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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

WRITTEN STATEMENT OF THE OBSERVATIONS AND SUBMISSIONS OF THE REPUBLIC OF EQUATORIAL GUINEA ON THE PRELIMINARY OBJECTIONS RAISED BY THE FRENCH REPUBLIC

31 July 2017

[Translation by the Registry]

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INTRODUCTION

I. History of the proceedings

0.1. The present case was brought before the International Court of Justice by an Application filed by the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") on 13 June 2016.

0.2. By an Order dated 1 July 2016, the Court fixed time-limits for the filing of the written pleadings, namely 3 January 2017 for Equatorial Guinea's Memorial and 3 July 2017 for the Counter-Memorial of the French Republic (hereinafter "France").

0.3. On 29 September 2016, Equatorial Guinea filed a Request for the indication of provisional measures. Hearings on this request were held from 17 to 19 October 2016. In its Order of 7 December 2016, the Court unanimously indicated the following provisional measures:

> "France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability."

In addition, the Court, again unanimously, "reject[ed] the request of France to remove the case from the General List"[1].

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0.4. On 3 January 2017, Equatorial Guinea filed its Memorial in accordance with the Court's Order of 1 July 2016.

0.5. On 31 March 2017, France raised a number of preliminary objections to the jurisdiction of the Court[2]. By an Order dated 5 April 2017, the Court fixed 31 July 2017 as the time-limit for the filing by Equatorial Guinea of a written statement of its observations and submissions on the preliminary objections raised by France. Equatorial Guinea files this Written Statement pursuant to that Order.

II. Summary of Equatorial Guinea's arguments

A. The Court has jurisdiction under the United Nations Convention against Transnational Organized Crime and the Optional Protocol to the Vienna Convention on Diplomatic Relations

0.6. As explained in Equatorial Guinea's Memorial[3], the Court has jurisdiction to entertain the present dispute under Article 35, paragraph 2, of the United Nations Convention against Transnational Organized Crime (hereinafter the "Palermo Convention")[4] and under Article I of the

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[1] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures,* Order of 7 Dec. 2016, para. 99. In this Order, the Court also found that it did not have prima facie jurisdiction to entertain Equatorial Guinea's claim regarding the immunity *ratione personae* of its Vice-President in charge of National Defence and State Security from the jurisdiction of the French courts (*ibid.*, para. 50). However, the Court noted that "[t]he decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves" (*ibid.*, para. 98).

[2] It should be noted that France has not complied with Article 79, paragraph 4, of the Rules of Court. Instead of attaching copies of the documents in support of its preliminary objections, as required by Article 79, France merely refers to a number of documents that it had produced on 14 October 2016, just before the start of the hearings on the request for the indication of provisional measures.

[3] Memorial of Equatorial Guinea, 3 Jan. 2017 (hereinafter "MEG"), Chap. 5.

[4] *Ibid.*, paras. 5.3-5.34.

Optional Protocol to the Vienna Convention on Diplomatic Relations (hereinafter the "Optional Protocol")[5]. The dispute relating to the Palermo Convention chiefly concerns France's violations of the immunities to which Equatorial Guinea is entitled in respect of both its Vice-President and its State property; the Optional Protocol is of relevance to the dispute concerning the inviolability of the building located at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission in France.

3 0.7. The procedural conditions for submitting the dispute to the Court laid down by the Palermo Convention and the Optional Protocol are met[6]. France does not contest this in its Preliminary Objections.

0.8. There is a dispute between Equatorial Guinea and France concerning the interpretation and application of the Palermo Convention, and in particular the interpretation and application of Article 4, read in conjunction with other provisions of the Convention. By virtue of Article 4, the States have undertaken to respect the principles of sovereign equality and non-intervention in the performance of their obligations under the Convention. In this instance, France's failure to respect the immunity *ratione personae* of the Vice-President of Equatorial Guinea in charge of National Defence and State Security, as well as the immunity from measures of constraint of the building located at 42 avenue Foch, as property of the State of Equatorial Guinea; the overextension of French criminal jurisdiction to the detriment of Equatorial Guinea's exclusive jurisdiction over certain offences; and France's refusal to take note of the information provided by Equatorial Guinea regarding the commission of such offences, constitute violations of Article 4 in carrying out the terms of Articles 6, 11, 12, 14, 15 and 18 of the Convention.

0.9. The present dispute also concerns the interpretation and application of the Vienna Convention on Diplomatic Relations (hereinafter the "VCDR"). Consequently, the Court has jurisdiction pursuant to Article I of the Optional Protocol. In particular, it is a question of ascertaining France's breaches of the inviolability enjoyed by the building located at 42 avenue Foch in Paris. This question concerns the interpretation and application of the VCDR, including, but not limited to, Article 1 *(i)* and Article 22 thereof. The legal issues on which the Parties disagree include: (i) the point at which premises become "premises of the mission" within the meaning of the VCDR; and (ii) the effect, if any, of a unilateral, arbitrary or discriminatory refusal by the receiving State to accept premises used for diplomatic purposes as "premises of the mission".

4 **B. France's preliminary objections must be dismissed**

0.10. In its Preliminary Objections, France takes an extraordinarily narrow view of the Court's jurisdiction under the treaties granting it jurisdiction to settle disputes concerning their "interpretation or application". There is no basis for this restrictive interpretation in the jurisprudence of the Court, or in that of other international courts. If France's approach were to be accepted, a great many compromissory clauses would be largely deprived of effect.

0.11. Equatorial Guinea can but express how deeply disappointed it is that France is once again accusing it of acting in bad faith in bringing this dispute before the Court[7]. Initiating proceedings can in no way be considered an unfriendly act between States[8], and the suggestion that

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[5] MEG, paras. 5.35-5.48.

[6] *Ibid.*, paras. 5.4-5.8 and 5.36-5.43.

[7] Preliminary Objections of France (hereinafter "POF"), paras. 59-75.

[8] Manila Declaration on the Peaceful Statement of International Disputes, Annex to United Nations General Assembly resolution 37/10 of 15 Nov. 1982, Sec. II, para. 5 ("Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States").

recourse has been had to the Court in bad faith cannot be made lightly. Indeed, such an accusation is entirely unfounded[9].

0.12. France's restrictive approach to the Palermo Convention and the VCDR does not only seek to deprive the Court of its role in the peaceful settlement of disputes on the basis of those treaties; France is also intent on minimizing the obligations accepted by the States parties in a manner that is inconsistent with the object and purpose of the said treaties. This approach, which invites confrontation and instability, cannot be accepted.

0.13. France's argument that the present dispute concerns neither the interpretation or application of the Palermo Convention, nor that of the VCDR, is all the more unacceptable given that the French authorities themselves have knowingly acted on the basis of these conventions. France itself has acknowledged, for instance, that the purpose of the provisions of French criminal law which have been used as a basis for the proceedings against the Vice-President of Equatorial Guinea in charge of National Defence and State Security, and for the measures of constraint against
5 the building located at 42 avenue Foch in Paris, is to give effect to the Palermo Convention. Furthermore, the French courts expressly referred to this Convention in their request to Equatorial Guinea for mutual legal assistance in 2013. Representatives of France have, moreover, paid regular visits to the building located at 42 avenue Foch to obtain consular and other services, thereby acknowledging that the said building houses the diplomatic mission of Equatorial Guinea.

0.14. In many respects, France's preliminary objections to the Court's jurisdiction are in fact issues that go to the merits of the case. For example, France refers to an alleged uncertainty about the date on which Equatorial Guinea acquired ownership of the building located at 42 avenue Foch[10] and the date on which that building was assigned for the purposes of Equatorial Guinea's diplomatic mission in France[11]. Such matters are not relevant at the preliminary objections stage; Equatorial Guinea will not respond to them in this Written Statement. This certainly does not mean, however, that they can be taken as accepted by Equatorial Guinea.

0.15. Equatorial Guinea's main arguments with regard to the preliminary objections raised by France can be summarized as follows:

— The subject-matter of the dispute between the Parties concerns the interpretation and application of the Palermo Convention and the VCDR.

— Equatorial Guinea's Application is not abusive.

— The Court has jurisdiction under Article 35, paragraph 2, of the Palermo Convention, since the dispute concerns the interpretation and application of Article 4 of that Convention, read in conjunction with Articles 6, 11, 12, 14, 15 and 18 thereof.

— The Court has jurisdiction under Article I of the Optional Protocol, since the dispute concerns the interpretation and application of the VCDR, including Article 1 *(i)* and Article 22.

— Consequently, France's preliminary objections must be dismissed in their entirety.

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III. Structure of this Written Statement

0.16. After this introduction, the Written Statement comprises three chapters, followed by Equatorial Guinea's submissions.

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[9] See paras. 1.67-1.80 below.

[10] POF, paras. 24-26.

[11] *Ibid.*, paras. 27-29.

0.17. **Chapter 1** contains a number of general observations. It is divided into four sections.

0.18. **Section I** deals with the recent events underlying the present dispute, in so far as they are relevant in responding to France's preliminary objections. It describes the developments in the criminal proceedings since the filing of Equatorial Guinea's Memorial on 3 January 2017 (**A**); the diplomatic exchanges between the Parties since that date (**B**); and the facts relating to the building located at 42 avenue Foch in Paris, in response to the misleading picture painted by France (**C**).

0.19. **Section II** responds to France's assertions regarding the subject-matter of the dispute. It will show, first, that Equatorial Guinea's submissions do not go beyond the subject-matter of the dispute submitted to the Court and, second, that Equatorial Guinea's claims are indeed based on conventions conferring jurisdiction on the Court, and not on customary international law as such.

0.20. **Section III** shows that, contrary to what France maintains, the Application brought before the Court by Equatorial Guinea is not abusive.

0.21. Finally, **Section IV** demonstrates that, to a large extent, France's objections go to the merits of the case and should not be raised or decided upon at this stage of the proceedings.

0.22. **Chapter 2** explains that the Court has jurisdiction, under Article 35, paragraph 2, of the Palermo Convention, to entertain Equatorial Guinea's claims. As mentioned above, those claims are based on France's violation of Article 4 of the Convention, read in conjunction with Articles 6, 11, 12, 14, 15 and 18 thereof.

7 0.23. **Chapter 3** shows that the Court also has jurisdiction under the Optional Protocol to rule on Equatorial Guinea's claim regarding France's violation of the VCDR in respect of the building located at 42 avenue Foch. In its Preliminary Objections, France itself appears to concede that the dispute between the Parties concerns the interpretation and application of the VCDR, even though it has a very restrictive understanding of the scope of this dispute.

0.24. In its **submissions**, Equatorial Guinea asks the Court to dismiss France's preliminary objections and declare that it has jurisdiction to entertain the present case.

CHAPTER 1

9

GENERAL OBSERVATIONS

1.1. This chapter starts with a description of recent events relating to the present case (**I**). It continues with a response to France's claims regarding the subject-matter of the dispute between the Parties (**II**). Section III will demonstrate that Equatorial Guinea's Application is not abusive (**III**). In the final section of the chapter, Equatorial Guinea will show that France's arguments largely go to the merits of the case, and that the objections raised by the Respondent are thus not of a preliminary character (**IV**).

I. Recent events relating to the case

A. Developments in the criminal proceedings

1.2. Following the hearings on the request for the indication of provisional measures, held from 17 to 19 October 2016, the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, to which the Vice-President of Equatorial Guinea was referred for laundering the proceeds of misappropriated public funds, breach of trust, misuse of corporate assets and corruption, held its first hearing on 24 October 2016.

1.3. At the end of that hearing, during which the Vice-President of Equatorial Guinea was neither present nor represented, the *Tribunal correctionnel* found that the order for partial dismissal and partial referral, issued by the investigating judges against the Vice-President on 5 September 2016, did not comply with the provisions of Article 184 of the Code of Criminal Procedure, since it did not mention the relevant texts that criminalize and punish the offences concerned. The *Tribunal*
10 therefore decided to refer the proceedings back to the Public Prosecutor's Office for resubmission to the investigating judges so that the order could be regularized, and fixed 2, 4, 5, 9, 11 and 12 January 2017 as the dates for the hearings to examine the merits of the case[12].

1.4. On 2 December 2016, the investigating judges signed a new referral order, duly regularized by reference to the provisions in the French Penal Code and Commercial Code that criminalize and punish the offences concerned. According to the new referral order, notified to him on 5 December 2016, the Vice-President was referred before the Paris *Tribunal correctionnel*

> "for having in Paris and on national territory during 1997 and until October 2011 . . . assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms EDUM, SOCAGE and SOMAGUI FORESTAL in particular"[13].

1.5. At the hearing on 2 January 2017, the Vice-President of Equatorial Guinea, who was absent but represented by his counsel, submitted a request to the *Tribunal correctionnel* for the postponement of the hearing on the merits, on the grounds that he had not been granted a reasonable period of time to prepare his defence since being notified of the referral order on 5 December 2016. He also referred to the fact that the Order indicating provisional measures made by the Court on 7 December 2016 was such as to make it impossible for the trial to be held, since the building at 42 avenue Foch housing Equatorial Guinea's diplomatic mission in France, which had been attached *(saisie pénale)* with a view to being confiscated by the French courts, should, under the Court's Order, enjoy equivalent treatment to that required by Article 22 of the VCDR.

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[12] Record of the hearing at the Paris *Tribunal correctionnel*, 24 Oct. 2016 (Ann. 1).

[13] MEG, Ann. 7, p. 35.

1.6. It appears from the record of the hearing of the Paris *Tribunal correctionnel* held on 2 January 2017 that the Public Prosecutor and counsel for the civil-party applicant were of the view that there was no reason to postpone examination of the merits of the case, on the grounds that the
11 Order indicating provisional measures did not constitute an impediment to further criminal proceedings.

1.7. In a decision dated 2 January 2017, the *Tribunal correctionnel* nonetheless postponed adjudication of the case on the merits until the hearings scheduled for 19, 21, 22, 26, 28 and 29 June and 3, 5 and 6 July 2017, and noted that

> "in order to respect the principle of the sound administration of justice, a constitutional objective which was binding on the judicial authorities, and which also obliged them to deliver judgment within a reasonable period of time, the *Tribunal* did not necessarily intend to await the ICJ's decision on the merits"[14].

1.8. It should be noted that in the meantime, on 12 June 2017, the Malabo *Tribunal d'instruction* No. 1, ruling on the predicate offences of misappropriation of public funds, corruption, breach of trust and misuse of corporate assets allegedly committed — according to the French courts — on the territory of Equatorial Guinea, against the State of Equatorial Guinea and the companies Edum, Socage and Somagui Forestal (all of which are governed by Equatorial Guinean law and have their headquarters in Equatorial Guinea), found that no offence had been committed and, in judgment No. 13/2017, declared the acquittal of all the defendants involved[15]. That judgment confirms that none of the predicate offences linked to the offence of money laundering being prosecuted before the French courts was committed in Equatorial Guinea, as the Public Prosecutor of Equatorial Guinea had previously found in 2010[16].

1.9. At the opening of the hearing of 19 June 2017 before the Paris *Tribunal correctionnel*, the Vice-President of Equatorial Guinea, who was absent but represented by his counsel, raised a defence *in limine litis* based on his immunity *ratione personae*, particularly in light of the fact that he had been promoted to the post of Vice-President in charge of National Defence and State Security by decree of the President of the Republic of Equatorial Guinea following the 2016 presidential elections, and that the Government of Equatorial Guinea had not waived his immunity. In the submissions made on his behalf before the *Tribunal*, the Vice-President based his
12 arguments on customary international law, as set out in the jurisprudence of the Court. However, instead of making a preliminary ruling on that ground, the *Tribunal* decided to continue the hearing, joining it to the merits.

1.10. The parties made their cases. The association Transparency International France, a civil-party applicant, argued that the offences of laundering the proceeds of the misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, alleged against the Vice-President of Equatorial Guinea, had occurred. In the view of the civil-party applicant, it made no difference whether the predicate offences said to have been committed on the territory of Equatorial Guinea were punishable under the criminal law of that State.

1.11. Transparency International France maintained that the French criminal courts were fully competent to entertain the offence of money laundering, given that it had been committed in France, and since it is an autonomous offence. Citing the investigating judges' referral order and the case law of the *Cour de cassation,* Transparency International France argued that the original offences must be characterized under French law, once again because of the autonomy of the

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[14] Record of the hearing at the 32nd *chambre correctionnelle* of the Paris *Tribunal correctionnel*, 2 Jan. 2017, p. 11 (Ann. 2).

[15] Malabo *Tribunal d'instruction* No. 1, judgment No. 13/2017 (Ann. 3).

[16] MEG, paras. 3.32-3.35 and 6.31-6.35.

offence of money laundering. In other words, the original act committed abroad must be characterized as if it had been committed on French territory, and the characterization of the original act is a matter for French law alone, to the exclusion of the law of the other country.

1.12. With regard to the immunity *ratione personae* claimed by the Vice-President's defence in light of the new functions he has exercised since 2016, Transparency International France asserted that the judgment of the *Cour de cassation* of 15 December 2015[17], which had rejected the defence based on his function as Second Vice-President in charge of Defence and State Security, should also apply to his current function as Vice-President. According to Transparency International, Mr. Teodoro Nguema Obiang Mangue's situation remains entirely unchanged, since he is neither a Head of State, a Head of Government nor a Minister for Foreign Affairs, and, moreover, the offences alleged against him, assuming them to be established, were committed for personal gain before he took up his current functions, at the time when he was performing the functions of Minister for Agriculture and Forestry.

13 1.13. Finally, Transparency International France asked the *Tribunal correctionnel* to dismiss the Malabo *Tribunal d'instruction*'s judgment of 12 June 2017, according to which the predicate offences presented by the French courts as having been carried out on the territory of Equatorial Guinea had not been committed.

1.14. In conclusion, Transparency International France asked the *Tribunal correctionnel* to order Mr. Teodoro Nguema Obiang Mangue to pay it reparations of €10,000 for the moral harm and €41,080 for the material harm it had suffered.

1.15. The *Tribunal correctionnel* allowed a second, newly established association, which has an exclusively political purpose, to intervene in the hearings as a civil party, notwithstanding an objection by the Vice-President of Equatorial Guinea's defence, which strongly protested against the proceedings being politicized in this way. The association in question is the "Coalition d'opposition pour la restauration d'un État démocratique pour la République de Guinée équatoriale" [Opposition Coalition for the Restoration of a Democratic State in Equatorial Guinea] (hereinafter "CORED"), whose registration was published in the *Journal officiel de la République française* on 11 August 2015.

1.16. Contending, in its turn, that the offences alleged against the Vice-President had occurred, CORED, portraying itself as the representative of the people of Equatorial Guinea, asked the *Tribunal correctionnel* to order Mr. Teodoro Nguema Obiang Mangue to pay it €400,001 in damages and €42,000 in procedural costs.

1.17. It should be noted that the arguments presented before the *Tribunal correctionnel* did not address any evidence as to whether Mr. Teodoro Nguema Obiang Mangue was guilty of money laundering, but focused on criticizing Equatorial Guinea's political régime.

1.18. Defence for the Vice-President of Equatorial Guinea made the preliminary point, as it had done at the opening of the trial, that in his capacity as a high-ranking representative of the State of Equatorial Guinea, the Vice-President in charge of National Defence and State Security should enjoy immunity from jurisdiction, which applies *ratione personae* to certain holders of
14 high-ranking office in a State, before foreign courts, in this instance before the Paris *Tribunal correctionnel*. Under the Constitution of Equatorial Guinea, the Vice-President holds the second-highest office in the State, and the sovereign nature of his functions, including international representation, is sufficiently well-established. Furthermore, according to the defence, the argument of immunity is particularly admissible and well-founded since the French *Cour de cassation* has not had the opportunity to rule on the immunity attached to Mr. Teodoro Nguema Obiang Mangue's current functions.

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[17] MEG, Ann. 29.

1.19. The Vice-President's defence also argued that the judgment of 12 June 2017 of the Malabo *Tribunal d'instruction*, having the force of *res judicata*, is binding on the French courts as regards the characterization of the original offences of misappropriation of public funds, misuse of corporate assets, breach of trust and corruption, over which the French courts do not have jurisdiction. Consequently, money laundering, being a derivative offence, cannot be considered in these proceedings, since the predicate offences were held not to be established by the courts of Equatorial Guinea, which has exclusive territorial jurisdiction to deal with them.

1.20. Relying on Articles 4 and 6 of the Palermo Convention, the Vice-President's defence recalled, first, that the fight against transnational crime could not be waged to the detriment of the principle of State sovereignty, and, second, that the same Convention lays down the obligation to determine whether the acts that may establish the original offences constitute "a criminal offence under the domestic law of the State where it is committed".

1.21. Furthermore, according to the Vice-President's defence, the source of funds used cannot establish the alleged offences of misuse of corporate assets, passive corruption of a public official before 14 November 2007, or misappropriation of foreign public funds, since there is no legal basis for doing so.

1.22. Indeed, the established case law of the French *Cour de cassation* shows that the offence of misuse of corporate assets "cannot be extended to companies in respect of which there is no provision in the law, such as a company incorporated under foreign law"[18]. Misuse of corporate assets only applies in the case of companies incorporated under French law. In this instance,
15 therefore, the offence of laundering the proceeds of misuse of corporate assets to the detriment of Edum, Socage and Somagui Forestal, all of which are companies incorporated under Equatorial Guinean law with their headquarters in Equatorial Guinea, cannot be constituted.

1.23. Similarly, the offence of passive corruption of foreign public officials did not exist before the law of 13 November 2007. Until an anti-corruption law of 30 June 2000, the offence of passive corruption concerned only French public officials. Consequently, the French courts could not accuse Mr. Teodoro Nguema Obiang Mangue of the offence of corruption without contravening Article 7 of the European Convention on Human Rights and Fundamental Freedoms on the principle of offences and penalties being established in law, which prohibits the extensive application of criminal law to the detriment of the defendant.

1.24. Finally, the Vice-President's defence pointed out that the offence of misappropriation of foreign public funds does not exist in French law: Article 432-15 of the French Penal Code criminalizes the misappropriation of French public funds, which are clearly not Equatorial Guinean public funds. Consequently, the offence of laundering misappropriated public funds alleged against Mr. Teodoro Nguema Obiang Mangue is not legally established.

1.25. At the hearing held before the *Tribunal correctionnel* on 5 July 2017, the Public Prosecutor requested not only that the Vice-President be given a term of three years' imprisonment and a fine of 30 million euros, but that all the assets purportedly belonging to him should be confiscated, including the building at 42 avenue Foch housing Equatorial Guinea's diplomatic mission in France, which was the subject of the provisional measures indicated by the Court. The Public Prosecutor did not bring the Order of 7 December 2016 to the attention of the *Tribunal correctionnel*.

1.26. The *Tribunal correctionnel*, having adjourned for deliberation, fixed 27 October 2017 as the date on which it will deliver its judgment.

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[18] *Chambre criminelle* of the *Cour de cassation*, 3 June 2004, No. 03-80.593. *[Translation by the Registry]*.

B. Diplomatic exchanges

1.27. As France mentioned in its Preliminary Objections, diplomatic exchanges have taken place between the Parties since the Court made its Order indicating provisional measures on 7 December 2016[19]. Notwithstanding France's renewed attempt to call into question the good faith of Equatorial Guinea, these diplomatic exchanges demonstrate the genuine and consistent efforts made by Equatorial Guinea to find an amicable solution to the present dispute. They also bear witness to France's persistent refusal to settle the dispute.

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1.28. In January 2017, the President of the Republic of Equatorial Guinea, His Excellency Mr. Obiang Nguema Mbasogo, held a meeting in Bamako with his French counterpart, His Excellency Mr. François Hollande, on the margins of the Africa-France summit. The Ministers for Foreign Affairs of both countries also met.

1.29. Following that meeting, the President of the Republic of Equatorial Guinea sent his French counterpart a letter dated 19 January 2017, in which he expressed his concern about the effect that the criminal proceedings in France against the Vice-President might have on the otherwise excellent bilateral relations between Equatorial Guinea and France. The President of Equatorial Guinea also restated his willingness to find a diplomatic solution to the dispute between the two countries[20].

1.30. In a letter from the French President dated 16 February 2017, France turned its back on Equatorial Guinea's amicable offer[21], as it has done in the past. The French President assured his Equatorial Guinean counterpart of his commitment "to dialogue and co-operation" between the two countries, "particularly with regard to regional security", while nonetheless regretting that he was unable to "accept the offer to settle the matter through the channels proposed by the Republic of Equatorial Guinea, which from a legal standpoint would subvert" judicial independence. On the subject of the provisional measures indicated by the Court in the present case, the French President made a point of providing assurances that France would comply with the Order issued on 7 December 2016.

1.31. On 15 February 2017, before the aforementioned letter from the French President and after two meetings between the French Foreign Ministry's Directorate for Africa and the Indian Ocean and the Ambassador of Equatorial Guinea, at which the situation of the building at 42 avenue Foch in Paris was raised, the Embassy of Equatorial Guinea in France sent a Note Verbale to the French Ministry of Foreign Affairs seeking to ascertain France's position on the Court's Order indicating provisional measures[22].

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1.32. In a Note Verbale in response, dated 2 March 2017, the French Ministry of Foreign Affairs confirmed to the Embassy of Equatorial Guinea in France that, pending a final decision by the Court, France would ensure that the premises located at 42 avenue Foch received "treatment equivalent to that required by Article 22 of the Vienna Convention". However, it also recalled "its consistent position", according to which "France does not consider the building located at 42 avenue Foch in Paris (16th arr.) as forming part of the premises of the diplomatic mission of the Republic of Equatorial Guinea in France"[23].

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[19] POF, para. 85.

[20] Letter from the President of Equatorial Guinea to the French President, 19 Jan. 2017 (Ann. 4).

[21] Letter from the President of the French Republic to the President of the Republic of Equatorial Guinea, 16 Feb. 2017 (Ann. 5).

[22] Note Verbale No. 069/2017 from the Embassy of Equatorial Guinea, 15 Feb. 2017 (Ann. 6).

[23] Note Verbale No. 2017-158865 from the French Ministry of Foreign Affairs, 2 Mar. 2017 (Ann. 7).

1.33. On 12 June 2017, a few days before the criminal proceedings in Paris against the Vice-President of Equatorial Guinea resumed, the Embassy of Equatorial Guinea in France sent the French Ministry of Foreign Affairs a Note Verbale in which it raised strong objections to those proceedings[24]. The Embassy stated explicitly that the Government of Equatorial Guinea would not waive the immunity *ratione personae* of its Vice-President and asked the French Ministry of Foreign Affairs to bring the Note Verbale to the attention of the competent French courts, in particular the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*. To date, Equatorial Guinea has received no reply from France and is unaware of the French Ministry of Foreign Affairs having forwarded a copy of the Note Verbale to the competent French courts.

1.34. As mentioned in paragraph 1.25 above, at the hearing on the merits held on 5 July 2017 before the Paris *Tribunal correctionnel*, the Public Prosecutor sought, *inter alia*, the confiscation of the building located at 42 avenue Foch in Paris. Faced with this situation, the Embassy of Equatorial Guinea in France was obliged to send the French Ministry of Foreign Affairs a Note
18 Verbale of protest on 6 July 2017, recalling the commitment made in writing by the President of the French Republic, on behalf of France, to comply with the terms of the Court's Order indicating provisional measures and to ensure the protection and inviolability of the diplomatic mission[25]. France responded by a Note Verbale dated 18 July 2017[26].

1.35. Equatorial Guinea notes that, according to a judgment of the European Court of Human Rights, in the French judicial system the Public Prosecutor is among the "members of the *ministère public* (prosecuting authorities) who are all under the same hierarchical authority, that of the *Garde des sceaux,* the Minister of Justice, who is a member of the Government, and consequently that of the executive"[27].

C. Facts relating to the building at 42 avenue Foch

1.36. In its Preliminary Objections to the jurisdiction of the Court, France addresses the facts of the case relating to the building at 42 avenue Foch in considerable detail. Although these facts essentially go to the merits, Equatorial Guinea will provide a brief response to the points made. France does not dispute that its judicial authorities imposed measures of constraint on the building, including police raids[28], searches[29] and attachment[30]. France does, however, contest the facts concerning the status of the building. Equatorial Guinea wishes to set the record straight, in view of a number of inaccuracies that crop up throughout the Respondent's presentation of those facts. As will be demonstrated, there is no uncertainty whatsoever about Equatorial Guinea's position.

1.37. France considers that there is uncertainty about the date on which Equatorial Guinea acquired rights over the building located at 42 avenue Foch[31]. However, there is no uncertainty at all in this matter. Equatorial Guinea has always been consistent in its written pleadings. The Court may wish here to consult Equatorial Guinea's Memorial, which reiterates what it stated previously
19 in its replies to the questions put by Judges Bennouna and Donoghue at the provisional measures hearings[32]. By becoming sole shareholder, on 15 September 2011, of the five Swiss companies

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[24] Note Verbale No. 262/2017 from the Embassy of Equatorial Guinea, 12 June 2017 (Ann. 8).

[25] Note Verbale No. 300/2017 from the Embassy of Equatorial Guinea, 6 July 2017 (Ann. 9).

[26] Note Verbale No. 2017-465600 from the French Ministry of Foreign Affairs, 18 July 2017 (Ann. 10).

[27] ECHR, *Moulin* v. *France*, No. 37104/06, Judgment of 23 Nov. 2010, para. 56. *[Translation by the Registry]*.

[28] POF, para. 26.

[29] *Ibid.*, para. 21.

[30] *Ibid.*, paras. 21 and 23.

[31] *Ibid.*, paras. 24-26.

[32] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, p. 1; MEG, paras. 2.12 *et seq*.

which had hitherto owned the building located at 42 avenue Foch, Equatorial Guinea acquired ownership of that building[33]. The question put by Judge Bennouna, regarding the statement made by Equatorial Guinea in a Note Verbale of 14 February 2012 that the title to the property was in the process of being transferred, essentially raised the issue of the transfer of ownership of the companies undergoing liquidation to the State of Equatorial Guinea. As explained in the reply to Judge Bennouna, the statement that the title to the property was in the process of being transferred makes sense only in that context.

1.38. France likes to exaggerate certain facts or describe them in an often simplistic or inappropriate way. Extracts taken out of context cannot help the Respondent's case, and will certainly not enable the truth to be established. In any event, repeated reference to the fact that in a Note Verbale of 4 October 2011 Equatorial Guinea stated that it had "for a number of years had at its disposal"[34] the building at 42 avenue Foch is of little relevance in view of the case against France. What is significant in this Note Verbale is that Equatorial Guinea sought to notify France that the building had been assigned as premises of its diplomatic mission.

1.39. To draw an adverse inference from the statement that on 14 February 2012 the title to the property was in the process of being transferred, whereas Equatorial Guinea had held the right of ownership of the property since 15 September 2011 as a result of the transfer made between it and the Swiss companies, is to misunderstand the sequence of events in this case. France has never contested Equatorial Guinea's right of ownership of the property[35]. In stating in the Note Verbale of 14 February 2012 that the title to the property was in the process of being transferred, Equatorial Guinea was referring to the fact that, pursuant to paragraph N of the agreement on the transfer of shares and claims between it and Mr. Teodoro Nguema Obiang Mangue, it was required to liquidate the five companies in order to register its property title at the Land Registration Department[36]. At the present time it is impossible to register that title, due to the registration on 31 July 2012 of the attachment order of 19 July 2012[37]. France's assertions regarding the Note Verbale of 14 February 2012 are thus far from being a true reflection of the situation[38].

1.40. France creates the same confusion when it claims that there is "uncertainty" about the use of the building located at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission[39]. Equatorial Guinea nonetheless clarified the facts of the matter, in response to Judge Donoghue's question, on 26 October 2016. Yet France, once again, prefers to be selective by referring in its Preliminary Objections to facts which appear to support its case, but which actually distort the truth. Equatorial Guinea has no intention of changing any part of its previous statements on the subject and kindly asks the Court to refer to its reply to the question put by Judge Donoghue[40].

1.41. As provided in Article 1 *(i)* of the VCDR, diplomatic premises include buildings "used for the purposes of the mission". As shown in Equatorial Guinea's Memorial and in Chapter 3 of this Written Statement, the diplomatic status of the building is determined by its use, and this

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[33] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 3; MEG, para. 2.18.

[34] POF, para. 25.

[35] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 13.

[36] *Ibid.*, para. 15.

[37] *Ibid.*, para. 16; MEG, para. 2.28.

[38] POF, para. 25.

[39] *Ibid.*, paras. 27 *et seq*.

[40] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, paras. 17-32.

includes the manifest intention to use it for the purposes of the diplomatic mission[41]. It is for this reason that Equatorial Guinea replied to Judge Donoghue that the use of the building located at 42 avenue Foch in Paris for diplomatic purposes was established in several stages; first, an assignment, i.e., its designation for use as premises of the mission, notified to France by the Note Verbale of 4 October 2011[42]; second, acts of using it for the purposes of the mission, including the
21 rehousing of the Chargée d'affaires *ad interim* in the building as from 17 October 2011[43]; and finally, the gradual relocation of its diplomatic offices to 42 avenue Foch, a move completed on 27 July 2012, as attested by the Note Verbale sent to France on that date[44].

1.42. Establishing the premises of a diplomatic mission involves a process. It is true that Equatorial Guinea gave official notification of the assignment of the building for diplomatic purposes on 4 October 2011, but that did not prevent it from objecting, as it did, to the intrusions of 28 September and 3 October 2011. That objection simply reflected its decision to use the building for diplomatic purposes, as also evidenced by the presence of a sign on the building marked "*République de Guinée Équatoriale — locaux de l'ambassade*" (Republic of Equatorial Guinea — Embassy premises)[45]. Moreover, the representatives of Equatorial Guinea had good cause to demand respect for the jurisdictional immunity of the State and its property.

1.43. Lastly, the fact that different addresses appeared in the headers and footers of correspondence or in the curriculum vitae of the Chargée d'affaires *ad interim*[46] cannot be regarded as decisive in settling the question of the date from which the building was assigned as premises of the diplomatic mission. Equatorial Guinea cannot see what can be proved by such a frivolous manner of proceeding, which merely reveals a dearth of convincing arguments. In any event, irrespective of whether they are significant, these are not preliminary questions, but go to the merits of the case.

II. The subject-matter of the dispute

1.44. France maintains that Equatorial Guinea's submissions "go far beyond" the subject-matter of the dispute as defined in its earlier written pleadings and that "Equatorial Guinea takes great liberties with the treaties on which it purports to base its claims"[47]. France's main line of argument is that Equatorial Guinea is basing its claims on customary international law/general
22 international law and not on the specific conventions establishing the jurisdiction of the Court. Such assertions are wrong. They are a caricature of Equatorial Guinea's arguments, produced by means of selective quotations from its written pleadings[48].

1.45. France presents the subject-matter of the dispute in a manner at odds with the jurisprudence of the Court: it does not just look at what is under a single heading or in any specific extract of an application. In this regard, the Court stated the following in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*:

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[41] MEG, para. 8.15.

[42] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, paras. 21-22 and 24; MEG, paras. 3.55, 4.4 and 8.46.

[43] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 25; MEG, paras. 4.9, 4.10 and 8.46.

[44] Replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 29; MEG, paras. 4.25 and 8.48.

[45] MEG, para. 8.17.

[46] POF, para. 27.

[47] *Ibid*., para. 44.

[48] For example, by quoting only the introductory summary of the dispute in paragraph 2 of Equatorial Guinea's Application (POF, para. 42).

"France has taken the view that it has only accepted the Court's jurisdiction over the stated subject-matter of the case which is to be found, and only to be found, in paragraph 2 of the Application, under the heading 'Subject of the dispute'. So far as the question of identifying the subject-matter of the dispute is concerned, while indeed it is desirable that what the Applicant regards as the subject-matter of the dispute is specified under that heading in the Application, nonetheless, the Court must look at the application as a whole."[49]

1.46. In the *Fisheries Jurisdiction* case, the Court also stated that:

"There is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it . . .

In order to identify its task in any proceedings instituted by one State against another, the Court must begin by examining the Application . . . However, it may happen that uncertainties or disagreements arise with regard to the real subject of the dispute with which the Court has been seised, or to the exact nature of the claims submitted to it. In such cases, the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant . . .

It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties . . .

The Court will itself determine the real dispute that has been submitted to it . . . It will base itself not only on the Application and final submissions, but on diplomatic
23 exchanges, public statements and other pertinent evidence . . ."[50]

1.47. In the latter case, which was then at the preliminary objections stage, as this one is, the Court ruled that it "w[ould] ascertain the dispute between Spain and Canada, taking account of Spain's Application, as well as the various written and oral pleadings placed before the Court by the Parties"[51]. Consequently, even assuming that Equatorial Guinea might have gone beyond the subject-matter of the dispute in the wording of its submissions in the earlier proceedings, this would not be fatal to establishing the Court's jurisdiction. In the circumstances of the present case, once the question of its jurisdiction is settled, the Court is called upon to make a decision on the whole of the dispute between Equatorial Guinea and France and not just part of it.

1.48. Furthermore, France does not cite the parts of Equatorial Guinea's Application that describe the subject-matter of the dispute correctly. The paragraphs of the relevant section in the Application read as follows:

"The dispute between Equatorial Guinea and France, arising from certain ongoing criminal proceedings in France, concerns the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, and the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property.

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[49] *Certain Questions of Mutual Assistance in Criminal Matters*, (*Djibouti* v. *France*), *Judgment*, *I.C.J. Reports 2008*, p. 177, para. 67.

[50] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, paras. 29-31 (references omitted in the quotation).

[51] *Ibid.*, para. 33.

> The criminal proceedings against the Second Vice-President constitute a violation of the immunity to which he is entitled under international law and interfere with the exercise of his official functions as a holder of high-ranking office in the State of Equatorial Guinea. To date, these proceedings have also resulted, *inter alia*, in the attachment of the building located at 42 avenue Foch in Paris, which is the property of Equatorial Guinea and used for the purposes of its diplomatic mission in France. These proceedings violate the Vienna Convention on Diplomatic Relations of 18 April 1961, the United Nations Convention against Transnational Organized Crime of 15 November 2000, and general international law."[52]

24 1.49. Similarly, in its Request for the indication of provisional measure, Equatorial Guinea describes the subject-matter of the dispute between the Parties in the following terms:

> "The rights of Equatorial Guinea that form the subject of the dispute are as follows: its right to sovereign equality, including the right to respect for the immunity from foreign criminal jurisdiction enjoyed by its Vice-President, as well as the immunity of its property; its right to non-intervention in its internal affairs; and its right to the inviolability, protection and dignity of its diplomatic mission in France. The personal immunity of the Vice-President and the inviolability of the building located at 42 avenue Foch in Paris, the subject of this request for the indication of provisional measures, derive from the principles of the sovereign equality of States and non-interference in States' internal affairs, which are fundamental principles of the international legal order and to which reference is explicitly made in the Palermo Convention. The immunity and inviolability of the diplomatic mission are well-established in customary international law, as codified by the Vienna Convention on Diplomatic Relations."[53]

1.50. The lengthy arguments in paragraphs 42 to 57 of the Preliminary Objections — in which France contends that what Equatorial Guinea seeks in its submissions goes beyond the subject-matter of the dispute — fail to shed any light on the question of jurisdiction which they raise. Assessing the scope of submissions is ultimately a matter for the merits, to be addressed once the jurisdiction of the Court has been established. Contrary to what France appears to believe, the description of the subject-matter of the dispute in the application instituting proceedings, although an essential requirement laid down in the Court's basic texts[54], does not confine the applicant to what is contained in the said application. It very often falls to the Court to determine what the subject-matter is.

1.51. It is clear from all of Equatorial Guinea's written pleadings that the present dispute concerns Frances's violations of the Palermo Convention and the VCDR. The questions relating to the immunity *ratione personae* of the Vice-President of Equatorial Guinea in charge of National Defence and State Security, and the legal status and inviolability of the building which houses that country's diplomatic mission in France, form an integral part of this dispute.

25 1.52. In its Memorial, Equatorial Guinea also founded the Court's jurisdiction on specific conventional provisions. In this regard, it writes:

> "The Court has jurisdiction in the present case both under Article 35 of the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000 . . . and under the provisions

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[52] Application instituting proceedings submitted by Equatorial Guinea, 13 June 2016 (hereinafter "AEG"), paras. 1-3. See also MEG, para. 0.2.

[53] Request for the indication of provisional measures submitted by Equatorial Guinea (hereinafter "RPMEG"), 29 Sep. 2016, para. 13.

[54] Statute of the Court, Art. 40; Rules of Court, Art. 38.

> of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, done at Vienna on 18 April 1961 . . ."[55]

1.53. These bases of jurisdiction are identical in every respect to those invoked by Equatorial Guinea in support of its Application[56] and its request for the indication of provisional measures[57]. In its Order of 7 December 2016 on that request, the Court refers to the same bases of jurisdiction in the following terms:

> "In its Application, Equatorial Guinea seeks to found the Court's jurisdiction, first, on the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations of 18 April 1961 . . . and, second, on Article 35 of the United Nations Convention against Transnational Organized Crime of 15 November 2000."[58]

1.54. France devoted a great deal of space in its Preliminary Objections to either stating the obvious or misrepresenting Equatorial Guinea's arguments regarding the bases of jurisdiction[59]. To support its reasoning, it quotes extracts from Equatorial Guinea's Application and Memorial, in which it highlights — through the use of italics — the terms "general international law" and "customary international law"[60], in order to claim that Equatorial Guinea "seeks to establish its case on principles of general international law rather than on treaty bases"[61].

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1.55. However, as is clear from Equatorial Guinea's Memorial and its oral arguments at the provisional measures hearings, general international law/customary international law is mentioned only in so far as it is incorporated in the Palermo Convention[62] and reflected in the VCDR. Equatorial Guinea does not therefore take any "liberties" with those treaties in order to provide a basis for its claims.

1.56. Of course, as the Court states, a dispute does not exist simply because one party invokes the application of a convention and the other refutes it. In the Order of 7 December 2016, the Court holds that in order to determine whether a dispute exists between the Parties concerning the conventions invoked by Equatorial Guinea, "[i]t must ascertain whether the acts complained of by Equatorial Guinea are prima facie capable of falling within the provisions"[63] of those conventions. Equatorial Guinea will return to this point later in its Written Statement, in order to demonstrate that the Court has jurisdiction to entertain the dispute under the Palermo Convention and the VCDR.

1.57. Despite France's efforts to prove the contrary, there is indeed a dispute between Equatorial Guinea and France regarding the interpretation and application of the VCDR, including Article 1 *(i)* and Article 22 thereof. As consistently maintained by Equatorial Guinea, this dispute concerns not only Article 1 *(i)* and Article 22 of the VCDR, but other provisions of the Convention

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[55] MEG, para. 5.1.

[56] AEG, paras. 4-10.

[57] RPMEG, para. 5.

[58] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures*, Order of 7 Dec. 2016, para. 3.

[59] POF, para. 48.

[60] *Ibid.*, paras. 49-52.

[61] *Ibid.*, para. 48.

[62] MEG, paras. 5.10 and 5.13; CR 2016/16, p. 11, para. 13 (Wood).

[63] *Immunities and criminal proceedings (Equatorial Guinea* v. *France), Provisional Measures,* Order of 7 Dec. 2016, para. 47.

as well. The question of whether premises constitute "premises of the mission" is also relevant when it comes to applying provisions such as Article 20 (flag and emblem of the sending State), Article 21 (facilitation of the acquisition of premises) and Article 23 (exemption from taxes). At this stage, however, the most important issue, and Equatorial Guinea's main concern, is the flagrant violation of Article 22 of the Convention.

1.58. The passage in Equatorial Guinea's Memorial cited by France in paragraph 129 of its Preliminary Objections establishes clearly that there is a dispute regarding the interpretation and application of the provisions of the VCDR between the two Parties. Contrary to what France maintains, Equatorial Guinea does not confine itself to making "bald, unsubstantiated assertions"[64]. It invokes the relevant conventional provisions, whose interpretation and application have given rise to the dispute between the two Parties. That is what is required of a party seising the Court on the basis of a compromissory clause, as is the case here.

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1.59. In France's view, the dispute "in fact" relates to what it says is a preliminary question: that of "whether, at the time of the events of which Equatorial Guinea complains in its Application, th[e] building [at 42 avenue Foch] should — or should not — have been regarded as being used for the purposes of Equatorial Guinea's mission in France"[65]. It also contends that even if the Court were to accept that it had jurisdiction on the basis of the VCDR, that jurisdiction would be limited to "examining the lawfulness of the attachment of the building located at 42 avenue Foch in Paris in the light of the Vienna Convention"[66].

1.60. In Equatorial Guinea's view, there is no preliminary question regarding the status of the premises housing its diplomatic offices that could be taken in isolation from the relevant provisions of the VCDR. Article 1 *(i)* of the VCDR provides:

> "For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
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> . . . . . .
>
> The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."[67]

1.61. This provision does not explicitly lay down the procedure for establishing premises of a diplomatic mission. Practice thus varies from State to State. There is no basis for a receiving State to establish a specific procedure unilaterally. On the other hand, this provision may be understood as entitling the sending State to provide its own definition of the premises of its diplomatic mission. That is the practice followed by many States, in instances where there is no legislation or any other specific regulations in this area. And that is precisely the case in France, unlike the United Kingdom, for example, whose legislation in this regard France was eager to cite, while omitting, however, to cite its own.

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1.62. France refers to its "constant practice"[68] in this area, without providing any examples. Rather than constant practice, a singular practice appears to be followed in respect of Equatorial Guinea alone; it is thus an arbitrary and discriminatory practice that is contrary to Article 47, paragraph 1, of the VCDR. What is more, this is a recent discriminatory practice, which was not

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[64] POF, para. 129.

[65] *Ibid.*, para. 137.

[66] *Ibid.*, para. 138.

[67] VCDR, Article 1 *(i)*.

[68] POF, para. 167.

applied when the previous premises of Equatorial Guinea's mission in Paris were established. The discriminatory nature of this practice is therefore aggravated by its *ad hoc* character. Moreover, France's assertion that the building at 42 avenue Foch does not have diplomatic status is directly contradicted by the conduct of many French officials who have made regular visits there to obtain permission to enter Equatorial Guinea.

1.63. In Equatorial Guinea's view, Article 1 *(i)* of the VCDR establishes that the premises used for diplomatic services are those that are designated as such by the sending State to the receiving State. France, however, maintains — though this is not supported by its "practice", except in the circumstances of the present case — that the status of a sending State's diplomatic premises is not covered by the provisions of Article 1 *(i)* or Article 22 of the VCDR, and that it is for the receiving State alone to establish the procedure to be followed by the sending State to obtain such a status for its diplomatic premises. There is thus undeniably a dispute between the Parties over the interpretation of Article 1 *(i)* of the VCDR.

1.64. As regards Article 22, the dispute concerns its application to the premises used by Equatorial Guinea for its diplomatic services. France contends that "the question of determining the legal status — or the diplomatic purpose — of a building for the purposes of the Vienna Convention is not settled by the Convention"[69]. Yet contrary to France's assertion, this question does not remain outside its scope[70]. In so far as it determines the very application of the
29 Convention, it is closely connected to it, and consequently any dispute over that question is necessarily a dispute relating to the application of the Convention.

1.65. As Equatorial Guinea has shown in its written pleadings, there is also a dispute over the interpretation and application of the Palermo Convention. Equatorial Guinea's claims in this case concerning the immunity *ratione personae* of its Vice-President in charge of National Defence and State Security, and the immunity from measures of execution of its State property, are based on the law of treaties, and, in particular, on the obligation incumbent upon France, under Article 4 of the Palermo Convention, to respect the principles of equality of States and non-intervention when performing its other obligations under the Convention. France itself does not disagree with this[71]. However, it draws attention to various references to customary international law made in Equatorial Guinea's written and oral pleadings[72]. As will be shown in Chapter 2, there is a reason for those references: the relevant provisions of customary international law in this area have become treaty obligations, and the Court has jurisdiction to determine whether they have been breached in the application of the Palermo Convention.

1.66. In conclusion, while inviting the Court to determine the subject-matter of the dispute in the light of its Application instituting proceedings and its final submissions, as well as in the light of diplomatic exchanges and public statements, Equatorial Guinea contends that there is a dispute between the Parties concerning the interpretation and application of the Palermo Convention and the VCDR, and that, consequently, the Court has jurisdiction to rule on Equatorial Guinea's Application.

III. The so-called "abusive nature" of Equatorial Guinea's Application

1.67. In its Preliminary Objections, France argues, as it did at the time of the request for the indication of provisional measures[73], that Equatorial Guinea's referral of the present dispute for

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[69] POF, para. 162.

[70] *Ibid.*

[71] *Ibid.*, para. 63.

[72] *Ibid.*, paras. 42 *et seq*.

[73] In its Order of 7 December 2016, the Court unanimously rejected France's request to have the case removed from the General List.

30 settlement by the Court is "abusive"[74]. In particular, it claims that Equatorial Guinea's Application is, first, an "abuse of process" aimed at circumventing the requirement for consent to the Court's jurisdiction (**A**), and, second, an attempt to consolidate an abuse of rights (**B**).

1.68. A general, preliminary observation must be made here. Having conceded that there is indeed a dispute between it and Equatorial Guinea[75], France has seen fit to use the word "abusive" in widely varying contexts, with a view to preventing the Court from performing its judicial functions. Explicitly or implicitly, it has impugned Equatorial Guinea's motives. Such assertions are not merely unexpected and inappropriate in diplomatic relations; they also run counter to the fundamental principle that bad faith is not to be presumed[76]. In any event, they are blatantly contradicted by the facts.

A. There is no abuse of process by Equatorial Guinea

1.69. France puts forward a variety of arguments in its attempt to demonstrate that Equatorial Guinea's efforts to resolve the present dispute constitute an "abuse of process". It states that Equatorial Guinea's arguments in respect of the Court's jurisdiction are very brief; that Equatorial Guinea relies on customary international law or the Court's jurisprudence to establish its jurisdiction; that Equatorial Guinea's reliance on the Palermo Convention and the VCDR is not legitimate; and that referral to the Court should not be used as a means of terminating the criminal proceedings against the Vice-President of Equatorial Guinea. Each and every one of these arguments is wholly unfounded. In fact, presenting such arguments could in itself be considered an abuse of process.

31 1.70. France starts by accusing Equatorial Guinea of being "particularly cursory" and even "evasive" with regard to the bases of jurisdiction it invokes in this case[77]. It is hardly necessary to respond to those criticisms. Equatorial Guinea's pleadings are entirely clear and require no further explanation. The two bases of jurisdiction relied upon were clearly addressed both in Equatorial Guinea's Application and in its Memorial. In any event, Equatorial Guinea could not have been expected to respond to arguments which, up until now, had not been set out in detail by France. It is precisely for this reason that the incidental proceedings of preliminary objections exist. Equatorial Guinea is delighted to have the opportunity to recall what it had considered to be obvious: the Palermo Convention[78] and the Optional Protocol[79] confer jurisdiction on the Court to rule on the violations of international law committed by France and to determine the consequences of that unlawful conduct.

1.71. France goes on to argue that, apart from the question of the diplomatic status of the building located at 42 avenue Foch in Paris, Equatorial Guinea's claims are based solely on customary international law[80]. This is not true. As recalled in the previous section, Equatorial Guinea is not basing itself directly on customary international law; it is relevant in so far as it is incorporated in the Palermo Convention and reflected in the VCDR. Equatorial Guinea also explained this point at the hearings on the request for provisional measures:

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[74] POF, Chap. 1, Sec. III.

[75] *Ibid.*, para. 64.

[76] *Certain German interests in Polish Upper Silesia, Judgment, 1926. P.C.I.J., Series A, No. 7*, p. 30. See also *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015*, p. 717, para. 141.

[77] POF, paras. 60-61.

[78] See Chap. 2 below.

[79] See Chap. 3 below.

[80] POF, para. 62.

> "At no time did we suggest that there was jurisdiction over questions of general or customary international law except in so far as such jurisdiction flowed from the two treaties we actually relied upon: the Palermo Convention and the Optional Protocol to the Vienna Convention."[81]

1.72. To contend that Equatorial Guinea is relying on certain cases previously brought before the Court (those concerning the *Arrest Warrant*, *Certain Questions of Mutual Assistance in Criminal Matters* and *Jurisdictional Immunities of the State*) to support its own arguments
32 regarding the Court's jurisdiction[82] is entirely irrelevant. Equatorial Guinea in no way refers to those cases in connection with the question of jurisdiction; rather, it relies on the statements of law found within them.

1.73. Even more surprising is France's claim that Equatorial Guinea's reliance on the Palermo Convention and the Optional Protocol as bases of jurisdiction should be described as an abuse of process, because France declined to accept the jurisdiction of the Court on the basis of *forum prorogatum* in 2012[83]. First and foremost, it is established jurisprudence that seising the Court, even immediately after accepting its jurisdiction, does not constitute an abuse of process [84]. The description of Equatorial Guinea's accession to the Optional Protocol as part of a "strategy" to circumvent the lack of consent in 2012[85] is therefore of no relevance. The same applies to the other argument put forward by France, according to which the Palermo Convention was already applicable between the Parties in 2012 and Equatorial Guinea failed to invoke it[86]. There may be a number of reasons why a State relies on a basis of jurisdiction on one occasion and not on another. In any event, a State cannot be criticized for doing so at a later stage, since under international law there is no limitation period for invoking bases of jurisdiction. Furthermore, it is to be recalled that France itself, in 2013, made it clear that the actions taken against the Vice-President of Equatorial Guinea and that country's Embassy in Paris were carried out on the basis of the Palermo Convention, when it invoked the latter in its letter rogatory of 14 November of that same year[87]. As a more general point, seeking to dissuade a State from settling a dispute by judicial means, and accusing it of abuse and bad faith in seising the Court, is most regrettable conduct.

33 1.74. France, moreover, accuses Equatorial Guinea of using the Court as a means to obstruct the criminal proceedings brought before the French courts against its Vice-President[88]. Yet that is a perfectly legitimate way of using the Court, when a State considers that a foreign court is exercising its jurisdiction in a manner contrary to international law. A number of cases have been brought before the Court for the same purpose (that of ending or suspending judicial proceedings instituted in violation of international law)[89].

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[81] CR 2016/16, p. 10, para. 10 (Wood).

[82] POF, para. 65.

[83] *Ibid.*, paras. 70-72.

[84] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 275, paras. 22-40; see also *Right of Passage over Indian Territory (Preliminary Objections), Judgment, I.C.J. Reports 1957*, p. 147; *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 31; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, para. 45.

[85] POF, para. 70.

[86] *Ibid.*, para. 72.

[87] MEG, paras. 3.47-3.48.

[88] POF, paras. 73-74.

[89] See, for example, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* or *Jadhav Case (India* v. *Pakistan)*.

1.75. In any event, as a renowned public law specialist wrote recently, abuse of process "is a dangerous concept because it limits the exercise of subjective rights grounded in positive law"[90]. In this case, Equatorial Guinea has had recourse to dispute settlement procedures in good faith and in accordance with the conditions and requirements of the conventions on which it bases the Court's jurisdiction. Any claim that the Application is "completely artificial"[91] is entirely unfounded and must be rejected.

B. There is no abuse of rights by Equatorial Guinea

1.76. France has also asserted that Equatorial Guinea's Application constitutes an abuse of rights, on the grounds that it was not entitled to require the immunities in question to be respected[92]. However, it is clear that the question of whether Equatorial Guinea enjoys such rights goes to the merits of this case. Similarly, any allegation that Equatorial Guinea may have acted improperly in seeking to defend the rights conferred on it by international law — which Equatorial Guinea vehemently refutes — raises issues pertaining to the merits that cannot be addressed in these incidental proceedings[93].

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1.77. Having failed to convince the Court at the provisional measures stage that Equatorial Guinea's efforts to ensure respect for the immunities afforded to its Vice-President and the building housing its Embassy in Paris are abusive, France has once again given a partial and manipulative portrayal of the facts. In the final analysis, France's assertion that Equatorial Guinea is seeking to abuse its rights is not supported by the slightest evidence. The facts presented by France itself show that Equatorial Guinea has acted reasonably and in accordance with international law, and that it has been tireless in seeking a solution to the dispute without aggravating it in a way that might affect bilateral relations between the two States.

1.78. France argues that flagrant abuse of the privileges and immunities granted by international law could lead to the very existence of those fundamental rights being called into question[94]. The same argument could be put forward when the legitimate exercise of privileges and immunities is challenged by the authorities of a foreign State in a conflictual way, particularly if the exercise of those privileges and immunities is subject to examination by the courts of that State. As the Court of Appeal of England and Wales recently noted, "[t]here is no support in the relevant international instruments or the case law for a functional review by a court where there is a challenge to a claim to immunity by a diplomat or Permanent Representative"[95]. While the claim to immunity might turn out to be unjustified in the light of the circumstances and facts of the case in question,

> "it is not envisaged that the correct response to such a situation is for the domestic courts to look behind the status of the representative. The decision whether or not to waive the immunity is a matter which is solely within the executive discretion of the sending State or the courts of the sending State."[96]

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[90] H. Ascensio, "Abuse of Process in International Investment Arbitration", *Chinese Journal of International Law*, Vol. 13, 2014, p. 785.

[91] POF, para. 59.

[92] *Ibid.*, para. 76.

[93] *Ambatielos Case (Greece* v. *United Kingdom), Jurisdiction, Judgment, I.C.J. Reports 1952*, p. 39.

[94] POF, para. 78.

[95] *Estrada* v. *Juffali (Secretary of State for Foreign and Commonwealth Affairs intervening)*, [2016] EWCA Civ 176 (22 Mar. 2016), para. 25 (available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/03/approved_judgment_rhd_estrada_v_juffali.pdf).

[96] *Ibid.*, para. 26 (referring, in particular, to the privileges and immunities laid down in the United Nations Convention on the Privileges and Immunities of the Specialized Agencies).

That reasoning should also have guided France, when it considered the immunities of Equatorial Guinea in the person of its Vice-President and in respect of the building housing its Embassy in Paris.

1.79. Finally, it is to be recalled that France did not raise any preliminary objections regarding the admissibility of Equatorial Guinea's Application. Even if such objections had been raised, however, the arguments presented by France would not be able to support them. As the Court held in the case concerning *Maritime Delimitation in the Indian Ocean*, "there is no need for the Court to address the more general question whether there are situations in which the conduct of an applicant would be of such a character to render its application inadmissible"[97].

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1.80. In conclusion, France's argument that Equatorial Guinea's Application is abusive is unfounded. There is no impediment to the Court's jurisdiction in this respect.

IV. France raises questions pertaining to the merits to conclude that the Court lacks jurisdiction

1.81. France has repeatedly gone beyond the inherent bounds of these incidental proceedings.

1.82. Although on the face of it France has confined itself to raising objections to the Court's jurisdiction, its written pleadings very often go beyond the issue of jurisdiction and touch on the merits of the case. The Rules of Court are nonetheless clear:

> "4. The preliminary objection shall *set out the facts and the law on which the objection is based*, the submissions and a list of the documents in support . . .
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> . . . . . .
>
> [7]. *The statements of facts and law in the pleadings* referred to in paragraphs 4 and 5 of this Article, and the statements and evidence presented at the hearings contemplated by paragraph 6, *shall be confined to those matters that are relevant to the objection*."[98]

1.83. As recalled above, France considers that there is, for example, uncertainty about the date on which Equatorial Guinea acquired ownership of the building located at 42 avenue Foch[99], and the date on which that building was assigned for the purposes of Equatorial Guinea's diplomatic mission in France[100]; it also takes the view that its domestic law is in line with the Palermo Convention[101]; and that "[t]he criminal proceedings that were instituted do not . . . involve an extraterritorial extension of the jurisdiction of the French courts"[102]. These arguments, among others, in fact go to the merits of this dispute. They are therefore not relevant at this stage in the proceedings.

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[97] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment,* 2 Feb. 2017, para. 143.

[98] Rules of Court, Art. 79, paras. 4 and [7] (emphasis added).

[99] POF, paras. 24-26.

[100] *Ibid.*, paras. 27-29.

[101] *Ibid.*, paras. 111, 116, 117 and 125.

[102] *Ibid.*, para. 18.

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CHAPTER 2

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

2.1. In its Preliminary Objections, France contends that the Court lacks jurisdiction under the Palermo Convention to entertain the present dispute[103]. This chapter will show that, contrary to the Respondent's assertions, the Court does have jurisdiction on the basis of Article 35, paragraph 2, of the Convention, since the dispute between the Parties indeed relates to the interpretation and application of the Convention, in particular the interpretation and application of Article 4 thereof, entitled "Protection of sovereignty".

2.2. Equatorial Guinea notes, first of all, that France's arguments are largely based on the Court's Order indicating provisional measures of 7 December 2016[104]. As expressly recalled in that Order, however, the Court's decision "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case"[105].

2.3. The central part of the Court's reasoning with regard to its jurisdiction on the basis of the Palermo Convention can be found in paragraph 49 of the Order of 7 December 2016. Equatorial Guinea agrees in part with what is stated in that paragraph, notably the following:

— "The purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States."

— "The provision does not appear to create new rules concerning the immunities of holders of high-ranking office in the State."

38 — "[A]ny dispute which might arise with regard to 'the interpretation or application' of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention."[106]

2.4. For the reasons set out in this chapter, the dispute between Equatorial Guinea and France relates to the manner in which the latter has carried out its obligations under the Palermo Convention. The dispute concerns whether France has performed a number of its obligations under the Convention — in particular those deriving from Articles 6, 11, 12, 14, 15 and 18 — in accordance with the principles of sovereign equality and non-intervention set out in Article 4 of the Convention. There can be no doubt that the rules relating to the jurisdictional immunities of States, including the immunity of certain holders of high-ranking office in a State and the immunity from execution of State property — régimes which are relevant to this case — flow directly from these principles[107]. Therefore, they must be respected under Article 4 of the Convention.

2.5. Furthermore, France's arguments regarding the Court's jurisdiction on the basis of the Palermo Convention raise complex legal and factual questions — several of which are closely connected in substance — that may be difficult to address at the preliminary objections stage.

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[103] POF, paras. 89-127.

[104] *Ibid.*, paras. 91, 99 and 105.

[105] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, para. 98.

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

[107] *Ibid.*, separate opinion of Judge Xue, paras. 4-7; separate opinion of Judge *ad hoc* Kateka, paras. 3-22.

2.6. Equatorial Guinea will begin by responding to the arguments put forward by France in respect of Article 4 of the Convention (**I**). It will then consider the relationship between the dispute and the other relevant provisions of the Convention, and will set out which of the Convention's obligations, in its view, France has failed to carry out in a manner consistent with the principles of sovereign equality and non-intervention, including the rules relating to the immunities of States deriving therefrom (**II**).

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I. The obligation pursuant to Article 4 of the Palermo Convention to carry out the obligations under the Convention in a manner consistent with the principles of sovereign equality and non-intervention

2.7. In its Preliminary Objections, France sets out some brief arguments regarding Article 4 of the Palermo Convention[108]. Equatorial Guinea notes as a general point that these arguments are almost identical to those presented by the Respondent at the hearings on the request for provisional measures[109]. France has thus made no attempt to address all the arguments put forward in respect of this provision of the Convention in Equatorial Guinea's Memorial[110].

2.8. Equatorial Guinea further notes that France does not dispute that the principles of sovereign equality and non-intervention, which must be respected pursuant to Article 4 of Convention, incorporate important rules of customary international law, and in particular those relating to the immunities of States[111]. Article 4 provides:

"*Article 4. Protection of sovereignty*

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."

2.9. France's main argument consists in claiming that Article 4 of the Palermo Convention does not constitute an "independent obligation", and is not intended to organize, in a general way, the legal relations between States. According to France, Equatorial Guinea:

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> "contends that Article 4 contains an 'independent obligation' to comply with customary international law in general. In so doing, it attempts to ascribe to the Convention an object that it does not have, in order to broaden the scope of the consent in Article 35, paragraph 2, thereof"[112].

2.10. France misrepresents the arguments put forward by Equatorial Guinea. Equatorial Guinea has never claimed that Article 4 imposes an "independent obligation" in the sense that its purpose is to organize, in a general way, the legal relations between States, in light of the principles of sovereign equality and non-intervention and the rules relating to the immunities of States which derive from them. Quite the contrary, its constant position is that Article 4 imposes an obligation to respect those principles when applying the Palermo Convention.

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[108] POF, paras. 94-103.

[109] CR 2016/15, pp. 21-22, para. 12 (Pellet); CR 2016/17, pp. 9-10, para. 6 (Pellet).

[110] MEG, paras. 5.9-5.26.

[111] *Ibid.*, paras. 5.13-5.16. See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, declaration of Judge Gevorgian.

[112] POF, para. 98. See also paras. 95 and 96.

2.11. During the hearings on the request for provisional measures, Equatorial Guinea explained that:

> "Article 4 of the Palermo Convention requires States to respect the rules concerning the immunities to which States are entitled before foreign courts *when applying the Palermo Convention*. Being embodied in the principle of sovereign equality, the rules concerning the immunities to which States are entitled before foreign courts are binding on States *when applying the Palermo Convention*.
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> . . . . . .
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> *The Palermo Convention does not oblige States to respect the principles of sovereign equality and non-intervention generally; it imposes on them the obligation to respect those principles when applying the Convention*. This is to ensure that no disturbance would be caused to international relations as a result of implementing the Convention; in other words, to prevent precisely a situation such as the one that has compelled Equatorial Guinea to turn to this Court."[113]

2.12. In its Order of 7 December 2016, the Court described Equatorial Guinea's position as follows:

> "According to Equatorial Guinea, Article 4 of the Convention is not merely a 'general guideline', in light of which the other provisions of the Convention should be interpreted. The principles of sovereign equality and non-intervention to which that Article refers encompass important rules of customary or general international law, in particular those relating to the immunities of States and the immunity of certain holders of high-ranking office in the State. *In the Applicant's view, the rules in question are binding on States when they apply the Convention* as they are embodied in the above-mentioned principles."[114]

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2.13. Finally, in its Memorial, Equatorial Guinea argued that:

> "*In performing its obligations under the Palermo Convention*, each State party is bound to respect the principle of sovereign equality, including the rules of immunity. The dispute between Equatorial Guinea and France concerning the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue, and the dispute concerning the status of the building located at 42 avenue Foch in Paris as State property used or intended for use by the State for government non-commercial purposes, are disputes which raise the question of whether France has complied with Article 4 of the Convention. *The answer to this question depends on the interpretation and application of Article 4, read in conjunction with other provisions of the Convention* . . .
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> . . . . . .
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> Article 4 of the Palermo Convention does not require respect for the principles of sovereign equality and non-intervention, or the rule of State immunity which flows from them, in a general sense. *That is a treaty obligation only in terms of the application of the Convention*."[115]

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[113] CR 2016/16, pp. 12-13, paras. 15 and 17 (Wood) (emphasis added).

[114] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, para. 43 (emphasis added).

[115] MEG, paras. 5.10 and 5.27 (emphasis added).

2.14. In short, Equatorial Guinea is of the view that Article 4 of the Palermo Convention does impose an obligation on its State parties. Contrary to France's assertions, however, it does not attempt to dissociate Article 4 from the Convention's other provisions[116].

2.15. The use of the expression "independent obligation" in Equatorial Guinea's Memorial[117] is intended to draw attention to the legally binding nature of Article 4 of the Convention, in response to France's argument during the hearings on the request for provisional measures that this provision is merely a "general guideline". In its Preliminary Objections, France once again cites the *Oil Platforms* case[118] to support its argument, and yet it has made no attempt to respond to
42 Equatorial Guinea's arguments regarding the relevance of that case to the present dispute[119]. Article 1 of the 1955 Treaty of Amity and Article 4 of the Palermo Convention are very different, and the Court's reasoning in the above-mentioned case is not applicable here.

2.16. It should be recalled that in its Order of 7 December 2016, the Court recognized Article 4 as establishing an obligation concerning the way in which States carry out their obligations under the Palermo Convention. The Court determined that:

> "Accordingly, any dispute which might arise with regard to 'the interpretation or application' of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention."[120]

2.17. Since such a dispute may arise, it cannot be argued that Article 4 of the Palermo Convention is merely a "general guideline". Respecting the principles of sovereign equality and non-intervention when applying the other provisions of the Palermo Convention is a treaty obligation.

2.18. France further claims that Equatorial Guinea maintains confusion between the obligations set out in the Palermo Convention and the manner in which they must be performed[121]. But there is in fact no confusion. The obligation contained in Article 4 specifically concerns the manner in which States carry out their other obligations under the Convention, as noted by the Court in its Order of 7 December 2016[122]. This must not be interpreted in a restrictive manner. There may be situations in which Article 4 of the Convention requires States to refrain from performing what would otherwise be an obligation under the Convention.

2.19. The consequence of this is simple: when prosecuting certain offences pursuant to the Convention, France must respect the principles of sovereign equality and non-intervention. When incorporating certain provisions into its domestic law to give effect to the Convention, the
43 provisions it adopts must respect those principles both formally and in practice. In order to adhere to the obligations concerning co-operation between States, such co-operation must be carried out in a manner consistent with those same principles. In short, when France performs each of the obligations under the Convention, it must respect the principles of sovereign equality and non-intervention and, if necessary, refrain from performing those obligations if doing so risks

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[116] POF, para. 106.

[117] MEG, para. 5.18.

[118] POF, para. 99.

[119] MEG, paras. 5.14, 5.17 and 5.18; CR 2016/16, p. 12, para. 16 (Wood).

[120] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, para. 49.

[121] POF, para. 98.

[122] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, para. 49.

infringing the principles of sovereign equality and non-intervention. These principles constitute a "legal framework within which the other provisions are to be implemented."[123]

2.20. This obligation is nothing out of the ordinary. Unless there is a clear indication to the contrary, States are always required to respect the fundamental principles of international law when applying a treaty. As France stated, this obligation is enforceable even if it is not expressly provided for[124]. But when a treaty does make such a provision (as does Article 4 of the Palermo Convention), it must be given full effect. In particular, an international court with jurisdiction to entertain disputes regarding the interpretation or application of the said treaty automatically has jurisdiction to rule on breaches of those fundamental principles in the treaty's implementation[125].

2.21. As a final argument in support of the claim that Article 4 of the Palermo Convention does not constitute an "independent obligation", even in the sense intended by Equatorial Guinea, France makes selective reference to the Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[126]. This argument cannot be accepted. Equatorial Guinea explained in its Memorial that Article 2 of the latter Convention and its Commentary serve to illustrate the position of States in respect of that provision, which was the
44 inspiration for Article 4 of the Palermo Convention[127]. In particular, the Commentary demonstrates that the article in question has a broad scope and requires strict respect for the principles of sovereign equality and non-intervention[128].

2.22. Equatorial Guinea also argued in its Memorial that the draft Palermo Convention was restructured to make Article 4 distinct from the provision covering the Convention's scope of application (Article 3)[129]. This aspect of the *travaux préparatoires* is significant. The restructuring in question was a deliberate act by the States participating in the negotiation of the Convention and confirms their intention to make Article 4 binding in character. France rejects this argument without any explanation[130].

2.23. Finally, Equatorial Guinea notes that France states — incorrectly — that "[u]nless a link can be established between the subject-matter of the dispute and the conventional obligations set out in other articles of the Convention, it must be concluded that the Court does not have jurisdiction *ratione materiae*"[131], thereby conceding that Article 4 imposes a treaty obligation to respect the principles of sovereign equality and non-intervention in applying the Convention.

II. The obligations under the Palermo Convention that France has failed to carry out in a manner consistent with the principles of sovereign equality and non-intervention

2.24. In Chapter 2, Part II, of the Preliminary Objections, concerning the Palermo Convention, France considers that the Court does not have subject-matter jurisdiction in the present

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[123] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, separate opinion of Judge Xue, para. 4.

[124] CR 2016/17, p. 9, para. 5 (Pellet).

[125] MEG, para. 5.14.

[126] POF, paras. 102-103.

[127] MEG, paras. 5.20-5.21.

[128] *Ibid*., para. 5.21.

[129] *Ibid*., para. 5.22.

[130] POF, para. 103.

[131] *Ibid.*, para. 104.

case because "no question of interpretation or application of a conventional obligation is at issue"[132].

2.25. Contrary to its assertions, France has performed several of its obligations under the Palermo Convention in a manner that is inconsistent with the principles of sovereign equality and
45 non-intervention. This conduct raises questions relating to the interpretation or application of the Convention, and, in Equatorial Guinea's view, constitutes a breach of Article 4, when read in conjunction with the Convention's other provisions. The Court's jurisdiction under Article 35, paragraph 2, of the Convention is thus established.

2.26. In this section, Equatorial Guinea will respond to the arguments put forward by France and explain in detail the scope of the relevant provisions of the Palermo Convention, besides Article 4, and how they are related to the present dispute. It will begin by examining the obligation to prosecute the offences set out in the Convention (**A**), before turning to the Convention's provisions on the criminalization of the laundering of proceeds of crime and the establishment of criminal jurisdiction to prosecute that offence (**B**). Equatorial Guinea will then consider the Convention's provisions relating to the confiscation, seizure and disposal of property (**C**). Finally, it will address the obligations under the Convention concerning co-operation between the States parties (**D**).

A. France has failed to carry out the obligations under the Convention relating to criminal proceedings in a manner consistent with the principles of sovereign equality and non-intervention

2.27. France claims in its Preliminary Objections that the Palermo Convention contains no provision requiring the prosecution of specific cases for the offences set out in the Convention[133]. Thus, the criminal proceedings against the Vice-President of Equatorial Guinea in charge of National Defence and State Security have been initiated not on the basis of the Convention, but solely on the basis of French law. This argument is mistaken.

2.28. Contrary to what France contends, the initiation of criminal proceedings against the Vice-President of Equatorial Guinea falls within the scope of the Palermo Convention. This Convention contains provisions that oblige France, as a State party, to submit cases to its
46 competent authorities, and indeed to apply its criminal law to the maximum extent possible and permissible, in order to deter commission of the offence of laundering the proceeds of crime. The Court's jurisdiction in the present case is established, because France has failed to perform these obligations in a manner consistent with the principles of sovereign equality and non-intervention, including the rule relating to the immunity of certain holders of high-ranking office in a State, of whom the Vice-President of Equatorial Guinea is one.

2.29. The Palermo Convention is an international legal instrument in the fight against transnational organized crime. Its object and purpose are set out in Article 1: "to promote cooperation to prevent and combat transnational organized crime more effectively". In General Assembly resolution 55/25 of 15 November 2000, the United Nations Member States also expressed their determination to "deny safe havens to those who engage in transnational organized crime by prosecuting their crimes".

2.30. France's suggestion that the Palermo Convention does not apply to criminal proceedings[134] goes against the object and purpose of that Convention, and manifestly disregards its overall scheme. It is also contrary to the Convention's express provisions. Article 3, entitled

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[132] POF, para. 105.

[133] *Ibid*., paras. 107, 108, 112 and 113.

[134] *Ibid*., para. 107.

"Scope of application", explicitly provides that the Convention applies "to the prevention, investigation and prosecution" of the offence of laundering the proceeds of crime established under Article 6 thereof.

2.31. France's argument that Article 3 of the Convention refers to investigations and prosecution solely "because of the conventional provisions relating to judicial co-operation"[135] is not convincing. Besides the provisions that directly concern criminal proceedings, the purpose of the Convention as a whole, and its raison d'être, is the suppression of transnational organized crime. Without criminal prosecution, the Convention would be largely devoid of meaning, and deprived of its object and purpose.

47 2.32. Article 16, paragraph 10, of the Convention clearly shows that it does apply to criminal proceedings[136] and that there is an obligation to submit specific cases to the competent authorities for prosecution, contrary to what France contends. Moreover, an interpretive note relating to this provision explains that:

> "[t]he *travaux préparatoires* should reflect the general understanding that States Parties should also take into consideration the need to eliminate safe havens for offenders who commit heinous crimes in circumstances not covered by paragraph 10. Several States indicated that such cases should be reduced and several States stated that the principle of *aut dedere aut judicare* should be followed."[137]

2.33. Article 11, paragraph 2, of the Convention reflects the position of States which deemed that account should be taken of the need, where appropriate, to eliminate any safe havens for the alleged perpetrators of crimes covered by the Convention and to go beyond the circumstances referred to in Article 16, paragraph 10. It provides:

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

2.34. France's argument regarding this provision consists in asserting that it does not impose an obligation, but is merely a recommendation[138]. Furthermore, abandoning the preceding
48 argument, France states that Equatorial Guinea does not claim that the French judicial authorities have pursued a "penal policy" that runs counter to that provision[139].

2.35. Contrary to what France writes, Article 11, paragraph 2, of the Palermo Convention imposes an obligation on the States parties. As explained in Equatorial Guinea's Memorial, this provision obliges States to exercise their jurisdictional authority and to apply their criminal law to

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[135] POF, para. 115.

[136] Article 16, paragraph 10, provides that:

> "[a] State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution."

[137] Interpretive notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1), para. 31 (Ann. 11).

[138] POF, para. 121.

[139] *Ibid*.

the maximum extent possible and permissible (always subject to Article 4) in order to deter money laundering[140]. Thus, every time that a State party initiates criminal proceedings against an individual for the alleged commission of an offence covered by the Convention, it is fulfilling this obligation.

2.36. It should be noted that the position adopted by France in this case is in contradiction with the one it assumed with regard to the application of the United Nations Convention against Corruption, Article 30, paragraph 3, of which is identical to Article 11, paragraph 2, of the Palermo Convention. When France supplied information as part of the implementation review mechanism of the Convention against Corruption, to demonstrate that it was correctly performing the obligation set out in Article 30, paragraph 3, it cited, for example, Article 31, paragraph 3, of the French Code of Criminal Procedure, according to which the "Prosecution Service brings public action and requests the application of the law"[141]. It also relied on Article 40 of the same Code, which provides:

"Article 40 of the Criminal Procedure Code, paragraph 1

The district prosecutor receives complaints and denunciations and decides how to deal with them, in accordance with the provisions of article 40-1.

Article 40-1 of the Criminal Procedure Code

Where he considers that facts brought to his attention in accordance with the provisions of article 40 constitute an offence committed by a person whose identity and domicile are known, and for which there is no legal provision blocking the implementation of a public prosecution, the district prosecutor with territorial jurisdiction decides if it is appropriate:

1. to initiate a prosecution;

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2. or to implement alternative proceedings to a prosecution, in accordance with the provisions of articles 41-1 or 41-2;

3. or to close the case without taking any further action, where the particular circumstances linked to the commission of the offence justify this."[142]

2.37. These provisions of the French Code of Criminal Procedure also give effect to Article 11, paragraph 2, of the Palermo Convention. They concern prosecution and the initiation of criminal proceedings in specific cases. In this case, Equatorial Guinea accuses France of having breached and continuing to breach Article 4 of the Convention by initiating and pursuing, through its courts, criminal proceedings against the Vice-President of Equatorial Guinea for an offence under the Convention.

2.38. If, as France claims, Article 11, paragraph 2, of the Convention imposed only a general obligation to introduce a "penal policy" consistent with the requirements of that provision, that obligation would nonetheless still be subject to Article 4 of the Convention. Consequently, this "penal policy" must not only make it clear to the law enforcement authorities that opening an investigation and criminal proceedings in the event of money laundering is the general rule, but also that the immunities of States under international law, including the immunity of certain

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[140] MEG, paras. 5.30-5.31.

[141] *Mechanism for the Review of Implementation of the United Nations Convention against Corruption — Country review report of France*, p. 51 (Ann. 12). The complete document is available at: http://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/France_Report_EN.pdf.

[142] *Ibid.*, pp. 51-52.

holders of high-ranking office in a State, must be taken into consideration before the criminal law is applied. The criminal proceedings against the Vice-President of Equatorial Guinea demonstrate that France's "penal policy" is not in conformity with Article 4 of the Convention. That is a question pertaining to the merits.

2.39. That the criminal law of a State must be applied and that criminal proceedings must be initiated to the maximum extent possible and permissible derives not only from Article 11, paragraph 2, of the Palermo Convention, but from the Convention as a whole. The principal purpose of the Convention, namely the fight against transnational organized crime, can only be achieved if States fully implement their domestic legislation giving effect to the Convention. A State which, having criminalized the offences under the Convention and established its criminal jurisdiction, decided never to prosecute those offences or to do so only occasionally, would not be complying with the Convention. Having understood that, France credits itself with having applied
50 Article 11, paragraph 2, of the Convention "too well"[143]. This is not at all the case, however: in order to apply this provision correctly, the States parties to the Convention must also respect the fundamental principles of international law referred to in Article 4.

B. France has failed to carry out the obligations under the Convention relating to the criminalization of the laundering of proceeds of crime and the establishment of criminal jurisdiction to prosecute that offence in a manner consistent with the principles of sovereign equality and non-intervention

2.40. The Palermo Convention requires States to incorporate certain provisions into their domestic law. This section addresses only Articles 6 and 15 of the Convention[144], which set out the

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[143] POF, para. 120.

[144] Article 6 of the Convention provides:

"1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a)(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime . . ."

Article 15 of the Convention provides:

"1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party;

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is:

(i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;

51 obligation to criminalize the offence of laundering the proceeds of crime and to establish criminal jurisdiction to prosecute it[145]. The Court's jurisdiction in the present case is established, since Equatorial Guinea considers that the obligations set out in these provisions have not been performed by France in a manner consistent with the principles of sovereign equality and non-intervention, including the rule relating to the immunity of a small number of holders of high-ranking office in a State, which constitutes a breach of Article 4 of the Convention.

2.41. France asserts that the measures it has adopted, or which were already in force in its domestic law, to implement its obligations under the Palermo Convention are compatible with the latter's provisions. It states in general terms that "Equatorial Guinea does not claim that French law is not in harmony with the Convention"[146]. The same assertion is made in respect of the specific provisions of the Convention mentioned in Equatorial Guinea's Memorial[147]. This is a misreading by France of Equatorial Guinea's written pleadings.

2.42. Equatorial Guinea does not claim that French law fails to criminalize the offence of laundering the proceeds of crime or that it fails to establish criminal jurisdiction to enable prosecution of that offence. However, it is of the view that the relevant French legislation, as interpreted and applied in practice by the French courts, including the *Cour de cassation*, does not respect the principles of sovereign equality and non-intervention, and is therefore not in harmony with Article 4 of the Convention. The incompatibility of French law with these principles manifests itself in two ways: first, French law does not respect the immunity of certain holders of high-ranking office in a State, among whom is the Vice-President of Equatorial Guinea in charge of National Defence and State Security. Second, French law, as interpreted and applied by the French courts, allows them to go beyond the bounds of their criminal jurisdiction to prosecute the offence of laundering the proceeds of crime.

52 2.43. When a treaty imposes obligations that must be implemented by adopting provisions (legislative or other) in domestic law, the conformity of those provisions with the treaty must be analysed at two levels. First, the text of a provision in domestic law must comply with the obligations imposed by the treaty in principle. Second — and this is often more important — the interpretation or application of that provision must also comply with the treaty in practice. This second analysis is necessary, because a normative text and its interpretation and application in practice cannot be regarded as two different things — it is the implementation of the text that shows its true scope and its effects.

2.44. For a treaty such as the Palermo Convention — which imposes an obligation to criminalize certain offences and to establish criminal jurisdiction to prosecute them, as well as an obligation, in so doing, to respect the principles of sovereign equality and non-intervention, including the rules relating to the immunities of States — it is particularly important, when examining whether provisions in domestic law are in conformity with the Convention, to pay attention to the interpretation and application of those provisions in practice. The majority of States, including France, do not generally have legislation on immunities. It is consequently in the practice of the French courts that it may be seen whether France is performing the obligations set out in Articles 4, 6 and 15 of the Convention.

(ii) One of those established in accordance with article 6, paragraph 1 *(b)* (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 *(a)* (i) or (ii) or *(b)* (i), of this Convention within its territory . . ."

[145] MEG, paras. 5.29 and 6.15.

[146] POF, para. 111.

[147] *Ibid*., paras. 116, 117, 125 and 126.

2.45. France is therefore right to recall that a State must implement the Palermo Convention by ensuring that its "legal system" is generally in conformity with the provisions of the Convention[148]. This harmony must be ensured not only when a legislative text is adopted, but each time it is interpreted and applied by the domestic courts.

2.46. State practice, including that of France, confirms that the implementation of a legislative text must be taken into consideration when determining whether that text is compatible with the obligations arising from a treaty.

2.47. The implementation review mechanism of the United Nations Convention against Corruption, whose provisions are similar to those of the Palermo Convention, is illuminating in this
53 regard[149]. In its review report for the cycle 2010-2015, for example, France explains that it is carrying out its obligations under the Convention against Corruption as follows:

— In respect of Article 23 (laundering of proceeds of crime):

> "With regard to subparagraph 2 *(e)*, France has indicated that the fundamental principles of its legal system do not require that the offence of laundering of proceeds of crime apply to the persons who committed the predicate offence.
>
> The Criminal Division of the Court of Cassation has enshrined the principle that 'the authorship of the predicate offence was not the sole preserve of the author of the subsequent crime of money laundering'. The Court first applied this theory to the situation referred to in paragraph 1 of article 324-1 of the Criminal Code, namely the facilitation by any means, of the false justification of the origin of property or income from the author of a felony or misdemeanor which has brought him a direct or indirect benefit (Cass. Crim., 25 June 2003, No. 02-86.182 or Cass. Crim., 14 January 2004, No. 03-81.165) and then applied it a second time to the situation referred to in paragraph 2 of that article, namely providing assistance to an operation of investment, concealment or conversion of the direct or indirect proceeds of a crime or misdemeanor. (Cass. Crim., 20 February 2008)."[150]

— In respect of Article 27 (participation and attempt):

> "In French law, intent is a key element for proving the commission of an offence. Article 121-3 of the Criminal Code provides in paragraph 1 that 'there is no felony or misdemeanor without intent to commit it'.
>
> However, consistent jurisprudence from the Court of Cassation has come to further explain this requirement by stating that 'the mere finding of the violation with knowledge that there is a law or regulatory requirement implies its author for having intent required by Article 121-3 paragraph 1['] (Cass. Crim., 25 May 1994). This applies to the violation of rules on public procurement regarding favoritism, or for example the ethical rules for public officials for example."[151]

— In respect of Article 29 (statute of limitations):

> "the statute of limitations may be suspended by the law and by the judges . . .

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[148] POF, para. 107.

[149] The Palermo Convention does not yet allow for a similar review mechanism.

[150] *Mechanism for the Review of Implementation of the United Nations Convention against Corruption — Country review report of France*, pp. 35-36 (Ann. 12).

[151] *Ibid*., p. 45.

. . . . . .

> case law has come to further lengthen the statute of limitations considering that for all offences of concealment (embezzlement, misuse of company assets, corruption, influence peddling, misappropriation of public funds, etc.) the starting point for the limitation period is fixed as the date of discovery of the offence and not the date of its commission. The formulation of the principle of the Criminal Division is as follows: public action only begins to run in cases of concealment 'from the day when the offence became apparent and could be observed under conditions permitting the exercise of prosecution'"[152].

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2.48. France refers to its case law in a similar manner elsewhere in the report[153]. It considers that the interpretation and application of its legislation, in particular by the *Cour de cassation*, are as important, if not more so, than the legislative texts themselves when ascertaining whether it is complying with its obligations under the Convention against Corruption. It is therefore surprising that France asserts in its Preliminary Objections that Equatorial Guinea "flagrantly disregards the content of the obligations when it claims that French law applies the Palermo Convention, and that any implementation of domestic law therefore falls within the scope of the Convention"[154].

2.49. The same approach is shared by other States parties to the Convention against Corruption, and the United Nations Office on Drugs and Crime has taken note of this. In the document entitled "State of implementation of the United Nations Convention against Corruption", it observes, for example, in respect of an article of that Convention, that "numerous recommendations were issued with regard to proceeding with the necessary legislative amendments or at least developing guidelines on judicial practice, or with regard to monitoring the way courts interpret the relevant provisions in the future"[155]. It was also noted in relation to another of the Convention's articles that:

> "recommendations were made on broadening the scope of the applicable provisions or ensuring that the domestic legislation is interpreted in a way that addresses benefits of a non-material nature. Ambivalent and imprecise jurisprudence is not deemed satisfactory. States parties should strive to provide for certainty, clarity and uniformity in the definitions contained in the bribery offences and to address issues of potential inconsistencies in the manner that such definitions are interpreted domestically, at the levels of both legislation and application of criminal laws"[156].

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2.50. The principle whereby a State cannot invoke a legislative text which appears compatible with an international obligation at first sight, but which, in practice, does not in fact comply with that obligation, is also applied elsewhere. For example, the Committee against Torture has observed that, while the definition of "torture" in the Convention against Torture and in the domestic law of a State may be the same, the meaning of the definition in domestic law may be qualified by the jurisprudence of that State. This is why the Committee "calls upon each State party

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[152] *Mechanism for the Review of Implementation of the United Nations Convention against Corruption — Country review report of France*, pp. 46-47.

[153] *Ibid*., pp. 44, 79, 98.

[154] POF, para. 110.

[155] United Nations Office on Drugs and Crime, *State of implementation of the United Nations Convention against Corruption*, United Nations, New York, 2015, p. 14 (available at: https://www.unodc.org/documents/treaties/UNCAC/COSP/session6/15-03457_ebook.pdf). See also p. 17 ("recommendations were made on broadening the scope of the applicable provisions or ensuring that the domestic legislation is interpreted in a way that addresses benefits of a non-material nature").

[156] *Ibid*., p. 17. Further references to the pertinence of jurisprudence to the compliance of a State with the obligations under the Convention against Corruption can be found on pp. 7, 26, 35, 36, 37, 44, 64, 66, 80, 86, 89 and 120 of this document.

to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State"[157].

2.51. Finally, it should be recalled that in the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice also faced the question of whether a national law was in conformity with the obligations established by a treaty. It determined that:

> "It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.
>
> . . . . . .
>
> In approaching the question whether the two groups of provisions in question are or are not compatible with a view to giving judgment on submission No. 1, the Court must consider, on the one hand, the régime established by Head III of the Geneva Convention and, on the other hand, the scope and effect of the provisions contained in Articles 2 and 5 of the Polish law of July 14th, 1920."[158]

56 2.52. As Equatorial Guinea has already stated, the French legislation intended to give effect to Articles 6 and 15 of the Palermo Convention are Articles 113-1 to 113-13 and 324-1 to 324-9 of the Penal Code, and Article 689 of the Code of Criminal Procedure[159]. France does not disagree[160]. These are, moreover, the same provisions used in the criminal proceedings against the Vice-President of Equatorial Guinea in charge of National Defence and State Security. What is at issue in the present case is that this legislation, as interpreted and applied by the French courts, including the *Cour de cassation*, is not in conformity with the Convention. This legislation, when applied, has the effect of infringing the principles of sovereign equality and non-intervention, which must be respected under Article 4 of the Convention.

2.53. Equatorial Guinea has demonstrated in its Memorial how these principles are not being respected. First, when applying the above-mentioned provisions, the French courts are failing to take note of the immunity enjoyed by certain holders of high-ranking office in a State, other than the Head of State, the Head of Government and the Minister for Foreign Affairs. This is evident in the criminal proceedings against the Vice-President of Equatorial Guinea in charge of National Defence and State Security. Furthermore, the French courts are going beyond the bounds of their criminal jurisdiction and infringing the sovereign rights of Equatorial Guinea. Equatorial Guinea's claims in this case are in part aimed at ensuring that France acts in such a way as to guarantee that its relevant domestic legislation is interpreted and applied in a manner that takes account of the principles set out in Article 4 of the Convention in all instances.

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[157] Committee against Torture, General Comment No. 2 (CAT/C/GC/2), para. 9.

[158] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 19-20.

[159] MEG, para. 5.29.

[160] POF, paras. 116-117.

2.54. France contends that Article 15 of the Palermo Convention relates to adjudicative jurisdiction and not to immunities, and that the two questions must be distinguished[161]. It is true that, in the case concerning *Arrest Warrant*, the Court observed that this distinction must be taken into consideration[162]. But it did so in order to conclude that:

57 "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions."[163]

2.55. The relationship between criminal jurisdiction and immunities was also discussed in the *Enrica Lexie* case, notably to establish the jurisdiction *ratione materiae* of the arbitral tribunal constituted pursuant to Annex VII of the United Nations Convention on the Law of the Sea. In its order of 24 August 2015, the International Tribunal for the Law of the Sea found that the arbitral tribunal would prima facie have jurisdiction to entertain Italy's claims[164]. In a declaration, Judge Paik noted that:

> "The present dispute between Italy and India comes down to the question which State has jurisdiction over the incident which occurred on 15 February 2012. (As the question of immunity is inextricably linked to that of jurisdiction, it can be considered to be part of the latter question.)"[165]

2.56. The arbitral tribunal constituted in that case similarly observed in its order of 29 April 2016 that:

> "In deciding how to preserve Italy's rights, the Arbitral Tribunal is mindful of the fact that in the current situation Sergeant Girone is under India's authority alone, although the decision as to which of the States may exercise jurisdiction, and the related question of Sergeant Girone's entitlement to immunity, remain to be decided when the Arbitral Tribunal considers the merits of the case."[166]

58 2.57. The obligation set out by Article 15 of the Palermo Convention concerns the establishment of criminal jurisdiction to prosecute the offence of laundering the proceeds of crime. Read in conjunction with Article 4 of the Convention (to which Article 15 makes express reference), this obligation can in no way be detached from the question of State immunities. Quite the opposite: to comply with the Palermo Convention, any legislation establishing criminal jurisdiction must make an exception for the immunities of States, explicitly or in practice.

2.58. The States parties to the Palermo Convention have confirmed the link between Article 15 and respect for State immunities. In an analytical report on the implementation of the

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[161] POF, para. 118.

[162] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 24-25, para. 59.

[163] *Ibid*.

[164] *The "Enrica Lexie" Incident (Italy* v. *India), Provisional Measures, Order of 24 Aug. 2015, ITLOS Reports 2015*, p. 192, para. 54.

[165] *Ibid*., declaration of Judge Paik, para. 2.

[166] *The "Enrica Lexie" Incident (Italy* v. *India)*, PCA Case No. 2015-28, Order on the Request for the Prescription of Provisional Measures, 29 April 2016, para. 103.

Convention presented at the Conference of the Parties by the United Nations Secretariat, it was noted, with regard to the implementation of Article 15 of the Convention, that:

> "All reporting States confirmed their capacity to assert such jurisdiction, which is mandatory under the Convention and in practice virtually universally established. The only exceptions mentioned concerned diplomatic and other immunities granted under generally accepted rules of international law as well as special arrangements applying to foreign troops stationed in a State's territory."[167]

2.59. In the present case, it is a question of whether, under Articles 4, 6 and 15 of the Palermo Convention, France has established its jurisdiction to prosecute the offence of laundering the proceeds of crime in a manner consistent with the principles of sovereign equality and non-intervention. This question is inextricably linked to that of whether the jurisdiction established by France respects and, in practice, makes an exception for the immunity *ratione personae* of certain holders of high-ranking office in a State.

2.60. Finally, Equatorial Guinea wishes to note that France does not appear to dispute the Court's jurisdiction with regard to the overextension of French criminal jurisdiction[168]. It confines itself to stating that "[t]he criminal proceedings that were instituted do not . . . involve an extraterritorial extension of the jurisdiction of the French courts, contrary to what Equatorial Guinea claims"[169]. This, too, is a question that goes to the merits of the present case.

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C. France has failed to carry out the obligations under the Convention relating to the confiscation, seizure and disposal of property in a manner consistent with the principles of sovereign equality and non-intervention

2.61. As Equatorial Guinea explained in its Memorial[170], France has also failed to perform its obligations under Articles 12 ("Confiscation and seizure") and 14 ("Disposal of confiscated proceeds of crime or property") of the Palermo Convention in a manner consistent with the principles of sovereign equality and non-intervention, including the customary rule relating to the immunity of State property used for government non-commercial purposes. This question clearly relates to the interpretation and application of the Convention, which establishes the Court's jurisdiction *ratione materiae* to entertain Equatorial Guinea's requests.

2.62. Article 12 of the Convention requires States to adopt within their domestic legal systems such measures as may be necessary to enable the confiscation and seizure of proceeds of crime. As a general point, Equatorial Guinea wishes to recall that it does not agree with France's position that the building located at 42 avenue Foch constitutes the proceeds of crime, since no predicate offence was committed in Equatorial Guinea[171].

2.63. Article 12, paragraphs 1 and 2 provide:

> "1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

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[167] *Implementation of the United Nations Convention against Transnational Organized Crime: updated information based on additional responses received from States for the first reporting cycle* (CTOC/COP/2005/2/Rev. 1), p. 11, para. 41 (Ann. 13). The complete document is available at: http://www.unodc.org/documents/treaties/organized_crime/COP3/CTOC_COP_2005_2_Rev_1_E_20_aug.pdf. The questionnaire to which the States responded is available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V05/891/58/pdf/V0589158.pdf?OpenElement.

[168] MEG, paras. 6.24-6.35.

[169] POF, para. 18.

[170] MEG, para. 5.32.

[171] *Ibid.*, paras. 6.31-6.35. See also Chap. 1, para. 1.8, above.

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

60 2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation."

2.64. The question of the relationship between legislative texts and the way in which they are implemented is also pertinent to the application of Article 12 of the Convention. Thus, French legislation in the area, and the way it is interpreted and applied in practice, must be consistent with the obligations under the Convention.

2.65. An interpretive note on Article 12 leaves no doubt as to the importance of respecting the immunity of the property of foreign States:

> "The *travaux préparatoires* should indicate that interpretation of article 12 should take into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State. Furthermore, the *travaux préparatoires* should indicate that it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations."[172]

2.66. As acknowledged in its Preliminary Objections, France aims to implement Article 12 of the Convention through Articles 131-21 and 324-7 of its Penal Code[173]. Equatorial Guinea has already shown in its Memorial that these provisions, as interpreted and applied by the French courts, do not respect the rules relating to the immunity from execution granted to the property of foreign States, and, in particular, that enjoyed by the building located at 42 avenue Foch in Paris[174]. Equatorial Guinea's claims in this regard are aimed at ensuring that France interprets and applies the relevant provisions of its criminal legislation in a manner consistent with the principles set out in Article 4 of the Convention.

2.67. France has also failed to perform the obligation deriving from Article 14 of the Convention in a manner consistent with the principles set out in Article 4. This provision does not impose an obligation to adopt measures within the domestic legal system, but applies to the disposal of specific assets. The first paragraph of Article 14 reads as follows:

61 "Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures."

2.68. This provision requires States to dispose of confiscated property in accordance with their domestic law. It is nonetheless essential that States dispose of such assets in a manner which is also consistent with the principles set out in Article 4 of the Convention. In the present case, the building located at 42 avenue Foch, which is owned by Equatorial Guinea, can now be disposed of by the French courts, since it has already been attached; this constitutes a breach of Article 4 of the

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[172] Interpretive notes for the official records *(travaux préparatoires)* of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1), para. 21 (Ann. 11).

[173] POF, para. 125.

[174] MEG, paras. 8.51-8.70.

Convention[175]. This question also clearly relates to the interpretation and application of the Convention, according to the terms of Article 35, paragraph 2, of the latter.

D. France has failed to carry out the obligations under the Convention relating to co-operation between States in a manner consistent with the principles of sovereign equality and non-intervention

2.69. Finally, France contends in its Preliminary Objections that there is no dispute between it and Equatorial Guinea in respect of the obligations of co-operation between States laid down in the Palermo Convention[176]. Contrary to these assertions — which, moreover, are unsubstantiated — Equatorial Guinea has shown in its Memorial that Article 4 of the Convention and certain provisions concerning co-operation have been breached by France. The questions raised by Equatorial Guinea in this regard also relate to the interpretation and application of the Palermo Convention, Article 35, paragraph 2, of which establishes the Court's jurisdiction.

2.70. First, Equatorial Guinea contends that France has failed to take account of information provided by the authorities of Equatorial Guinea since 2010, and more recently on 19 January 2017[177], according to which none of the predicate offences alleged against the Vice-President of Equatorial Guinea have been committed in Equatorial Guinea. France's conduct constitutes a breach of Article 4, Article 15, paragraph 5, and Article 18, paragraph 1, of the Palermo Convention. This is a question for the merits.

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2.71. Second, Equatorial Guinea has argued that France's request for mutual legal assistance of 14 November 2013 was made in a manner contrary to Article 4 of the Convention. That request for mutual assistance was made expressly on the basis of the Palermo Convention[178], which highlights the relationship between the actions of the French courts and the Convention. In view of the personal immunity enjoyed by the Vice-President of Equatorial Guinea, France should have refrained from making such a request on the basis of the Convention. This is another question that goes to the merits of the present case.

2.72. France has made much of the fact that Equatorial Guinea chose to act on the above-mentioned request for mutual legal assistance[179]. Equatorial Guinea wishes to recall that it acted on that request simply in order to assert, once again, the immunity *ratione personae* of its Vice-President before the French courts[180]. In any event, Equatorial Guinea's conduct cannot be interpreted as a waiver of that immunity.

Conclusions

2.73. For the reasons set out in this chapter, the Court has jurisdiction on the basis of Article 35, paragraph 2, of the Palermo Convention to entertain the dispute between Equatorial Guinea and France. It appears from the foregoing arguments that, among other things:

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[175] As noted in paragraph 1.25 above, at the hearing of 5 July 2017, the Public Prosecutor called for the penalty of confiscation in respect of the building located at 42 avenue Foch in Paris, notwithstanding the Court's Order of 7 December 2017.

[176] POF, para. 105.

[177] Letter from the President of Equatorial Guinea to the President of the French Republic, 19 Jan. 2017 (Ann. 4). See also para. 1.8 above.

[178] Embassy of France in Equatorial Guinea, Note Verbale No. CHAN/92/2014, 13 Feb. 2014 (Ann. 14) ("In the absence of a treaty on mutual legal assistance in criminal matters between France and Equatorial Guinea, this request is made on the basis of the United Nations Convention against Transnational Organized Crime".); Request for international legal assistance of the Paris *Tribunal de grande instance*, 14 Nov. 2013, p. 2 (Ann. 15).

[179] POF, para. 123. See also CR 2016/15, p. 12, paras. 26-27 (Alabrune).

[180] MEG, paras. 3.45-3.48.

— article 4 of the Palermo Convention imposes a treaty obligation to respect the principles of sovereign equality and non-intervention, including the rules relating to the immunities of States, when applying the Convention;

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— the dispute concerns the interpretation and application of the Palermo Convention, since, in Equatorial Guinea's view, the manner in which France has performed its obligations relating to criminal prosecution is in breach of Article 4, read in conjunction with Article 11, paragraph 2, and, more generally, the Convention as a whole;

— the dispute concerns the interpretation and application of the Palermo Convention, since, in Equatorial Guinea's view, the manner in which France has performed its obligations relating to the criminalization of the laundering of proceeds of crime and the establishment of its criminal jurisdiction is in breach of Article 4, read in conjunction with Articles 6 and 15;

— the dispute concerns the interpretation and application of the Palermo Convention, since, in Equatorial Guinea's view, the manner in which France has performed its obligations relating to the confiscation, seizure and disposal of property is in breach of Article 4, read in conjunction with Articles 12 and 14;

— the dispute concerns the interpretation and application of the Palermo Convention, since, in Equatorial Guinea's view, the manner in which France has performed its obligations relating to co-operation between States is in breach of Article 4, read in conjunction with Articles 15 and 18.

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CHAPTER 3

THE COURT'S JURISDICTION ON THE BASIS OF THE OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

3.1. The Court has jurisdiction to entertain the dispute between Equatorial Guinea and France regarding the status of the building located at 42 avenue Foch in Paris on the basis of Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations.

3.2. France has criticized Equatorial Guinea for devoting little space in its Memorial to the question of the Court's jurisdiction[181]. In this regard, the first ten paragraphs of Chapter 3 of France's Preliminary Objections are perplexing. They are either a misinterpretation of the law, the facts of the case and the statements made on behalf of Equatorial Guinea, or constitute a line of argument that is irrelevant for the purposes of these proceedings. The passage from Equatorial Guinea's Memorial, cited by France as setting out the existence of the dispute and the Court's jurisdiction to entertain it, reads as follows:

> "The dispute before the Court concerns the interpretation and application of several provisions of the VCDR, including but not limited to Article 1 *(i)* and Article 22. One of the fundamental aspects of the dispute is indeed to determine whether the building located at 42 avenue Foch in Paris forms part of the premises of Equatorial Guinea's diplomatic mission in France, and as from what date. This raises a number of factual and legal issues, which the Court is called upon to decide. Equatorial Guinea and France have different views on these matters, which is why there is no question that a dispute concerning the VCDR exists."[182]

3.3. This passage not only forms part of a section comprising several paragraphs, it also clearly establishes the existence of a dispute between the two Parties regarding the interpretation and application of provisions of the VCDR. The Court has jurisdiction, on the basis of the Optional
66 Protocol, to entertain this dispute. France evidently favours addressing these matters in more detail. Equatorial Guinea notes that it does not limit itself to "bald, unsubstantiated assertions"[183], as France claims. The Memorial invokes the treaty basis of the Court's jurisdiction[184], as well as the relevant treaty provisions whose interpretation and application underlie the dispute between the two Parties[185]. This is what is required of a party that seises the Court on the basis of a treaty clause, as in these proceedings.

3.4. Equatorial Guinea again takes the view that there is no need to insist on recalling, as France does, that the Order indicating provisional measures confines itself to the "prima facie jurisdiction of the Court" and "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case". This has been the Court's consistent position, one with which Equatorial Guinea has never suggested that it disagrees. France, however, cannot use this position as a basis for over-interpreting the Court's Order of 7 December 2016, or for putting words into the Court's mouth. There is nothing to suggest that the Court is being any more "notably cautious"[186] than usual, or that it is making more than its usual observations in its orders on provisional measures when it states that "the rights apparently at issue may fall within the scope of Article 22 of the Vienna Convention, which guarantees the inviolability of diplomatic premises". The Court

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[181] POF, para. 129.

[182] MEG, para. 5.46.

[183] POF, para. 129.

[184] MEG, paras. 5.37-5.41.

[185] *Ibid.*, Chap. 8, particularly paras. 8.4 *et seq*.

[186] POF, para. 131.

could not dispense with this basic level of caution, rendered by the adverb "apparently", without prejudging its jurisdiction on the merits, which it cannot do at the provisional measures stage when its jurisdiction is based on prima facie considerations. The Court routinely uses this Latin phrase to confirm that it "appears" to have jurisdiction to indicate provisional measures. This is not unique to the present case[187].

67 3.5. Finally, Equatorial Guinea takes note of the fact that France "does not dispute that the formal conditions for relying" on the Optional Protocol are met in this instance[188]. However, it does not agree with the manner in which France distorts the presentation of the subject-matter of the dispute to conclude that the Court lacks jurisdiction in this case.

3.6. A dispute submitted to the Court on the basis of the Optional Protocol must arise out of "the interpretation or application of the Convention"[189]. The Respondent interprets the need for a connection between the dispute and the Convention as requiring the Applicant to prove that the dispute falls "under the provisions of the Vienna Convention"[190]. It takes the view that, by asking the Court to settle the question of whether the building at 42 avenue Foch in Paris enjoys immunity as premises of the diplomatic mission and as property of the State[191], Equatorial Guinea is not submitting the "real dispute"[192] to the Court. Such reasoning is at best confused. On the one hand, France contends that the dispute must fall under the provisions of the VCDR; on the other, it argues that the question of whether the building should enjoy immunity is excluded on the pretext that it is not the true subject-matter of the dispute. The criterion is either that the dispute must fall under the provisions of the Convention, or that it must be the "real dispute", which is, moreover, undefined.

3.7. By invoking this "concept" of a "real dispute", the precise meaning of which is unclear, France over-interprets the statement made by the Court in its Order of 7 December 2016, referring to its Judgment in the case concerning *Fisheries Jurisdiction*, that it is for the Court itself to determine "on an objective basis the dispute dividing the parties, by examining the position of both"[193]. Even if the Court does not confine itself to the Applicant's formulation, the "real dispute" criterion would not apply; clearly, what the Court must ask itself is whether the dispute falls under the provisions of the VCDR. The question of whether the building at 42 avenue Foch benefits from
68 the Article 22 régime can only fall under the provisions of the VCDR. This is the dispute that Equatorial Guinea is submitting to the Court.

3.8. France's claim that the dispute does not concern Article 22 of the VCDR is all the more curious, since it states, in the alternative, that if the Court were to consider its jurisdiction established in respect of the building at 42 avenue Foch, it "would therefore be limited to examining the lawfulness of the attachment of the building located at 42 avenue Foch in Paris in the light of the Vienna Convention"[194]. Once again, this is a selective understanding of the subject-matter of the dispute: it is evident that the lawfulness of the attachment can only be

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[187] See more recently still: *Jadhav Case (India* v. *Pakistan), Provisional Measures*, Order of 18 May 2017, para. 15; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures*, Order of 19 April 2017, para. 62.

[188] POF, para. 132.

[189] Optional Protocol, Art. I.

[190] POF, para. 134.

[191] MEG, para. 2.9.

[192] POF, para. 136.

[193] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 448-449, paras. 30-31.

[194] POF, para. 138.

determined by reference to the principle of immunity, which also includes the inviolability of premises of a diplomatic mission that Equatorial Guinea considers applicable in this case.

3.9. Equally, France cannot argue that the real dispute is whether or not the building at 42 avenue Foch should be considered as being used for the purposes of Equatorial Guinea's diplomatic mission in France, while at the same time claiming that this question does not form part of the dispute since it is a "preliminary" issue[195]. This is yet another contradiction: the Respondent is seeking to demonstrate that the real question determining the application of Article 22 of the VCDR — namely, whether the building at 42 avenue Foch constitutes "premises of the mission" in the sense of Article 1 *(i)* of the Convention — does not "aris[e] out of the interpretation or application of the Convention", as provided by the Optional Protocol. In short, in France's view, although there is a dispute between the two Parties, it is not the "real dispute" that has been submitted to the Court, hence its lack of jurisdiction.

3.10. In the following sections, Equatorial Guinea reiterates what it stated in its Memorial: that there is indeed a dispute between it and France regarding the interpretation and application of the VCDR in respect of the inviolability of the premises of Equatorial Guinea's diplomatic mission in France (**I**). In the second section, it will show that the Court has jurisdiction to entertain the entire dispute (**II**).

69 I. There is a dispute between Equatorial Guinea and France regarding the interpretation and application of the Vienna Convention on Diplomatic Relations

3.11. Equatorial Guinea will respond to France's arguments in two stages. It will show, first, that there is a dispute between the Parties regarding the question of whether the building at 42 avenue Foch in Paris constitutes the premises of the diplomatic mission in the sense of Article 1 *(i)* the VCDR (**A**); and, second, that there is a dispute between the Parties relating to the interpretation and application of Article 22 of the VCDR (**B**).

A. There is a dispute regarding the interpretation and application of Article 1 *(i)* of the VCDR

3.12. Article 1 *(i)* of the VCDR provides that:

> "[t]he 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission".

3.13. France has sought to demonstrate that this provision does not indicate the procedure for establishing premises of a diplomatic mission, that practice in the matter varies, and that a small number of States, unlike the majority, have legislation or rules on the establishment of premises of a diplomatic mission[196]. This is not contested by Equatorial Guinea. However, the Parties do not draw the same conclusions from these facts.

3.14. Relying on Article 1 *(i)* of the VCDR, Equatorial Guinea stated to France, and in its written pleadings before the Court, that the "declaratory" nature of the régime establishing the premises of a diplomatic mission was implicit in the terms of that provision, according to which, the buildings that constitute "'premises of the mission' are the buildings . . . used for the purposes of the mission"; there is no need for a recognition process. Although Article 1 *(i)* does not specify a procedure for establishing premises of a diplomatic mission, there is by no means a legal void, as
70 France would like to suggest. As soon as a building is designated for the purposes of a diplomatic mission by the sending State — at least in the absence of clear and undisputed conditions imposed

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[195] POF, para. 137.

[196] *Ibid.*, paras. 159 *et seq*.

by the receiving State on all sending States, without discrimination — the receiving State must recognize its inviolability. This is an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[197].

3.15. According to this interpretation, there is nothing to suggest that Article 1 *(i)* authorizes the establishment of specific procedures by the receiving State. It may be understood as authorizing the sending State to identify the premises of its diplomatic mission itself. That is the practice of a number of States with no specific domestic legislation in this area. And that is precisely the situation of France, unlike the United Kingdom, for example, whose relevant legislation France has been quick to cite (as has been noted), while failing to mention its own. The Respondent invokes its "constant practice" in the area[198], but does not offer any specific examples.

3.16. There is, it must be said, a contradiction in France's assertions: on the one hand, it argues that Article 1 *(i)* is silent on the establishment of premises of a mission; on the other, it claims that it is for the host State to accredit such premises at its sole discretion[199]. This stance is in clear opposition to that maintained by Equatorial Guinea, and illustrates that there is a dispute between the Parties regarding the interpretation of the VCDR provision at issue here.

3.17. The *travaux préparatoires* of the VCDR referred to by France do not address the issue of the establishment of premises of a diplomatic mission. France, moreover, recognizes as much when it asserts that the draft articles of the Convention adopted in 1958 do not "specify how the status of diplomatic premises is acquired"[200]. It then claims that "[t]he diversity of State practice alone is testimony to the fact that the question of how a particular building is recognized as having the legal status of 'premises of the mission' is not covered by the Convention"[201]. By relying so heavily on practice[202], not only does France address the merits of the case, but its reasoning seems illogical. Diversity of State practice does not constitute proof that a subject is not covered by a treaty. It may, on the other hand, show that States interpret a treaty's provisions differently. Such is the situation here, except that, even in the absence of Article 1 *(i)* of the VCDR, there would still be a question of interpretation as to what constitutes diplomatic premises.

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3.18. France continues to confuse the Court's jurisdiction with the merits of the case. It is therefore necessary to recall that Equatorial Guinea demonstrated in its Memorial, citing national practice in support[203], that the approval of the receiving State for the establishment of premises of a diplomatic mission was the exception, particularly in States with legislation to that end. Obtaining the receiving State's consent to use a building as premises of a diplomatic mission is not always essential. It is clear from the practice of most States that the starting-point for acquiring diplomatic status is designation for the purposes of a diplomatic mission. In the event of a disagreement

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[197] Vienna Convention on the Law of Treaties, Art. 31, para. 1.

[198] POF, para. 167.

[199] *Ibid.*, para. 159.

[200] *Ibid.*, paras. 161-162.

[201] *Ibid.*, para. 163.

[202] *Ibid.*, paras. 163-165.

[203] For the record, the following may also be cited here: *Petrococchino* v. *Swedish State*, 1929-1930, AD No. 198, ("[t]he acquisition of real property by a foreign State does not *ipso facto* invest that property with the privilege of exterritoriality: it is necessary that the property be completely appropriated to the service of the embassy"); *Beckman* v. *Chinese People's Republic*, 1957, *ILR*, Vol. 24, p. 221 (the Swedish Supreme Court refused to exercise its jurisdiction in a dispute relating to the validity of the sale of a property to the Chinese People's Republic, holding that even if foreign States do not generally enjoy immunity from actions in respect of real property, once "the property in this case [wa]s used by the Republic for its Embassy in this country[, China could] plead immunity"); *Tietz et al.* v. *People's Republic of Bulgaria*, *Weinmann* v. *Republic of Latvia*, *Bennett and Ball* v. *People's Republic of Hungary*, *ILR*, Vol. 28, pp. 369, 385, 392 (the Supreme Restitution Court for Berlin ruled that immunity depends only upon an actual and present use of the premises).

between States regarding the establishment of such premises, the point of view of the receiving State does not necessarily prevail.

3.19. An official commentary on the subject states in this regard that, even if applicable legislation exists, the VCDR would take precedence in the event of a disagreement[204]. Eileen Denza is clear on this point: "Article 1 *(i)* of the Convention does not require a sending State to seek the approval of the receiving State before acquiring property for use as premises of its mission"[205]. It is common practice to consider in good faith the declaration of a State asserting the diplomatic status of the premises of its mission[206]. 72

3.20. In order to deny the existence of a dispute between the Parties, France introduces a new criterion, which no longer concerns whether the dispute falls under the provisions of the Convention invoked as the basis of jurisdiction, but is a requirement to '"establish a reasonable connection between the Treaty and the claims submitted to the Court'"[207]. It concludes, unsurprisingly, that "no such 'reasonable connection' can be established, since the Vienna Convention contains no rules specifying the modalities or procedure for identifying the premises of a diplomatic mission and, therefore, for determining whether the Article 22 régime applies to a given building"[208].

3.21. This notion of a "reasonable connection" is irrelevant for establishing the Court's jurisdiction. The only relevant question is whether there is a dispute between the Parties regarding the application or interpretation of the provisions of the VCDR. And it is beyond doubt that such a dispute exists. As the Court remarked in its Order of 7 December 2016:

> "[it] notes that the Parties do indeed appear to have differed, and still differ today, on the question of the legal status of the building located at 42 avenue Foch in Paris. While Equatorial Guinea has maintained at various times that the building houses the premises of its diplomatic mission and must therefore enjoy the immunities afforded under Article 22 of the Vienna Convention, France has consistently refused to recognize that this is the case, and claims that the property has never legally acquired the status of 'premises of the mission'. In the view of the Court, there is therefore every indication that, on the date the Application was filed, a dispute existed between the Parties as to the legal status of the building concerned."[209]

3.22. France is once again mistaken about the criterion applicable under the Optional Protocol when it claims that, "[s]ince the Convention contains no provision under which it is possible to assess the lawfulness of France's conduct, as disputed by the Applicant, the Court cannot exercise jurisdiction over the dispute submitted by Equatorial Guinea"[210]. First, there are provisions of the Convention that are relevant in this case, namely Articles 1 *(i)* and 22. Second, the question to be resolved at the preliminary objections stage is not whether France's conduct is unlawful, but whether the dispute between it and Equatorial Guinea — to use the language of Article I of the Optional Protocol — "aris[es] out of the interpretation or application of the Convention". It would be strange to conclude that the question of whether a building constitutes the 73

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[204] Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations: A Commentary, 4th ed., Oxford University Press, 2016, p. 127.

[205] *Ibid.*, p. 16.

[206] *Ibid.*, pp. 14-15.

[207] POF, para. 159.

[208] *Ibid.*

[209] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, para. 66.

[210] POF, para. 166.

premises of the mission for the purpose of applying Article 22 does not arise out of the interpretation or application of the Convention.

3.23. The Court must disregard the conjectures of France, which repeatedly tries to psychoanalyse the statements or the silence of Equatorial Guinea on a given point of the dispute[211]. Besides this tendency to speculate, the Respondent again likes to systematically distort the facts presented by Equatorial Guinea in order to discredit it, by emphasizing imagined inconsistencies[212]. It already made dramatic use of this tactic at the provisional measures stage. To avoid being misled, the Court must pay close attention to the factual and legal inconsistencies in France's Preliminary Objections. Paragraph 171 of those Objections is one such example:

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

3.24. Such an assertion is legally unfounded and, moreover, contrary to widespread practice: neither the VCDR nor any other rule of international law provides that every State must own the
74 premises of its diplomatic mission. If this were the case, a number of States would not have diplomatic missions, being unable to acquire a building for that purpose. It is worth noting that, in practice, several States lease the premises housing their diplomatic missions. The risks of abuse mentioned by France are fictional and the product of paranoia. If France is so concerned about such risks, one may well wonder why it has not developed its own legislation governing the establishment of premises of diplomatic missions, as Great Britain or the United States — which it cites so abundantly — have done. It is no more able to provide concrete examples of the abuses it fears than it is to establish any abuse on the part of Equatorial Guinea since it acquired the building at 42 avenue Foch in 2011 — well before any measures of constraint, including the attachment of that building, which France says it is prepared to consider as the sole point of dispute — for use as premises of its diplomatic mission.

3.25. In any event, France is wrong to deny the building diplomatic status on the basis of any anticipated abuse by Equatorial Guinea in the manner it has done. Diplomatic law is not devoid of solutions to address situations of abuse.

B. There is a dispute regarding the interpretation and application of Article 22 of the VCDR

3.26. Article 22 of the VCDR provides that:

> "1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

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[211] POF, paras. 168-169.

[212] *Ibid.*, paras. 172 *et seq*.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

3.27. Contrary to what it suggests in paragraph 171 of its Preliminary Objections, France does not dispute, in paragraph 141 of that pleading, the fact that the application or invocation of
75 Article 22 is not dependent on Equatorial Guinea owning the building located at 42 avenue Foch in Paris[213]. It would, however, like to take credit for the Court's finding in its Order of 7 December 2016 that there is a dispute between the Parties concerning Article 22 of the VCDR[214], since it states that, "[i]n so doing, [the Court] relied not only on Equatorial Guinea's assertion that the building at 42 avenue Foch had been assigned for diplomatic use since 4 October 2011, *but, above all, on the purely factual observation made by France 'that, from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear[ed] to have been transferred' to that address*"[215]. It endeavours to show that the Court's prima facie jurisdiction did not cover the attachment or searches of the building before the summer of 2012, and that, at the current stage of the proceedings, jurisdiction based on the plausibility of Equatorial Guinea's rights cannot suffice[216].

3.28. France's chosen method of demonstration is curious. It suggests that if an argument was not made at the provisional measures stage, that this was either through ignorance, or that Equatorial Guinea would then be disqualified from relying on that argument at a later stage of the proceedings. Equatorial Guinea, however, confined itself at the provisional measures stage to what was needed to establish the Court's prima facie jurisdiction; indeed this was recognized by the Court, which decided in its Order of 7 December 2017 that prima facie jurisdiction was "sufficiently establish[ed], at this stage"[217]. If the question of the Court's jurisdiction over the merits of the dispute had to be resolved at the provisional measures stage, there would no longer be any difference between that stage and the preliminary objections stage, between prima facie jurisdiction and jurisdiction to entertain the merits of the dispute. There was, for example, no need to enter into a debate on the basis of Article 1 *(i)* of the VCDR at the provisional measures stage; there is a need to do so now, because France is invoking the "preliminary issue" argument with regard to the status of the building, a problem it did not raise at the provisional measures stage.

76 3.29. Basing itself on the reasoning of the arbitral tribunal established in the *Southern Bluefin Tuna Case*, France contends that the claims presented must be "capable of falling within the provisions of Article 22 of the Vienna Convention"[218]. According to the Respondent, Equatorial Guinea has failed to show that Article 22 is applicable to the dispute between the Parties. To demonstrate this failure, it argues that the Article 22 régime, "which derogates from ordinary law, only applies to premises 'used for the purposes of the mission', as defined by Article 1 *(i)* of the Convention"[219]. But Equatorial Guinea does not have a different understanding of this article. It simply states that Article 22 of the VCDR applies to the building located at 42 avenue Foch, because that building forms part of the premises of its mission.

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[213] POF, para. 141.

[214] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, para. 68.

[215] POF, para. 144 (emphasis added).

[216] *Ibid.*, paras. 145-146.

[217] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Provisional Measures*, Order of 7 Dec. 2016, para. 68.

[218] POF, para. 147.

[219] *Ibid.*, para. 149.

3.30. France declares that it "in no way disputes the fact that diplomatic premises are entitled to inviolability, as established by Article 22"[220]. Equatorial Guinea takes note of this. However, France cannot ally itself with Equatorial Guinea on this subject in the way it does. Indeed, Equatorial Guinea contends that, by its conduct, France is, for all practical purposes, disputing the inviolability of diplomatic premises, and that by acting in this way, i.e., by refusing to apply the provisions of Article 22 to the building located at 42 avenue Foch, it has breached its obligations under the VCDR.

3.31. France maintains that the building at 42 avenue Foch does not satisfy the definition of premises of the diplomatic mission and therefore cannot benefit from the application of the provisions of Article 22; it is, however, prepared to apply these provisions to the former premises of Equatorial Guinea's diplomatic mission at 29 boulevard de Courcelles (8th arrondissement), which have not been used since the mission was transferred to 42 avenue Foch, thereby substituting itself for Equatorial Guinea in designating the premises of its mission. At the same time, France recognizes that Article 22 "contains no reference to any criteria or procedure for determining the diplomatic purpose of a particular premises"[221]. Such reasoning is difficult to follow: if Article 22 is silent on the subject, why is France refusing to apply the rule of inviolability that derives from it to the building which Equatorial Guinea declares to be the premises of its diplomatic mission?
77 Such paradoxical reasoning from the Respondent points to the fact that there is a conflict of legal views between the Parties. Equatorial Guinea clearly demonstrated in the previous section that the answer to the question of the diplomatic status of a building is implicitly contained in Article 1 *(i)* of the VCDR. That this question is preliminary to invoking Article 22 is a matter of simple logic. It does not mean that the Parties' dispute in this regard is outside the provisions of the Convention.

3.32. France asserts that there is no dispute between the Parties concerning Article 22, because Equatorial Guinea cited the "fail[ure] to recognize the building as the premises of the diplomatic mission", whereas Article 22 "imposes no such obligation of recognition on the receiving State"[222]. Such a manner of dissecting and distorting Equatorial Guinea's arguments is particularly reprehensible since it could mislead the Court. The extracts cited by France in its attempt to confine the dispute over Article 22 to the question of the recognition of the building's diplomatic status are taken solely from Equatorial Guinea's Application instituting proceedings[223]. Yet Equatorial Guinea has described in detail — both at the provisional measures stage and in its Memorial — the conduct by the Respondent that has infringed the inviolability of the premises of its diplomatic mission in France. In view of the facts alleged, France cannot claim that the dispute "does not relate to the régime for the inviolability of diplomatic premises, but more directly and, as it were, upstream, to the legal status of a building which Equatorial Guinea claims to own and use"[224]. It cannot make such selective use of Equatorial Guinea's written pleadings, by sometimes citing all of them (including its oral arguments) and at other times only the Application instituting proceedings. Equatorial Guinea's later written pleadings clarify and complement its earlier ones, in light of the different stages of the proceedings.

3.33. For the aforementioned reasons, there is undeniably a dispute between Equatorial
78 Guinea and France regarding the diplomatic status of the building at 42 avenue Foch in Paris and the inviolability it enjoys under both the VCDR and general international law.

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[220] POF, para. 150.

[221] *Ibid.*

[222] *Ibid.*, paras. 153-155.

[223] *Ibid.*, paras. 153-154.

[224] *Ibid.*, para. 156.

II. The Court has jurisdiction to entertain the entire dispute relating to the interpretation and application of the VCDR

3.34. According to France, should the Court find that it has jurisdiction to entertain the case, it must confine itself to certain aspects of the dispute. The Respondent has no doubt overlooked the fact that the Court is competent to entertain the question of the inviolability of the building at 42 avenue Foch in Paris, housing the premises of Equatorial Guinea's diplomatic mission, but also, once its jurisdiction has been established, to determine France's international responsibility, and that therefore France cannot limit the scope of the dispute referred to the Court by means of an Application.

3.35. France argues in its Preliminary Objections that the submissions in Equatorial Guinea's Memorial go far beyond the definition of the subject-matter of the dispute[225]. It then cites Equatorial Guinea's submissions in full, including those relating to France's international responsibility[226]. With regard to the building at 42 avenue Foch in particular, France maintains, in the alternative, that if the Court had jurisdiction, "[that] jurisdiction would therefore be limited to *examining the lawfulness* of the attachment of the building located at 42 avenue Foch in Paris in the light of the Vienna Convention"[227]. Later on it asserts that such limits must be "strict"[228], before concluding in a similar manner, again in the alternative, that should the Court have jurisdiction, "such jurisdiction could only extend *ratione materiae* to *the one question* of whether the attachment of the building located at 42 avenue Foch in Paris *is lawful* under the Convention"[229].

3.36. Equatorial Guinea has sufficiently established the Court's jurisdiction to entertain the question of the inviolability of the premises of its diplomatic mission. With regard to the other aspects of the dispute that France is seeking to exclude from the scope of the Court's jurisdiction,
79 Equatorial Guinea recalls that, since international responsibility is a consequence of a breach of an international obligation, it necessarily forms part of the dispute once the Court's jurisdiction has been established. Contrary to France's assertions, the Court could not strictly confine itself, or only extend its subject-matter jurisdiction, to the sole question of lawfulness, should its jurisdiction be established. The Court has itself observed that a compromissory clause on the "interpretation [or] application" of a treaty covers the consequences of any breach by a State of the treaty, including the amount of reparation[230].

3.37. Limiting the Court to an examination of treaty provisions alone to settle a dispute submitted to it would be tantamount to suggesting that, if a convention does not expressly state that the breach of one of its provisions engages the responsibility of the perpetrator, it must be considered impossible to invoke responsibility in such an event. This kind of reasoning is clearly inadmissible. In sum, contrary to what France maintains, the question of responsibility falls within the scope of the Court's jurisdiction in the present case.

3.38. France also believes that it can limit the subject-matter of the dispute, because, during the hearings on provisional measures, Equatorial Guinea argued before the Court that the attachment of movable property which occurred prior to the attachment of immovable property on 19 July 2012 did not form part of the dispute, and this position, the Respondent contends, is

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[225] POF, para. 44.

[226] *Ibid.*, para. 45.

[227] *Ibid.*, para. 138 (emphasis added).

[228] *Ibid.*, para. 183.

[229] *Ibid.*, para. 185 (emphasis added).

[230] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 55.

a fortiori valid at the preliminary objections stage[231]. It also attempts to argue that the fact that Equatorial Guinea's submissions in its Application and Memorial — unlike those in its Request for the indication of provisional measures, which concern the protection of the furnishings of the premises of the diplomatic mission[232] — relate only, as far as the building is concerned, to its attachment and to Equatorial Guinea's request that France recognize its diplomatic status[233]. France contends that if the Court were to consider its jurisdiction established,

> "it would be strictly limited to an examination of the lawfulness of *the attachment of the building* at 42 avenue Foch — the only claim that appears in the submissions in the Application and Memorial — to the exclusion of any question relating to the movable property present in the building before its attachment on 19 July 2012"[234].

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3.39. As set out above, it is not for France to define the scope of Equatorial Guinea's submissions. If the Court cannot compensate for the failure of a party in this regard, as indeed France has pointed out, why would the other party be able to do so?

3.40. Furthermore, the submissions at the end of the Request for the indication of provisional measures are specific to the nature and scope of such proceedings. France cannot criticize Equatorial Guinea because the claims made at that stage are not identical to those in the Memorial or those made at other stages of the proceedings.

3.41. Finally, all of Equatorial Guinea's written pleadings, both the Application and the Memorial, mention the French authorities' repeated intrusions on the premises of Equatorial Guinea's diplomatic mission. The provisions of Article 22 of the Vienna Convention cover a broader range of measures of constraint than just the attachment of immovable property. If the Court's jurisdiction is established with regard to the VCDR, there is nothing to prevent the Court from examining France's conduct in the light of the actual scope of the relevant provisions invoked.

Conclusions

3.42. In sum, having recalled the basis of the Court's jurisdiction in this case, Equatorial Guinea has amply demonstrated that there is a dispute between the Parties regarding the interpretation and application of the relevant provisions of the VCDR, in particular Articles 1 *(i)* and 22. This dispute falls within the jurisdiction of the Court by virtue of Article I of the Optional Protocol. There is nothing to prevent the Court from entertaining this dispute in its entirety. The Court's jurisdiction to consider the lawfulness of France's conduct also implies jurisdiction to establish that State's responsibility for any breach by it of international law.

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[231] POF, paras. 180-181.

[232] *Ibid.*, paras. 177-179.

[233] AEG, p. 13, para. 41 *(c)* (i); MEG, p. 182, *(c)* (i).

[234] POF, para. 181 (emphasis added).

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SUBMISSIONS

For the reasons set out above, the Republic of Equatorial Guinea respectfully requests the Court:

(1) to reject the preliminary objections of France; and

(2) to declare that it has jurisdiction to rule on the Application of Equatorial Guinea.

The Hague, 31 July 2017

(Signed) Mr. Carmelo NVONO NCA,

Ambassador of the Republic of Equatorial Guinea
to the Kingdom of Belgium and the Netherlands,
Agent of the Republic of Equatorial Guinea.

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ATTESTATION

I hereby certify that the documents reproduced as annexes are true copies of the originals and that translations into either of the Court's official languages are accurate.

The Hague, 31 July 2017

(Signed) Mr. Carmelo NVONO NCA,

Ambassador of the Republic of Equatorial Guinea
to the Kingdom of Belgium and the Netherlands,
Agent of the Republic of Equatorial Guinea.

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LIST OF ANNEXES

Annex 15 Request for international mutual assistance in criminal matters of the Paris *Tribunal de grande instance*, 14 November 2013 (excerpts)