embassy offices are located at 42 avenue Foch, Paris (16th arrondissement), a building which it is henceforth using for the performance of the functions of its diplomatic mission in France".

31. Yet, the attachment of the building was ordered on 19 July 2012. Considering its careful scrutiny of the judicial proceedings concerning Mr. Teodoro Nguema Obiang Mangue, the Republic of Equatorial Guinea could not have been unaware that it was declaring that it was moving into a building that had been attached under the Code of Criminal Procedure. Moreover it had confirmation of this fact from France in a Note Verbale of 6 August 2012. Consequently, the Republic of Equatorial Guinea cannot now claim before this Court that it has suffered a prejudice resulting from a situation that it has created itself, that is, by moving into a building that is the subject of a precautionary measure.

32. Once again, it should be recalled that no searches or attachment measures were carried out in the building at 42 avenue Foch after that date — after 27 July 2012.

33. In addition to its requests relating to the building, the Republic of Equatorial Guinea also requests protection for the furnishings or other property on — and even "previously" on — the so-called diplomatic premises established at 42 avenue Foch. This wording is really quite imprecise, and it was not mentioned yesterday by Equatorial Guinea's counsel, Professor Maurice Kamto. With respect to the building, instead of referring to the property "previously thereon", he referred to the property "that might be thereon"[70]. This nuance is important, seeing as the phrasing no longer refers to the past and no longer pertains to the property seized in 2011 and 2012.

34. If this is to be considered a new development in the Republic of Equatorial Guinea's requests, it is welcome. In 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
41 Paris. It did not at any point request the protection of furniture or other property — in particular

[70] CR 2016/14, p. 30, para. 3 (Kamto).

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.

35. According to the jurisprudence of this Court and that of its predecessor, the Permanent Court of International Justice, in the *Polish Agrarian Reform*[71] case, such requests must be rejected because they are not solely designed to protect the subject of the dispute and the subject of the requests, as submitted by the Application instituting proceedings.

36. In any event, if the request did actually concern furniture and property that had been seized several years prior, it would be devoid of any urgency. Moreover, the Republic of Equatorial Guinea has never claimed that it holds any title to that property, so it cannot suffer any irreparable prejudice.

37. Mr. President, Members of the Court, I have one last point to address very briefly.

III. THE ABSENCE OF URGENCY AND IRREPARABLE PREJUDICE IN RESPECT OF THE OTHER REQUESTS

38. In paragraph *(c)* of its submissions seeking the indication of provisional measures, Equatorial Guinea requests that France "refrain from any other measure" that might cause prejudice to the rights claimed and/or aggravate or extend the dispute. In support of this request, it invokes a risk of prejudice to the honour and the international image of Equatorial Guinea and to the dignity of the Vice-President and the diplomatic mission.

39. This request is clearly quite general and vague. No specific evidence has been produced to demonstrate either urgency, or the risk of irreparable prejudice, or the risk of aggravation of the dispute. In the case concerning *Certain Criminal Proceedings in France*, your Court rejected similar requests, not deeming them necessary in the circumstances of that case[72]. The analysis presented to you this morning regarding the circumstances of the present case can only lead to the same conclusion.

42 40. In short, the ordinary course of criminal proceedings for offences committed in French territory, concerning an Equatorial Guinean national and his assets located in France, does not

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[71] *Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58*, p. 175.

[72] *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003*, p. 102.

prejudice either the honour or the dignity of the Republic of Equatorial Guinea, its representatives or its diplomatic mission. The outcome of those proceedings remains, at the present time, both distant and hypothetical. And it does not give rise to either urgency or irreparable prejudice.

41. Mr. President, Members of the Court, that concludes the presentation of the arguments of the delegation of the French Republic for this first round of oral argument. Thank you for your attention.

The VICE-PRESIDENT, Acting President: I thank Professor Ascensio. We have indeed reached the end of the first round of oral observations from France. The Court will meet again tomorrow, Wednesday 19 October, at 10 a.m., to hear the second round of oral observations from Equatorial Guinea. The sitting is closed.

The Court rose at 11.40 a.m.

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