Traduction
Translation

CR 2016/16

CR 2016/16

Mercredi 19 octobre 2016 à 10 heures

Wednesday 19 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 second round of oral observations of Equatorial Guinea on its request for the indication of provisional measures.

I now call Sir Michael. Vous avez la parole.

Sir Michael WOOD : Merci, Monsieur le président.

INTRODUCTION : COMPÉTENCE *PRIMA FACIE*

I. Introduction

1. Monsieur le président, Mesdames et Messieurs de la Cour, après quelques observations liminaires, je répondrai à ce que mon ami et collègue M. Pellet a dit hier au sujet de la compétence *prima facie*.

2. Mon intervention sera suivie de celle de M[e] Tchikaya, qui traitera de la réalité de la procédure pénale en France.

3. M. Kamto répondra à ce qui a été dit hier au sujet du risque de préjudice irréparable avant l'arrêt définitif de la Cour.

4. L'agent de la Guinée équatoriale présentera enfin nos conclusions finales.

5. Monsieur le président, nous avons entendu hier nos contradicteurs nous entretenir de la compétence et du fond avec force faits, droit, rhétorique et pures préconceptions. Or nous n'en sommes pas au stade du fond. Nous n'en sommes pas non plus à un éventuel stade des exceptions préliminaires. Ceci est une audience en indication de mesures conservatoires. Nos collègues du côté français ne font apparemment pas grand cas de votre Instruction de procédure XI, pas plus que du droit et de la pratique des mesures conservatoires.

6. Les interventions d'hier étaient surtout remarquables par ce qu'elles ne disaient pas :

— nos contradicteurs ne semblaient pas contester que la Guinée équatoriale ait acquis la propriété de l'immeuble sis 42 avenue Foch à Paris ;

— ils n'ont pas davantage contesté que cet immeuble accueille actuellement l'ambassade de Guinée équatoriale en France ;

— alors même qu'ils appuyaient leur raisonnement sur des probabilités et des statistiques, ils n'ont pas nié que les juridictions françaises — juridictions sur lesquelles ils ont tenu à souligner qu'ils n'avaient aucun contrôle, allant jusqu'à suggérer qu'elles pourraient trouver

9 difficile de donner effet à une mesure portant suspension de la procédure[1] — puissent décider de poursuivre la procédure engagée contre le vice-président de la Guinée équatoriale, y compris en décernant un nouveau mandat d'arrêt et en prononçant, le cas échéant, une condamnation.

7. Nos contradicteurs ont préféré vous présenter ce qu'ils ont appelé la «chronologie d'un détournement de procédure». Cela rappelait l'attitude que les juridictions françaises ont adoptée à l'égard de la Guinée équatoriale et de ses hauts représentants — M. Pellet a d'ailleurs repris, en l'approuvant apparemment, l'expression «habillage juridique» employée dans l'ordonnance de renvoi[2]. Cette façon de mettre en doute les motifs des Etats est inadmissible dans les relations internationales.

8. Tant au regard des faits qu'au regard du droit, nos contradicteurs voudraient que vous tranchiez des questions qui relèvent du fond. C'est clairement le cas, par exemple, en ce qui concerne le droit du vice-président de la Guinée équatoriale, chargé de la défense nationale, à l'immunité *ratione personae*, droit dont nos contradicteurs ont pris soin de ne pas exclure entièrement la possibilité. (En vérité la France a reconnu à plusieurs reprises par le passé, à la Sixième Commission par exemple, que le droit international ne réservait pas cette immunité à la seule «troïka»[3].) La question juridique des limites du cercle restreint des personnes occupant un rang élevé dans l'Etat dont «il est clairement établi en droit international[4]» qu'elles jouissent de l'immunité *ratione personae* pourrait donc bien être, comme le dit M. Ascensio, «une question … sensible et complexe[5]», ce qui fait qu'elle ne se prête manifestement pas à une décision

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[1] CR 2016/15, p. 32, par. 33 (Pellet).

[2] CR 2016/15, p. 29, par. 26 (Pellet).

[3] Voir A/C.6/63/SR.19, compte rendu analytique de la 19e séance (29 octobre 2008), par. 12 à 15 ; A/C.6/66/SR.20, compte rendu analytique de la 20e séance (26 octobre 2011), par. 44 ; A/C.6/68/SR.17, compte rendu analytique de la 17e séance (28 octobre 2013), par. 115 et 116.

[4] *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C. I. J. Recueil 2002*, p. 20, par. 51.

[5] CR 2016/15, p. 37, par. 17 (Ascensio).

définitive au stade des mesures conservatoires ; on peut en dire autant des questions éminemment factuelles qui concernent le poste et les fonctions spécifiques du vice-président et de divers autres personnes de rang élevé dans l'ordre constitutionnel équato-guinéen[6]. Ces questions relèvent de toute évidence du fond. Au stade actuel, la seule chose à démontrer est que la revendication de cette immunité par la Guinée équatoriale est au moins plausible. Je crois que nous l'avons clairement fait, notamment en renvoyant aux exposés de droit de la Cour elle-même dans les affaires du *Mandat d'arrêt* et *Djibouti c. France*.

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II. Compétence *prima facie*

9. Monsieur le président, j'en viens maintenant à la question de la compétence *prima facie*. Hier, M. Pellet n'a pas vraiment essayé de répondre au critère de la compétence *prima facie* dans le cadre des mesures conservatoires. Il a préféré lancer contre la compétence de la Cour une offensive en règle, telle qu'on l'attendrait plutôt au stade des exceptions préliminaires ou du fond, après un échange complet de pièces de procédure écrite. Il a répugné à admettre que c'est à une simple condition de compétence *prima facie* qu'est subordonnée l'indication de mesures conservatoires, et que la Cour «n'a pas besoin de s'assurer de manière définitive qu'elle a compétence quant au fond de l'affaire»[7].

10. Les arguments présentés hier par M. Pellet ont largement manqué leur cible. Il a commencé par formuler un certain nombre d'observations qui n'avaient rien à voir avec ce que nous avions dit :

— nous n'avons à aucun moment suggéré que la compétence dépendait «de l'importance des principes en cause»[8] ;

— nous n'avons à aucun moment invoqué la Convention des Nations Unies de 2004 comme base de compétence ou droit applicable[9] ;

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[6] CR 2016/15, p. 36, par. 15 et 16 (Ascensio).

[7] *Questions concernant la saisie et la détention de certains documents et données (Timor-Leste c. Australie), mesures conservatoires, ordonnance du 3 mars 2014, C.I.J. Recueil 2014*, p. 151, par. 18.

[8] CR 2016/15, p. 19, par. 5 et 6 (Pellet).

[9] CR 2016/15, p. 19 et 20, par. 7 ; p. 31, par. 29 (Pellet).

— nous n'avons à aucun moment suggéré qu'il y avait compétence sur des questions de droit international général ou de droit international coutumier[10], sauf dans la mesure où cette compétence découlait des deux traités sur lesquels nous nous appuyons : la convention de Palerme et le protocole de signature facultative à la convention de Vienne ;

— nous n'avons à aucun moment «tent[é] d'étendre [au vice-président] l'application de l'immunité juridictionnelle des diplomates»[11] ;

— M. Pellet a avancé hier que notre demande relative à l'inviolabilité de l'immeuble dépendait de notre demande relative à l'immunité du vice-président, et que, du fait que nous avions dit que les deux questions étaient liées, il en était de même de la base de compétence pour statuer sur

11 elles[12]. Tel n'est pas le cas. Les deux questions sont effectivement intimement liées dans la procédure pénale engagée en France ; mais aux fins de la compétence de la Cour de céans, la Guinée équatoriale a invoqué des bases de compétence distinctes.

a) La compétence *prima facie* de la Cour en vertu de la convention de Palerme

11. Monsieur le président, Mesdames et Messieurs de la Cour, la revendication par la Guinée équatoriale du respect des principes de l'égalité souveraine et de la non-intervention, ainsi que des règles d'immunité des Etats qui en découlent, notamment l'immunité de juridiction pénale étrangère dont jouissent certaines personnes occupant un rang élevé dans l'Etat et l'immunité d'exécution des biens de l'Etat, trouve son fondement dans l'article 4 de la convention de Palerme.

12. L'objet de cette disposition est, comme l'indique son intitulé, de protéger la souveraineté des Etats parties à la convention de Palerme. Ainsi qu'il est précisé dans les Guides législatifs établis par les Nations Unies, «[l]'article 4 est le principal instrument de protection de la souveraineté nationale dans le cadre de l'application de la Convention»[13].

13. L'article 4 crée une obligation conventionnelle de respecter les principes de l'égalité souveraine et de la non-intervention dans l'application de la convention de Palerme. Cette

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[10] CR 2016/15, p. 20, par. 8 (Pellet).

[11] CR 2016/15, p. 20 et 21, par. 9 ; p. 31, par. 29 (Pellet).

[12] CR 2016/15, p. 23, par. 16 (Pellet).

[13] *Guides législatifs pour l'application de la Convention des Nations Unies contre la criminalité transnationale organisée et des protocoles s'y rapportant* (New York ; Nations Unies, 2004), p. 17, par. 33.

disposition a pour effet d'incorporer ces principes fondamentaux de l'ordre juridique international dans la convention.

14. Les principes de l'égalité souveraine et de la non-intervention englobent d'importantes règles de droit international coutumier ou général, en particulier celles qui touchent aux immunités des Etats et de leurs représentants. Ainsi que la Cour l'a déclaré dans l'affaire relative aux *Immunités juridictionnelles de l'Etat*,

> «[l]a Cour considère que la règle de l'immunité de l'Etat joue un rôle important en droit international et dans les relations internationales. Elle procède du principe de l'égalité souveraine des Etats qui, ainsi que cela ressort clairement du paragraphe 1 de l'article 2 de la Charte des Nations Unies, est l'un des principes fondamentaux de l'ordre juridique international.»[14]

La même observation pourrait être faite à propos des règles relatives à l'immunité de certaines personnes occupant un rang élevé dans l'Etat.

12 15. Par conséquent, l'article 4 de la convention de Palerme impose aux Etats de respecter, dans leur application de la convention, les règles relatives aux immunités de juridiction étrangère auxquelles les Etats ont droit. Consacrées par le principe de l'égalité souveraine, ces règles sont contraignantes pour les Etats lorsqu'ils appliquent la convention. Il convient de rappeler dans ce contexte qu'une chambre de la Cour a déclaré dans l'affaire de l'*Elettronica Sicula*, au sujet d'une disposition conventionnelle, qu'elle «ne saurait accepter qu'on considère qu'un principe important du droit international coutumier a été tacitement écarté sans que l'intention de l'écarter soit verbalement précisée»[15].

16. Nos contradicteurs ont soutenu que l'article 4 de la convention de Palerme ne constituait pas une réelle obligation, mais simplement une «directive générale»[16] à la lumière de laquelle il convenait d'interpréter les autres dispositions de la convention. A cet égard, ils ont cité l'affaire des *Plates-formes pétrolières*. Je ferai deux remarques à ce sujet :

— Premièrement, les traités et dispositions spécifiquement en cause dans les deux affaires sont totalement différents. Dans l'affaire des *Plates-formes pétrolières*, c'était l'article premier du traité d'amitié qui était en cause. Cette disposition avait un champ d'application vaste et un

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[14] *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant)), arrêt, C.I.J. Recueil 2012 (I),* p. 123, par. 57.

[15] *Elettronica Sicula S.p.A. (ELSI) (Etats-Unis d'Amérique c. Italie), arrêt, C.I.J. Recueil 1989*, p. 42, par. 50.

[16] CR 2016/15, p. 21, par. 12 (Pellet).

libellé vague, ce qui a amené la Cour à conclure, après avoir attentivement analysé le traité dans son ensemble, qu'elle fixait simplement un objectif[17]. L'article 4 de la convention de Palerme, en revanche, n'énonce pas l'«objectif» de cet instrument. C'est l'article premier de la convention qui pourrait être considéré comme «fixant un objectif» aux fins de l'interprétation de cet instrument. L'article 4, pour sa part, crée une obligation claire et précise établissant ce que les Etats doivent et ne doivent pas faire, non de façon générale et à toutes fins utiles, mais dans le cadre de l'application de la convention de Palerme.

— Deuxièmement — et c'est un point crucial — l'article 4 est clairement libellé comme une obligation. L'interprétation qu'en a donné hier la France va à l'encontre de son libellé clair et priverait cette disposition de tout effet utile.

17. La convention de Palerme n'oblige pas les Etats à respecter de façon générale les principes de l'égalité souveraine et de la non-intervention ; elle leur impose l'obligation de
13 respecter ces principes dans le cadre de l'application de la convention. Cela vise à garantir qu'aucune perturbation des relations internationales ne résultera de la mise en œuvre de la convention ; en d'autres termes, à éviter précisément une situation telle que celle qui a obligé la Guinée équatoriale à saisir la Cour.

18. Je ferai trois remarques à ce sujet :

— Premièrement, en engageant une procédure pénale entre le vice-président de la Guinée équatoriale, la France exerce des poursuites à raison d'une prétendue infraction, dont l'article 6 de la convention de Palerme impose expressément l'incrimination. Il est également clair que la France cherche à mettre en œuvre d'autres dispositions de la convention, comme l'article 12 (Confiscation et saisie), l'article 14 (Disposition du produit du crime ou des biens confisqués) et l'article 18 (Entraide judiciaire).

S'agissant de l'entraide judiciaire en particulier, rappelons que, comme l'a également mentionné hier l'agent de la France[18], les autorités judiciaires françaises ont adressé une

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[17] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1996 (II)*, p. 814, par. 28.

[18] CR 2016/15, p. 12, par. 25 (Alabrune).

demande d'entraide à la Guinée équatoriale le 14 novembre 2013. Cette demande faisait explicitement référence à la convention de Palerme[19].

— Deuxièmement, il est clair que la France considère la disposition sur le fondement de laquelle elle exerce des poursuites contre le vice-président, à savoir l'article 324-1 de son code pénal, comme un texte d'application de la convention de Palerme. On peut en citer pour preuve un rapport établi par le Sénat en 2002 au sujet de la ratification de cet instrument, d'où il ressort que les législateurs français étaient d'avis que la législation française sur le blanchiment d'argent était déjà en conformité avec la convention[20] et qu'elle constituait par conséquent une base suffisante pour l'application de cet instrument.

— Troisièmement, je mentionnerai le fait que les autorités françaises n'ont pas, de façon générale, explicitement fait référence à la convention de Palerme. Qu'elles l'aient fait, comme je viens de l'observer, quand elles ont approché la Guinée équatoriale, n'était pas seulement naturel et compréhensible, c'était également dépourvu de toute pertinence. Le droit international n'impose pas aux Etats de mentionner expressément les obligations internationales auxquelles

14 ils cherchent à donner effet dans leur droit interne. En l'absence d'obligation en ce sens, les Etats sont libres de choisir de quelle manière ils donnent effet, sur le plan interne, à leurs obligations internationales.

b) La compétence *prima facie* de la Cour en vertu du protocole de signature facultative à la convention de Vienne sur les relations diplomatiques

19. Pour finir, Monsieur le président, je traiterai brièvement de la compétence *prima facie* en vertu de l'article II du protocole à la convention de Vienne sur les relations diplomatiques. Le raisonnement de M. Pellet sur la question s'est un peu brouillé au fil d'un diaporama d'images quelque peu datées. J'essaierai de le débrouiller ; M. Pellet semblait dire que l'immeuble du 42 avenue Foch ne relevait pas des «locaux de la mission» de la Guinée équatoriale à ce qu'il a appelé la «date critique», mais sans expliquer ce qu'il entendait par cette notion ; que cet immeuble

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[19] Voir ordonnance de non-lieu partiel, de renvoi partiel devant le tribunal correctionnel (Paris, 5 septembre 2016), p. 29 (demande en indication de mesures conservatoires, annexe 1).

[20] Rapport fait au nom de la commission des affaires étrangères, de la défense et des forces armées (1) sur le projet de loi autorisant la ratification de la convention des Nations Unies contre la criminalité transnationale organisée (annexe au procès-verbal de la séance du 31 janvier 2002). Ce document peut être consulté à l'adresse suivante : https://www.senat.fr/rap/101-200/101-200_mono.html, p. 11, 15.

n'avait jamais acquis en droit la qualité de «locaux de la mission» ; et qu'il était ou est un «bien privé»[21]. Et, poursuit le raisonnement, puisque l'immeuble ne relevait pas des «locaux de la mission», l'article 22 de la convention de Vienne relatif à l'inviolabilité, ainsi que la convention de Vienne tout entière, ne lui étaient pas applicables. Il s'ensuivait, a encore dit M. Pellet, qu'il n'y avait pas compétence en vertu du protocole de signature facultative.

20. Comme le sait M. Pellet, je suis le premier à admirer la logique cartésienne, mais il y a quelque chose de peu convaincant dans cet exemple particulier. Monsieur le président, nous pourrions avoir — et nous aurons peut-être — des débats intéressants sur les faits et le droit relatifs à la question de savoir si et à quelle date (si tant est que la date précise soit pertinente) l'immeuble a acquis la qualité de «locaux de la mission» au sens que la convention de Vienne donne à cette expression. Mais une chose est déjà claire : un différend sur ces questions entre dans la catégorie des «différends relatifs à l'interprétation ou à l'application de la Convention [de Vienne]» au sens de l'article premier du protocole de signature facultative. A ce titre, la Cour est compétente en vertu de l'article II si certaines conditions sont réunies. Or ces conditions sont réunies, comme nous l'avons montré dans la requête introductive d'instance. La France n'a pas prétendu le contraire.

21. M. Pellet a évoqué à ce sujet les affaires relatives à la *Licéité de l'emploi de la force*[22], dans lesquelles la Cour a considéré qu'elle

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> «ne peut se borner à constater que l'une des parties soutient que la convention [sur le génocide] s'applique alors que l'autre le nie ; … au cas particulier, elle doit rechercher si les violations de la convention alléguées par la Yougoslavie sont susceptibles d'entrer dans les prévisions de cet instrument[23]».

Rappelant la caractéristique essentielle du génocide, la Cour a conclu qu'il n'apparaissait pas que les bombardements qui constituaient l'objet de la requête yougoslave comportant l'élément requis d'intentionnalité dirigée contre un groupe en tant que tel[24]. Monsieur le président, la question de savoir si l'immeuble du 42 avenue Foch relève ou relevait des «locaux de la mission»

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[21] CR 2016/15, p. 26 et 27, par. 19 (Pellet).

[22] CR 2016/15, p. 30, par. 27 (Pellet).

[23] *Licéité de l'emploi de la force (Yougoslavie c. Belgique), mesures conservatoires, ordonnance du 2 juin 1999, C.I.J. Recueil 1999(I)*, p. 137, par. 38.

[24] *Ibid.*, p. 138, par. 40.

au sens de la convention de Vienne appartient à un genre entièrement différent de la question de savoir si le bombardement de la Serbie constituait un génocide. Compte tenu des positions des Parties dans la présente espèce, le statut diplomatique ou autre du 42 avenue Foch soulève manifestement de sérieuses questions de droit et de fait qui justifient une analyse approfondie au fond. A la différence des allégations de génocide faites par la Yougoslavie, les violations de la convention de Vienne dénoncées par la Guinée équatoriale sont manifestement «susceptibles d'entrer dans les prévisions de cet instrument»[25].

22. Enfin, Monsieur le président, M. Pellet est allé jusqu'à vous exhorter à rayer l'affaire du rôle de la Cour sans plus entendre les Parties[26]. Il a une fois encore évoqué les affaires relatives à la *Licéité de l'emploi de la force*. Or je le répète, ces affaires constituaient une exception complète, et il ne se trouve dans nos conclusions aucune base sur laquelle appuyer l'action suggérée par M. Pellet.

23. Monsieur le président, Mesdames et Messieurs de la Cour, voilà qui conclut ce que j'avais à dire. Je vous remercie, et je vous prie d'appeler M[e] Tchikaya à la barre.

Le VICE-PRESIDENT, faisant fonction de président : Je remercie sir Michael Wood et j'appelle M[e] Jean-Charles Tchikaya à la barre. Vous avez la parole.

16 Mr. TCHIKAYA:

THE REALITY OF THE CRIMINAL PROCEEDINGS IN FRANCE

1. Mr. President, Members of the Court, it is a great honour for me to appear before the Court again on behalf of the Republic of Equatorial Guinea in order to explain the reality of the criminal proceedings in France.

2. Yesterday, the Agent of the French Republic and Professor Alain Pellet argued before the Court that the time frames for proceedings before the French *Tribunal correctionnel* and the means of recourse available to the defendant are such that the conditions of urgency and the risk of irreparable prejudice to Equatorial Guinea's plausible rights were not met in this case.

[25] Voir plus haut, note n° 23.

[26] CR 2016/15, p. 31, par. 31 (Pellet).

3. The Agent of the French Republic thus asserted that:

> "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*.
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> 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 . . . In all probability, the first hearings on the merits will not be held before next year."[27]

I. The referral order seises the *Tribunal correctionnel* and renders inevitable the trial of the Vice-President

4. Addressing you after the Agent of the French Republic had had his say, Professor Alain Pellet was particularly taken with the term "ill-gotten gains" coined by the press, as opposed to the title *Immunities and Criminal Proceedings* adopted by the Court. He claimed:

> "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); 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."[28]

17 5. The Republic of Equatorial Guinea contends, however, that it is precisely the referral to the *Tribunal correctionnel* which entails the exercise by France of its judicial power against our Vice-President and, just as importantly, in respect of, among other things, acts of laundering misappropriated public funds alleged to have been committed on French territory, which is in breach of the Vice-President's jurisdictional immunity *ratione personae*, and of the principles of the sovereign equality of States and non-interference in the internal affairs of another State.

6. The jurisdictional immunity invoked by Equatorial Guinea has the effect of preventing its Vice-President from being tried by any court of a foreign State, in this instance, the Paris *Tribunal correctionnel*.

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[27]CR 2016/15, p. 14, paras. 36-37 (Alabrune).

[28]CR 2016/15, p. 27, para. 20 (Pellet).

7. This is the case because, in so far as the referral order of 5 September 2016 seises the *Tribunal correctionnel*, it constitutes in itself an imminent risk of irreparable prejudice to Equatorial Guinea's plausible rights.

8. In explaining, quoting the letter sent to the Vice-President's lawyer by the Assistant Financial Prosecutor of Paris, that the sole purpose of the hearing on 24 October 2016 is to enable the Tribunal to refer the case back to the investigating judges so that they may regularize the order, which is said to contain a "purely clerical error"[29] in that it fails to cite the relevant criminal law and procedural texts in its operative part, France neglects to mention the fact that seisin of the Tribunal is irrevocable.

9. But that letter does absolutely nothing to alter the irrevocable nature of the referral to the *Tribunal correctionnel* or the resultant inevitability of a trial.

10. France cannot argue the contrary, since, in the same letter, the Assistant Financial Prosecutor states that "[o]nce the order has been regularized, we will resume scheduling of the hearings" and, further, invites the Vice-President's lawyer to discuss "when the case can be examined on the merits"[30].

11. It should be noted, therefore, that in spite of all this, the Tribunal was not kept apprised by the Assistant Financial Prosecutor of the real purpose of the hearing on 24 October 2016, whereas the document entitled "Notice of hearing" sent to the Vice-President's lawyer on
18 21 September 2016 contains the words "hearing on the merits", which the Prosecutor made a point of stressing, so as to avoid any misunderstanding by the recipient of the purpose of the hearing on 24 October.

12. That hearing — requested by the Prosecutor in his capacity as prosecuting authority, to eliminate a procedural defect — is the prelude to the trial, the principle of which is established and the holding of which is therefore certain.

13. Mr. President, Members of the Court, Article 388 of the French Code of Criminal Procedure provides that:

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[29] No. 51 of the documents communicated by France.

[30] *Ibid.*

> "[t]he *tribunal correctionnel* is seised of offences within its jurisdiction either by the voluntary appearance of the parties, or by a summons . . . or when the case is referred to it by the investigating jurisdiction." *[Translation by the Registry.]*

14. It follows that the Tribunal is seised by the referral order of 5 September 2016, and by that alone.

15. According to the jurisprudence of the French *Cour de cassation*, it is that order which determines the facts referred to the criminal court and fixes the scope and date of the referral[31].

16. Admittedly, under French criminal procedure, the referral order does not actually include the date of the hearing, meaning that further action is required before the case can be heard by the trial court; this action is carried out by the registry and by the Prosecutor's Office, although the latter, that is to say the Prosecutor, has no discretionary power and simply acts in an administrative capacity. Thus, Article 180 of the Code of Criminal Procedure provides:

> "In the event of referral, either to the local court, to the *tribunal de police* or to the *tribunal correctionnel*, the investigating judge shall transmit the case file with his order to the Public Prosecutor. The latter shall send it forthwith to the registry of the court which is due to hear the case.
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> If the correctional court is seised, the Public Prosecutor must summon the defendant to appear at one of the forthcoming hearings, respecting the time-limits for summons set out in the present Code." *[Translation by the Registry.]*

17. Seisin of the Tribunal is thus effective by reason of the referral order only, and the act of returning the proceedings to the investigating judge for regularization, proposed by the Prosecutor in this case, is irrelevant. Hence, the investigating judge has no power other than to regularize the
19 file and to send it back to the Public Prosecutor, together with the corrected order, in accordance with the terms of the previously mentioned Article 180.

18. The fact that seisin of the trial court is irrevocable is a reflection of the principle that, in France, the Public Prosecutor has no discretionary control over the course of criminal proceedings: it is he who initiates the proceedings (in the present case by making an application to open an investigation, with the special feature that the complainant, the association Transparency International France, is involved jointly as a civil party), but once those have begun, they are no longer under his control and must continue until a decision is reached by the (investigating or trial) court sitting in the case. Consequently, by virtue of the referral order of 5 September 2016, the

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[31] Judgments of the *Chambre criminelle* of the *Cour de cassation* of 22 June 1977, *Bulletin criminel* No. 223 of 23 April 1980, published in *Bulletin criminel* No. 118.

investigating judges are relieved of the file and the *Tribunal correctionnel* is irrevocably seised of a duty to try the Vice-President.

II. France has no legal means by which to prevent or delay the trial of the Vice-President

19. Mr. President, Members of the Court, I must draw your attention to the fact that, even if France wanted to, it is completely unable to stop the trial of the Vice-President from going ahead, having no legal means at its disposal to do so.

20. Indeed, we pointed out in the Application instituting proceedings that when rejecting Equatorial Guinea's offer to settle the dispute through conciliation and arbitration, France explained that it was unable to accept that offer on the grounds that "the facts mentioned . . . have been the subject of court decisions in France and remain the subject of ongoing legal proceedings"[32].

21. In the course of his presentation, the Agent of France reaffirmed this position in the following terms:

> "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 . . . [I]t is a reflection of the principle of separation of powers, which is common to States governed by the rule of law."[33]

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22. This ban on interference by the French Government in ongoing legal cases is so fundamental a principle that it is enshrined in Article 30 of the French Code of Criminal Procedure, which states that:

> "The Minister of Justice is responsible for carrying out the criminal justice policy determined by the Government. He ensures that it is applied in a uniform manner throughout the territory of the Republic.
>
> To that end, he provides the prosecutors of the Public Prosecutor's Office with general instructions.
>
> He may not provide them with any instructions in respect of individual cases." *[Translation by the Registry.]*

23. Mr. President, the Court knows by now that the criminal proceedings instituted in France against the Vice-President of the Republic of Equatorial Guinea were done so not on the initiative

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[32] Application instituting proceedings, para. 34.

[33] CR 2016/15, p. 8, para. 3 (Alabrune).

of the Public Prosecutor, who has always been opposed to them, but further to complaints filed by a number of French associations.

24. After the referral order against the Vice-President of Equatorial Guinea was made, the lawyer representing the associations which had filed those complaints expressed delight, in the newspaper *Le Monde Afrique*, that "France will hold the first trial on the ill-gotten gains"[34]. This statement shows that during the hearing process, even in the highly unlikely event of the Public Prosecutor's inaction, the civil-party association in the case could validly call the Vice-President of the Republic of Equatorial Guinea to appear before the *Tribunal correctionnel*, both it and the Public Prosecutor having the right to do so under Article 551 of the Code of Criminal Procedure.

25. Finally, it is to be noted that following the Vice-President's questioning at first appearance, which took place by videoconference on 18 March 2014, and in execution of a request for international mutual legal assistance of 14 November 2013 addressed by the French authorities to the Republic of Equatorial Guinea, the Vice-President was placed under judicial examination on 13 February 2014, on the basis of the United Nations Convention against Transnational Organized Crime signed at New York on 15 November 2000, known as the Palermo Convention. Contrary to what was claimed by the Agent of France, it was not judges from the Supreme Court of Malabo
21 who placed him under judicial examination[35], but the French investigating judges, Equatorial Guinea's judges having merely confirmed that placement[36].

26. The Vice-President was notified of his placement under judicial examination, which is by definition a form of legal proceeding, for, *inter alia*, laundering the proceeds of the misappropriation of public funds and the proceeds of the misuse of corporate assets; the investigating judges cited, among other criminal law texts, Article 445-3 of the French Penal Code concerning the crime of corruption[37], which provides, as a mandatory additional penalty, for the confiscation "of whatever was used or intended for the commission of the offence or of whatever is its product" *[translation by the Registry]*.

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[34]*Le Monde Afrique* (7 September 2016).

[35]CR 2016/15, p. 12, para. 27 (Alabrune).

[36]Request for the indication of provisional measures of Equatorial Guinea, Ann. 1, p. 29.

[37]*Ibid*., p. 3, para. 1.

27. And the attachment order issued against the building located at 42 avenue Foch dated 19 July 2012 — which is among the documents communicated by France —, as reasoned by the investigating judge, does indeed state that this measure of constraint was decided upon with a view to confiscation:

> "Whereas that building may therefore be confiscated as the product of the investment, concealment or conversion of proceeds of the offences of misappropriation of public funds, misuse of corporate assets and breach of trust."[38]

28. Consequently, the imminent and inevitable character of the Vice-President's trial as an effect of the referral order of 5 September 2016 clearly constitutes a risk of irreparable prejudice to the plausible rights of Equatorial Guinea.

29. Yesterday, after projecting images of 42 avenue Foch, which stirred only his emotions, Professor Alain Pellet stated that "law and morality are two distinct things. But there are limits. In our case, they have been exceeded." Law and morality have the same centre, but not the same circumference, would be the response of the British jurist Jeremy Bentham.

30. Thank you, Mr. President, Members of the Court, for your kind attention. Mr. President, I would most respectfully request that you now give the floor to Professor Maurice Kamto.

22 The VICE-PRESIDENT, Acting President: Thank you, Mr. Tchikaya. I give the floor to Professor Maurice Kamto. You have the floor, Professor.

MR. KAMTO:

FACTS ALLEGED BY FRANCE — SERIOUS RISK OF IRREPARABLE PREJUDICE — REMOVAL OF THE CASE FROM THE COURT'S LIST

1. Thank you, Mr. President. Mr. President, Members of the Court, in this second round of oral argument of Equatorial Guinea, I will enlighten the Court with regard to three points raised by the other Party in its oral argument yesterday.

2. First,

— I will make a few brief — very brief — comments on some of the facts that have been alleged;

[38] No. 47 in the documents communicated by France, pp. 4-13.

— I will then re-establish the actual subject of the proceedings for the indication of provisional measures which have brought us here before the Court today — a subject which was largely ignored by the other Party during its oral argument yesterday;

— next, I will return to the issue of the real risk of irreparable prejudice;

— and, finally, I will show not only that the case should not be removed from the Court's List, but, on the contrary, that the circumstances of the present case justify the indication by the Court of the provisional measures sought by Equatorial Guinea.

I. A few general observations

1.1. On the facts alleged by France

3. With regard to the facts, the main points were set out by my colleague, Sir Michael Wood. That being said, it is necessary to reconstruct the exact sequence of events, which, despite being abundantly clear, was muddled yesterday by a presentation that did not include all the relevant information. First, contrary to the impression given by France yesterday, it was on 4 October 2011, and not as from 27 July 2012, that the Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that it had for a number of years had available to it a building located at 42 avenue Foch "which it used for the performance of the functions of its diplomatic mission without having given your services official notification thereof". Equatorial Guinea is not saying

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that it is the owner of that building, it is not saying that it acquired the building a number of years previously, it is acknowledging that it had not given official notification regarding the building, but it is saying that it has a building which is being used as diplomatic premises. While our opponents mention the Note from the Ministry of Foreign Affairs of 11 April responding to the Embassy of Equatorial Guinea, which states that they did not consider the building to form part of the diplomatic premises, they do not say to which message this Note of 11 April was responding. Of course, it was responding to the Note of Equatorial Guinea previously mentioned. Throughout the diplomatic exchanges between the two countries, and there were at least some thirty of them, Equatorial Guinea consistently reiterated the diplomatic status of the building at 42 avenue Foch, which housed the premises of its diplomatic mission.

4. Second, France included in the judges' folder a letter of 14 February 2012 from President Obiang to President Sarkozy in which, according to France, the President of Equatorial Guinea acknowledges that the building was "owned by his son"[39]. But our opponents are seeing something in that letter that simply is not there. President Obiang states very clearly that "because of the pressure exerted on [his son] as a result of an alleged illegal acquisition of assets, he had decided to sell the building to the Government of the Republic of Equatorial Guinea"; and, most importantly, President Obiang specifies: "The building in question is currently an asset lawfully acquired by the Government of Equatorial Guinea."[40] These are the precise facts, Mr. President, Members of the Court.

1.2. On the subject of the proceedings for the indication of provisional measures

5. In its oral argument yesterday, the other Party asked that Equatorial Guinea's request for the indication of provisional measures be rejected on the grounds that, aside from the lack of prima facie jurisdiction of the Court, "the rights claimed by the Republic of Equatorial Guinea are not plausible, and that the request for provisional measures constitutes an abuse of process"[41]. While the jurisprudence has established the condition of plausible rights, the same cannot be said for the

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notion of abuse of process invoked by France. These arguments in no way enlighten the Court as to the subject of the present proceedings. If they intended to show that Equatorial Guinea's rights are not plausible, it would have been sufficient for them to refer to Equatorial Guinea's oral argument on Monday for proof of this. So we will not revisit that issue.

6. The argument relating to "abuse of process", which, moreover, lacks any basis in your jurisprudence, must therefore be dismissed.

7. Given that the status of the Vice-President of Equatorial Guinea is not contested — and neither is Equatorial Guinea's right of ownership in the building located at 42 avenue Foch, which houses the premises of its diplomatic mission — the Court must conclude that Equatorial Guinea's rights in respect of the immunity of its Vice-President and the inviolability of the premises of its diplomatic mission are plausible. Throughout its oral argument, France has attempted to

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[39]CR 2016/15, p. 10, para. 13 (Alabrune); p. 26, para. 18 (Pellet).

[40]Judges' folder, tab 5.

[41]CR 2016/15, p. 33, para. 2 (Ascensio).

demonstrate not that the Vice-President is not vice-president — which, incidentally, would have been inadmissible — but that the Vice-President did not enjoy any immunities because he was not part of the so-called "troika"; it has also attempted to demonstrate that the building at 42 avenue Foch was not used as premises for a diplomatic mission. These are issues that should be reserved for the merits.

8. To recall, the criterion of plausibility of the rights refers back to the criterion of credibility. The position of the Vice-President and Equatorial Guinea's ownership of the building at 42 avenue Foch having been established, it is plausible that such an organ and such an asset should enjoy immunity and inviolability under international law. Whether they do actually enjoy immunity and inviolability is not the subject of the present proceedings for the indication of provisional measures. Only your Court's decision on the merits could confirm or refute this.

II. The real and imminent risk of irreparable prejudice

9. Mr. President, Members of the Court, France claimed yesterday that, in addition to the requirements of prima facie jurisdiction and plausible rights, there were also "other conditions which are well-known and long established in the Court's jurisprudence: urgency and the risk of irreparable prejudice"[42].

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10. In reality, what France claims to identify as "other conditions", in the plural, is in fact a single condition only: the condition of real and imminent risk of irreparable prejudice. In the Order for the indication of provisional measures rendered in the case concerning *Certain Activities carried out by Nicaragua in the Border Area*, the Court stated that its power "to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute"[43]. The expression "in the sense that" explains what is meant by "urgency"; it is not intended to introduce a new, separate criterion. It seeks to reply to the question whether a breach of the rights of the party requesting provisional measures is to be anticipated, so that, unless the measures requested are ordered, even a decision on the merits would be unable to remedy the prejudice caused to those

[42]CR 2016/15, p. 33, para. 2 (Ascensio).

[43]*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.

rights. We dealt at length with this criterion in the first round of oral pleadings on Monday morning. We will confine ourselves here to responding to those arguments of our opponents that there is no imminent risk of irreparable prejudice, whether to the immunity of the Vice-President or to the inviolability of the premises of the diplomatic mission of Equatorial Guinea.

11. To show that there is no imminent risk to the rights of Equatorial Guinea which would justify the current request for provisional measures, our opponents explained at length that the slowness of French criminal proceedings renders Guinea's request inadmissible as regards the risk of breach of the Vice-President's immunity and of the inviolability of the building at 42 avenue Foch. Our opponents tell us that "any custodial sentence *that might be given* would not become final for several years"[44] and that a final decision of confiscation "would not be rendered for several years"[45]. Our opponents would have you believe that Equatorial Guinea should welcome the alleged slowness of French justice; a slowness over which it could exercise no control. The use of the conditional tense, with its reference to probabilities, is in itself evidence of the risk to Equatorial Guinea's rights. The aim of the present proceedings is precisely to eliminate that risk.

26 **2.1 The absence of real and imminent risk of irreparable prejudice to the personal immunity of the Vice-President**

12. France's argument that "this Court has never found that ongoing criminal proceedings concerning a State official other than [those of the troika] would risk causing a grave and irreparable prejudice"[46] is misconceived. Our opponents cannot be unaware of the fact that the Court's solution to a case depends on the particular circumstances of each one. In effect, all that the *Arrest Warrant* case has in common with this case is the fact that the national proceedings were of a penal nature and that the personal immunity of an individual occupying a senior governmental post was involved. For the rest, while Mr. Yerodia subsequently became Minister for Education and consequently occupied a post which, as you put it, "involved less frequent foreign travel"[47], in

[44]CR 2016/15, p. 34, para. 9 (Ascensio).

[45]CR 2016/15, p. 38, para. 22 (Ascensio).

[46]CR 2016/15, p. 35, para. 13 (Ascensio).

[47]*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.

this case we are in precisely the opposite situation. Mr. Teodoro Nguema Obiang Mangue has meanwhile become Vice-President of Equatorial Guinea, so that by contrast with the Minister for Agriculture, the post which he had occupied when penal proceedings began in France, he now occupies a post which involves him having to travel abroad frequently, at least as often as a Minister for Foreign Affairs.

13. Equatorial Guinea has provided in paragraph 18 of its Request for the indication of provisional measures a detailed list, albeit a purely illustrative one, of the frequent foreign trips undertaken by Mr. Teodoro Nguema Obiang Mangue, as second Vice-President in charge of Defence and Security; I will not therefore repeat it. Since becoming Vice-President in charge of National Defence and State Security, on 30 June 2016, shortly after his appointment, he had a meeting in Malabo with the Ambassador of France, Mr. Christian Bader, to discuss military co-operation. He is also responsible for the implementation of the bilateral agreement between France and Equatorial Guinea of 9 March 1985 on military co-operation. The Ambassador of France was the first diplomat to visit the office of the Vice-President to congratulate him after his nomination to that post. The Vice-President received the Ambassador together with the Minister of National Defence, who is subordinate to him.

27 14. Very recently, on 30 July 2016, the Vice-President led a high-level delegation from Equatorial Guinea at the summit of the Heads of States of the Central African Economic and Monetary Community (CEMAC), in which all Heads of States and representatives of member States of that community took part, including the Presidents of the Republic of the Congo, the Central African Republic and Gabon, as well as the Prime Ministers of Cameroon and Chad.

15. In August 2016, the Vice-President made an official visit to Brazil where he had official meetings on military co-operation.

16. As these examples show, in his duties as Vice-President Mr. Teodoro Nguema Obiang Mangue occupies senior functions which are clearly of an international character. He is one of the chief representatives of his country internationally, in fact the second after the Head of State. Foreign trips are an integral and indispensable part of his role and he is involved in the conduct of international relations for Equatorial Guinea on questions of the highest national importance.

17. France maintains that no irreparable prejudice will be caused to the duties of the Vice-President of Equatorial Guinea in charge of Defence and Security, claiming that these functions are filled by other ministers and individuals in Equatorial Guinea's executive[48]. Firstly, as Vice-President, Mr. Teodoro Nguema Obiang Mangue has responsibilities far greater than those solely relating to defence and security of the State. Constitutionally, he is the second most important person in the executive, ranking above the prime minister.

18. In the second place, although these duties are functions of the State and can be carried out by any person charged with exercising them, the relevant criterion according to your jurisprudence is not whether there is a real and imminent risk to the post; what counts is the real and imminent risk of irreparable prejudice to the rights of the parties. And clearly each State has the right to appoint a particular person to a particular post.

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19. France further claims that, while Mr. Teodoro Nguema Obiang was the subject of an arrest warrant in the past, it is "highly unlikely" that he would be so in the future[49]. The criterion that you have always applied, Mr. President, Members of the Court, is whether there exists a real and imminent risk of irreparable prejudice. As soon as it becomes a mere "possibility", the risk of a breach of a party's rights must give an entitlement to provisional measures. That was your position in the *Congo* v. *France* case, when you refused provisional measures for a Congolese general because the Congo had, as you put it, not "demonstrated the likelihood, or even the possibility of any irreparable prejudice to the rights it claimed resulting from the procedural measures taken in relation to General Dabira"[50]. It thus follows that even the possibility of risk is sufficient for this Court to indicate provisional measures.

20. Mr. President, Members of the Court, France used no less than six times the adjective "unlikely" in its presentation yesterday. You are well aware that this term does not correspond to any criterion enshrined in your jurisprudence. Unless France can state that there is no possibility of an arrest warrant being issued against the Vice-President of Equatorial Guinea, the Court must respond favourably to Equatorial Guinea's request. The argument that the Vice-President of

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[48]CR 2016/15, p. 36-37, paras. 15-18 (Ascensio).

[49]CR 2016/15, p. 36, para. 14 (Ascensio).

[50]*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.

Equatorial Guinea can still carry out his duties by means of special missions is misconceived[51], and in my view paradoxical. It is misconceived in that it is precisely this interference with the sovereignty of a State, this intrusion in its internal affairs that Equatorial Guinea contests. It is not for a sovereign State to dictate to another sovereign State the way in which it is to conduct its international relations. The argument is furthermore paradoxical in that it consists in France saying to Equatorial Guinea: while we are perfectly well aware of the immunity *rationae personae* of your Vice-President, when he is called to appear before the French criminal courts, he may still stay undisturbed in France to conduct special missions while his case is being heard. I am sure that the Court will not be convinced by such an obviously artificial argument.

29 The VICE-PRESIDENT, Acting President: Professor, I apologize for interrupting you, but we have a slight time problem. There are only five minutes left and the Agent of Equatorial Guinea has still to make his submissions. I should therefore like to know if you are now going to conclude your speech.

Mr. KAMTO: I have finished, Mr. President. I respectfully ask you to give the floor to the Agent of Equatorial Guinea. Thank you Mr. President.

The VICE-PRESIDENT, Acting President: Thank you. Sir, you have the floor.

Mr. NVONO NCA:

FINAL SUBMISSIONS

1. Mr. President, Members of the Court, now that you have heard the arguments of Equatorial Guinea's counsel, I should like to mention two points:

— As I said in my presentation on Monday, Equatorial Guinea reiterates its commitment to dialogue based on negotiation and conciliation, in the interest of good relations between itself and France.

— We are convinced that confrontational and needlessly conflictual exchanges do not make for good relations between States, and we are concerned that should these persist, they

[51] CR 2016/15, para. 19 (Ascensio).

will affect the quality of the relations between our two countries. However, should there be a willingness to maintain good relations, Equatorial Guinea can only encourage you to move ahead and find peaceful solutions: Mr. Alabrune, this is still possible.

We are open to and ready for negotiation: Mr. Alabrune, it is never too late.

— The legal proceedings initiated before the French courts are a serious impediment to the ability of the Republic of Equatorial Guinea, as a sovereign State, to conduct its international relations effectively with States and international organizations.

30 2. Equatorial Guinea is a country that is clearly committed to respect for and non-interference in the internal affairs of other sovereign States. I can assure you that our independence is not for sale and that it is unconditional.

We constantly strive to safeguard international law, without abandoning our obligations but whilst always demanding our rights.

3. Mr. President, Members of the Court, in accordance with the Rules of Court, I shall now read out Equatorial Guinea's submissions:

> "On the basis of the facts and law set out in our Request of 29 September 2016, and in the course of the present hearing, Equatorial Guinea respectfully asks 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 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."

4. A written copy of these submissions has been transmitted to the Court and to the Agent of France.

5. I should like to extend my special thanks to the Registrar and his staff for having ensured the smooth conduct of these proceedings. We are particularly grateful to the interpreters and to

those who produced the verbatim records with such efficiency. Finally, I would like to thank our counterparts on the other side of the Bar, representing France, and in particular its Agent Mr. François Alabrune, for the courtesy they have shown in the various stages of the proceedings.

6. Mr. President, Members of the Court, that concludes our oral argument at this stage. Thank you for your attention.

31 The VICE-PRESIDENT, Acting President: I thank the Agent of Equatorial Guinea, H.E. Mr. Carmelo Nvono Nca. This brings to a close the second round of oral observations of Equatorial Guinea. The Court will meet again this afternoon, at 5 p.m., to hear the second round of oral observations of France. The sitting is closed.

The Court rose at 11 a.m.