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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING IMMUNITIES AND CRIMINAL PROCEEDINGS (EQUATORIAL GUINEA *v.* FRANCE)

COUNTER-MEMORIAL OF THE FRENCH REPUBLIC

6 December 2018

[Translation by the Registry]

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INTRODUCTION

0.1. By an Order dated 6 June 2018, the Court fixed 6 December 2018 as the time-limit for the filing by the French Republic of its Counter-Memorial. That is the subject of these written pleadings.

I. Procedural history

0.2. On 13 June 2016, Equatorial Guinea filed an Application against France before the International Court of Justice with regard to a dispute concerning "the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security [Mr. Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea in France". As basis for the Court's jurisdiction in the case, Equatorial Guinea invoked Article 35 of the Convention against Transnational Organized Crime and the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.

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

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

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

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

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0.4. After the public hearings which were held from 17 to 19 October 2016, the Court, by an Order dated 7 December 2016, rejected Equatorial Guinea's request for the legal proceedings before the French courts to be suspended, finding that it did not have prima facie jurisdiction to entertain Equatorial Guinea's request relating to the immunity from criminal jurisdiction which Mr. Teodoro Nguema Obiang Mangue is said by the Applicant to enjoy as Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security[1].

0.5. Regarding the building located at 42 avenue Foch, the Court considered that the conditions for indicating provisional measures were met and ordered France, pending a final

[1] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1160, para. [50].

decision in the case, to take "all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability"[2].

0.6. On 3 January 2017, Equatorial Guinea filed its Memorial in the Registry of the Court.

0.7. Pursuant to the provisions of Article 79, paragraph 1, of the Rules of Court, and the Court's Order of 1 July 2016 fixing time-limits for the proceedings, on 31 March 2017 France raised preliminary objections to the Court's jurisdiction, contending in particular that

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

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

9 *(c)* the provisions of the VCDR do not cover that question;

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

0.8. By a Judgment dated 6 June 2018, the Court concluded that it

> "lack[ed] jurisdiction pursuant to the Palermo Convention to entertain Equatorial Guinea's Application. The Court further conclude[d] that it ha[d] jurisdiction pursuant to the Optional Protocol to the Vienna Convention to entertain the submissions of Equatorial Guinea relating to the status of the building at 42 Avenue Foch in Paris as diplomatic premises, including any claims relating to the seizure of certain furnishings and other property present on the above-mentioned premises. Finally, the Court [found] that Equatorial Guinea's Application [was] not inadmissible on grounds of abuse of process or abuse of rights".

II. Overview and structure of the Counter-Memorial

0.9. The French Republic will first recall the pertinent facts underlying the present case (Chapter 1) and the limits of the subject-matter of the dispute as it results from the Court's Judgment of 6 June 2018 regarding its jurisdiction (Chapter 2).

0.10. Second, the French Republic will show that the alleged violations of the VCDR in respect of the building located at 42 avenue Foch are unfounded (Chapter 3).

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

0.11. Third, it will be demonstrated that the Republic of Equatorial Guinea's reliance on the VCDR with regard to the building at 42 avenue Foch is an abuse of rights (Chapter 4).

0.12. Lastly, since France is of the view that all of Equatorial Guinea's submissions must be rejected, this Counter-Memorial will address the Republic of Equatorial Guinea's claims for reparation only in the alternative (Chapter 5).

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CHAPTER 1

STATEMENT OF THE FACTS OF THE CASE

1.1. Article 49 of the Rules of Court provides that:

"1. A Memorial shall contain a statement of the relevant facts . . .

2. A Counter-Memorial shall contain: an admission or denial of the facts stated in the Memorial; any additional facts, if necessary . . .".

1.2. In many respects, the statement of facts at the beginning of Equatorial Guinea's Memorial is incomplete, often biased and sometimes contradictory. Yet the facts are particularly important in this case in view of the questions of law raised before the Court. It is thus important to recall the various procedural steps of the judicial investigation opened against Mr. Teodoro Nguema Obiang Mangue, whereby the French authorities found that the building at 42 avenue Foch was not actually being used for any diplomatic activities when the legal proceedings contested by Equatorial Guinea were brought. It is also useful to revisit Equatorial Guinea's successive and inconsistent statements about the building's alleged assignment for diplomatic use.

Context and origin of the criminal proceedings initiated before the French courts

1.3. As a preliminary point, France considers it useful to recall that the Embassy of Equatorial Guinea in France has been located at 29 boulevard de Courcelles since 29 March 2001[3]. The residence of the Ambassador in France, for its part, has been located at 8 bis rue de Verzy since 28 April 2006[4], and Equatorial Guinea's Permanent Delegate to UNESCO resides at 46 rue des Belles Feuilles in Paris.

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1.4. The criminal proceedings brought against Mr. Teodoro Nguema Obiang Mangue before the French courts, which led to the attachment *(saisie pénale immobilière)* of the building at 42 avenue Foch — which served as his private residence — and to the seizure of certain movable property belonging to him, arose from a complaint with civil-party application filed on 2 December 2008 before the senior investigating judge of the Paris *Tribunal de grande instance* by the French association Transparency International France against several individuals, including Mr. Teodoro Nguema Obiang Mangue, for acts of handling misappropriated public funds, money laundering, misuse of corporate assets, breach of trust and concealment[5].

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[3] Note Verbale No. 3227 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 28 June 2002 (Ann. 1). Thus, when Equatorial Guinea sought to obtain an exemption from the registration fees relating to the acquisition of this building, the Protocol Department of the French Ministry of Foreign Affairs confirmed that "[t]he official character of the premises in question has been recognized since 29 March 2001".

[4] Note Verbale from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 27 Dec. 2006 (Ann. 2).

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

1.5. France is neither the first nor the only State whose judicial institutions have had occasion to examine the lavish spending of Mr. Teodoro Nguema Obiang Mangue. Indeed, in 2007, the French authorities were also informed of criminal investigations already under way in the United States and South Africa, looking into Mr. Teodoro Nguema Obiang Mangue and the assets he had accumulated in those countries. Today, he is also the subject of criminal investigations in Switzerland and Brazil.

1.6. The complaint filed in France was ruled admissible by an order of the investigating judge dated 5 May 2009, and its admissibility was confirmed by a judgment of the *Chambre criminelle* of the *Cour de cassation* rendered on 9 November 2010, in particular on the grounds that the offences under investigation would be likely to cause direct and personal harm to the association on account of the specific object and purpose of its mission. A judicial investigation was opened and two investigating judges were assigned to the case following the filing of the Public Prosecutor's final submissions on 1 December 2010.

The building at 42 avenue Foch is a private residence

1.7. The investigations carried out by the *Office central de répression de la grande délinquance financière* (the serious financial crime squad) focused on the movable and immovable property proved to have been acquired by Mr. Teodoro Nguema Obiang Mangue on the territory of the French Republic between 1997 and October 2011.

12 1.8. They confirmed that Mr. Teodoro Nguema Obiang Mangue had assets of considerable value in France. The preliminary investigation, followed by the judicial investigation, thus demonstrated that Mr. Teodoro Nguema Obiang Mangue had, among other things, purchased jewellery for over €10 million and works of art for over €15 million. The investigations also established that most of the invoices for these goods were addressed to Mr. Teodoro Nguema Obiang Mangue at 42 avenue Foch.

1.9. After verifying with the *Direction générale des finances publiques* (the French tax authorities), investigators were able to establish that a six-storey townhouse used for residential purposes was located at that address.

1.10. The first three floors consist of some 20 rooms, including four large living or dining areas, a master bedroom with an en-suite bathroom, a gym, a hammam, a discotheque with a movie screen, a bar, a middle-eastern style sitting room, a hair salon, two kitchens and several bedrooms with bathrooms. The fourth, fifth and sixth floors contain apartments. Lastly, between the ground floor and the entresol, a duplex has been created, along with a games room and a home cinema. It should be noted that the description of the building drawn up by police officers at the time of the searches makes no mention of offices, work space or meeting areas.

1.11. Heard by investigators on 24 May 2011, the manager of an interior design firm confirmed that she had worked on the interior design of the building at 42 avenue Foch on behalf of Mr. Teodoro Nguema Obiang Mangue. The documents seized from the firm's premises showed that Mr. Teodoro Nguema Obiang Mangue made two €1 million down payments, on 3 May 2010 and 4 July 2011, so that the firm could purchase furniture and works of art on his behalf.

1.12. The investigations also confirmed that Mr. Teodoro Nguema Obiang Mangue was the owner of a collection of luxury vehicles. The address listed on the many invoices discovered during the investigation once again led investigators to 42 avenue Foch, establishing an indisputable link between Mr. Teodoro Nguema Obiang Mangue, the townhouse and the assets it contained.

13 1.13. In light of the foregoing, there can therefore be no doubt that the building at 42 avenue Foch was the private residence of Mr. Teodoro Nguema Obiang Mangue when the judicial authorities turned their attention to the circumstances of its acquisition. This was confirmed by the searches that they subsequently requested.

Failure to assert the diplomatic status of the building at 42 avenue Foch during the searches and seizures carried out between 28 September and 3 October 2011

1.14. Equatorial Guinea took no steps to obtain recognition of the diplomatic status of the building at 42 avenue Foch until searches involving property belonging to Mr. Teodoro Nguema Obiang Mangue were carried out in autumn 2011.

1.15. On 28 September 2011, investigators conducted an initial on-site inspection at 42 avenue Foch to draw up an inventory of the vehicles present at that address, with a view to their seizure. These legal proceedings relating to the assets of Mr. Teodoro Nguema Obiang Mangue led to the seizure, on 28 September and 3 October 2011, of 18 luxury vehicles stored in the courtyard of the property and in car parks nearby.

1.16. The Embassy of Equatorial Guinea reacted to these measures of execution in a letter delivered in person on 28 September 2011 to the French Minister for Foreign Affairs, making no mention of any assignment for diplomatic use and no reference to the VCDR or even to the acquisition of the building. However, it did condemn "[i]n particular . . . the searches and attachments targeting the person of its Minister for Agriculture, Minister of State"[6], Mr. Teodoro Nguema Obiang Mangue.

1.17. It was in this context, linked to criminal proceedings, that, on 28 September 2011, the French Ministry of Foreign Affairs turned its attention to the building at 42 avenue Foch.

[6] Letter from the Embassy of the Republic of Equatorial Guinea delivered in person to Mr. Alain Juppé, Minister for Foreign Affairs of the French Republic, 28 Sept. 2011 (Memorial of Equatorial Guinea (MEG), Ann. 32).

14 1.18. In its Memorial, Equatorial Guinea now appears to suggest that the vehicles seized belonged to the Embassy[7]. Yet, according to the record of search and seizure[8], none of the 11 vehicles parked in the courtyard of the townhouse — a Peugeot, a Mercedes, two Ferraris, two Bentleys, a Maserati, two Bugattis, including one bearing the inscription "special edition 669 Made for Mr. Teodoro Nguema Obiang", a Porsche and an Aston Martin — had diplomatic plates. Moreover, the invoices show that they belonged to Mr. Teodoro Nguema Obiang Mangue.

Equatorial Guinea's claim of diplomatic status as from 4 October 2011 and France's express refusal to uphold that claim

1.19. On 4 October 2011, the day after the search and seizures had been conducted and a week after Equatorial Guinea had drawn the attention of the French authorities to the criminal proceedings involving the building at 42 avenue Foch, the Embassy of the Republic of Equatorial Guinea claimed for the first time that the building had diplomatic status. It even asserted that these premises, although not registered with the Protocol Department, had for a long time been assigned for diplomatic use: a Note Verbale of 4 October 2011 stated that "the Embassy has for a number of years had at its disposal a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to [the] Department"[9].

15 1.20. On 5 October 2011, investigators returned to 42 avenue Foch and noted that two makeshift signs marked "*République de Guinée Équatoriale — locaux de l'ambassade*" (Republic of Equatorial Guinea — Embassy premises) had been affixed to the entrance porch.

1.21. According to the testimony given by the building's caretaker, "the previous day, a driver and two employees of the Embassy of the Republic of Equatorial Guinea had come to the premises . . . and had affixed the signs on all of the entrances to the upper floors and outbuildings belonging to Teodoro NGUEMA OBIANG MANGUE"[10].

1.22. Furthermore, the record of the on-site inspection states that "[t]he official address of the Embassy of Equatorial Guinea, 29 boulevard de Courcelles, Paris (8th arr.), also appeared on the two signs"[11] affixed to the entrance of the townhouse.

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[7] [MEG, p. 39, para. 3.54]:

> "On 28 and 29 September 2011, the French courts instructed the police to enter the building in order to attach items of property, notwithstanding the protests raised by Equatorial Guinea in a letter from its counsel which was submitted in the proceedings. In their record, the police mentioned that the cars did not belong to the Embassy and that the building belonged to Mr. Teodoro Nguema Obiang Mangue."

[8] See the record of on-site inspection and attachment of vehicles of Mr. Teodoro Obiang Nguema located at 42 avenue Foch, 75016 Paris, 28 Sept. 2011 (Doc. No. 33 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures).

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

[10] Judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 Oct. 2017, p. 31. *[This and any subsequent extracts from this judgment have been translated by the Registry.]*

[11] Record of on-site inspection at 42 avenue Foch, 75016 Paris, 5 Oct. 2011 (Ann. 3).

1.23. On 11 October 2011, the Protocol Department of the French Ministry of Foreign Affairs responded to Equatorial Guinea's Note Verbale dated 4 October 2011, recalling that

> "the . . . building [at 42 avenue Foch] does not form part of the premises of Equatorial Guinea's diplomatic mission.
>
> It falls within the private domain and is, as such, subject to ordinary law. The Protocol Department thus regrets that it is unable to grant the Embassy's request."[12]

Equatorial Guinea's differing presentations of the building at 42 avenue Foch and France's consistent and expressly stated rejection of those claims

1.24. On 17 October 2011, the premises in question were presented by the Embassy of Equatorial Guinea in France as housing the new residence of the Permanent Delegate to UNESCO. However, the Permanent Delegate's residence was registered by UNESCO with the Protocol Department as being located at 46 rue des Belles Feuilles in Paris. The Embassy explained that:

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> "[p]ending the arrival of [the Ambassador's] successor, the Embassy will be headed by Ms Mariola BINDANG OBIANG, Permanent Delegate of the Republic of Equatorial Guinea to UNESCO in the capacity of Chargée d'affaires *ad interim*, and we wish to inform you that the official residence of the Permanent Delegate to UNESCO is on the premises of the diplomatic mission located at 40-42 avenue FOCH, 75016, which is at the disposal of the Republic of Equatorial Guinea."[13]

1.25. On 31 October 2011, the Ministry of Foreign Affairs then reminded the Embassy of Equatorial Guinea that,

> "in accordance with Article 19 of the Vienna Convention of 18 April 1961 on Diplomatic Relations, only a member of the mission's diplomatic staff may be designated Chargé d'affaires *ad interim* by the sending State. The appointment of Ms BINDANG OBIANG is thus contrary to the above-mentioned Vienna Convention."[14]

1.26. By the same Note Verbale, the French Ministry of Foreign Affairs explained that:

> "If there was a change in the address of Ms BINDANG OBIANG's residence, the Permanent Delegation of the Republic of Equatorial Guinea to UNESCO must give official notification thereof to that organization's Protocol Department, which should, in turn, advise our Protocol Department in an official Note Verbale.
>
> Indeed, the Embassy may not communicate on behalf of the Permanent Delegation."

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[12] Note Verbale No. 5007 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 11 Oct. 2011 (Doc. No. 2 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures).

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

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

1.27. However, UNESCO, which was nonetheless directly concerned, was not informed by Equatorial Guinea of the purported change of residence of its Permanent Delegate until four months later, on 14 February 2012, which was also the first day of further searches and seizures at 42 avenue Foch.

1.28. On 20 February 2012, the French Ministry of Foreign Affairs once again reiterated its position that

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> "the building located at 42 avenue Foch in Paris, 16th [i]s not part of the mission's premises, that it ha[s] never been recognized as such by the Ministry of Foreign and European Affairs, and that it c[an] not be considered as the residence of Ms BINDANG OBIANG since, according to the official documents notifying her appointment and the assumption of her duties as transmitted several days earlier by UNESCO — to which Ms BINDANG OBIANG is attached — her residence is located at 46 rue des Belles Feuilles, Paris 16th."[15]

1.29. It was further noted that:

> "the avenue Foch building was presented by the Embassy on 7 October 2011 as premises used for the performance of the duties of its diplomatic mission (the Embassy acknowledges that this had never been officially notified), and then, on 17 October 2011, as the official residence of Ms BINDANG OBIANG.
>
> Finally, the Note Verbale from UNESCO's Protocol Department dated 15 February 2012 and sent to the Protocol Department transmitting [the Note Verbale] of the Permanent Delegation dated 14 February 2012 officially presenting the address at 42 avenue Foch as that of Ms BINDANG OBIANG's residence cannot be taken into account because the date of 14 February is the date on which searches of that same building began."

The seizure between 14 and 23 February 2012 of movable property belonging to Mr. Teodoro Nguema Obiang Mangue kept at 42 avenue Foch

1.30. Between 14 and 23 February 2012, a further search was conducted on the premises of the townhouse, which, according to the testimony given by employees of the firm Foch Service, continued to be used in a private capacity by Mr. Teodoro Nguema Obiang Mangue[16]. As noted in the investigation file:

> "Findings made at the site confirmed that Teodoro NGUEMA OBIANG MANGUE enjoyed free disposal of the property.
>
> However, no official documents were discovered concerning the State of Equatorial Guinea or indicating that the building might serve as a venue for official representation.

[15] Note Verbale No. 802 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 20 Feb. 2012 (Doc. No. 13 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures).

[16] See the judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 Oct. 2017, p. 33.

18 The findings also made it possible to take stock of the extravagant purchases made by Teodoro NGUEMA OBIANG MANGUE in a personal capacity over several years, and to confirm that he did indeed occupy the premises."[17]

1.31. In addition to the many works of arts, for which invoices establish a clear link between the townhouse where they are on display and Mr. Teodoro Nguema Obiang Mangue, investigators found men's clothing all in the same size, some of which was monogrammed with Teodoro Nguema Obiang Mangue's name or the initials TNO.

1.32. Moreover, lawyers representing Mr. Teodoro Nguema Obiang Mangue before the French courts did not dispute his ownership of the movable property seized. Indeed, as the judgment of the *Tribunal correctionnel* of 27 October 2017 states:

> "It is not disputed that the following movable assets which have been attached represent the proceeds and object of the offence and/or belong to the convicted person within the meaning of Articles 131-21 and 324-7 of the Penal Code:
>
> — the movable assets (furnishings, works of art, etc.) attached during the search conducted in the townhouse of which Teodoro NGUEMA OBIANG MANGUE had free disposal;
>
> — the collector vehicles representing a purchase price of some €7.5 million and handed over to AGRASC [agency for the management and recovery of seized and confiscated assets] for disposal;
>
> — the debt of €377,000 owed by the firm PINTO, also in the hands of AGRASC."[18]

1.33. When asked about Mr. Teodoro Nguema Obiang Mangue's assets, an employee of Foch Service also told investigators that, between the searches conducted in autumn 2011 and those carried out in February 2012, a number of valuable items and works of art had been removed from the property at 42 avenue Foch to be stored at the residence of the Ambassador of Equatorial Guinea in Paris.

1.34. Lastly, on 16 February 2012, a person identified "as an employee of Mr. Teodoro Nguema Obiang Mangue" arrived at 42 avenue Foch and explained that the chief executive of Foch Service "had asked him to come and collect two suitcases belonging to Mr. Teodoro Nguema Obiang Mangue, which were located in the security guard's lodge".

19 1.35. The police authorities then noted that those suitcases "contained men's items (suits, T-shirt, shirt, pair of shoes and a typewritten list of the clothing in each of the suitcases, dated 10 February 2012)"[19].

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[17] *Ibid.*, p. 31.

[18] *Ibid.*, p. 98.

[19] See the record of further search of the townhouse located at 42 avenue Foch, 75016 Paris, 15 Feb. 2012 (Doc. No. 4[4] of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures).

The attachment of the building at 42 avenue Foch on 19 July 2012 and its consequences

1.36. On 19 July 2012, an attachment order *(ordonnance de saisie pénale immobilière)* was issued against the building at 42 avenue Foch, on the grounds that the investigations had demonstrated that the building owned by six Swiss and French companies had been wholly or partly paid for out of the proceeds of the offences under judicial investigation and represented the laundered proceeds of the offences of misuse of corporate assets, breach of trust and misappropriation of public funds. The order stated that Mr. Teodoro Nguema Obiang Mangue enjoyed free disposal of the building.

1.37. Under French law, the seizure of assets in the context of a criminal investigation is aimed at ensuring the enforcement of any subsequent measure of confiscation and may apply to any confiscatable assets. The specific procedure for attaching immovable property is set out in Articles 706-150[20] *et seq*. of the Code of Criminal Procedure, in addition to Articles 706-141 to 706-147, which are applicable to all special seizures.

1.38. Attachment *(saisie pénale immobilière)* covers the full value of the immovable property seized, until such time as the property is definitively released or confiscated. Article 706-145 states that "[n]o one may validly dispose of property seized in the context of criminal proceedings". As a consequence, the property seized is rendered inalienable. As in civil cases, attachment in criminal proceedings does not have the effect of transferring ownership; the owner of the estate to which the property belongs remains the owner of the property seized but cannot exercise all the rights attached to that title.

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1.39. When an attachment is ordered without deprivation of title, as expressly stated in the order issued on 19 July 2012, the owner of the attached property can still make use of it, but cannot sell the property or transfer ownership of it.

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[20] Art. 706-150 of the French Code of Criminal Procedure provides that:

"During an expedited or preliminary investigation, the liberty and custody judge, at the request of the Public Prosecutor, may, by a reasoned order, authorize the attachment, at the initial expense of the Treasury, of immovable property whose confiscation is provided for by Article 131-21 of the Penal Code. The investigating judge may, during the investigation, order such an attachment under the same conditions.

The order made pursuant to the first paragraph is notified to the Public Prosecutor's Office, to the owner of the attached property and, if they are known, to any third parties having rights thereto, who may refer the order to the *Chambre de l'instruction* by declaration at the registry of the court within ten days of being notified thereof. Such an appeal does not have suspensive effect. Appellants may, in this context, only ask to be provided with the procedural documents relating to the attachment they are contesting. If they are not appealing, the owner of the property or any third party may nevertheless be heard by the *Chambre de l'instruction*, but may not ask to be furnished with the procedural documents." *[This and any subsequent provisions of the French Code of Criminal Procedure cited in this Counter-Memorial have been translated by the Registry.]* (The text is available, in French, at the following address: https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000028312072&cidTexte=LEGITEXT000006071154.)

Equatorial Guinea's new presentation of the use of the building at 42 avenue Foch and France's persistent rejection of that claim

1.40. A week after the attachment had taken place, the Embassy of Equatorial Guinea presented the premises at 42 avenue Foch as housing its offices. Indeed, by Note Verbale dated 27 July 2012, its footer still showing the Embassy's address as 29 boulevard de Courcelles in Paris (8th arr.), the Embassy of Equatorial Guinea stated that:

> "as from Friday 27 July 2012, the Embassy's offices are located at 42 avenue Foch, Paris (16th arr.), a building which it is henceforth using for the performance of the functions of its diplomatic mission in France"[21].

1.41. The French Ministry of Foreign Affairs responded by Note Verbale of 6 August 2012, stating that

> "the building located at 42 avenue Foch, Paris (16th arr.), was the subject of an attachment order *(ordonnance de saisie pénale immobilière)*, dated 19 July 2012. The attachment was recorded and entered in the mortgage registry on 31 July 2012.
>
> . . . The Protocol Department is thus unable officially to recognize the building . . . as being the seat of the chancellery as from 27 July 2012.
>
> *The seat of the chancellery thus remains at 29 boulevard de Courcelles, Paris (8th arr.)*, the only address recognized as such."[22]

1.42. The French Ministry of Foreign Affairs thereafter consistently reiterated its position in every exchange with Equatorial Guinea on the status of the building at 42 avenue Foch.

1.43. Thus, when the Protocol Department of the French Ministry of Foreign Affairs was asked about the property tax exemptions to which premises designated for diplomatic use are entitled, it reminded Equatorial Guinea, in its Note Verbale dated 13 June 2014, that

> "[t]he premises of the Embassy located at 29 boulevard de Courcelles in Paris (8th arr.) and the residence of the Ambassador at 8 bis avenue de Verzy in Paris (17th arr.) are thus exempt from property tax"[23].

1.44. Moreover, when, on 21 April 2016, the Embassy of Equatorial Guinea requested specific measures of protection for the premises at 42 avenue Foch, the French Ministry of Foreign Affairs reaffirmed that it

> "does not consider the building located at 42 avenue Foch in Paris (16th arr.) as forming part of the premises of Equatorial Guinea's diplomatic mission in France"[24].

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[21] Note Verbale No. 501/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 27 July 2012 (Doc. No. 22 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures).

[22] Note Verbale No. 3503 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 6 Aug. 2012 (Doc. No. 24 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures).

[23] Note Verbale No. 5638 from the Ministry of Foreign Affairs and International Development of the French Republic to the Embassy of the Republic of Equatorial Guinea, 13 June 2014 (Ann. 4).

1.45. After the Court made its Order indicating provisional measures, the Ambassador of Equatorial Guinea in France was received twice, at his request, by the Department for Africa and the Indian Ocean at the Ministry for Europe and Foreign Affairs. During these meetings, he asked the French authorities to confirm that they now recognized the diplomatic status of the townhouse at 42 avenue Foch.

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1.46. Thus, by Note Verbale dated 15 February 2017, the Embassy of Equatorial Guinea in France observed that

> "this matter [was] raised at the last two meetings with officials from the Department for Africa and the Indian Ocean, and . . . assurances [were given by] the Director that a Note recognizing its current status would be sent to the diplomatic mission located at 42 avenue Foch"[25].

1.47. In response to that Note Verbale, the Ministry for Europe and Foreign Affairs stated on 2 March 2017 that

> "[i]n keeping with its consistent position, France does not consider the building located at 42 avenue Foch in Paris (16th arr.) to form part of the premises of the diplomatic mission of the Republic of Equatorial Guinea in France.
>
> In accordance with the Order made by the International Court of Justice on 7 December 2016, and pending the Court's final decision in the case, France will ensure that the premises located at 42 avenue Foch receive treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability."[26]

1.48. Faced with Equatorial Guinea's changing and contradictory assertions, the French Ministry of Foreign Affairs consistently recalled that it did not consider the premises of 42 avenue Foch as forming part of Equatorial Guinea's diplomatic mission and that those premises could not officially form part of the mission on account of the criminal measures taken against them. The only premises France has officially agreed to recognize as such are those located at 29 boulevard de Courcelles in Paris.

Latest developments in the criminal proceedings in France

1.49. During the oral proceedings on the request for the indication of provisional measures, the Agent of the French Republic had the opportunity to inform the Court of the status of the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue in France and the possible subsequent developments[27].

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[24] Note Verbale No. 2016-313721 from the Ministry of Foreign Affairs and International Development of the French Republic to the Embassy of the Republic of Equatorial Guinea, 27 Apr. 2016 (Ann. 5).

[25] Note Verbale No. 069/2017 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs and International Development of the French Republic, 15 Feb. 2017 (Ann. 6).

[26] Note Verbale No. 2017-158865 from the Ministry of Foreign Affairs and International Development of the French Republic to the Embassy of the Republic of Equatorial Guinea, 2 Mar. 2017 (Ann. 7).

[27] CR 2016/15, 18 Oct. 2016, pp. 13-17 (Alabrune).

23 1.50. France stated that following Mr. Teodoro Nguema Obiang Mangue's referral to the Paris *Tribunal correctionnel*, any first instance conviction could not occur before the end of the first quarter of 2017.

1.51. On 27 October 2017, i.e. towards the end of the second half of 2017, the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel* rendered its judgment finding Mr. Teodoro Nguema Obiang Mangue guilty of money laundering offences committed between 1997 and October 2011; it accordingly sentenced him to a three-year suspended prison term and a suspended fine of €30 million. The *Tribunal* also ordered the confiscation of all assets seized, including the entire immovable property located at 42 avenue Foch.

1.52. On 3 November 2017, this judgment was appealed by Mr. Teodoro Nguema Obiang Mangue and cross-appealed by the Financial Prosecutor's Office.

1.53. This appeal *(appel)* is the ordinary form of review by which a court of second instance may amend or annul the decision rendered by a court of first instance. The appeal court is tasked with hearing the case for a second time.

1.54. Appeal is one of the forms of review which has the broadest effects. It is a corrective remedy that challenges the first instance *res judicata* with a view to obtaining a new ruling on fact and law.

1.55. Furthermore, an appeal has the effect of suspending the sentence handed down at first instance, meaning that the disputed decision cannot be enforced during the appeal period.

1.56. As stated by the Agent of the French Republic during the hearings on the request for the indication of provisional measures, in all likelihood the case will not appear on the list of the Paris *Cour d'appel* until the second half of 2019.

24 1.57. The decision rendered on appeal could be contested through a further appeal *(pourvoi)* before the *Chambre criminelle* of the *Cour de cassation*. In such an event, and since the suspensive effect applies to all aspects of the criminal proceedings, the judgment handed down by the *Cour d'appel* would thus still not be enforced.

1.58. In light of the foregoing, a final decision of the French courts would therefore not be expected until 2020.

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CHAPTER 2

SUBJECT-MATTER OF THE DISPUTE

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

> "The dispute between Equatorial Guinea and France, arising from certain ongoing criminal proceedings in France, concerns the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, and the legal status of the building which houses the Embassy of Equatorial Guinea in France, both as premises of the diplomatic mission and as State property"[28].

2.2. Pursuant to Article 79, paragraph 1, of the Rules of Court, on 31 March 2017 France raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application instituting proceedings filed by Equatorial Guinea on 13 June 2016.

I. The Court's Judgment on the preliminary objections

2.3. In its Judgment rendered on 6 June 2018, the Court upheld France's first preliminary objection in the following terms:

> "Having analysed the aspect of the dispute in respect of which Equatorial Guinea invoked the Palermo Convention as a basis of jurisdiction (see paragraph 68 above), the Court concludes that this aspect of the dispute is not capable of falling within the provisions of the Palermo Convention. The Court therefore lacks jurisdiction pursuant to the Palermo Convention to entertain Equatorial Guinea's Application and must uphold France's first preliminary objection."[29]

2.4. There is no doubt that "it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim"[30] on the basis of the application, "while giving particular
26 attention to the formulation of the dispute chosen by the applicant"[31]. Consequently, the subject-matter of the dispute as it stands at this stage of the proceedings must be assessed in light of the Court's Judgment dated 6 June 2018. The scope of the Court's jurisdiction excludes:

> "[t]he aspect of the dispute for which Equatorial Guinea invokes the Palermo Convention as the title of jurisdiction[, which] involves various claims on which the Parties have expressed differing views in their written and oral pleadings. First, they disagree on whether, as a consequence of the principles of sovereign equality and non-intervention in the internal affairs of another State, to which Article 4 of the

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[28] Application of Equatorial Guinea (AEG), para. 2. See also MEG, para. 0.2.

[29] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 118.

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

[31] *Ibid*. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38.

> Palermo Convention refers, Mr. Teodoro Nguema Obiang Mangue, as Vice-President of Equatorial Guinea in charge of National Defence and State Security, is immune from foreign criminal jurisdiction. Second, they hold differing views on whether, as a consequence of the principles referred to in Article 4 of the Palermo Convention, the building at 42 Avenue Foch in Paris is immune from measures of constraint. Third, they differ on whether, by establishing its jurisdiction over the predicate offences associated with the offence of money laundering, France exceeded its criminal jurisdiction and breached its conventional obligation under Article 4 read in conjunction with Articles 6 and 15 of the Palermo Convention."[32]

2.5. With regard to the second aspect of the dispute, the Court declared in its Judgment of 6 June 2018 that

> "it has jurisdiction, on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, to entertain the Application filed by the Republic of Equatorial Guinea on 13 June 2016, in so far as it concerns the *status of the building located at 42 Avenue Foch in Paris as premises of the mission*, and that this part of the Application is admissible"[33].

The Court defines it as follows:

> "The aspect of the dispute for which Equatorial Guinea invokes the Optional Protocol to the Vienna Convention as the title of jurisdiction involves two claims on which the Parties have expressed differing views. First, they disagree on whether the building at 42 Avenue Foch in Paris constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment afforded for such premises under Article 22 of the Vienna Convention. They also disagree on whether
27 France, by the action of its authorities in relation to the building, is in breach of its obligations under Article 22."[34]

2.6. Later in this Counter-Memorial, France will establish that it has not committed any breach of Article 22 of the VCDR. First, however, some clarification is needed regarding the precise subject-matter and scope of the dispute.

II. The irrelevance of rules other than those deriving from the Vienna Convention on Diplomatic Relations

2.7. In its Application instituting proceedings, Equatorial Guinea makes the following submissions in respect of the building at 42 avenue Foch:

> "*(c) With regard to the building located at 42 avenue Foch in Paris,*
>
> (i) to adjudge and declare that, by attaching the building located at 42 avenue Foch in Paris, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the

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[32] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 68.

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

[34] *Ibid.*, para. 70.

Vienna Convention on Diplomatic Relations and the United Nations Convention, as well as general international law;

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

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

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

(ii) to order the French Republic to make full reparation to the Republic of Equatorial Guinea for the harm suffered, the amount of which shall be determined at a later stage."[35]

Equatorial Guinea makes the same submissions in its Memorial[36].

28 2.8. In its Request for provisional measures, dated 29 September 2016, Equatorial Guinea claims that:

> "[t]he 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.*"[37]

Equatorial Guinea thus asserts, in the same paragraph, that the alleged inviolability of the building at 42 avenue Foch is based on both the Palermo Convention and the VCDR.

2.9. Since the Court has found that it "lacks jurisdiction pursuant to the Palermo Convention to entertain Equatorial Guinea's Application"[38], it is no longer seised of the aspect of the dispute said to be covered by that treaty basis — including the alleged violation of the building as purported property of Equatorial Guinea used for government non-commercial purposes — in the context of these proceedings.

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[35] AEG, para. 41; MEG, para. 9.42. See also CR 2016/14, 17 Oct. 2016 (provisional measures), pp. 21-22, para. 5 (Wood); CR 2016/15, 18 Oct. 2016 (provisional measures), p. 19, para. 5 (Wood).

[36] MEG, p. 182.

[37] AEG, para. 13 (emphasis added).

[38] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 118.

2.10. The same is clearly true of Equatorial Guinea's claims based on "general international law"[39]. As France has repeatedly recalled[40], the Court's jurisdiction in this case is limited to settling the dispute before it on the basis of the relevant treaty clauses; it has no jurisdiction to apply general international law autonomously. Since the Court has definitively ended Equatorial Guinea's
29 attempt to artificially link its reliance on general international law to the Palermo Convention[41], all that remains is the aspect of the dispute relating to the VCDR as such.

2.11. Throughout its written pleadings, Equatorial Guinea has created considerable confusion regarding the obligations under the provisions of the VCDR which France is alleged to have violated in this case. In its Application, for example, Equatorial Guinea asserts that France "breached its obligations owed to Equatorial Guinea under the VCDR . . . *in particular Article 22 thereof*"[42]. In its Memorial, Equatorial Guinea states that "[t]he 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"[43], and mentions Article 20 (flag and emblem of the sending State)[44] and Article 21 (facilitation of the acquisition of premises)[45] of the Convention without once seeking to demonstrate in what way France might have contravened these provisions. Next came a reference to Article 23 (exemption from taxes), with no further explanation, in the observations filed in response to the preliminary objections[46]. Lastly, during the hearings, the Applicant once again offered nothing more than the terse statement that "the provisions contained in Articles 20, 21 and 23 are violated incidentally, because the inviolability guaranteed by Article 22 is not respected"[47].

2.12. France has already amply demonstrated that there is no dispute between it and Equatorial Guinea regarding those three provisions of the Convention[48]. The dispute — whose subject-matter must be assessed on the day the Court was seised — concerns only the status of the building at 42 avenue Foch and the régime of inviolability potentially associated with that status, to the exclusion of any other question. This is precisely how the Judgment rendered on 6 June 2018 is to be understood. In that Judgment, the Court "recalls that the aspect of the dispute" relating to the VCDR

> "concerns whether the building at 42 Avenue Foch, Paris, constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the
> **30** treatment *provided for under Article 22 of the Vienna Convention*. It also concerns

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[39] See in particular AEG, para. 39; MEG, paras. 8.63, 8.66.

[40] See POF, paras. 5, 54-55, 64. See also CR 2018/2, p. 15, para. 13, and p. 16, para. 17 (Alabrune); p. 17, para. 2 (Ascensio); pp. 32-33, para. 8 (Bodeau-Livinec); p. 45, para. 2 (Pellet); and CR 2018/4, pp. 10-12, paras. 4-6 (Pellet).

[41] See in particular *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 96.

[42] AEG, para. 38 (emphasis added).

[43] MEG, para. 5.46 (emphasis added).

[44] *Ibid.*, para. 8.18.

[45] *Ibid.*, para. 8.32.

[46] Written Statement of Equatorial Guinea on the Preliminary Objections of France (WSEG), para. 1.57.

[47] CR 2018/3, p. 47, para. 10 (Kamto).

[48] See POF, paras. 139-142, and CR 2018/2, pp. 39-40, paras. 25-26 (Bodeau-Livinec).

whether France, by the actions of its authorities in relation to the building, is in breach of its obligation *under Article 22*."[49]

III. The irrelevance of the building's ownership in assessing the alleged violations of the Vienna Convention on Diplomatic Relations

2.13. This first observation has major implications for some of the submissions made by Equatorial Guinea. The Applicant has, however, thus far been careful to maintain a certain amount of confusion between the bases for its claims in respect of the building located at 42 avenue Foch[50]. In its Application instituting proceedings, for instance, it stated that:

> "The building located at 42 avenue Foch in Paris was, until 15 September 2011, co-owned by five Swiss companies of which Mr. Teodoro Nguema Obiang Mangue had been the sole shareholder since 18 December 2004. On 15 September 2011, he transferred his shareholder's rights in the companies to the State of Equatorial Guinea. Since then, the building has been used by the diplomatic mission of Equatorial Guinea."[51]

2.14. This conflates the question of the building's ownership with that of the premises' assignment. In Equatorial Guinea's view, since Mr. Teodoro Nguema Obiang Mangue "transferred his shareholder's rights . . . to the State of Equatorial Guinea" on 15 September 2011, Equatorial Guinea has, "[s]ince then, [been the owner of] the building" or, at the very least, the owner of the Swiss companies whose shares it acquired. Be that as it may, the question of the building's assignment under the VCDR is entirely separate.

2.15. At this stage of the proceedings, a clear distinction must be made between the two aspects of the dispute. As France has repeatedly asserted[52], the question of who actually owns the
31 building at 42 avenue Foch is immaterial in determining whether the property is capable of forming part of the premises of Equatorial Guinea's diplomatic mission in France and might therefore benefit from the régime of protection provided for in Article 22 of the VCDR. Article 1 *(i)* of the Convention leaves no ambiguity in this regard:

> "*(i)* The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, *irrespective of ownership*, used for the purposes of the mission including the residence of the head of the mission."[53]

2.16. Equatorial Guinea itself has acknowledged that there is no correlation between ownership, on the one hand, and diplomatic status and régime, on the other[54]; hence it cannot now claim that France's alleged failure to respect the right of ownership of this building might be in breach of an obligation under the VCDR. In its Judgment of 6 June 2018, the Court did not consider it necessary to state that the aspects of Equatorial Guinea's Application relating to the

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[49] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 120 (emphasis added).

[50] See POF, paras. 45-52.

[51] AEG, para. 20.

[52] See POF, para. 141; CR 2018/2, p. 38, para. 23 (Bodeau-Livinec).

[53] Article 1 *(i)* of the VCDR of 18 Apr. 1961 (emphasis added).

[54] See in particular MEG, para. 8.32; WSEG, para. 3.24; CR 2018/3, p. 46, para. 7 (Kamto).

building's ownership fell outside the provisions of the VCDR. Indeed, the clear distinction drawn by the Court between the claims based on the Palermo Convention and those said to fall within the VCDR[55] is sufficient to conclude that the alleged failure to respect the immunity of the building as property of the State of Equatorial Guinea was founded on the first basis of jurisdiction, not the second. As Judge Gaja noted in his declaration appended to the Judgment:

> "the issue of the ownership concerning the building located at 42 Avenue Foch must be distinguished from the issue of inviolability and immunity of the premises of the mission. While the latter comes within the scope of the Optional Protocol, the part of the dispute over the ownership of the building is not so covered. Under the Optional Protocol the Court does not have jurisdiction to decide on that part of the dispute."[56]

2.17. Moreover, in the submissions presented in its Memorial, Equatorial Guinea requested the Court to order:

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> "the French Republic to recognize the status of the building located at 42 avenue Foch in Paris as the property of the Republic of Equatorial Guinea . . . and, accordingly, to ensure its protection as required by international law"[57].

2.18. Yet the lack of correlation between the question of the building's ownership and that of its assignment under the VCDR[58] has an important consequence for one aspect of the dispute that Equatorial Guinea has sought to bring before the Court. In its Order of 7 December 2016 indicating provisional measures, the Court requested that "the execution of any measure of confiscation . . . be stayed"[59] until it has rendered its final decision in the case. France has since complied with that request, the Paris *Tribunal correctionnel* having stated in its decision of 27 October 2017 ordering the confiscation of the building at 42 avenue Foch that "the pending proceedings [before the International Court of Justice] made the execution of any measure of confiscation by the French State impossible but not the imposition of that penalty"[60]. However, as the Agent of the French Republic recalled at the hearings on the preliminary objections,

> "even should it become final, confiscation would simply transfer ownership of the building at 42 avenue Foch to the State, without prejudice to the prevailing situation with regard to the occupation and use of the premises"[61].

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[55] See *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, paras. 52-53.

[56] *Ibid.*, declaration of Judge Gaja.

[57] MEG, p. 182.

[58] See above, paras. 2.12-2.15.

[59] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1170, para. 95.

[60] See CR 2018/2, p. 11, para. 5 (Alabrune) and *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 40.

[61] CR 2018/2, p. 12, para. 5 (Alabrune). See Article L. 1124-1 of the *Code général de la propriété des personnes publiques* (General Code of Public Property) (https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070299&idArticle=LEGIAR TI000006361154&dateTexte=29990101&categorieLien=cid).

2.19. Equatorial Guinea, moreover, expressly acknowledged that the measure of confiscation concerned the building's ownership, and made no mention of its use[62]. It follows from this shared view that confiscation of the building at 42 avenue Foch cannot in itself constitute a violation of the relevant provisions of the VCDR: even if France were to take ownership of the building at the end of the judicial proceedings instituted against Mr. Teodoro Nguema Obiang Mangue, such a circumstance would in itself make no difference to the régime of diplomatic inviolability invoked by Equatorial Guinea, which is contingent on the use of the premises in question, not on their ownership. In a case relating to the nationalization by Romania of a building used by an American organization with diplomatic status in Romania, the European Court of Human Rights (ECHR) noted in this regard that:

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> "even if the organisation in question did indeed enjoy such immunity, this in no sense acted as a bar to the transfer to the applicant of ownership rights over the disputed property. As that transfer did not in itself entail the eviction of the tenant, it was open to the latter, in the event of a dispute over the occupancy of the building, to submit defence arguments, including arguments relating to its alleged immunity from jurisdiction."[63]

2.20. In view of the foregoing, and as the Court found in its Judgment of 6 June 2018, only "Equatorial Guinea's claim based on the Vienna Convention concern[ing] France's alleged failure to respect the inviolability of the building at 42 Avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission"[64] remains within the scope of its jurisdiction. The aspects of the dispute relating to ownership are excluded from it. While the question of the building's ownership is indicative of the abusive nature of Equatorial Guinea's approach[65], it is in itself irrelevant to the régime of diplomatic inviolability invoked by the Applicant.

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2.21. It is therefore within the strict limits of the subject-matter of the dispute, as identified by the Court in its Judgment of 6 June 2018 on the basis of Equatorial Guinea's Application and Memorial, that the alleged violations of the provisions of Article 22 of the VCDR in respect of the building at 42 avenue Foch must be assessed.

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[62] "[I]n French criminal law, confiscation is a penalty which involves transfer of the ownership of the asset in question, to the benefit of the French State." (CR 2018/3, p. 26, para. 43 (Tchikaya).)

[63] ECHR, *Hirschhorn* v. *Romania*, application No. n°29294/02, decision of 26 July 2007, para. 60. See also German Federal Constitutional Court, *Jurisdiction over Yugoslav Military Mission (Germany) Case*, Case No. AVR XI (1963/64), 30 Oct. 1962, *International Law Reports (ILR)*, Vol. 38, pp. 162-170 ("None of this would adversely affect the mission in the performance of its diplomatic functions. So far as concerns the performance of its functions, it is irrelevant whether the sending State or any other person is registered as the owner of the mission premises").

[64] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 53.

[65] See below, Chap. 4, paras. 4.28-4.45.

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CHAPTER 3

NO BREACH OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS WITH REGARD TO THE BUILDING AT 42 AVENUE FOCH

3.1. As the Court stated in its Judgment of 6 June 2018, the aspect of the dispute over which the Court upheld its jurisdiction concerns two claims on which France and Equatorial Guinea have expressed divergent views. The Court thus notes that

> "[f]irst, they disagree on whether the building at 42 Avenue Foch in Paris constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment afforded for such premises under Article 22 of the Vienna Convention. They also disagree on whether France, by the action of its authorities in relation to the building, is in breach of its obligations under Article 22."[66]

3.2. Thus circumscribed, the definition of the subject-matter of the dispute delimits precisely the legal scope of the dispute submitted to the Court, which concerns, first, the question of whether the building at 42 avenue Foch can be considered part of the premises of the diplomatic mission of Equatorial Guinea in France, and, second, whether the search and attachment of that building was in breach of the relevant obligations of Article 22 of the VCDR.

3.3. Regarding the first question, France strongly contests the so-called declaratory theory advanced by Equatorial Guinea, according to which the sending State can unilaterally impose on the receiving State its choice of premises for its diplomatic mission. In accordance with the VCDR, and in line with the practice of many other States, the régime for establishing the diplomatic premises of foreign State missions in France is subject to compliance with two cumulative conditions. A building can have the status of diplomatic premises only if, first, France, as the receiving State, has not expressly objected to its being considered part of the diplomatic mission, and, second, it is actually used for diplomatic purposes (I). France has never consented to granting
35 the status of diplomatic premises to the building at 42 avenue Foch, which could in no way have been considered as being used for diplomatic purposes when it was searched and attached by the French judicial authorities. Consequently, the building at 42 avenue Foch never acquired the status of diplomatic premises and France could not have been in breach of its obligations under the VCDR (II).

I. The granting of the status of diplomatic premises is subject to compliance with two cumulative conditions

3.4. In the part of its Application on the "legal bases" of that pleading, Equatorial Guinea makes only one substantial reference to the VCDR, which is the following:

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[66] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Preliminary Objections, Judgment of 6 June 2018*, para. 70.

> "by the fact that its judicial authorities have seized a building used for the purposes of the diplomatic mission of Equatorial Guinea in France, and by failing to recognize the building as the premises of the diplomatic mission, the French Republic has breached its obligations owed to Equatorial Guinea under the Vienna Convention on Diplomatic Relations of 18 April 1961, in particular Article 22 thereof"[67].

3.5. This bald assertion raises questions. A thorough examination of the facts of the case clearly shows that France has always refused to grant the status of diplomatic premises to the building at 42 avenue Foch and that it was not assigned for the purposes of Equatorial Guinea's mission in Paris at the time it was searched and attached. In accordance with the spirit and letter of the VCDR, identification of a building as mission premises — and entitlement to the resulting régime of protection — presupposes, first, that the receiving State does not expressly object to granting it diplomatic status (A) and, second, that the building is actually assigned for the purposes of the diplomatic mission (B).

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A. The granting of diplomatic status to a building cannot be unilaterally imposed on the receiving State

3.6. In its reply to the question put by Judge Donoghue, Equatorial Guinea asserts that "regarding the status of premises of a diplomatic mission, the régime of the Vienna Convention is declaratory"[68]. By this it is to be understood that "the premises used for diplomatic services are those designated as such by the sending State to the receiving State"[69], and that this designation alone establishes the benefit of diplomatic status for a building, without the express or implicit consent of the receiving State being required. Stretching the logic of this "declaratory" view still further, Equatorial Guinea contends that "there is no need for a procedure"[70], stating, for example, that the notification sent to the Ministry of Foreign Affairs of the French Republic on 4 October 2011 regarding the building at 42 avenue Foch was merely a matter of "courtesy"[71]: in Equatorial Guinea's view, Article 1 *(i)* of the Convention may even "be understood as entitling the sending State to provide its own definition of the premises of its diplomatic mission"[72].

3.7. The sole benefit of this understanding of the régime for identifying diplomatic premises is that the sending State can claim diplomatic status for any premises, without the receiving State ever being able to object, even when such claims are abusive[73]. Such an interpretation, however, appears legally unrealistic: in accordance with the letter and spirit of the VCDR, it is impossible for

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[67] AEG, para. 38.

[68] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 23.

[69] WSEG, para. 1.63; "there is no need for a recognition process" (*ibid.*, para. 3.14).

[70] CR 2018/3, p. 50, para. 23 (Kamto).

[71] MEG, para. 8.35. In its Note Verbale of 4 Oct. 2011, the Embassy of Equatorial Guinea nevertheless explained to the Ministry of Foreign Affairs that "[s]ince the building forms part of the premises of the diplomatic mission, pursuant to Article 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Republic of Equatorial Guinea wishes to give you official notification *so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention*." (Note Verbale No. 365/11 (Doc. No. 1 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures); emphasis added.)

[72] WSEG, para. 1.61.

[73] As France has pointed out, Equatorial Guinea could thus simply declare that it has established its diplomatic mission on the first floor of the Eiffel Tower for those premises to be considered as enjoying diplomatic status (CR 2016/17, p. 12, para. 11 (Pellet)).

the sending State to impose its choice of premises of its diplomatic mission on the receiving State (1). Moreover, Equatorial Guinea's "declaratory" theory is not borne out by State practice (2).

37 **1.** ***Equatorial Guinea's "declaratory" theory is contrary to the letter and spirit of the Vienna Convention on Diplomatic Relations***

3.8. Even though this question is crucial to the application of the privileges and immunities under the VCDR, the Convention provides no details on the procedure for granting diplomatic status and related protections to the premises in which a State wishes to establish its diplomatic mission.

3.9. Equatorial Guinea believes that it can infer from this lack of procedural detail that the sending State is recognized as having complete freedom in designating or changing the premises of its mission, and that the receiving State is obliged, unconditionally, to ensure compliance with all the protections derogating from ordinary law that are granted to such premises by the VCDR. Yet the ordinary meaning to be given to the terms of Article 1 *(i)*, interpreted in light of the object and purpose of the Convention, runs counter to this "declaratory" view. Thus, in accordance with the essentially consensual letter and spirit of the VCDR, the premises that the sending State wishes to use for its diplomatic mission can be used as such only when the receiving State gives its consent and, above all, does not expressly object to that choice, after notification has been given by the sending State.

3.10. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court solemnly declared that "[t]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose"[74]. There is no doubt that this régime imposes particularly stringent obligations on the receiving State, of which Article 22 is one of the most obvious examples. This is perfectly natural since the aim is to ensure the smooth and efficient functioning of diplomatic missions necessary to the development of peaceful relations between States. Nevertheless, while the receiving State thus has to accept significant restrictions on the exercise of its territorial sovereignty, the sending State,
38 for its part, must use the rights conferred on it in good faith. The Convention's preamble clearly underscores this when it expresses the conviction that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"[75].

3.11. The bond of trust that needs to be forged between sending and receiving States is thus broken when the sending State seeks to use the privileges offered by the Convention for the benefit of private individuals, without any relation whatsoever to "the efficient performance" of diplomatic functions. In keeping with this *ratio legis*, it is understandable that the designation of buildings as premises of a mission is not left to the sole discretion of the sending State. Jean Salmon explains in this regard that

> "[w]hile the mission is entitled to characterize what it regards as premises used for the purposes of the mission, that characterization is merely provisional and unilateral, and the receiving State, which may have the power to refuse the necessary authorizations,

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[74] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 38, para. 19.

[75] VCDR, 18 Apr. 1961, fourth paragraph of the preamble.

> can contest it . . . Agreement must be sought. In the absence of agreement, it seems to us that here too the receiving State should have the last word. The underlying issue is actually the functions of the mission and the qualitative and quantitative extension of those functions, in respect of which the receiving State has a say, in particular because it has onerous obligations to protect such premises."[76]

3.12. Indeed, the VCDR sets out clearly the obligations incumbent on the receiving State: in addition to the general obligation to accord "full facilities for the performance of the functions of the mission"[77], it has "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"[78].

3.13. If Equatorial Guinea's view were to be upheld, should it be accepted that the receiving State would be compelled to take steps derogating from ordinary law, which are sometimes particularly hard to implement in practice, without even having the possibility of approving the choice made by the sending State? Should it also be accepted that the receiving State cannot object
39 to the choice of the sending State, even if that choice is likely to violate public policy? The Convention is built around the principle of respect for sovereign will and the development of diplomatic relations based on mutual consent. Article 2 provides in particular that "[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent". Discussions in the International Law Commission (ILC) attest to the need for mutual agreement in the establishment of diplomatic relations, a notion deeply embedded in State practice[79]. On this basis, it would seem strange that either of the two States could impose on the other the choice of premises for its mission.

3.14. To counter this obvious interpretation of the Convention and justify its declaratory own-definition theory, Equatorial Guinea attempts to draw on Article 12 of this instrument[80]. Its reasoning is as follows:

> "Article 12 of the VCDR grants the receiving State the power to consent to the establishment of the premises of a diplomatic mission only when offices of the mission are established in localities other than those in which the mission is established. This provision is irrelevant for the purposes of the present case, since Equatorial Guinea has neither established, nor sought to establish, offices forming part of its mission 'in [other] localities'. It simply transferred its mission to other premises owned by it in the city of Paris. *A contrario*, it can be inferred from the terms of Article 12 that the opening of offices of a mission in the same locality, or the transfer

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[76] J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, 1994, p. 190. *[This and any subsequent extracts from this publication have been translated by the Registry.]*

[77] Art. 25.

[78] Art. 22, para. 2.

[79] See the discussions in the ILC, in particular on the subject of current Art. 2: "no right of legation can be exercised without agreement between the parties" (*Yearbook of the International Law Commission (YILC)*, 1958, Vol. II, A/CN.4/SER.A/1958/Add.l, p. 90 (commentary on Art. 2, para. 1)); the ILC having previously noted that this article confirms general State practice (*YILC*, 1957, Vol. II, A/CN.4/SER.A/1957/Add. l, p. 133 (commentary on Art. 1)).

[80] "The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established."

of premises within the same locality, is not subject to the consent of the receiving State."[81]

3.15. However, Equatorial Guinea fails to point out that, in the circumstances to which it refers, Article 12 requires "the *express* consent of the receiving State"[82]. The *a contrario* reasoning
40 it puts forward does not therefore stand up. In fact, the text of Article 12 clearly supports the need for the receiving State's consent to the establishment of premises of the diplomatic mission of the sending State. In the specific circumstances of establishing diplomatic premises outside the capital of the territorial State, it is perfectly understandable that that State's express agreement is required. This does not mean that in ordinary circumstances, when the mission must be established in the capital, such consent is not necessary; it is still necessary but can be given implicitly. The practice of many States corroborates this consensual view.

2. *The "declaratory" theory is not borne out by State practice*

3.16. As France has previously had occasion to observe[83], a number of States make the establishment of premises of foreign diplomatic missions on their territory explicitly subject to some form of consent, which determines the starting date of the régime of inviolability to which those premises will subsequently be entitled. Equatorial Guinea is aware of this but tries to downplay the extent of these national practices, in particular by arguing that this is done only by "some Western countries"[84], whose intention, it claims, is "to provide a framework rather than contradict the right that the VCDR grants the sending State to assign property as premises of its diplomatic mission"[85].

3.17. A close examination of these practices leads to utterly different conclusions. The very fact that they exist shows that, contrary to the "declaratory" own-definition theory advanced by Equatorial Guinea, the VCDR does not confer on the sending State any right to designate on its own and at its convenience the buildings that are to house its mission. If it were so, those national practices would, by definition, be contrary to the Convention, which the Applicant does not appear
41 to argue[86]. It merely presents them as an "exception"[87], stating that "[i]n the event of a

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[81] MEG, para. 8.36. During the hearings on the preliminary objections, Equatorial Guinea again explained that "[w]hen the Convention's drafters wanted to restrict a State's freedom to establish the premises of its diplomatic mission, they did so explicitly. They did so, for example, with regard to the establishment of premises of a diplomatic mission in locations other than the capital of the receiving State, by virtue of Article 12 of the Vienna Convention on Diplomatic Relations." (CR 2018/3, para. 20 (Pellet).)

[82] Emphasis added. Art. 12 reads as follows: "The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established."

[83] See POF, paras. 163-164.

[84] MEG, para. 8.42. Equatorial Guinea cites Canada, Spain, the United States, the United Kingdom, Switzerland and Sweden, as well as India and South Africa.

[85] *Ibid.*

[86] In its observations on the preliminary objections, it nevertheless asserts, without further clarification, that "[t]here is no basis for a receiving State to establish a specific procedure unilaterally" (WSEG, para. 1.61). As noted by one author, "Art. 41.1 requires persons enjoying privileges and immunities to respect the laws of the receiving State. The view has therefore been taken by a number of receiving States that provided that the obligations imposed by Article 21 of the Convention in regard to acquisition of mission premises are observed*, it is fully compatible with Article 1* (i) *and with the Convention as a whole to control the particular premises in which foreign missions carry out their functions.*" (E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, Oxford, 4th ed., 2016, pp. 16-17; emphasis added.)

disagreement between States regarding the establishment of such premises, the point of view of the receiving State does not necessarily prevail"[88], and that the sending State retains "the freedom to choose its diplomatic premises . . . when the receiving State has no applicable national legislation in this area"[89]. The VCDR of course states nothing of the kind and nowhere in the Convention is there any recognition of the freedom of choice claimed by Equatorial Guinea, certainly not in the radical form the Applicant seeks to uphold. There is nothing to prevent the receiving State from exercising some control over the designation of buildings that the sending State intends to use for the purposes of its diplomatic mission, if only so that it can verify that the conditions, both legal and practical, are met for it to guarantee the inviolability of the said premises; whether it does so through specific legislation, on the basis of guidelines or through the usual diplomatic channels is immaterial from the point of view of international law. Many States thus seek to retain some control over the sending State's intended choice of diplomatic mission.

3.18. Far from confirming the declaratory view of a right to establish premises of a diplomatic mission, the common feature of the national practices considered here is that, on the contrary, they corroborate the existence of a régime based on agreement between the parties, in accordance with the object and purpose of the Vienna Convention[90]. The practices of the United States and the United Kingdom have already been mentioned[91]; suffice to recall that the 1982 US Foreign Missions Act provides that "[t]he Secretary shall require any foreign mission . . . to notify the Secretary prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission"[92]. Section 1 of the Diplomatic and Consular Premises Act adopted by the United Kingdom in 1987 provides that

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> "where a State desires that land shall be diplomatic or consular premises, it shall apply to the Secretary of State for his consent to the land being such premises . . . In no case is land to be regarded as a State's diplomatic or consular premises for the purposes of

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[87] MEG, para. 8.44; see also WSEG, para. 3.18.

[88] WSEG, para. 3.18.

[89] CR 2018/3, p. 49, para. 19 (Kamto).

[90] As one author explains "[p]rovided that the power of control is exercised in such a manner that sending States are able to acquire premises adequate and suitable to their needs . . . a system of control is not against the letter or spirit of the Convention. It is in the interests of both sending and receiving States that mission premises are placed in locations where they do not cause friction with local inhabitants and where the receiving State may discharge without undue difficulty its duty of protection . . . A system of notification and agreement may also have the advantage of fixing precisely when the status of mission premises begins and ends." (E. Denza, *op. cit.*, p. 147.)

[91] See POF, para. 164.

[92] *Foreign Missions Act 22 U.S.C. 4301-4316*, available at https://www.state.gov/documents/organization/17842.pdf, § 4305 *(a)* (1). According to § 4305 *(a)* (2), "[f]or purposes of this section, 'acquisition' includes any acquisition or alteration of, or addition to, any real property or *any change in the purpose for which real property is used by a foreign mission*" (emphasis added). The text goes on to state that "[t]he foreign mission (or other party acting on behalf of the foreign mission) may initiate or execute any contract, proceeding, application, or other action required for the proposed action — (A) only after the expiration of the 60-day period beginning on the date of such notification (or after the expiration of such shorter period as the Secretary may specify in a given case); and (B) only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such a notification such terms and conditions as the Secretary may determine appropriate in order to remove the disapproval".

any enactment or rule of law unless it has been so accepted or the Secretary of State has given that State consent under this section in relation to it."[93]

Other States, in various parts of the world, have formalized the need for their consent to the establishment of premises of foreign diplomatic missions on their territory and specified the procedural arrangements for the dialogue that must take place between the sending and receiving States. While not aiming to be exhaustive, here are some examples:

— In **South Africa**, Section 12 of the Diplomatic Immunities and Privileges Act of 2001 provides:

"(1) All foreign missions or consular posts, the United Nations and all specialised agencies or organisations referred to in this Act, must submit a written request to the Director-General [of International Relations and Co-operation] for acquiring, constructing, relocating, renovating, replacing, extending or leasing immovable property in the Republic . . . (2) Any such request must consist of a narrative and graphic description of, and indicate the reasons for, the proposed acquisition, construction, relocation, renovation, replacement, extension or leasing. (3) No deed of transfer of land may be registered . . . in the name of any such government, mission or post, the United Nations or any such specialised agency, organisation, person or representative unless the Director-General has informed the Registrar of Deeds in writing that the property has been recognised for the use of an embassy, chancellery, legation, office or official residence and that the Director-General approves of such registration."[94]

— In **Germany**, the Protocol Handbook of the Federal Foreign Office (1 January 2013) states:

43 "The use for official purposes of property (land, buildings and parts of buildings) for diplomatic missions and career consular posts is possible only with the prior agreement of the Federal Foreign Office (authorization for use) . . . The Federal Foreign Office may attach obligations and conditions to its authorization for use . . . Buildings or parts of buildings not used for diplomatic or consular purposes are subject without reservation to German law. They are not entitled to any of the tax exemptions, any immunity from measures of constraint or any protection of buildings accorded to diplomatic missions and career consular posts."[95]

— In **Australia**, the Protocol Guidelines: Diplomatic Missions in the Australian Capital Territory (ACT) state:

"Any chancery to be located on Territory Land, but not within commercial premises such as an office building, will need approval from the ACT Government.

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[93] *Diplomatic and Consular Premises Act*, 15 May 1987, Secs. 1 (1) and (3) (available at http://www.legislation.gov.uk/ukpga/1987/46). Sec. 1 (3) states that "if (a) a State ceases to use land for the purposes of its mission or exclusively for the purposes of a consular post; or (b) the Secretary of State withdraws his acceptance or consent in relation to land, it thereupon ceases to be diplomatic or consular premises for the purposes of all enactments and rules of law". For a commentary on this text, see, for example, C. Lewis, *State and Diplomatic Immunity*, London, LLP, 3rd ed., 1990, which notes in particular that the certificate of the Secretary of State "is conclusive in any proceedings" (p. 149).

[94] *Diplomatic Immunities and Privileges Act*, 2001, Act No. 37, 2001, Government Gazette, Vol. 437, 29 Nov. 2001, No. 22876, available at: http://www.saflii.org/za/legis/num_act/diapa2001363.pdf.

[95] *Protocol Handbook of the Federal Foreign Office of the Federal Republic of Germany*, published on 1 Jan. 2013, para. 12.1 (Ann. 8). The Handbook subsequently sets out the procedure for applying for authorization for use, "strongly recommend[ing] that applications should be submitted a long time *prior to* the purchase or lease of premises" (*ibid.*, para. 12.1.1; emphasis in the original). *[Translations by the Registry.]*

> Missions should contact Protocol Branch to ensure that ACT Government approval will be forthcoming."[96]

— In **Brazil**, the 2010 Manual of Rules and Procedures on Privileges and Immunities, A Practical Guide for the Diplomatic Corps Accredited in Brazil informs foreign diplomatic missions that

> "the establishment of seats of Diplomatic Missions (Chancery and Residence), Consulates, and foreign Trade Offices on Brazilian territory, as well as the leasing, acquisition, and localization of real property for such purpose are subject to prior MRE authorization"[97].

— In **Canada**, the guidelines on Property: Acquisition, Disposition and Development of Real Property in Canada by a Foreign State (2017) provide that

> "[a] foreign state shall seek, through normal diplomatic channels, the written consent of the Department of Foreign Affairs, Trade and Development prior to the acquisition, disposition and development of real property in Canada to be used as the premises of the mission, consular premises and the residence of the career head of the consular post"[98];

they further state that

> "[w]ith respect to acquisition requests, the real property concerned would not normally be considered 'inviolable' for the purpose of the Vienna Convention during the examination process, nor would the Government of Canada have a special duty to ensure its protection during such period. It is therefore the responsibility of the foreign state to plan accordingly"[99].

44 — In **Spain**, Chapter 11 of the Practical Guide for the Diplomatic Corps Accredited in Spain (2017) states:

> "Circular Note Verbale 10/7, of 11 April 2011, reminded Diplomatic Missions, Consular Posts and International Agencies with headquarters or offices in Spain that the purchase or lease of real estate for official use, by EU countries and by non-EU countries, are subject to the relevant prevailing national and municipal provisions. Thus, it noted that it is necessary to address the competent municipal authorities in

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[96] *Protocol Guidelines: Diplomatic Missions in the Australian Capital Territory,* available at: https://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Pages/11-1-diplomatic-missions-in-the-australian-capital-territory.aspx, para. 11.1.2.

[97] *Manual of Rules and Procedures on Privileges and Immunities, A Practical Guide for the Diplomatic Corps Accredited in Brazil*, available at: https://sistemas.mre.gov.br/kitweb/datafiles/Cgpi/en-us/file/Manual.pdf, p. 73.

[98] Guidelines on *Property: acquisition, disposition or development of real property in Canada by a foreign state*, available at: https://www.international.gc.ca/protocol-protocole/policies-politiques/property-guide_lignes-directrices-immobiliers.aspx?lang=eng, para. 3.1. The Canadian Government adds that "[t]his includes temporary moves and relocations of missions and official residences due to renovation or other reasons" (*ibid.*).

[99] *Ibid*., para. 3.3.

advance to ensure that the property to be purchased or leased can be used for the intended purpose."[100]

— In **Norway**, the guide Diplomat in Norway (2018) informs foreign missions that

"[l]ocal regulations may apply to the use of real estate by foreign nationals. The purpose of the use of the property and other aspects may also be subject to regulations, and it may be necessary to obtain relevant permits from the municipal planning and building authorities"[101].

— In the **Netherlands**, the Protocol Guide for Diplomatic Missions and Consular Posts (2018) states that "[d]iplomatic missions may choose their own office and residential accommodation, under several conditions", which are as follows:

"Offices should in principle be situated within the municipality of The Hague. Residential accommodation must in principle be situated in the environs of The Hague (that is, within the municipalities of The Hague, Wassenaar, Leidschendam, Voorburg, Rijswijk or Zoetermeer), so that the Dutch authorities can meet their obligation to uphold the inviolability of such offices and residential accommodation and where necessary to protect them."[102]

— In the **Czech Republic**, the document entitled "Protection and Security of Diplomatic Missions", available on the website of the Ministry of Foreign Affairs, provides a detailed description of the procedures to follow when a diplomatic mission wants to change premises:

"To enable the Czech Republic to take all appropriate steps to protect the premises of the mission as required by the Vienna Convention on Diplomatic Relations, a diplomatic mission, consular post or international organization preparing to relocate its chancery or residence *must announce the new address to the Diplomatic Protocol well in advance*. The Diplomatic Protocol, in cooperation with the competent authorities, will consider whether the new property is suitable for the purpose namely in terms of security, transport accessibility and operational needs. *The new property cannot be recognized as premises of the mission in terms of the Vienna Convention on Diplomatic Relations without the consent of the receiving State, conveyed to the mission through the Diplomatic Protocol*. It is important to note that on approving the relocation, the Diplomatic Protocol will not automatically change the mission's address in the Diplomatic List. The mission must first send to the Diplomatic Protocol a verbal note *formally announcing the date on which the change of address takes effect.*"[103]

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[100] *Practical Guide for the Diplomatic Corps Accredited in Spain*, available at: http://www.exteriores.gob.es/Portal/es/Ministerio/Protocolo/Documents/GU%C3%8DA%20PR%C3%81CTICA%20CD%202017.%20INGL%C3%89S.pdf, p. 73. The same document further states that "[p]rior to the purchase or lease of a property, a Note Verbale shall be sent to the Deputy Director-General for Chancellery indicating the exact location of the property, in order to assess whether it is feasible in terms of town planning" (*ibid.*, p. 74).

[101] *Diplomat in Norway*, 2018, available at: https://www.regjeringen.no/en/dep/ud/about_mfa/diplomatic_relations/diplomat-in-norway/id2354407/, para. 31.

[102] *Protocol Guide for Diplomatic Missions and Consular Posts*, available at: https://www.government.nl/documents/leaflets/2015/04/15/protocol-guide-for-diplomatic-missions-en-consular-posts, p. 4.

[103] *Protection and Security of Diplomatic Missions*, available at: https://www.mzv.cz/jnp/cz/o_ministerstvu/organizacni_struktura/diplomaticky_protokol/x2_protection_and_sec urity_of_diplomatic.html, Sec. 2.1.1. (emphasis added).

— In **Switzerland**, Article 16 of the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act, HSA) of 22 June 2017 provides that "institutional beneficiaries"[104] must submit an application to the Federal Department of Foreign Affairs (FDFA) when they wish to "acquire land and buildings for the purposes of their official activities"[105];

> "[t]he [FDFA] shall consult the relevant authority in the canton concerned and verify that the acquirer is an institutional beneficiary within the meaning of Article 2, paragraph 1, and that the acquisition is for official purposes. It shall then issue a ruling. Approval of the application is conditional on the necessary authorisations, i.e. building permits and safety clearance being obtained from the competent authorities."[106]

— In **Turkey**, in a section entitled "Approval of the Ministry", the Guide to Diplomatic Missions in Turkey (2015) provides:

> "All Missions shall notify and request the consent [of] the Ministry prior to a proposed lease, purchase, sale or other forms of acquisition or disposition of a real property. This requirement applies to properties acquired for chancery or residential use by the foreign government for its diplomatic and consular missions in Turkey. Missions shall also notify and request the consent [of] the Ministry in advance to alterations, renovations, additions on existing real estate or changes in their use."[107]

46 3.19. All the States cited above are parties to the VCDR. Irrespective of their number and the varying conditions and procedures they apply, all of them have laid down the principle of the receiving State's consent to the choice — by acquisition or other forms of taking possession — of the buildings the sending State intends to actually use as premises of its mission. Clearly, none of them considered that such a practice might be contrary to the Convention, or that a simple "declaration" by the sending State would be sufficient to establish the diplomatic status of the premises concerned and the concomitant régime of inviolability, regardless of the receiving State's response. Above all, these laws, guidelines and practical guides do not appear to have been

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[104] Which, according to Art. 2, para. 1 d., include diplomatic missions.

[105] Art. 16, para. 1. Acquisition is defined as "any acquisition of a title to a building, part of a building or a piece of land, a right of habitation or a usufruct to a building or a part thereof, or the acquisition of other rights which confer on the holder equivalent status to that of owner, such as a long-term lease of land or buildings if the terms of such lease go beyond the scope of practice in civil matters . . . A change of use is deemed an acquisition for these purposes." (Art. 17, paras. 1 and 2.)

[106] Art. 16, para. 3. See also Art. 25 of the Ordinance to the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State. In a Note of 28 July 1989 sent to the Consulate General of State X in Geneva, the FDFA explained that "[t]he acquisition by a foreign State of a building intended for its diplomatic mission is not sufficient for that State to be able to claim the inviolability of the premises. The purchase agreement must be followed up by the effective establishment of the offices of the chancellery for inviolability to take effect. It might nonetheless be considered that refurbishment of the diplomatic mission already gives rise to such inviolability. The same applies when the sending State signs a lease agreement for the purposes of its diplomatic mission. The agreement per se is not sufficient to lead to inviolability; here too, the criterion of actual assignment must be met" (reproduced in L. Caflisch, "La Pratique Suisse en Matière de Droit International Public 1990", *Swiss Review of International and European Law (SRIEL)*, Vol. 1, 1991, pp. 545-546.)

[107] *Guide to Diplomatic Missions in Turkey*, available at: http://cd.mfa.gov.tr/Files/diplomaticguide.pdf, Sec. 17.1. See also Sec. 17.2 on the applicable procedure.

contested by the States to which they are addressed, which confirms, if confirmation were needed, that they are compatible with the Convention[108].

3.20. Equatorial Guinea — which has embassies in Germany, South Africa, Spain, the United Kingdom and the United States[109] — knows of these practices; even though it attempts to downplay their importance[110], it cannot therefore be unaware of the fact that the consent of the receiving State to a building being assigned for the purposes of the sending State's diplomatic mission does not entail a breach of the VCDR. Faced with such a rigorous conclusion, the Applicant attempts a formal argument against France: since the latter "has no legislation to which it could have referred Equatorial Guinea, unlike some States which require consent to the assignment of a building as premises of a diplomatic mission"[111], "the power to verify that premises are actually assigned to a diplomatic mission, as claimed by France, is arbitrary"[112].

3.21. As recalled previously[113], this formalistic distinction is completely immaterial from the point of view of international law: either the practice of consent of the receiving State, irrespective
47 of the specific procedures, is in breach of the VCDR or it is compatible with it. It is common knowledge that in States which have not legally formalized their practices in this area — such as the People's Republic of China — the host State reserves the right to ascertain whether the sending State's choice of premises for its mission is acceptable, both in fact and in law.

3.22. In its Memorial, Equatorial Guinea states that the texts governing the establishment of premises of foreign diplomatic missions are usually intended to ensure that it is not "permitted for [such premises] to be established in a sensitive area or near sensitive buildings"[114]. This is quite correct. However, it hardly seems feasible to consider that States which have not formalized their practice in this area have relinquished the possibility of disallowing the diplomatic missions of foreign States to be established in areas that are sensitive or strategic for the defence of their national interests, just as it cannot be considered that they have relinquished that same right when the choice of the sending State is intended to obstruct ongoing legal proceedings. The receiving State thus retains the right to assess whether the sending State's choice of premises for its diplomatic mission is acceptable in light of what may be termed public policy considerations.

3.23. Finally, although Equatorial Guinea attempts to downplay the importance of these practices and the role of the receiving State's consent, it nonetheless fails to provide any example of a State whose practice is to accept that foreign States can freely establish their diplomatic missions in premises of their choosing, without any oversight. Equatorial Guinea itself has not indicated whether it is possible for foreign States to establish their diplomatic missions in any

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[108] Eileen Denza notes, for example, with regard to the United Kingdom's *Diplomatic and Consular Premises Act* that its "compatibility with the Vienna Convention has not been challenged by other governments" (*Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations, op. cit.*, p. 148).

[109] Equatorial Guinea's embassies are listed on the official website of the Government of the Republic of Equatorial Guinea (https://www.guineaecuatorialpress.com/noticia.php?id=130). The French version of the site (consulted on 30 Oct. 2018) still states that the Embassy of Equatorial Guinea in France is located at 29 boulevard de Courcelles, Paris 75018.

[110] See para. 3.16 above.

[111] MEG, para. 8.41.

[112] *Ibid.*, para. 8.50. See also CR 2018/5, p. 29, para. 17 (Kamto).

[113] See POF, para. 165.

[114] MEG, para. 8.42.

premises whatsoever in Malabo, without there being any need to notify the authorities of Equatorial Guinea of such a decision, if only "[a]s a courtesy", and without it being possible for those same authorities to object to the choice of those premises[115].

48 **B. The granting of diplomatic status to a building — and the ensuing inviolability régime — is dependent on its actual assignment**

3.24. Furthermore, it is not sufficient for a State to acquire or lease a building with a view to establishing its diplomatic mission there for that building to be considered to form part of the premises of the mission and as such to enjoy inviolability. Its diplomatic mission must be effectively established there (1). This condition of effective use is also confirmed by State practice (2).

1. ***A building constitutes diplomatic premises only if it is effectively used for the purposes of the mission***

3.25. The definition of diplomatic premises in Article 1 *(i)* of the VCDR simply states that they must be understood as being "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission".

3.26. As previously noted[116], the definition in Article 1 *(i)* was not included in the draft articles on diplomatic intercourse and immunities adopted by the ILC in 1958[117], which merely contained an indication in the commentary to draft Article 20 ("Inviolability of the mission premises") that "[t]he expression 'premises of the mission' includes the buildings or parts of buildings *used for the purposes of the mission*, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented"[118]. During the discussions held within the ILC on the draft, the question "of the exact moment from which inviolability of the premises started"[119] was touched on briefly and gave rise to different positions: Roberto Ago "understood that it was the practice of the sending State to notify the receiving State that certain premises had been acquired for use as the headquarters of its mission. The beginning of inviolability could, therefore, date from the time such notification reached the receiving State"[120];
49 Sir Gerald Fitzmaurice and Jean Spiropoulos, for their part, stated in similar terms, that "[t]he inviolability of the premises . . . began from the time they were put at the disposal of the mission"[121]; Alfred Verdross, in turn, pointed out that "[t]he inviolability and immunities of the

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[115] *Ibid.*, para. 8.35. In its Note Verbale of 4 Oct. 2011, the Embassy of Equatorial Guinea explains to the Ministry of Foreign Affairs, in contradiction to the stance it takes, that "[s]ince the building forms part of the premises of the diplomatic mission, pursuant to Article 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Republic of Equatorial Guinea wishes to give you official notification *so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention*." (Note Verbale No. 365/11 (Doc. No. 1 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures); emphasis added.)

[116] See POF, paras. 161-162.

[117] The text of these draft articles is reproduced in *YILC*, 1958, Vol. II, A/CN.4/SER.A/1958/Add.1, pp. 89 *et seq*., para. 53.

[118] *Ibid*., p. 95 (para. 2 of commentary to Art. 20; emphasis added).

[119] *YILC*, 1957, Vol. I, *Summary records of the ninth session*, 394th Meeting, 9 May 1957, p. 52, para. 17 (Mr. Bartos).

[120] *Ibid.*, p. 53, para. 25 (Mr. Ago).

[121] *Ibid.*, p. 53, para. 19 (Sir Gerald Fitzmaurice) and para. 24 (Mr. Spiropoulos).

premises of the mission began only from the time that they were really in the service of the mission"[122].

3.27. In the end, the ILC refrained from dealing explicitly with this point[123], which was incorporated, during the Vienna Conference, in a "somewhat shortened version of th[e] descriptive Commentary [to draft Article 20]"[124], and added to the definitions in Article 1 of the Convention.

3.28. Significantly, the ILC preferred not to take the same approach in its draft articles as that which prevailed during the preparation of the 1932 Draft Convention of the Harvard Law School on Diplomatic Privileges and Immunities[125], which retained the obligation of the sending State to notify the receiving State of the occupation or use of the premises concerned[126]. The text of Article 1 *(i)*, for its part, adopts as a distinguishing criterion for mission premises the fact that they are "used for the purposes of the mission". Saying that it concerns buildings that are "used" amounts to acknowledging that the sending State must "put [them] to use, make [them] serve a precise purpose"[127]. In other words, it is not sufficient for the buildings to have been chosen and
50 designated by the sending State — and accepted by the receiving State; it is necessary for them to be actually assigned for the purposes and functions of the mission.

3.29. This plain reading of the terms of the treaty is, moreover, supported by scholarly analysis of the text and of the underlying issue. For example, Philippe Cahier states:

> "We think that notification is not sufficient, as, moreover, the purchase of a building with the intention to make it the headquarters of a diplomatic mission is not sufficient. What is necessary is for the building to be *actually assigned* for that purpose. From this point of view, works being carried out on the building may already be sufficient to establish the inviolability of the headquarters; however, if, once the work has been finished, there is no evidence of officials moving in after a certain amount of time, no evidence of diplomatic activity, it could then be considered that inviolability would end. Thus, the unilateral act of the receiving *[sic]* State manifested

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[122] *Ibid.*, p. 52, para. 5 (Mr. Verdross).

[123] "The question of the exact moment from which inviolability of the premises started was a very thorny one, and in the absence of any established rule, it would be more prudent for the Commission to refrain from mentioning the matter." (*Ibid.*, pp. 52-53, para. 17 (Mr. Bartos).)

[124] E. Denza, *op. cit.*, p. 16. The commentary to draft Article 20 on the "[i]nviolability of diplomatic premises" states that "[t]he expression 'premises of the mission' includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented. The premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park." (*YILC*, 1958, Vol. II, A/CN.4/SER.A/1958/Add.1, p. 95 (para. 2 of the commentary to Art. 20).)

[125] Text in *American Journal of International Law (AJIL)*, Vol. 26, Supplement, 1932, p. 15.

[126] According to Art. 3, para. 1, of that draft "[a] receiving State shall prevent its agents or the agents of any of its political subdivisions from entering the premises occupied or used by a mission, or occupied or used by a member of a mission, without the consent of the chief of the mission, provided that notification of such occupation or use has been previously given to the receiving State" (*ibid.*, p. 52). See P. Cahier, *Le droit diplomatique contemporain*, Librairie Droz, Geneva, 2nd ed., 1964, p. 198 ("[t]he Commission did not think it had to follow up on this proposal" *[translation by the Registry]*); E. Denza, *op. cit.*, p. 145.

[127] *Le Nouveau Petit Robert*. *Dictionnaire de la langue française*, Dictionnaires Le Robert, Paris, 1994, p. 2348 *[translation by the Registry]*.

> in the form of notification is sufficient only if it is followed up by facts. It is really from that time that inviolability will apply to those buildings."[128]

3.30. For buildings to be validly considered "premises of the mission", they must therefore be actually intended for and assigned to the functions of such a mission, as described in Article 3, paragraph 1, of the VCDR:

> "*(a)* Representing the sending State in the receiving State;
>
> *(b)* Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
>
> *(c)* Negotiating with the Government of the receiving State;
>
> *(d)* Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
>
> *(e)* Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

51 3.31. Clearly, such functions could not be fulfilled in practice if the sending State did not have buildings specifically and effectively reserved for that purpose in the receiving State. This criterion of actual assignment reflects the object and purpose — as well as the spirit — of the VCDR. It is also borne out by State practice.

2. *State practice establishes the criterion of effective use*

3.32. An examination of State practice confirms that applicability of the inviolability régime set out in Article 22 of the VCDR is closely dependent on the property concerned being actually assigned so that it may be considered premises of the diplomatic mission.

3.33. This is, in particular, the practice of France. Equatorial Guinea was reminded of this practice when its authorities sought to argue that "the mere designation of premises by any diplomatic mission is sufficient for those premises to be afforded the benefit of such protection as is provided for by Article 22 of the Vienna Convention of 18 April 1961". The Protocol Department of the Ministry of Foreign and European Affairs informed Equatorial Guinea that

> "in accordance with constant practice in France, an Embassy which envisages acquiring premises for its mission so notifies the Protocol Department beforehand and undertakes to assign the said premises for the performance of its missions or as the residence of its head of mission. Official recognition of the status of 'the premises of

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[128] P. Cahier, *op. cit.*, p. 198 (emphasis added; the reference to the "receiving" State should be read as a reference to the sending State) *[translation by the Registry]*. In the same vein, see also, for example, A. Aust, *Handbook of International Law*, New York, Cambridge University Press, 2nd ed., 2010, pp. 118-119 ("[t]heir mere acquisition will, in itself, not make them 'premises of the mission'. But once the premises are ready to be occupied, they probably then become premises of the mission and will continue so even if later they have to be vacated for refurbishment. They will cease to have their special status once they cease to be used for the purposes of the mission, which is essentially a question of fact, and which in practice is often a matter of negotiation with the receiving State. The receiving State can always agree to treat the site on which new buildings for the mission are being constructed as premises of the mission [Russia-UK Agreements of 1996, United Nations, *Treaty Series (UNTS)*, 1997, Vol. 1967, No. 33636, p. 142; *United Kingdom Treaty Series (UKTS)* (1997) 1 and 2].")

> the mission' within the meaning of Article 1, paragraph *(i)*, of the Vienna Convention on Diplomatic Relations of 18 April 1961 is determined on the date of completion of the assignment of the said premises to the services of the diplomatic mission, i.e., at the time that they are effectively moved into. The criterion of actual assignment must accordingly be satisfied. It is only as from that date, notified by Note Verbale, that the premises enjoy the benefit of appropriate protection as provided for by Article 22 of the Vienna Convention on Diplomatic Relations of 18 April 1961."[129]

52 3.34. This practice of France applies in particular with regard to tax exemptions granted to buildings with diplomatic status. Equatorial Guinea must have known this, since, when it sought in 2005 to be exonerated of registration fees and land registration taxes relating to the acquisition of a building on avenue de Verzy in Paris, intended as the residence of its Ambassador, the Protocol Department of the French Ministry of Foreign and European Affairs informed it that "this benefit may be withdrawn should the property be reassigned"[130].

3.35. This French practice is confirmed by jurisprudence. In a decision rendered in 1929, the *Tribunal civil de la Seine* had already upheld that "it is not the acquisition of property by a foreign State that establishes, *ipso facto*, the benefit of extraterritoriality for that property, but only *the assignment — once it has taken place —* of the said property to the offices of the Embassy of that State"[131].

3.36. In a 2005 decision concerning property of the Democratic Republic of the Congo, the *Chambre civile* of the French *Cour de cassation* similarly ruled that "having found that the property in question was not assigned to the offices of the Embassy or its annexes and was not the residence of the Ambassador, . . . the appeal court decided, quite rightly, that the Democratic Republic of the Congo could not claim immunity from execution"[132].

3.37. The practice of other States is consistent with that of France. The following are some examples:

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[129] Ministry of Foreign and European Affairs, Note Verbale No. 1341 PRO/PID, 28 Mar. 2012 (Doc. No. 18 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures). In its reply to the questions of the investigating judges assigned to the "ill-gotten gains" case, the Protocol Department stated that

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

[130] Note Verbale No. 3190 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 6 July 2005 (Ann. 9).

[131] *Tribunal civil de la Seine*, 30 Oct. 1929, *Suède* v. *Petrocochino*, *Journal du droit international (JDI)*, Vol. 59, 1932, p. 946 (emphasis added). The judgment states immediately afterwards that "while it is not contested that the house at issue is part of a property of which certain buildings are occupied by the Swedish legation, it emerges from the debates that Petrocochino occupies the entire house and that at no time during its lease has the said house, or even part of it, been *assigned to the offices* of that legation" (*ibid.*; emphasis added). *[Translations by the Registry.]*

[132] *Cour de cassation*, 1st *Chambre civile*, 25 Jan. 2005, *République démocratique du Congo* v. *Syndicat des propriétaires de l'immeuble résidence Antony Châtenay*, No. 03-18176, *D.*, 2005, p. 616; *Revue critique de droit international privé (RCDIP)*, 2006, p. 123, Note Horatio Muir Watt *[translation by the Registry]*.

53 — The **Supreme Restitution Court of Berlin** (SRCB), established by the Allied Powers at the end of the Second World War to rule on requests for the restitution of property confiscated illegally between 1933 and 1945, handed down a number of decisions relating to the status or régime of buildings used by foreign States during the war and having not been used for diplomatic purposes since. The court dismissed each and every request for recognition of the inviolability of the buildings concerned, noting in particular "that no diplomatic activity whatever, in the sense of the conduct of diplomatic relations between a sending sovereign and a receiving sovereign, exists in West Berlin. When, therefore, the use and the function of the premises has ceased — and ceased for a reason not truly and merely temporary — then their immunity must be considered as likewise having come to an end"[133]. Adopting the same reasoning, the court stated in another decision that "[t]he rationale of functional necessity makes it clear that the immunity of diplomatic premises exists because of their possession, coupled with their actual use, for diplomatic purposes. Absent the elements of possession and of actual use, a mere intention to *use* such premises for diplomatic purposes in the future, prior to their actual use, is of no legal significance upon the question of the resurrection of the privilege of immunity"[134].

— In **Germany**, the Federal Supreme Court made the following ruling in 1969 with regard to a building which had housed the premises of the Hungarian diplomatic mission before the Second World War and was destroyed in 1945:

> "The immunity of embassy property from execution extended only so far as
54 performance of the duties of the diplomatic mission required. The test was whether satisfaction of a claim by execution would interfere with the functioning of the mission. Where immoveable property used for the purposes of the mission ceased to be used, its immunity from execution automatically ended."[135]

More recently, relying on evidence provided by the sending State regarding the assignment of premises and corroborated by the German Ministry of Foreign Affairs, the same court took the

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[133] SRCB, 10 July 1959, *Tietz* v. *Bulgaria*, (ORG/A/1266), *AJIL*, Vol. 54, 1960, pp. 165-178, p. 177. In the same case, the Court set out in detail the *ratio legis* of the privileges and immunities enjoyed by diplomatic premises: "[i]t is only because of these important public (yet personal) human necessities which affect the conduct of diplomacy and of international relations that the buildings and the precincts of an embassy enjoy their traditional nexus of special privileges and immunities. These privileges and immunities of the buildings and the real property on which the buildings stand are in reality no more than an inanimate reflection of the necessary public privileges and immunities of the persons who embody the mission, and who constitute the embassy staff, and these privileges and immunities were created and exist and are designed to be applicable in order to ensure to the mission the peace of mind and tranquillity, together with the sense of security and confidence, which are so indispensable in permitting the persons who are members of an embassy or legation staff to perform their great public duties to the best of their personal capacities, without being interfered with or impeded in any way whatever, no matter how slight, by local disturbances or difficulties or by the possibility of the existence of local disturbances or difficulties." (*Ibid.*, p. 173.)

[134] SRCB, 10 July 1959, *Cassirer* v. *Japan*, (ORG/A/1896), *AJIL*, Vol. 54, 1960, pp. 178-188, p. 187. Regarding these decisions, see in particular P. Cahier, *op. cit.*, p. 199.

[135] Federal Supreme Court, 1969, *Hungarian Embassy Case*, Case No. V ZR 122/65, *ILR*, Vol. 65, p. 111. The court goes on to state that "the purchase of the property . . . has occurred at the level of private law so that no immunity existed in respect of this act. Nor was this affected by the fact that the property was intended to serve and did serve to accommodate the Hungarian Embassy. As long as an embassy of a foreign State was erected on the land purchased, the land did indeed remain extraterritorial. This principle, however, did not apply on an unrestricted basis . . . The immunity of embassy land extended only so far as the performance of the duties of the diplomatic mission required . . . Furthermore, the defendant could not rely upon extraterritoriality in respect of the land because, since its destruction, it had no longer been using the land for embassy purposes." (*Ibid.*, p. 112.)

view that a building presented by Kenya as being part of its diplomatic premises enjoyed inviolability and could not be subjected to a forced sale[136].

— In **Canada**, the Ontario Court of Justice rejected a request from Croatia for a property (known as Fairview Avenue) — against which there was an outstanding debt — to be considered as forming part of the premises of its diplomatic mission and to benefit from the Article 22 régime; the court first took the view that "the 'premises of the mission' as defined in Article 1 *(i)* of the Vienna Convention on Diplomatic Relations (Vienna Convention) does not include lands and buildings never used in the past or present or in all likelihood ever to be used in the future as the premises of the mission, and therefore such lands and buildings are not subject to the special protection and immunity of Article 22 of that convention"[137]; having examined the evidence put forward by the debtor, the court dismissed the argument that

55 "Fairview Avenue is the premises of the Croatian mission because the Croatian ambassador intends to reside there. Croatia presented no evidence of that intent other than an aside in a letter dated August 6, 1997, that Fairview Avenue was to be used as the premises of the Croatian mission. The court buttressed its rejection of Croatia's argument by stating that the inviolability and immunity of Article 22 of the Vienna Convention attaches to the premises where the ambassador currently resides, which is not Fairview Avenue. Thus, the court concluded that Fairview Avenue is not the premises of the Croatian mission."[138]

— In the **United States**, in 1982, an appeal court refused to grant a request from a county to collect property tax on a building acquired and used by the German Democratic Republic to house staff of its diplomatic mission. The judge based his decision on the US Foreign Missions Act[139], the views of the State Department and the actual use of the building under consideration[140].

— The **British** courts have been faced with such questions on a number of occasions and have clearly favoured the criterion of actual assignment and the views of the Foreign Office on the diplomatic nature of a given building. France has previously cited a landmark decision of the United Kingdom's High Court of Justice, in which a London property owned by the Federal Republic of Nigeria was denied the benefit of the Article 22 régime in the absence of a

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[136] See Federal Supreme Court, 28 May 2003, *Kenyan Diplomatic Residence Case*, Case No. IXa ZB 19/03, *ILR*, Vol. 128, pp. 632-639 ("[t]he debtor [Kenya] has *sufficiently established* its submissions, in view of the fact that its embassy declared, in a note verbale of 17 August 2001 to the Ministry of Foreign Affairs, that the premises were being used for diplomatic purposes at the time of the order and continue to be used as the diplomatic residence of the embassy and in order to accommodate staff of the diplomatic mission during their stay in Bonn. Moreover, as the *Ministry has informed the Court* by letter of 7 November 2001, the debtor's ambassador declared personally at a meeting in the Ministry of Foreign Affairs that the premises continue to be used by him in person and his colleagues for diplomatic purposes on official visits to Bonn and in the case of visits by delegations from Kenya. These statements prove that, even when the creditor's submissions are taken into account, there is an overwhelming probability that the facts asserted by the debtor are true." (*Ibid*., p. 637; emphasis added.))

[137] Ontario Court of Justice (General Division), 15 Jan. 1998, *Croatia (Republic)* v. *Ru-Ko Inc.*, [1998] 37 O.R. (3d) 133, in American Bar Association, *International Law News (ILN)*, Vol. 27, 1998, p. 16.

[138] *Ibid.*, pp. 16-17.

[139] See above, para. 3.18.

[140] "Neither the Act nor its legislative history specifies what property is or is not 'used for purposes of maintaining a diplomatic or consular mission.' *The views of the Department* concerning the scope of this phrase, though not conclusive, are *entitled to great weight*. The Department is charged with maintaining our missions abroad and with dealing with foreign missions here. *It has expertise for determining whether property is used for maintaining a mission. Only if its views are manifestly unreasonable should they be rejected*. In this instance we believe the Department's views are reasonable. The property is owned by a foreign state, and presently it is *used exclusively by its diplomatic and consular staff and their families*. It is not operated for profit as a commercial venture. On the contrary, it serves a public function." (CA, 4th circuit, 1 Feb. 1982, *US* v. *County of Arlington*, 669 F. 2d 925, p. 937; emphasis added.)

certificate from the Secretary of State[141]. In a previous case, the same court refused to consider
56 that a building owned by Iran, which had been abandoned several years earlier after intervention by British special forces and a fire, was still part of Iran's diplomatic premises. The judge reasoned that

> "[t]he fact that premises have been used in the past cannot be relevant to the state immunity afforded by the Vienna Convention 1961. The evidence is clear that since May 1980 the premises have not been used. The premises are in such a state now that they could not be used without extensive rebuilding . . . The Foreign and Commonwealth Office, in a letter dated 2 November 1984, expressed to the city council the view that the building no longer constituted the premises of the Iran mission within the meaning of article 1 *(i)*. I agree. It seems to me clear beyond argument that the premises have ceased to be used for the purposes of the mission, and in those circumstances the provisions of article 22 have no application to the premises."[142]

3.38. The examples cited above, while not exhaustive[143], point to a constant and long-established jurisprudential practice of recognition of diplomatic inviolability being conditional on the actual assignment of the building concerned, with particular focus being placed on the views of the receiving State. In 1960, one author was thus able to state with regard to this practice:

> "The protection that the receiving State is required to ensure for the premises of a diplomatic mission is fundamentally linked, under general international law, to the fact that those premises serve as the headquarters of the sending State's mission. This fact consequently also determines the duration of the protection. The sending State is entitled to that protection only from the time and until the time the premises it owns or occupies are used for the purposes of the diplomatic mission, are assigned to diplomatic service."[144]

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[141] High Court of Justice (Mr. Justice Males), *Avionics Technologies Ltd.* v. *Nigeria*, [2016] EWHC 1761 (Comm), 8 July 2016 (available at http://www.bailii.org/ew/cases/EWHC/Comm/2016/1761.html); see POF, para. 151.

[142] High Court of Justice, Chancery Division, 21 Jan. 1986, *Westminster City Council* v. *Iran*, [1986] 1 *Weekly Law Reports (WLR)* 979, 1986, pp. 984-985.

[143] For instance, Jean Salmon notes that, "regarding, for example, a building or land bought by a State to establish an embassy (or a consulate), but not yet assigned as such, the State's jurisdictional immunity in respect of that acquisition is not recognized by the courts: Rome Civil Tribunal, *Perucchetti* v. *Puig y Cassauro*, 6 June 1928, *Foro Italiano*, p. 857; *ADILC* (1927-28) case No. 247, p. 366. — Tribunal civil de la Seine, *State of Sweden* v. *Petrococchino*, 30 Oct. 1929 . . ., Clunet, 1932, p. 945, *ADILC*, (1929-1930), case No. 198" (p. 191). " — Mixed Civil Tribunal of Cairo, *Minister of Yugoslavia in Egypt* v. *W.R. Fanner*, 29 April 1947, *Clunet*, 1949, p. 113; — Tokyo District Court, *Limbin Hteik Tin Lat* v. *Union of Burma*, 9 June 1954, *ILR*, Vol. 32, p. 124. — West Berlin, Kammergericht, 25 February 1955, *Mrs J.W.V. Republic of Latvia*, *AJIL*, 1955, p. 574. — Brussels *Tribunal de première instance*, 3 March 1989, *Boubaker* v. *Kingdom of Saudi Arabia*, (unpublished)" (*Manuel de droit diplomatique*, *op. cit.*, p. 192). See also the judgment of the European Court of Human Rights in *Manoilescu and Dobrescu* v. *Romania and Russia* (ECHR, 3 Mar. 2005, No. 60861/00, para. 77).

[144] M. Giuliano, "Les relations et immunités diplomatiques", *Collected Courses of the Hague Academy of International Law (RCADI)*, Vol. 100, 1960, pp. 189-190 *[translation by the Registry]*. See also H. P. Romberg, "The Immunity of Embassy Premises", *British Year Book of International Law (BYIL)*, Vol. 35, 1959, p. 235 ("The general immunity of embassy buildings has been the subject of many decisions of national and international courts. Some of these decisions deal with the inception of the immunity and state that the purchase of real property does not *ipso facto* invest the property with the privileges of extraterritoriality but that it is necessary for the property to be completely appropriated to the services of the embassy.").

57 3.39. In support of its arguments relating to Article 22, paragraphs 1 and 3, Equatorial Guinea claims first that "[a] building which has very recently been acquired by the sending State — when, as in the present case, that State intends it to be used as premises of its diplomatic mission — enjoys inviolability on the same basis as a building effectively used for that purpose"[145]; referring very briefly to the "practice of other States", it goes on to assert, in more nuanced terms[146]:

> "While, generally speaking, the practice is that the mere acquisition of a building does not suffice for it to be recognized as inviolable under Article 22 of the VCDR, it nonetheless does not require that the building be used effectively and fully as premises of the diplomatic mission for the obligation under that article to be operative. Jurisprudence has referred both to complete appropriation for use as Embassy premises and to use, usually in situations where such use was effective before the dispute over immunity was brought before the courts"[147].

3.40. By way of "practice", Equatorial Guinea cites just one decision rendered in 2001 by the Brussels *Cour d'appel* and the circumstances surrounding the construction of the United States Embassy in China. However, in the first instance, the excerpt reproduced in the Memorial shows that the *Cour d'appel* in fact based its decision on the converging views of the sending and receiving States[148], and, in the second example, an agreement concluded between the United States and China provides for the building concerned to be accorded inviolability from the date of delivery of possession[149].

3.41. Far from undermining France's consistent position, these two examples reinforce it. It is the actual assignment of a building that determines its diplomatic status and, consequently, the associated inviolability régime; the sending State cannot impose its views in this matter on the
58 receiving State, and the possibility of granting inviolability before actual assignment (or once assignment has ceased) remains subject to the express agreement of the receiving State.

3.42. State practice whereby premises can enjoy diplomatic status only if the receiving State does not object, and only if said premises are effectively used for the purposes of a diplomatic mission, has become more prevalent in recent years[150]. It does not entail any alteration of the inviolability régime provided for in Article 22 of the VCDR, but, on the contrary, ensures that the integrity of that régime is maintained, being reserved specifically for premises effectively used for the purposes of a diplomatic mission. It is in light of this fact that it should be determined whether the conduct of France was lawful in this instance.

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[145] MEG, para. 8.15.

[146] *Ibid.*, paras. 8.15-8.16.

[147] *Ibid.*, para. 8.16.

[148] See Brussels *Cour d'appel*, *Democratic Republic of the Congo* v. *Segrim NV*, judgment of the 8th Chamber, 11 Sept. 2001, para. 20, quoted in MEG, para. 8.15 ("it is clear from recent announcements made by the Ambassador of the sending State and by the Belgian Ministry of Foreign Affairs that the designated use of the building has remained unchanged").

[149] See E. Denza, *op. cit.*, p. 146.

[150] See, for example, J. d'Aspremont, "Premises of Diplomatic Missions", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VIII, Oxford University Press, Oxford, 2009, p. 414 ("[i]t is clear that the requirement of prior notification is being eroded to give way to satisfaction of functional, or close thereto, usage of diplomatic premises in order to trigger inviolability").

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II. The building at 42 avenue Foch never acquired the status of diplomatic premises and therefore does not enjoy inviolability under the Vienna Convention on Diplomatic Relations

3.43. In this case, a simple examination of the facts at issue is sufficient to show that the premises of 42 avenue Foch never acquired diplomatic status and that France cannot therefore have violated its obligations under Article 22 of the VCDR. Indeed, France has consistently refused to grant the building at 42 avenue Foch the status of diplomatic premises (A) and, in any event, the building was not assigned for the purposes of Equatorial Guinea's mission in Paris at the time it was searched and attached (B).

A. France has expressly opposed the granting of diplomatic status to the building at 42 avenue Foch

3.44. French practice regarding the granting of diplomatic status to buildings which a sending State wishes to assign to its diplomatic mission is fully in line with the national practices described above. Indeed, as French practice suggests, and as brought to the attention of Equatorial Guinea[151], prior official notification by a sending State of its intention to assign premises to the offices of its mission is generally sufficient for the Ministry to recognize that those premises

60 benefit from the régime of the VCDR. Under these quite common circumstances, the absence of express opposition from the competent French authorities constitutes recognition of the diplomatic status of the property concerned. As Professor Eileen Denza notes:

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[151] Note Verbale No. 1341 PRO/PID from the Ministry of Foreign and European Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 28 Mar. 2012 (Doc. No. 18 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures), whereby the Protocol Department of the Ministry of Foreign and European Affairs recalled that

> "[i]n accordance with constant practice in France, an Embassy which envisages acquiring premises for its mission so notifies the Protocol Department beforehand and undertakes to assign the said premises for the performance of its missions or as the residence of its head of mission.
>
> Official recognition of the status of 'the premises of the mission', within the meaning of Article 1, paragraph *(i)*, of the Vienna Convention on Diplomatic Relations of 18 April 1961, is determined on the date of completion of the assignment of the said premises to the offices of the diplomatic mission, i.e., at the time that they are effectively moved into. The criterion of actual assignment must accordingly be satisfied.
>
> It is only as from that date, notified by Note Verbale, that the premises enjoy the benefit of appropriate protection as provided for by Article 22 of the Vienna Convention on Diplomatic Relations of 18 April 1961."

In its response to the requests for information made by the investigating judges assigned to the "ill-gotten gains" case, the Protocol Department explained that,

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

> "In States where no specific domestic legal framework controls the acquisition or disposal of mission premises, the definition of Article 1 *(i)* falls to be applied by agreement between sending and receiving State. Generally speaking, a receiving State is likely to be notified of mission premises for the purpose of ensuring that it carries out its duties under Article 22 to protect those premises and ensure their inviolability. *Challenge to such notification will usually take place only where there are grounds to suspect that the premises are not being used for purposes of the mission*. Article 3, which describes the functions of the mission, may be relevant in this context"[152].

3.45. Contrary to Equatorial Guinea's claims, this prior official notification cannot be considered a mere "courtesy"[153]. While it must allow the receiving State to approve, at least implicitly, or expressly oppose the granting of diplomatic status, it also ensures that the authorities of the State approving such status give full effect to its ensuing obligations under the VCDR. When a State acquires premises to house its diplomatic mission, it is, for example, entitled to request an exemption from the property registration fees and taxes associated with that acquisition. Equatorial Guinea cannot be unaware of this, since, although France has never received an exemption request for the building at 42 avenue Foch, such a request was made by Equatorial Guinea following its acquisition of a building on avenue de Verzy in Paris for use as the residence of its Ambassador[154].

3.46. As previously recalled[155], France has expressly refused, on a number of occasions, to
61 grant diplomatic status to the premises at 42 avenue Foch[156]. It has refused to do so ever since Equatorial Guinea first attempted to shield the building at 42 avenue Foch under the VCDR régime, when, on 11 October 2011 — just seven days after Equatorial Guinea first sent notification of the building's alleged assignment for diplomatic purposes — it stated that "the above-mentioned building does not form part of the premises of Equatorial Guinea's diplomatic mission. It falls within the private domain and is, as such, subject to ordinary law"[157]; it recalled its constant practice in this area and set out the reasons why it was unable to recognize officially the building at

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[152] E. Denza, *op. cit.*, p. 17 (emphasis added).

[153] MEG, para. 8.35.

[154] Note Verbale from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 27 Dec. 2006 (Ann. 2).

[155] See POF, para. 29; Comments of the French Republic on the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 31 Oct. 2016, para. 32.

[156] See in particular Note Verbale No. 5007 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 11 Oct. 2011 (Doc. No. 2 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures); Note Verbale No. 5393 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 31 Oct. 2011 (Doc. No. 4 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures); Note Verbale No. 80[3] from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 20 Feb. 2012 (Doc. No. 12 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures); Note Verbale No. 1341 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 28 Mar. 2012 (Doc. No. 18 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures); Note Verbale No. 2017-158865 from the Ministry of Foreign Affairs and International Development of the French Republic to the Embassy of the Republic of Equatorial Guinea, 2 Mar. 2017 (Ann. [7]).

[157] Note Verbale No. 5007 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 11 Oct. 2011 (Doc. No. 2 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures).

42 avenue Foch as the seat of the chancellery of Equatorial Guinea following the reported move of 27 July 2012[158].

3.47. French practice in relation to other States confirms that Equatorial Guinea has not been subjected to discriminatory treatment. That practice is based on the right of the receiving State to agree or refuse to grant diplomatic status to premises. For instance, in May 2016, a State asked the Ministry of Foreign Affairs and International Development to "*confirm* the diplomatic status"[159] of a building it owned in the 16th arrondissement of Paris. In reply, the Protocol Department pointed out that the premises in question, which had previously housed the Consulate General of the State concerned, had been in disuse since 1 August 2014 and "subject to ordinary law since that date"[160]. Similarly, in response to a request made by an Embassy that wished to know which of its properties in Paris benefited from diplomatic immunity and since when[161], the Protocol Department explained that buildings such as those housing the Embassy, its offices and the residence of the Ambassador enjoyed diplomatic privileges and immunity "as from the date of effective entry into the premises"[162]. The Ministry noted, however, that other residences "do not form part of the premises of the mission within the meaning of Article 1 *(i)* of the Vienna Convention on Diplomatic Relations of 18 April 1961 [and, t]herefore, . . . do not enjoy privileges and immunities"[163] under that Convention.

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3.48. In the present case, where the sending State's conduct is exceptional, the Ministry of Foreign Affairs had every reason to believe that far from wanting to "ensure the efficient performance of the functions" of its diplomatic mission, as provided in the preamble to the VCDR, Equatorial Guinea instead intended to "benefit individuals" by attempting to alter the actual — private — assignment of the building at 42 avenue Foch, and to do so in the context of ongoing criminal proceedings involving those premises. In this light, the claims that the building was used for the purposes of the mission could not reflect the reality.

3.49. It is clear from the foregoing that, owing to the refusal of the receiving State, the building at 42 avenue Foch could not have validly acquired the diplomatic status provided for in the VCDR. Consequently, it did not enjoy inviolability under Article 22 of that Convention, which France did not therefore breach.

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[158] Note Verbale No. 3503 from the Ministry of Foreign Affairs of the French Republic to the Embassy of the Republic of Equatorial Guinea, 6 Aug. 2012 (MEG, Ann. 49).

[159] Note Verbale from the Embassy of [X] to the Ministry of Foreign Affairs and International Development of the French Republic, 6 May 2016 (Ann. 10; emphasis added).

[160] Note Verbale No. 2016-468932 from the Ministry of Foreign Affairs and International Development of the French Republic to the Embassy of [X], 24 June 2016 (Ann. 11).

[161] Note Verbale from the Embassy of [X] to the Ministry of Foreign Affairs and International Development of the French Republic, 12 Jan. 2017 (Ann. 12).

[162] Note Verbale No. 2017-050359 from the Ministry of Foreign Affairs and International Development of the French Republic to the Embassy of [X], 20 Jan. 2017 (Ann. 13).

[163] *Ibid.*

B. France has not breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations since the building at 42 avenue Foch did not have diplomatic status when the measures of search and seizure were carried out

3.50. First, it should be noted that in the context of the dispute between Equatorial Guinea and France only paragraphs 1 and 3 of Article 22 are relevant, since the Applicant has never
63 claimed that France might have breached its obligations under paragraph 2[164].

3.51. As noted by the Applicant during the hearings on the preliminary objections,

> "the date on which the building located at 42 avenue Foch did or did not acquire the status of premises of the diplomatic mission of the Republic of Equatorial Guinea and, consequently, the inviolability guaranteed by Article 22 of the Vienna Convention, is very much the subject-matter of the dispute over which Equatorial Guinea claims that the Court has jurisdiction"[165].

In its Application, Equatorial Guinea asserts that the dispute "*aris[es] from* certain ongoing criminal proceedings in France"[166]; in its submissions with regard to the building, it states that it is requesting the Court "to adjudge and declare that, *by attaching the building located at 42 avenue Foch in Paris*, the property of the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France, the French Republic is in breach of its obligations under international law, notably the Vienna Convention on Diplomatic Relations"[167].

3.52. As France has already had occasion to point out[168], the dispute between the two States is strictly linked to the institution of the criminal proceedings which led to the attachment of the building concerned. If, during that period, the building at 42 avenue Foch was reserved for the private use of the defendant — whom Equatorial Guinea has never claimed to have diplomatic status or, *a fortiori*, the status of head of its mission in France — then the régime provided for by the VCDR could not apply to it, and France cannot therefore have violated the Convention. The only "action[s] of [the French] authorities in relation to the building [capable of] breach[ing] its obligations under Article 22"[169] are in fact the searches, all of which took place between
64 28 September 2011 and 23 February 2012. Indeed, it is important to recall that the attachment carried out on 19 July 2012 affects only the right of ownership of the building and therefore cannot entail a breach of the inviolability which the building at 42 avenue Foch is said by Equatorial Guinea to enjoy. Moreover, even if that building were now home to the seat of Equatorial Guinea's mission in Paris — which France has always contested[170] — the Applicant made no claim in its

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[164] According to Equatorial Guinea, "[i]n the present case, the French authorities have both breached the prohibition on entering the premises of Equatorial Guinea's diplomatic mission without the consent of the head of the mission and carried out measures of constraint against the building which were prohibited by the provisions of Article 22, paragraph 3, of the VCDR" (MEG, para. 8.11).

[165] CR 2018/5, p. 26, para. 8 (Kamto). In its Memorial, Equatorial Guinea also explains that "[o]ne 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" (MEG, para. 5.46).

[166] AEG, para. 2 (emphasis added).

[167] *Ibid*., para. 41 [*(c)*] (i) (emphasis added).

[168] See CR 2018/4, p. 13, para. 9 (Pellet).

[169] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 70.

[170] See above, Chap. 1, paras. 1.19-1.23.

Application instituting proceedings that any further measures were carried out in breach of the provisions of the VCDR.

3.53. Equatorial Guinea, moreover, takes the view that "[t]he building located at 42 avenue Foch should be considered as the premises of Equatorial Guinea's diplomatic mission in France as from 4 October 2011"[171], the date on which the Embassy of Equatorial Guinea in France informed the Ministry of Foreign Affairs of the French Republic that it had "for a number of years had at its disposal a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission"[172].

3.54. Whether in its exchanges with France or in its presentations before the Court, Equatorial Guinea's claims regarding the date from which the building at 42 avenue Foch should be considered as diplomatic premises have varied considerably, the Applicant citing in turn 15 September 2011, 4 October 2011 and even 27 July 2012[173]. These prevarications are themselves evidence of the abuses of diplomatic rights that Equatorial Guinea has committed in its attempt to frustrate the progress and outcome of the legal proceedings against Mr. Teodoro Nguema Obiang Mangue[174]. However, as France recalled above[175], the crucial point is that the building at 42 avenue Foch was not assigned to any actual diplomatic activity when it was searched between 28 September 2011 and 23 February 2012, nor when the attachment took place on 19 July 2012.

65 3.55. Indeed, a simple examination of the facts of this case shows that the premises at 42 avenue Foch were not part of Equatorial Guinea's diplomatic mission when they were subjected to the measures of search and seizure contested by the Applicant (1). They were therefore not entitled to inviolability under the VCDR. Consequently, France has not violated its obligations under Article 22 of that Convention (2).

1. *The facts of the case show that the premises at 42 avenue Foch were not actually assigned for the purposes of Equatorial Guinea's diplomatic mission when they were searched and attached*

3.56. The at best chaotic and undoubtedly abusive circumstances in which Equatorial Guinea claimed that the building at 42 avenue Foch formed part of the premises of its diplomatic mission in Paris have already been amply recalled[176]. It does not therefore seem necessary to return to this here, other than to underline that, at the time of the measures of search and seizure referred to in the Application instituting proceedings, the building was not actually assigned for the performance of the functions of Equatorial Guinea's mission in France.

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[171] MEG, para. 8.46.

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

[173] See above, Chap. 1.

[174] See below, Chap. 4.

[175] See above, Chap. 1.

[176] See CR 2016/15, pp. 9-12, paras. 11-28 (Alabrune); Comments of the French Republic on the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, paras. 17-32; POF, para. 27; CR 2018/4, pp. 13-15, paras. 11-13 (Pellet).

3.57. The most relevant facts in this regard have already been set out in Chapter 1 of the present Counter-Memorial[177]. It is sufficient to recall here only the most significant of them:

— There can be no doubt — and Equatorial Guinea has never claimed otherwise, moreover — that, on 1 December 2010, the date of the opening of the judicial investigation[178], the building at 42 avenue Foch did not house the premises of the Applicant's diplomatic mission in Paris.

— The first searches of the building, on 28 September and 3 October 2011, lead to the same conclusions: Equatorial Guinea has never claimed that the vehicles seized on those dates from
66 the building's courtyard and the surrounding area belonged to the mission's fleet[179]. The letter of protest sent to the French Minister for Foreign Affairs by the Ambassador of Equatorial Guinea on the day of the first search bears the Embassy's usual address at 29 rue de Courcelles in Paris (8th arr.) and makes no suggestion that the building searched might be protected by the VCDR régime[180].

— Equatorial Guinea maintains that

> "the criterion of 'effective assignment', relied on by France to refuse the diplomatic protection that had been requested, was fulfilled *through its declaration of 4 October 2011*. It could not be otherwise, since assignment consists in giving a purpose or a function to a person or property"[181].

Even if this definition of the concept of "assignment" were to be accepted, it would make no difference to the assessment of the problem here: the Applicant itself explains that Equatorial Guinea's diplomatic mission moved to 42 avenue Foch "in July 2012, *after allowing due time to prepare for that move*"[182]; this is equivalent to admitting that, on 4 October 2011, the building was not actually or effectively assigned to the Embassy's offices.

— This is further confirmed by the events that followed: when the building was next searched, in February 2012, it was not actually assigned for the purposes of Equatorial Guinea's mission. In a Note Verbale of 15 February 2012, Equatorial Guinea requested police protection for its Deputy Minister for Foreign Affairs and the Secretary-General of the Ministry of Foreign Affairs, who "wish[ed] to *visit the property of the Government of Equatorial Guinea* at 42 avenue Foch in Paris"[183]. This was not therefore a visit to Equatorial Guinea's diplomatic
67 mission, whose address was still shown in the Note Verbale as being 29 boulevard de Courcelles. Equatorial Guinea eventually acknowledged this before the Court, stating that the visit "was in fact in order to supervise *preparations for the effective occupation of the building*,

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[177] See above, Chap. 1, paras. 1.3-1.48.

[178] See above, Chap. 1, para. 1.6.

[179] See the Judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, p. 18.

[180] Letter from Mr. M. F. Edjo Ovono, Ambassador of the Republic of Equatorial Guinea in France, to Mr. Alain Juppé, Minister for Foreign Affairs, 28 Sept. 2011 (MEG, Ann. 32).

[181] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 24 (emphasis added).

[182] MEG, para. 2.30 (emphasis added).

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

which had been acquired for use as premises of the diplomatic mission of Equatorial Guinea"[184].

— According to Equatorial Guinea, the move took place on 27 July 2012. This, at least, is the gist of the Note Verbale of the same date (still bearing the address 29 boulevard de Courcelles), in which the Embassy of Equatorial Guinea informs the Protocol Department that "*as from Friday 27 July 2012*, the Embassy's offices are located at 42 avenue Foch, Paris (16th arr.), a building which it is *henceforth* using for the performance of the functions of its diplomatic mission in France"[185]. In any event, the building at 42 avenue Foch thus did not form part of the premises of that diplomatic mission at the time of its attachment on 19 July 2012.

3.58. All of the measures of search and seizure contested by Equatorial Guinea were carried out before 27 July 2012, the date from which it claims the premises were effectively assigned to its diplomatic mission. On none of those dates could the building thus objectively be considered as part of the "premises of the mission" within the meaning of Article 1 *(i)* of the VCDR. Consequently, it could not benefit from the régime of inviolability guaranteed by Article 22 of that instrument. For the reasons set out earlier[186], France has maintained its position of principle with regard to that building ever since, even though it is of course complying with the provisional measures decided by the Court in its Order of 7 December 2016.

3.59. In a "Memorandum" dated 16 October 2015 and transmitted to the French authorities, Equatorial Guinea included as an annex a legal consultation carried out at its request by Professor Yann Kerbrat on the subject of "privileges and immunities in the ill-gotten gains case",
68 the conclusions of which bear repeating here. After citing Article 22 of the 1961 Convention, Professor Kerbrat points out that:

> "[t]he protection conferred by this provision . . . is, however, subject to the property's effective use for the needs of the mission; indeed, Article 1 *(i)* of the same Convention states that '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*'. In this case, however, it appears that, when investigative measures were carried out at the end of September 2011, i.e. after the transfer of the building to the State of Equatorial Guinea, no mention was made of the diplomatic use of the premises or property concerned. The searches conducted inside the premises of 42 avenue Foch demonstrated, on the contrary, that, until its attachment, the building was being used for purely personal purposes and for the exclusive requirements of Mr. Nguema Obiang.
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> *In the light of this, it cannot therefore be concluded that the building at 42 avenue Foch is protected by diplomatic immunity*; the refusal of diplomatic immunity by the Paris *Cour d'appel* in its judgment of 13 June 2013, confirmed by the

[184] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 28 (emphasis added).

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

[186] See above, Chap. 1.

> *Chambre criminelle* of the *Cour de cassation* in its judgment No. 990 of 5 March 2014 (No. 13-84.977), is not contestable in our view."[187]

3.60. This is the same conclusion reached by the French authorities.

2. *France has not breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations*

3.61. It is clear from the above that France was not in breach of its obligations under Article 22 of the VCDR when the building at 42 avenue Foch was subjected to measures of search and seizure between September 2011 and July 2012. Those measures, made necessary by the advancement of the legal proceedings against Mr. Teodoro Nguema Obiang Mangue, were directed solely at the personal and private property of the defendant; when they were carried out, the building was at the "free disposal"[188] of Mr. Obiang Mangue, was not actually assigned for the purposes of Equatorial Guinea's Embassy in France and could not be considered to form part of the
69 "premises of the mission" within the meaning of Article 1 *(i)* of the VCDR[189]. And as Article 22 of the Convention plainly states, the régime of inviolability it provides for concerns the "premises of the [diplomatic] mission" alone. All these elements of fact and law have already been amply developed in France's written pleadings; therefore, only the most salient aspects with regard the allegations of Article 22 violations will be set out below.

3.62. First, it is important to recall that Equatorial Guinea has never specified the precise nature of the violations France is said to have committed under Article 22, either in its Application instituting proceedings or in its Memorial. With the exception of the attachment — which cannot constitute a breach of Article 22, since it took place before Equatorial Guinea had notified the French Ministry of Foreign Affairs of its intention "henceforth"[190] to use the building for the purposes of its mission — no details have been provided about the specific measures said to have constituted a violation of Article 22 by France, or, in particular, about the furnishings, property and means of transport seized.

3.63. In this regard, it should be noted that, according to statements made by the Applicant itself, the judicial measures targeting Mr. Obiang Mangue's assets cannot constitute violations of Article 22. In its reply to Judge Donoghue's question, Equatorial Guinea states that it:

> "does not claim that the building, while being used prior to 4 October 2011, enjoyed diplomatic mission status, in other words, that the building was protected by the principle of inviolability of premises under the Vienna Convention"[191].

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[187] Annex 2 to the Memorandum filed in the interest of the Republic of Equatorial Guinea, represented by Mr. Jean-Pierre Mignard and Mr. Jean-Charles Tchikaya, for the attention of the competent services of the French Republic in the so-called 'ill-gotten gains' case: the Equatorial Guinean chapter, 16 Oct. 2015 (Ann. 14) (emphasis in the original).

[188] See the judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, p. 31.

[189] See above, paras. 3.55-3.58.

[190] Note Verbale No. 501/12 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 27 July 2012 (MEG, Ann. 47).

[191] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 22. See also MEG, para. 8.45.

3.64. Yet Equatorial Guinea attempts to argue elsewhere that France first "violated the prohibition, established under Article 22"[192], during the "searches on 28 September and 3 October 2011"[193]! Equatorial Guinea itself admits that, on those dates, the building at 42 avenue Foch could
70 not benefit from any immunity; thus, the searches carried out in the building and the seizure of the fleet of vehicles belonging to Mr. Obiang Mangue — which in any event did not comprise "means of transport of the mission" within the meaning of Article 22 — cannot be contrary to the principle of inviolability set out in that provision.

3.65. The same is true of the second searches, which took place from 14 to 23 February 2012. The description of the conduct and outcome of those searches, as it appears in the judgment of the *Tribunal correctionnel* of 27 October 2017, leaves no doubt as to the fact that the use of the building at 42 avenue Foch in no way met the conventional criterion of effective assignment.

— Findings made at the site, corroborated by the testimony of employees at the property, show that the building was reserved for the private use of Mr. Teodoro Nguema Obiang Mangue, who enjoyed free disposal of the premises[194];

— "no official documents were discovered concerning the State of Equatorial Guinea or indicating that the building might serve as a venue for official representation"[195];

— the property seized on that occasion belonged to Mr. Teodoro Nguema Obiang Mangue, which was not disputed[196];

— between the first and second searches, "several valuables and masterpieces had been taken away to be stored at the residence of the Ambassador of Equatorial Guinea in Paris"[197], according to statements made to investigators by one of the building's managers.

3.66. The same conclusions can be drawn from an examination of the order of attachment of the building at 42 avenue Foch on 19 July 2012: "Mr. Teodoro NGUEMA OBIANG MANGUE's
71 personal effects, furniture and documents" were still on the premises, the defendant having enjoyed "free disposal of the real estate complex fictitiously ascribed to legal persons"[198]. Since that time, no measure directed at the building, its furnishings or the property therein has been taken by the French judicial authorities.

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[192] MEG, para. 8.12.

[193] *Ibid.*, para. 8.1[4].

[194] See the judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, pp. 31-32.

[195] *Ibid.*, p. 31.

[196] *Ibid.*, p. 98.

[197] *Ibid.*, p. 34.

[198] Order of attachment of real property *(saisie pénale immobilière)*, 19 July 2012 (MEG, Ann. 25, pp. 3-4).

3.67. All of these findings confirm that France has not committed any violation of Article 22, paragraphs 1 and 3, in relation to Equatorial Guinea. The provision in question undoubtedly affords a sending State comprehensive protection against possible measures of constraint by a receiving State. However, notwithstanding the fact that this special protection applies only to the premises of the mission, it has never been regarded as absolute. In his declaration appended to the Judgment of 6 June 2018, Judge Gaja thus recalls that Article 22, paragraph 3, of the Convention "does not grant total immunity to the building. It only refers to forcible measures that interfere with the use of the building for the diplomatic mission"[199]. Therefore, unless it were to run counter to the object and purpose pursued by the VCDR, this cardinal provision cannot have the effect of shielding individual and private criminal conduct. Its aim is to protect the free exercise of a sending State's diplomatic functions in the receiving State. France has in no way contravened it in this case.

[199] See also on the same subject P. Cahier, *op. cit.*, pp. 209-210, and W. Koffler, "A passing glimpse at diplomatic immunity", *Kentucky Law Journal (KLJ)*, Vol. 54, 1965, p. 262.

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CHAPTER 4

EQUATORIAL GUINEA'S RELIANCE ON THE PROVISIONS OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS WITH REGARD TO THE BUILDING LOCATED AT 42 AVENUE FOCH CONSTITUTES AN ABUSE OF RIGHTS

4.1. In the preliminary objections it raised in this case on 30 March 2017, France asked the Court to decide that Equatorial Guinea's Application was inadmissible, in particular in view of the abusive nature of the applicant State's assertion of the rights set out in the VCDR with regard to the building located at 42 avenue Foch[200]. In its Judgment rendered on 6 June 2018, the Court found that

> "[a]s to the abuse of rights invoked by France, it will be for each Party to establish both the facts and the law on which it seeks to rely at the merits phase of the case. The Court considers that abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits. Any argument in relation to abuse of rights will be considered at the stage of the merits of this case."[201]

4.2. The Court having found that it lacks jurisdiction under the United Nations Convention against Transnational Organized Crime to entertain Equatorial Guinea's Application[202], the question of abuse of rights must now be considered solely with regard to the invocation of the Optional Protocol to the VCDR.

4.3. Accordingly, France will demonstrate in this section that the allegations of violations of VCDR provisions with regard to the building at 42 avenue Foch in Paris are an attempt by Equatorial Guinea to abuse the rights and privileges afforded by international law (II). A few preliminary observations will be made on the notion of abuse of rights and its application in diplomatic law (I).

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I. The principle of the prohibition of abuse of rights and its application to the Vienna Convention on Diplomatic Relations

4.4. According to the definition provided in Jean Salmon's *Dictionnaire de droit international public*, an abuse of rights occurs when "a State exercises a right, power or jurisdiction in a manner or for a purpose for which that right, power or jurisdiction was not intended, for example to evade an international obligation or obtain an undue advantage"[203].

4.5. The applicability of this "general principle of law"[204] in the international legal order is widely accepted. The Court has recognized it in its jurisprudence as a necessary corollary of the

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[200] POF, paras. 76-88.

[201] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, *Preliminary Objections, Judgment of 6 June 2018*, para. 151.

[202] *Ibid.*, para. 118.

[203] J. Salmon (ed.), *Dictionnaire de droit international public*, Bruylant, Brussels, 2011, pp. 3-4. *[Translation by the Registry.]*

[204] DSB, *Shrimps*, Report of the Appellate Body (WT/DS58/AB/R), 12 Oct. 1998, para. 158.

principle of good faith[205]. The Court's invitation in paragraph 151 of its Judgment of 6 June 2018 to discuss the question at the merits stage of this case further attests to this.

4.6. Numerous international conventions expressly recall that States parties must fulfil their obligations in good faith and not abuse the rights to which they are entitled[206]. This is, moreover, the very essence of the law of treaties, which is governed by the principle of *pacta sunt servanda*, whereby "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"[207].

74 4.7. Privileges and immunities are granted for a legitimate purpose and help ensure the independence of foreign States, in accordance with the principle of the sovereign equality of States and the territorial sovereignty of the host State. Their very purpose, however, leaves them open to abuse. In light of the growing mistrust of privileges and immunities — which are nevertheless vital for States' external action — the utmost vigilance is necessary to prevent attempts to abuse them, which could ultimately jeopardize the continued existence of these fundamental rights. It was with this risk in mind that the drafters of the VCDR made a point of recalling, in the preamble to that text, that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"[208]. A large number of international agreements on privileges and immunities contain similar provisions[209]. Certain international texts even contain specific provisions to prevent the risk of abuse of privileges and immunities accorded by treaty[210].

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[205] See *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7,* p. 30. See also *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167; *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951,* p. 142; *Ambatielos (Greece* v. *United Kingdom), Merits, Judgment, I.C.J. Reports 1953*, p. 23; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970,* p. 39, para. 56; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 268, para. 46; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 49; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, paras. 37-38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 622, para. 46.

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

[207] Vienna Convention on the Law of Treaties, 23 May 1969, Art. 26. France is not a party to the Convention, but considers that, on this point, it reflects the state of customary international law. See *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 212.

[208] VCDR, 18 Apr. 1961, fourth paragraph of the preamble.

[209] See in particular the Convention on the Privileges and Immunities of the United Nations of 13 Feb. 1946, Secs. 20 and 21; the Convention on the Privileges and Immunities of the Specialized Agencies of 21 Nov. 1947, Secs. 22 and 23; Supplementary Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of the Organisation of 16 Apr. 1948, Art. 10; the Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory of 2 July 1954, Art. 21; the Convention on Special Missions of 8 Dec. 1969, seventh paragraph of the preamble; the Agreement on the Privileges and Immunities of the International Criminal Court of 9 Sept. 2002, Art. 24, para. 1, and Art. 25; the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea of 23 May 1997, Art. 19.

[210] See in particular the Convention on the Privileges and Immunities of the United Nations of 13 Feb. 1946, Secs. 20 and 21, or the Convention on the Privileges and Immunities of the Specialized Agencies of 21 Nov. 1947, Secs. 22 and 23.

4.8. The purpose of privileges and immunities is not to benefit the individuals who enjoy them, but to safeguard the independence of the State and its representatives abroad. The application of rules on immunities must not shield their beneficiaries — be they individuals or property — from ordinary legal proceedings brought for purposes other than those for which such protections have been granted. Using the provisions of the VCDR in that way constitutes an abuse of rights,
75 which is the case in this instance[211]. Moreover, the Court has recognized in the past that the rules of diplomatic law establish privileges and immunities which are susceptible to "abuse"[212].

4.9. As an ICSID arbitral tribunal has noted with regard to abuse of rights, "[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case"[213]. Extensive investment jurisprudence — which we see no reason not to transpose into inter-State law here — further holds that:

> "As for any abuse of right, the threshold for a finding of abuse . . . is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only 'in very exceptional circumstances'."[214]

4.10. Yet while it is accepted that the standard of proof for abuse of rights is high, "[i]t is equally accepted that the notion of abuse does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test"[215]. The Court has, moreover, implicitly recognized that abuse of rights can be established through a functional test consisting in ascertaining whether a person who enjoys a legal prerogative has used it for the purpose for which it was conferred, without considering whether the perpetrator of the disputed act was driven by malicious intent. Thus, in the case concerning *Certain German Interests in Polish Upper Silesia*, the PCIJ found that Germany had not misused its right, relying in particular on the fact that the alienation of certain property "[did] not overstep the limits of the *normal* administration of public property and was not
76 designed to procure for one of the interested Parties an illicit advantage". The annulment of the contract in dispute thus appeared "to have fulfilled a *legitimate object* of the administration"[216]. Similarly, in his declaration appended to the Judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, Judge Keith referred to the notion of abuse of rights, asserting that it requires the State "to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors".

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[211] See below, para. 4.27.

[212] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980,* p. 40, para. 86.

[213] *Mobil Corporation et al.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 177. See also *Renée Rose Levy and Gremcitel S.A.* v. *Republic of Peru*, Award of 9 Jan. 2015, ICSID Case No. ARB/11/17, para. 186; *Philip Morris Asia Limited* v. *the Commonwealth of Australia*, Award on Jurisdiction and Admissibility, 17 Dec. 2015, PCA Case No. 2012-12, p. 167, para. 539.

[214] *Renée Rose Levy and Gremcitel S.A.* v. *Republic of Peru*, Award of 9 Jan. 2015, ICSID Case No. ARB/11/17, p. 58, para. 186. See also *Chevron Corporation and Texaco Petroleum Company* v. *Republic of Ecuador* (I), Interim Award of 1 Dec. [2008], PCA Case No. 34877, p. 80, para. 143; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Pakistan*, Award of 27 Aug. 2009, ICSID Case No. [ARB/03/29], pp. 39-40, paras. 142-143; *Philip Morris Asia Limited* v. *the Commonwealth of Australia,* Award on Jurisdiction and Admissibility, 17 Dec. 2015, PCA Case No. 2012-12, para. 539; *Capital Financial Holdings Luxembourg S.A.* v. *Republic of Cameroon*, Award of 22 June 2017, ICSID Case No. ARB/15/18, para. 135.

[215] *Philip Morris Asia Limited* v. *the Commonwealth of Australia*, Award on Jurisdiction and Admissibility, 17 Dec. 2015, PCA Case No. 2012-12, para. 539.

[216] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 37-38 (emphasis added).

4.11. Malicious intent and bad faith on the part of a perpetrator are criteria frequently used in domestic law for establishing abuse of rights. However, they are ill suited to public international law, given the nature of its subjects. In practice, a more objective criterion is used. There is an abuse of rights when a right is used for a purpose other than that intended. Malicious intent, if established, is merely an element attesting to the abuse.

4.12. In the present case, France's claim concerning an abuse of rights committed by Equatorial Guinea pertains to very exceptional circumstances and is based on "clear and convincing evidence which compels such a conclusion"[217]. The evidence put forward establishes an objective situation of abuse of rights.

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II. The abuse of rights committed by Equatorial Guinea

4.13. The dispute between France and Equatorial Guinea arose out of the French authorities' refusal to recognize Equatorial Guinea's abusive invocation of the protection offered by diplomatic status for the purpose of shielding the building at 42 avenue Foch from the criminal proceedings instituted in France against Mr. Teodoro Nguema Obiang Mangue.

4.14. To demonstrate the abusive nature of Equatorial Guinea's claims with regard to the building at 42 avenue Foch, the following will be examined in turn: (A) the acts constituting an abuse of rights; (B) the contradictory positions taken by Equatorial Guinea on the assignment of the premises; (C) the circumstances in which Equatorial Guinea acquired ownership of the building (it being noted, however, that this question does not fall within the VCDR); and (D) the seisin of the Court used as a last resort to consolidate the abuse of rights.

A. The acts constituting an abuse of rights with regard to the building at 42 avenue Foch

4.15. It is above all in light of the circumstances of the case that the question of abuse of rights must be assessed. In this regard, the timing of the events in this case is sufficient in itself: Equatorial Guinea's claim is an abuse of the rights and obligations which it asserts with regard to the building at 42 avenue Foch.

4.16. The criminal proceedings instituted against Mr. Teodoro Nguema Obiang Mangue before the French courts arose from a complaint filed on 2 December 2008. It was not until 1 February 2011, however, that the judicial investigation identified the building at 42 avenue Foch as forming part of his assets, on the basis of evidence transmitted by the association Transparency International France[218].

4.17. On 28 September and 3 October 2011, the property was searched and a number of
78 expensive cars belonging to Mr. Teodoro Nguema Obiang Mangue, which were kept in the courtyard of the building and in neighbouring car parks, were seized.

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[217] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132.

[218] Judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, p. 17.

4.18. Equatorial Guinea's first Note Verbale to the French Ministry of Foreign Affairs regarding the building at 42 avenue Foch was dated 4 October 2011, i.e. a few days after the seizures. In that Note, the Embassy of the Republic of Equatorial Guinea stated that it "has *for a number of years* had at its disposal [the] building [and] uses [it] for the performance of the functions of its diplomatic mission"[219]. That position was untenable: the investigations conducted by the French judicial and police authorities, described in the documents included in the case file, showed that, prior to that date, the building had been used by Mr. Teodoro Nguema Obiang Mangue for purely personal purposes[220]; the President of the Republic of Equatorial Guinea himself acknowledged this in a letter to his French counterpart dated 14 February 2012[221]. Equatorial Guinea later retracted that statement, maintaining that it had acquired ownership of the building on 15 September 2011 — conveniently, just a few days before the first searches — and had set up its Embassy offices there "as from . . . 27 July 2012"[222].

4.19. It is significant to note that it was also in the wake of those seizures that Mr. Teodoro Nguema Obiang Mangue was appointed Permanent Assistant Delegate of Equatorial Guinea to UNESCO[223] by presidential decree dated 13 October 2011 — i.e. two days after France had refused to recognize the building as part of the premises of Equatorial Guinea's diplomatic mission, in response to the Note Verbale of 4 October 2011, in which Equatorial Guinea stated that it had had the property at its disposal "for a number of years"[224]. In May 2012, Mr. Teodoro Nguema Obiang
79 Mangue was appointed Second Vice-President of the Republic, in charge of Defence and State Security, two months after the second set of searches conducted at 42 avenue Foch[225].

B. The contradictory positions taken by Equatorial Guinea on the assignment of the building at 42 avenue Foch

4.20. Before bringing this case before the International Court of Justice, Equatorial Guinea attempted, through a considerable amount of diplomatic correspondence, to block the attachment of the building at 42 avenue Foch in the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue before the French courts. Its contentions varied, however, as the judicial proceedings developed.

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

[220] See, in particular, judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, pp. 13-46; additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures.

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

[222] Note Verbale No. 501/12 from the Embassy of Equatorial Guinea, dated 27 July 2012, to the French Ministry of Foreign and European Affairs (MEG, Ann. 47).

[223] See the press release reproducing the text of the decree on the official website of the Government of Equatorial Guinea (https://www.guineaecuatorialpress.com/noticia.php?id=1994).

[224] See above, Chap. 1, para. 1.19.

[225] See the records of the on-site inspections and searches of the townhouse located at 42 avenue Foch 75016 Paris, dated 14, 15 and 16 Feb. 2012 (Doc. Nos. 42, 43 and 44 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures), and Presidential decree No. 64/2012 of 21 May 2012 appointing Mr. Teodoro Nguema Obiang Mangue as Second Vice-President of the Republic in charge of Defence and State Security (MEG, Ann. 3).

4.21. The Notes Verbales from the Embassy of Equatorial Guinea to the Protocol Department of the French Ministry of Foreign Affairs in themselves reveal contradictions in Equatorial Guinea's successive positions regarding the status of the building at 42 avenue Foch:

— On 4 October 2011, the Embassy claimed that it

> "has *for a number of years* had at its disposal a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified"[226].

80 During the searches conducted on 28 September and 3 October 2011, however, the French investigators found no trace of Equatorial Guinea's diplomatic offices. Instead, they were told that the owner of the premises, Mr. Teodoro Nguema Obiang Mangue, "was absent — he was abroad — and the keys to the luxury vehicles [parked in the building's courtyard] were in the possession of his right-hand man"[227]. The findings of the investigations by the French authorities made Equatorial Guinea's claim that the building had been used for its diplomatic mission "for a number of years" untenable[228]. Faced with the facts, Equatorial Guinea changed tack.

— On 17 October 2011, the building was then described by the Embassy of Equatorial Guinea as housing the new official residence of the Permanent Delegate to UNESCO[229]. In its reply to the question put by Judge Donoghue at the end of the oral proceedings on the request for the indication of provisional measures, Equatorial Guinea admitted that it had not notified UNESCO of its Permanent Delegate's change of residence until 14 February 2012[230], that is, the first day of the further searches and seizures of movable assets carried out at 42 avenue Foch in the proceedings against Mr. Teodoro Nguema Obiang Mangue[231]. By a Note Verbale dated 31 October 2011, the French Ministry of Foreign Affairs had nonetheless taken care to remind Equatorial Guinea that any such change of residence had to be notified not to France, but rather to UNESCO's protocol department[232].

In this regard, Equatorial Guinea claims in its Memorial that, "on 17 October 2011, following the end of Ambassador Edjo Ovono Frederico's mission, the designated Chargée d'affaires *a.i.*, Ms Bindang Obiang, who is also the Permanent Delegate of Equatorial Guinea to UNESCO, was rehoused at 42 avenue Foch. The reason for this change in accommodation was that the

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[226] Note Verbale No. 365/11 from the Embassy of the Republic of Equatorial Guinea to the Ministry of Foreign Affairs of the French Republic, 4 Oct. 2011 (Doc. No. 1 of the additional documents communicated by France on 14 Oct. 2016 in the context of Equatorial Guinea's request for the indication of provisional measures; emphasis added). See also Note Verbale No. 5007/PRO/PID from the French Ministry of Foreign and European Affairs, dated 11 Oct. 2011, to the Embassy of Equatorial Guinea (MEG, Ann. 35). See above, Chap. 1, para. 1.19.

[227] Judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, p. 13.

[228] See in particular the judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, pp. 26-33.

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

[230] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 27.

[231] Following the searches and seizures carried out on 28 Sept. and 3 Oct. 2011, further searches were conducted at 42 avenue Foch from 14 to 23 Feb. 2012 (see the judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, p. 18).

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

81 dwelling at 46 rue des Belles Feuilles notified to UNESCO was unfit for habitation, and the dignity of Ms Bindang Obiang's new functions required a better residence."[233] However, on 19 September 2012, in the Note Verbale from the Embassy of Equatorial Guinea requesting that the Protocol Department of the Ministry of Foreign Affairs issue a special residence permit to Ms Bindang Obiang in her capacity as Ambassador Extraordinary and Plenipotentiary, the address listed in the notification form regarding her appointment and the assumption of her duties is given as 8 bis avenue de Verzy in Paris (17th arr.), not 46 rue des Belles Feuilles or 42 avenue Foch[234].

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

— Furthermore, in its reply to the question put by Judge Donoghue during the hearings on the request for the indication of provisional measures of 29 September 2016[235], Equatorial Guinea admitted that the request made by its Embassy in Paris, by Note Verbale dated 15 February 2012[236], for protection for two Equatorial Guinean ministers who had to go to the building at 42 avenue Foch, was "in fact in order to supervise preparations for the effective occupation of the building, which had been acquired for use as premises of the diplomatic mission of Equatorial Guinea"[237].

82 However, during the searches conducted on the premises of the building at 42 avenue Foch between 14 and 23 February 2012, the investigators found no "preparations for the effective occupation of the building" by Equatorial Guinea's diplomatic offices and seized additional movable property belonging to Mr. Teodoro Nguema Obiang Mangue[238].

With regard to the searches conducted in September and October 2011, as well as those carried out in February 2012, as the Paris *Tribunal correctionnel* noted in its judgment of 27 [October] 2017, "[t]he findings made at the site [in the context of the criminal proceedings] confirmed that Teodoro NGUEMA OBIANG MANGUE enjoyed free disposal of the property"; the judgment further noted: "However, no official documents [belonging to] the State of Equatorial Guinea or indicating that the building might serve as a venue for official representation [were discovered]"[239].

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

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[233] MEG, para. 4.9.

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

[235] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 28.

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

[237] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 28.

[238] Judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, p. 18.

[239] *Ibid.*, p. 31.

"*[a]s from . . . 27 July 2012*, the Embassy's offices are located at 42 avenue Foch, Paris (16th arr.), a building which it is *henceforth* using for the performance of the functions of its diplomatic mission in France"[240].

4.22. Unsure as to which legal bases to rely on, Equatorial Guinea initially claimed, on 4 October 2011, that the building at 42 avenue Foch had "for a number of years . . . [been] use[d] for the performance of the functions of its diplomatic mission"[241]; then, for a few months, it allegedly became the new official residence of the Permanent Delegate to UNESCO[242], before
83 finally, "as from . . . 27 July 2012, the Embassy's offices [were] [re?]located [there]"[243].

4.23. These contradictory and changing statements have resurfaced in Equatorial Guinea's written pleadings over the course of these very proceedings:

— In its Application instituting proceedings, dated 13 June 2016, Equatorial Guinea maintained that the building at 42 avenue Foch had been used by its diplomatic mission in France since 15 September 2011[244], though it did not claim to have given notification on that date. It is legitimate to ask how a receiving State could comply, where appropriate, with its obligations under the VCDR, if it has not been informed of the premises' existence and assignment. Under Equatorial Guinea's theory of a declaratory régime for the establishment of diplomatic premises, it is simply not possible.

— In its written reply to the questions put by Judge Bennouna and Judge Donoghue, dated 26 October 2016, Equatorial Guinea gave 4 October 2011 as the date marking the start of its use of the premises for the performance of its diplomatic mission in France[245], although that date, which is purely artificial, does not correspond to an effective assignment of the building.

— Furthermore, in its Memorial filed on 3 January 2017, Equatorial Guinea states that it protested against the first searches conducted in the building on 28 September and 3 October 2011, but acknowledges in the next line that it was not until 4 October 2011 that it informed the French Ministry of Foreign Affairs that the property was assigned to its diplomatic mission in
84 France[246]. Equatorial Guinea thus protested against the search measures before it had even sent the first Note Verbale, dated 4 October 2011, informing the French authorities of the building's alleged diplomatic status.

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[240] Note Verbale No. 501/12 from the Embassy of Equatorial Guinea, dated 27 July 2012, to the French Ministry of Foreign and European Affairs (MEG, Ann. 47; emphasis added).

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

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

[243] Note Verbale No. 501/12 from the Embassy of Equatorial Guinea, dated 27 July 2012, to the French Ministry of Foreign and European Affairs (MEG, Ann. 47).

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

[245] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 32.

[246] AEG, para. 8.49.

4.24. Simply recalling Equatorial Guinea's positions on the assignment of the building at 42 avenue Foch is sufficient to demonstrate their inconsistencies. In each of these instances — which can only be construed as Equatorial Guinea reacting to developments in the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue — France responded with a firm and consistent position and recalled, through the Protocol Department of the Ministry of Foreign Affairs, that the building at 42 avenue Foch in Paris had never been considered part of the premises of Equatorial Guinea's diplomatic mission[247].

4.25. The fact that Equatorial Guinea's erratic positions regarding the assignment of the building at 42 avenue Foch cannot possibly be justified illustrates the abusive nature of its assertion of the rights set out in the VCDR.

4.26. Moreover, at no point since the proceedings began has Equatorial Guinea ever claimed that the investigations and searches conducted by the French judicial authorities in the context of the proceedings against Mr. Teodoro Nguema Obiang Mangue interfered with the functions of its diplomatic mission in France.

85 4.27. In its Request for the indication of provisional measures, dated 29 September 2016, Equatorial Guinea based its claims on the fact that, "since [the premises at 42 avenue Foch] are not recognized . . . by France [as forming part of its diplomatic mission], there is a constant risk of intrusion, either by the police and the French judicial authorities or by private individuals"[248]. Yet Equatorial Guinea does not claim that the searches conducted in the building in September 2011 and February 2012, and the seizures of movable property, actually interfered with the functions of its diplomatic mission — which is only logical since its mission was not established there[249] and the investigations concerned property belonging to Mr. Teodoro Nguema Obiang Mangue. The Republic of Equatorial Guinea bases its allegations of violations of the provisions of Article 22 of the VCDR on the attachment of the building and the French authorities' subsequent refusal to recognize it as part of the premises of Equatorial Guinea's diplomatic mission. However, that attachment was a consequence of investigations of which Equatorial Guinea was fully aware, as evidenced by the circumstances in which it took possession of the building at 42 avenue Foch. It would thus appear that the building in no way meets the definition of "premises of the mission" contained in Article 1 *(i)* of the VCDR, which refers to "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"; it would also appear that the defence dreamt up by Equatorial Guinea seeks only to ensure the application, without any legal or factual justification, of Article 22, paragraph 3, of the Convention, which provides that "[t]he premises of the mission,

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

[248] Request for the indication of provisional measures of Equatorial Guinea (RPMEG), 29 Sept. 2016, para. 16.

[249] See above, fn. 240. Note Verbale No. 501/12 from the Embassy of Equatorial Guinea, dated 27 July 2012, to the French Ministry of Foreign and European Affairs (MEG, Ann. 47).

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

C. The circumstances in which Equatorial Guinea acquired ownership of the building at 42 avenue Foch

4.28. International law places no requirement on the sending State to own the premises that it assigns to its diplomatic missions abroad. In the present case, however, the question of ownership
86 of the building at 42 avenue Foch is an aspect of the factual background which is of particular importance in that it confirms the abuse of rights committed by Equatorial Guinea.

4.29. In a legal opinion dated 25 July 2015, attached to the Memorandum transmitted by the Republic of Equatorial Guinea to the French Republic, Professor Kamto rightly pointed out that:

> "the question is complicated by the unfolding of events which make it difficult to clearly distinguish the building's status, particularly as regards its ownership.
>
> The investigations conducted by the competent authorities and the searches carried out at 42 avenue Foch showed that the building was owned by Mr. Nguema Obiang Mangue. Equatorial Guinea itself does not contest this fact"[250].

4.30. Indeed, at no time during these proceedings has Equatorial Guinea contested the fact that Mr. Teodoro Nguema Obiang Mangue owned the building at 42 avenue Foch at the time the criminal proceedings were instituted in France and for at least the first three years of the judicial investigation.

4.31. In the first place, with regard to the date on which the building was acquired, Equatorial Guinea's statements have been extremely erratic:

— At the end of the hearings on the request for the indication of provisional measures, Judge Bennouna put the following question to Equatorial Guinea:

> "In a Note Verbale dated 15 February 2012 to the French Ministry of Foreign Affairs, which is included in the case file, the Embassy of the Republic of Equatorial Guinea states that 'the Republic of Equatorial Guinea has acquired a townhouse at 42 avenue Foch', adding that '[t]he title to the property is in the process of being transferred'. My question is as follows:
>
> 'On what date did Equatorial Guinea definitively acquire that property title, and did it register it at the Land Registry in France?'"[251].

87 In its reply to the question, Equatorial Guinea states that "[i]t was . . . on 15 September 2011, the date of the agreement on the transfer of shares and claims, that Equatorial Guinea became

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[250] Annex 2 to the "Memorandum filed in the interest of the Republic of Equatorial Guinea, represented by Mr. Jean-Pierre Mignard and Mr. Jean-Charles Tchikaya, for the attention of the competent authorities of the French Republic in the so-called 'ill-gotten gains' case: the Equatorial Guinean chapter", 16 Oct. 2015, p. 13 (Ann. 14).

[251] CR 2016/17, 19 Oct. 2016 (provisional measures), p. 20.

the owner of the building located at 42 avenue Foch"[252]. However, it fails to explain why it claimed elsewhere, in its Note Verbale of 15 February 2012, that "[t]he title to the property is in the process of being transferred". Moreover, in its Application transmitted to the Registry on 22 September 2012 on the basis of Article 38, paragraph 5, of the Rules of Court, with regard to the same facts, Equatorial Guinea stated that "[t]he Republic of Equatorial Guinea acquired a building located at 40/42 avenue Foch, 75116 Paris, from Mr. Teodoro Nguema Obiang Mangue on 16 September 2011"[253]. It should again be noted that in its Note Verbale of 4 October 2011 — which Equatorial Guinea now references as a starting point for its claim concerning the building's diplomatic status — the Embassy of Equatorial Guinea stated that it "has for a number of years had at its disposal a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified"[254]. This position directly conflicts with Equatorial Guinea's reply to the question put by Judge Bennouna[255].

— While "France has never contested Equatorial Guinea's right of ownership of the property at 42 avenue Foch"[256], nor has it recognized Equatorial Guinea as the owner of that property.

In the eyes of the French authorities, the building at 42 avenue Foch has been owned throughout the proceedings by the same person, or rather the same persons: five companies registered in Switzerland, which purchased the various units of the building on 19 September 1991[257]. On 18 December 2004, Mr. Teodoro Nguema Obiang Mangue acquired the shares of the companies that owned the property, through a complex financial arrangement[258]. Similarly, on 15 September 2011, Equatorial Guinea acquired the shares of the five co-owning companies by means of a transfer agreement concluded with Mr. Teodoro Nguema Obiang Mangue. And it is as the sole shareholder of these companies that Equatorial Guinea now claims to be the owner of the property at 42 avenue Foch.

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4.32. Thus, as Equatorial Guinea stated in its written reply to the question put by Judge Bennouna at the end of the hearings on the request for provisional measures,

> "[c]urrently [and still today], the companies Ganesha Holding SA, GEP Gestion Entreprise Participation SA, RE Entreprise SA, Nordi Shipping & Trading Co Ltd, and Raya Holdings SA are listed as the owners of the property at the Land Registration Department of the 8th arrondissement of Paris"[259].

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[252] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 12.

[253] Letter No. 140831 from the Registrar of the Court to the Minister for Foreign Affairs of the French Republic, 25 Sept. 2012, p. 16 (POF, Ann. 7).

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

[255] See above, fn. 251.

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

[257] Judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*, 27 [Oct.] 2017, p. 27

[258] *Ibid*.

[259] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 14.

4.33. In this context, the question put by Judge Bennouna regarding the registration of the property title at the Land Registry in France is of particular importance. As Equatorial Guinea was forced to admit:

> "Pursuant to paragraph N of the share transfer contract, Equatorial Guinea must liquidate the five companies in order to register its property title at the Land Registration Department directly.
>
> However, because of the attachment order registered by the Paris *Tribunal de grande instance* at the Land Registration Department of the 8th arrondissement of Paris on 31 July 2012, it was legally impossible for Equatorial Guinea to register the property title directly under its name as the owner of the building at 42 avenue Foch"[260].

4.34. After setting out the various steps it took with the French administrative authorities, Equatorial Guinea is careful to state merely that, "[h]aving recorded and registered the transfer of shareholder rights to Equatorial Guinea and having collected the related taxes, France has never
89 contested Equatorial Guinea's right of ownership of the property"[261]. The shares of the Swiss companies were indeed transferred and the relevant taxes collected[262], but Equatorial Guinea's property title to the building at 42 avenue Foch was not registered.

4.35. The reason for this is that the measure of attachment ordered on 19 July 2012 was precisely intended to prevent any attempt to shield the property from the proceedings[263].

4.36. However, the attachment of property in criminal proceedings *(saisie pénale immobilière)* does not deprive the owner of that property. In accordance with the relevant provisions of the French Code of Criminal Procedure, "[u]ntil the attached property is released . . . the owner or, in the absence thereof, the person in possession of the property is responsible for its upkeep and maintenance"[264]. Equatorial Guinea was thus able to take advantage of the limits of the French régime governing the attachment of property in criminal proceedings and the duration of the judicial investigations to present the French authorities with a fait accompli: the occupation of property believed to be the proceeds of money laundering, in respect of which a measure of attachment had been carried out just days before Equatorial Guinea claimed to have declared to France that its Embassy offices were henceforth located there[265] and thus required the protection afforded by the privileges and immunities provided for in the VCDR.

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[260] *Ibid*., paras. 15-16.

[261] *Ibid*., para. 13.

[262] *Ibid*., paras. 7-13.

[263] Art. 706-145 of the French Code of Criminal Procedure provides that "no one may validly dispose of assets attached in a criminal proceeding" (text available at the following address: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=0BB91706B2A96D1AA92BFE8889F06FAD.tplgfr21s_2?idSectionTA=LEGISCTA000022470122&cidTexte=LEGITEXT000006071154&dateTexte=20180925).

[264] Art. 706-143 of the French Code of Criminal Procedure (text available at the following address: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=0BB91706B2A96D1AA92BFE8889F06FAD.tplgfr21s_2?idSectionTA=LEGISCTA000022470122&cidTexte=LEGITEXT000006071154&dateTexte=20180925).

[265] Note Verbale No. 501/12 from the Embassy of Equatorial Guinea, dated 27 July 2012, to the French Ministry of Foreign and European Affairs (MEG, Ann. 47).

4.37. Furthermore, the French courts had no means of preventing the shares of the companies registered in Switzerland from being transferred by private agreement between Equatorial Guinea and Mr. Teodoro Nguema Obiang Mangue — whatever his official functions, moreover. The
90 measure of attachment does, however, bar Equatorial Guinea from being recognized directly as the owner of the property by registering it at the Land Registry[266].

4.38. If the purpose of the transaction had not been to shield the building from the criminal proceedings brought against Mr. Teodoro Nguema Obiang Mangue, it would have been surprising, to say the least, that Equatorial Guinea did not ask for the agreement on the transfer of shares and claims to be cancelled when it discovered that the property — the main asset of the companies it sought to acquire — was the subject of criminal proceedings in France for money laundering offences. It is indeed strange for a property buyer, on discovering the property's fraudulent origin, to take action against the authorities that seized it rather than the seller who is being prosecuted.

4.39. In a letter addressed to the President of the French Republic, dated 14 February 2012, the President of the Republic of Equatorial Guinea nonetheless explicitly acknowledged that the reason for selling the building to the Government of Equatorial Guinea and invoking its diplomatic nature was to protect the building from the criminal proceedings against his son:

> "Your Excellency is not unaware of the fact that my son, Teodoro NGUEMA OBIANG MANGUE, lived in France, where he pursued his studies, from childhood until he reached adulthood. France was his preferred country and, as a young man, he purchased a residence in Paris; however, due to the pressures on him as a result of the supposed unlawful acquisition of assets, he decided to resell the said building to the Government of the Republic of Equatorial Guinea."[267]

4.40. As Judge Donoghue found in the opinion she appended to the Court's Judgment dated 6 June 2018, in that letter

> "[t]he President of Equatorial Guinea made clear that the purpose of these actions is a personal one, to address difficulties faced by his son. Such a purpose is entirely at odds with the régime of privileges and immunities contained in the Vienna Convention, which states in its preamble that the purpose of privileges and immunities 'is not to benefit individuals but to ensure the efficient performance of the functions of
> **91** diplomatic missions as representing States'"[268].

4.41. In light of the foregoing, the abusive nature of Equatorial Guinea's reliance on the provisions of the VCDR is objectively established. The use of privileges and immunities for the "purpose of . . . benefit[ing] individuals"[269] is precisely what characterizes an abuse of rights in the context of the VCDR[270]. Equatorial Guinea even expressly acknowledges this in its letter of

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[266] See the written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 16.

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

[268] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, dissenting opinion of Judge Donoghue, para. 15.

[269] VCDR, 18 Apr. 1961, fourth paragraph of the preamble.

[270] See above, Chap. 4, Sec. I.

14 February 2018, which, significantly, emanated from its highest representative. This is not a "disputable inference", but "clear and convincing evidence which compels such a conclusion"[271].

4.42. A more recent letter, from the President of the Republic of Equatorial Guinea to the President of the French Republic, dated 19 January 2017, included an annex entitled "Note seeking a diplomatic resolution of the dispute". Surprisingly, that Note mentioned the bilateral agreement between France and Equatorial Guinea concerning the mutual protection of investments as an alternative means of resolving their dispute:

> "The Agreement on the mutual protection of investments dated 3 March 1982, by which both States are bound, provides for inter-State disputes concerning its interpretation and application to be resolved by diplomatic means.
>
> Since Equatorial Guinea has consistently maintained that the assets attached by the French courts were all acquired lawfully and do not represent the proceeds of misappropriated public funds or of an offence of any kind, consideration must be given to the question of their protection by France under the aforementioned Agreement.
>
> That being the case, in the context of diplomatic discussions between the two States provided for under Article 11 of the said Agreement, and before any decision by the French courts on the substance of the dispute, the two States could agree to consider that the assets lawfully acquired in France meet the definition of 'investments' within the meaning of Article 1 of the same Agreement and that, consequently, France has a duty to protect them."[272]

92 4.43. In keeping with its consistent position in this case, France indicated that the facts mentioned were the subject of judicial decisions and ongoing legal proceedings, and that consequently it was not possible to accept the offer to settle the dispute by the means proposed by Equatorial Guinea[273]. However, this initiative demonstrates Equatorial Guinea's willingness to invoke — with a blatant disregard for legal credibility — any conventional provision that provides for a dispute settlement mechanism and binds the Parties, in order to put an end to the ongoing judicial proceedings. And it assumes that its referral of the case to the Court will achieve precisely that:

> "Thus, [the Note concludes,] a permanent solution to the dispute between the two States having been found, it will only remain for the Republic of Equatorial Guinea to end the proceedings pending before the International Court of Justice."[274]

4.44. Above all, it should be noted that Equatorial Guinea protested against the attachment of property carried out in the context of the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue not because it was the owner of the assets, or because they had diplomatic status, but because they "were all acquired lawfully and do not represent the proceeds of misappropriated public funds or of an offence of any kind". It is for the French courts to rule on this point, and they

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[271] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132.

[272] Letter from the President of Equatorial Guinea to the French President, 19 Jan. 2017 (POF, Ann. 12).

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

[274] Letter from the President of Equatorial Guinea to the French President, 19 Jan. 2017 (POF, Ann. 12).

will have a further opportunity to do so in the appeal proceedings[275]. Nonetheless, this is an acknowledgment that the assets seized — the building, furnishings and other objects — were the private property of Mr. Teodoro Nguema Obiang Mangue, the only person concerned by the criminal proceedings instituted in France.

4.45. While the question of ownership is not in itself at issue in these proceedings, and the Court is not called upon to rule on this matter[276], the circumstances in which Equatorial Guinea acquired ownership of the building at 42 avenue Foch form part of the vast body of corroborating evidence which leads to the conclusion that the invocation of diplomatic status for the building in question is an attempt to abuse the rights set out in the VCDR.

93 D. The seisin of the Court as a constituent element of the abuse of rights committed by Equatorial Guinea

4.46. In its Judgment dated 6 June 2018 on the preliminary objections raised by France, the Court found that

> "[a]n abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings. In this case, the Court does not consider that Equatorial Guinea, having established a valid title of jurisdiction, should be barred at the threshold without clear evidence that its conduct could amount to an abuse of process. Such evidence has not been presented to the Court. It is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. The Court does not consider the present case to be one of those circumstances."[277]

4.47. While France obviously does not call this decision into question, it is of the view that even though Equatorial Guinea's seisin of the Court does not in itself constitute an abuse of process providing grounds for its Application to be declared inadmissible, it is a further indication of the attempted abuse of rights which characterizes Equatorial Guinea's approach.

4.48. As discussed at length in these and previous written pleadings of France, and during the oral arguments in the earlier stages of the case[278], the dispute between Equatorial Guinea and France concerns the French authorities' refusal to accept Equatorial Guinea's attempts to protect Mr. Teodoro Nguema Obiang Mangue's private property from the consequences of the criminal proceedings brought against him.

4.49. Equatorial Guinea's reliance on the provisions of the VCDR with regard to the building at 42 avenue Foch and the movable property seized by the French courts constitutes an abuse of

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[275] See above, Chap. 1, paras. 1.52-1.58.

[276] See above, Chap. 2, paras. 2.13-2.20.

[277] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 150.

[278] See CR 2016/17, 19 Oct. 2016 (provisional measures), pp. 8-9, para. 3 (Pellet); POF, paras. 64, 71-72, 127, 136-137.

94 rights, as France has shown above[279]. Seising the Court in order to delay (and attempt to block) the implementation of judicial decisions is an abuse of rights.

4.50. Equatorial Guinea has contrived to find a treaty "hook" on which to hang its case in order to come before the Court. It chose the Palermo Convention as a basis for its claims relating to the immunity from foreign criminal jurisdiction to which, in its view, Mr. Teodoro Nguema Obiang Mangue is entitled. The Court did not accept this[280]. Equatorial Guinea's reliance on the VCDR is just as artificial: none of its provisions can reasonably be relied on in this case[281].

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

> "the Government of Equatorial Guinea is satisfied because, in the ruling given by the International Court of Justice in The Hague this 7th December 2016, there is clear recognition of the diplomatic nature of the building located at 42, Avenida Foch, in Paris, and as such, recognition that the property does not constitute 'dishonestly acquired goods'. The Equatoguinean State has reiterated its claim to ownership of this property, which was the property of the Equatoguinean State, but the French party refused to recognise this, refusing to yield on this point.
>
> The recognition that the State of Equatorial Guinea is the legitimate owner of the building, with all the objects it contains, is thus recognition that it is not 'dishonestly acquired goods', and it is also evidently proof of the judicial farce that French justice is unilaterally trying to serve up.
>
> On demonstrating that the building is not 'dishonestly acquired goods', the French party should have finally withdrawn the accusation against the Vice-President of the Republic of Equatorial Guinea, as it was unsupported by the basis of the main accusation, and thus recognise unambiguously the immunity of H.E. Nguema Obiang Mangue."[282]

95 4.52. It goes without saying that France does not share this rather surprising reading of the Court's Order on Equatorial Guinea's request for the indication of provisional measures. This statement is nonetheless a perfect illustration of Equatorial Guinea's strategy in this case, which is to use the Court as a means of attempting to obstruct the proceedings brought against Mr. Teodoro Nguema Obiang Mangue before the French courts. Above all, it attests to Equatorial Guinea's true motives: it is not seeking a settlement by the Court of a dispute relating to the interpretation or application of the provisions of the VCDR, but a retrial of Mr. Teodoro Nguema Obiang Mangue's case on the merits and to shield his property from the consequences of the

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[279] See above, Chap. 4, paras. 4.13-4.45.

[280] See *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 118.

[281] See above, Chap. 4, para. 4.27.

[282] Press release of the spokesperson for the Government of the Republic of Equatorial Guinea, 7 Dec. 2016, Malabo (English version available on the official website of the Government of the Republic of Equatorial Guinea: http://www.guineaecuatorialpress.com/noticia.php?id=9000&lang=en (POF, Ann. 9)). See also, press release of the Representation of Equatorial Guinea in The Hague, 8 Dec. 201[6] (POF, Ann. 10), and press release of the Equatorial Guinea Press and Information Office, 9 Dec. 2016 (POF, Ann. 11).

criminal proceedings brought against him. That is not the Court's mission, and to use the Court for this purpose is indicative of the abuse of rights committed by Equatorial Guinea.

4.53. In its press release regarding the hearings on the preliminary objections raised by France, Equatorial Guinea stated that

> "France has not respected the Vienna Convention that grants diplomatic immunity to Teodoro Nguema Obiang, and has not respected the diplomatic status of the building which houses the Equatorial Guinea Embassy in Paris, which France had tried to seize"[283].

The press release quotes Equatorial Guinea's Agent in the case, Mr. Carmelo Nvono Ncá, as stating:

> "The sentence passed on 29th October 2017 by the Paris Criminal Court against our Vice-President, i[n] flagrant violation of international law, has caused real indignation in my country, and this injustice will not be permitted".

This is in stark contrast to the statement published on the website of the Government of the Republic of Equatorial Guinea on 28 October 2017, which hailed the judgment of the *Tribunal correctionnel* as a "clear victory"[284]; but it once again unequivocally demonstrates that what is really at issue in the case which Equatorial Guinea has brought before the Court is the fate of Mr. Teodoro Nguema Obiang Mangue and his property. The allegations of violations of the rights set out in the VCDR serve only to give the dispute the appearance of a question of interpretation or application of conventional provisions.

96 4.54. The conclusion to be drawn from the foregoing was aptly summed up by Judge Donoghue in her opinion appended to the Court's Judgment of 6 June 2018:

> "The sequence of actions taken by the applicant State is established by the documents submitted by the Applicant. The purpose of those actions, which was stated by the President of the applicant State, is manifest. The evidence regarding the character of the Applicant's conduct is conclusive, easily meeting the heightened standards of proof that the Court has suggested in certain circumstances . . . The applicant State has told the Court nothing to suggest that its diplomatic functions were disrupted when French authorities entered the Building and initiated searches in September 2011, nor is there any indication that French authorities entered or attached the Building with such a purpose".

4.55. The circumstances of the present case are sufficiently exceptional for the principle prohibiting abuse of rights — whose applicability in the international legal order is incontestable and whose application is particularly necessary with regard to immunities and privileges — to be applied.

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[283] Press release from the Embassy of the Republic of Equatorial Guinea in Brussels, 20 Feb. 2018 (text available at the following address: https://www.guineaecuatorialpress.com/mobile/noticia.php?id=11062&lang=en).

[284] Text available at the following address: https://www.guineaecuatorialpress.com/noticia.php?id=10566&lang=en, cited in CR 2018/4, 21 Feb. 2018, p. 38, para. 10 (Alabrune).

4.56. The facts set out, on the basis of objective elements, form a body of corroborating circumstantial evidence which leaves no doubt about the abusive nature of Equatorial Guinea's claims concerning the building at 42 avenue Foch. In asserting the rights set out in the VCDR, Equatorial Guinea's purpose is not "to ensure the efficient performance of the functions of [its] diplomatic missio[n]" in France, but "to benefit individuals"[285], or rather, one individual, Mr. Teodoro Nguema Obiang Mangue, by claiming the application of the privileges and immunities contained in the VCDR, in order to shield his personal property from the consequences of the criminal proceedings brought against him before the French courts. Equatorial Guinea has at no point explained to the Court in what way the functions of its diplomatic mission in France were purportedly affected by the investigations and measures of attachment carried out in the context of the ongoing judicial proceedings. Equatorial Guinea's acts and conduct, and the contradictory positions taken by its authorities, do not amount to "disputable inferences but . . . [to] clear and convincing evidence which compels such a conclusion"[286]. These facts, taken together (and in some instances, even taken individually), characterize an objective situation of abuse of rights.

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4.57. For the reasons set out in this chapter, the French Republic requests the Court to reject, on the grounds of abuse of rights, all the claims put forward by Equatorial Guinea on the basis of the VCDR, regarding the building at 42 avenue Foch and the furnishings and other objects seized in the context of the judicial proceedings instituted in France against Mr. Teodoro Nguema Obiang Mangue.

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[285] VCDR, 18 Apr. 1961, fourth paragraph of the preamble.

[286] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132.

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CHAPTER 5

FRANCE BEARS NO INTERNATIONAL RESPONSIBILITY

5.1. The Republic of Equatorial Guinea devotes a chapter of its Memorial to "France's international responsibility as a consequence of the breach of its obligations to Equatorial Guinea"[287], in which it recalls the fundamental principal that "[e]very internationally wrongful act of a State entails the international responsibility of that State"[288]. However, as France has shown in the preceding chapters of this Counter-Memorial, none of the conduct attributable to it "[c]onstitutes a breach of an international obligation"[289] arising from the VCDR. Therefore, the conditions for engaging France's responsibility are not met. It is thus only on a supplementary basis that France will comment on the alleged harm (I) and the content of the responsibility (II).

I. The alleged harm

5.2. France first notes that most of the harm mentioned in the Memorial is not the result of a breach of an obligation falling within the subject-matter jurisdiction of the Court. In the operative part of its Judgment of 6 June 2018, the Court declared that it had jurisdiction on the basis of the Optional Protocol to the VCDR to rule on the Application "in so far as it concerns the status of the building located at 42 Avenue Foch in Paris as premises of the mission"[290]. The Court is thus precluded from ruling on the harm alleged to have resulted from the criminal proceedings brought against Mr. Teodoro Nguema Obiang Mangue notwithstanding his supposed personal immunity.

5.3. The alleged harm relating to the attachment of the building at 42 avenue Foch[291] also falls outside the scope of the dispute over which the Court has jurisdiction pursuant to the
99 Judgment of 6 June 2018. Attachment *(saisie pénale)* is a measure which affects the alienability of the property, but not its use. As discussed earlier in this Counter-Memorial, the purpose of the VCDR is not to protect ownership of immovable property, by a State or any other person, but to protect the use of premises for diplomatic purposes[292]. The Republic of Equatorial Guinea itself acknowledges the relevance of this distinction in the present case[293]. The alleged harm relating to ownership of the building thus has no bearing on this dispute.

5.4. The only harm mentioned in the Memorial which could be related to the VCDR is that which is said to have resulted from the searches carried out at the premises and from the non-recognition of the premises' diplomatic status.

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[287] MEG, pp. 163-179.

[288] ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, Vol. II, Part Two, p. 26, and the annex to resolution A/RES/56/83 of 12 Dec. 2001 (hereinafter "2001 Draft Articles"), Art. 1.

[289] *Ibid.*, Art. 2.

[290] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 153.

[291] MEG, paras. 9.8, 9.12.

[292] See above, Chap. 2, paras. 2.13-2.20.

[293] MEG, paras. 8.26, 8.32, 8.45.

5.5. Equatorial Guinea first alleges that the searches carried out at 42 avenue Foch infringed the inviolability of the premises of its diplomatic mission and draws a parallel with the case concerning *United States Diplomatic and Consular Staff in Tehran*[294]. This parallel is implausible, since those circumstances were very different from the ones in the present case: the building at 42 avenue Foch is not unlawfully occupied. Moreover, the occupation at issue in the *Diplomatic and Consular Staff* case was a continuing act[295], whereas here the alleged infringements of the premises' inviolability are the result of searches, i.e. instantaneous and completed acts[296]. This means that it is not possible to seek, as a corollary of responsibility, cessation of those acts[297].

5.6. Moreover, the first searches, which led to the seizure of luxury vehicles, took place on 28 September and 3 October 2011. It was not until 4 October 2011, however, that the Republic of
100 Equatorial Guinea first declared its intention to assign the building for diplomatic use[298], which suffices to rule out any relationship between the supposed harm and the breach of a VCDR provision.

5.7. The only other acts claimed by Equatorial Guinea to have caused harm, and which could give rise to reparation if a breach of the Convention were to be established, are the searches that took place between 14 and 23 February 2012, the period with regard to which the Parties' arguments conflict. The Republic of Equatorial Guinea does not claim ownership of the items seized at that time or allege that harm was caused to any diplomatic property or archives which may have been in the building when the searches and seizures took place. Nor does it allege any subsequent infringement of the inviolability of the premises at 42 avenue Foch, including since the Court's Order of 7 December 2016. Thus, as far as the searches are concerned, it is not possible to speak of "successive breaches", or "particularly serious" moral harm caused by "repeated violations of its immunity from execution and jurisdiction in respect of the building at 42 avenue Foch, which houses those premises"[299].

5.8. For non-recognition of diplomatic status, the Republic of Equatorial Guinea claims material harm consisting in "the fact that it cannot safely use its building at 42 avenue Foch as premises of its diplomatic mission"[300]. The way in which this harm is presented implies that it was caused by a continuing act which persisted throughout the period in which the building is said by Equatorial Guinea to have housed its diplomatic mission, a suggestion which is later repeated in relation to the continuing nature of the obligation[301]. This is not the case.

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[294] *Ibid*., paras. 9.4-9.5.

[295] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 42, para. 90 ("successive and continuing breaches").

[296] 2001 Draft Articles, Art. 14.

[297] See below, Chap. 5, para. 5.14.

[298] See above, Chap. 1, paras. 1.19-1.23, and Chap. 3, paras. 3.53-3.54.

[299] MEG, paras. 9.5 and 9.16.

[300] *Ibid*., para. 9.10.

[301] *Ibid*., para. 9.41 ("the wrongful act denounced by Equatorial Guinea persists, causing Equatorial Guinea continuing harm . . . France is thus continuing to contest the building's status as premises of the diplomatic mission").

5.9. In the present proceedings, the dispute between the Parties concerns an act which took place at a specific point in time: France's refusal on 11 October 2011 to grant Equatorial Guinea's request of 4 October 2011 to consider the building at 42 avenue Foch as diplomatic premises[302]. Equatorial Guinea's subsequent requests to the same effect led France simply to recall its initial
101 refusal; those requests cannot transform an instantaneous act into a continuing one. France's refusal has undoubtedly produced effects over time, since it later gave rise to a dispute. However, the effect of this instantaneous act must not be equated with a continuing unlawful act[303]. As the ILC's commentaries on Article 14 of the 2001 Draft Articles suggest, "[a]n act does not have a continuing character merely because its effects or consequences extend in time"[304].

5.10. Moreover, allowing the harm to be presented as having been caused by a continuing unlawful act would be to accept and give legal effect to the *de facto* transfer of certain activities to 42 avenue Foch against the clearly expressed will of the receiving State and despite the circumstances in which the transfer was made[305].

5.11. France further observes that the Applicant offers no concrete evidence that any damage was caused by a breach of the security of the premises in question.

5.12. Equatorial Guinea also claims moral harm resulting from "various difficulties that Equatorial Guinea has had to endure in seeking to ensure that France respect the status of the premises of its diplomatic mission"[306]. The vagueness of the phrase "various difficulties" reveals how hard it is for the Applicant to identify any harm precisely. Indeed, it is more fitting to describe as vague Equatorial Guinea's changing and contradictory statements regarding the use of the building, including after 11 October 2011[307].

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II. The content of the responsibility

5.13. Most of the arguments that Equatorial Guinea's Memorial subsequently devotes to the consequences of the alleged wrongful act are also predicated on purported violations of an international obligation which do not fall within the scope of the subject-matter jurisdiction of the Court. As in the case of harm, the discussion should be limited to what does fall within that scope under the terms of the Judgment of 6 June 2018, i.e. the searches and the non-recognition of diplomatic status.

5.14. The obligation of cessation is mentioned in Equatorial Guinea's Memorial only in relation to the proceedings against Mr. Teodoro Nguema Obiang Mangue and the attachment of the building — thus, for acts falling outside the scope of the dispute over which the Court has jurisdiction. This is logical given that such an obligation can relate only to breaches of a continuing

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[302] See above, Chap. 1, para. 1.23.

[303] Seventh Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, The internationally wrongful act of the State, source of international responsibility *(continued)*, *YILC*, *1978*, Vol. II, Part One, paras. 26-37.

[304] 2001 Draft Articles, commentaries, p. 60, para. 6.

[305] See above, Chap. 1, para. 1.40, and Chap. 4, paras. 4.20-4.25.

[306] MEG, para. 9.16.

[307] See above, paras. 1.24-1.28, and Chap. 4, paras. 4.21-4.23.

nature[308], as the Republic of Equatorial Guinea also points out[309]. Since the alleged wrongful acts are instantaneous, there is no need for the Court to order their cessation.

5.15. Guarantees of non-repetition, for their part, would not be appropriate in view of the circumstances, i.e. the small number of acts at issue, the fact that they are all connected to the same judicial proceedings, the inconsistencies in Equatorial Guinea's position regarding the assignment of the premises, and the numerous indications of an abuse of rights. Exactly the same applies to the guarantees of non-repetition subsequently claimed by the Applicant by way of satisfaction[310]. In accordance with the Court's jurisprudence, the ordering of such measures presupposes "special circumstances"[311]. Yet, the arguments put forward in support of the claim do not all fall within the scope of the present case; nor can they constitute special circumstances suggesting that the wrongful act would be repeated. As the Court has frequently noted, "there is no reason to suppose
103 that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed"[312].

5.16. Turning to reparation, the Republic of Equatorial Guinea claims measures of satisfaction and compensation[313]. However, were the existence of any wrongful act attributable to France to be accepted, Equatorial Guinea's contribution to the harm would have to be considered before the terms of reparation could be addressed. According to Article 39 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, the "wilful or negligent action or omission of the injured State" must be taken into account in determining reparation[314]. This is consistent with the jurisprudence of the Court[315]. Moreover, pursuant to Article 31, paragraph 1, of the 2001 Draft Articles, a causal link between the internationally wrongful act and the injury must be established. Here, that link is quite clearly affected by the conduct of the State claiming to have been injured.

5.17. In the present case, the contribution to the harm is at its highest level, since it was the Applicant itself that created the situation which it now characterizes as harm, by claiming to have transferred, as from 27 July 2012, certain activities to a building which it knew to be the subject of judicial proceedings and a preventive measure *(mesure de sûreté)*. Prior to this, it contributed to the

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[308] 2001 Draft Articles, commentaries, pp. 88-89; *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 153, para. 137; *Rainbow Warrior (New Zealand* v. *France)*, Award of 30 Apr. 1990, *Reports of International Arbitral Awards*, Vol. XX, p. 270, para. 113.

[309] MEG, para. 9.21.

[310] *Ibid*., para. 9.33. See 2001 Draft Articles, Art. 30 *(a)*.

[311] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150; *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 154, para. 138.

[312] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60, and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150; *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 154, para. 138.

[313] MEG, paras. 9.27-9.37.

[314] 2001 Draft Articles, Art. 39.

[315] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 508, para. 116.

harm through its varying and contradictory statements[316]. It even established a direct link between its position on the building and the ongoing judicial proceedings against Mr. Teodoro Nguema Obiang Mangue[317]. Each of these acts constitutes a significant contribution to the supposed harm. Taken together, rather than the legitimate exercise of a right under the VCDR, they are far more suggestive of an abuse of rights[318].

104 5.18. Assuming, in the further alternative, that an obligation of reparation rests on France regardless, the Applicant's claims should be examined carefully, and only in so far as they fall within the scope of the Court's subject-matter jurisdiction.

5.19. The claims for reparation set out in the Memorial take the form of measures of satisfaction, for moral harm, and compensation, for both material and non-material harm. The Applicant thus correctly excludes restitution, including in relation to the searches. The only form of reparation sought for the searches is satisfaction, because those acts "cannot be made good by restitution or compensation"[319].

5.20. Furthermore, the Republic of Equatorial Guinea has never claimed that the items seized belonged to it or otherwise pertained to the functions of its diplomatic mission[320]. Judicial proceedings have established that they belonged to a third party, Mr. Teodoro Nguema Obiang Mangue[321]. Thus, reparation for any harm suffered solely by the Republic of Equatorial Guinea cannot extend to those personal, private assets.

5.21. As regards the claims for compensation, the claim relating to non-material harm pertains solely to violations which fall outside the scope of the Court's subject-matter jurisdiction[322]. This leaves just one claim for compensation in respect of material harm, for non-recognition of the diplomatic status of the premises at 42 avenue Foch.

5.22. Not only does the Republic of Equatorial Guinea fail to provide any evidence of damage in this regard, it also fails to make any specific claims. It simply "reserves the right to request, at a later stage of the proceedings, that it be awarded an amount of compensation covering all of the pecuniary consequences of France's wrongful acts"[323]. France is thus unable to respond to those allegations here. Moreover, France cannot discern any material harm, since it is clear that
105 Equatorial Guinea's diplomatic mission, located *de jure* at 29 boulevard de Courcelles, was perfectly able to fulfil its functions. The wish of the Republic of Equatorial Guinea to transfer certain activities to 42 avenue Foch, notwithstanding France's opposition and the earlier criminal measures to which the building was subject, cannot give rise to harm attributable to the French Republic.

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[316] See above, Chap. 4, paras. 4.20-4.25.

[317] See above, Chap. 4, paras. 4.39-4.40.

[318] See above, Chap. 4, para. 4.56.

[319] MEG, para. 9.31.

[320] See above, Chap. 3, para. 3.62, and Chap. 4, para. 4.44.

[321] See above, Chap. 1, paras. 1.7-1.13 and 1.30-1.35.

[322] MEG, para. 9.36.

[323] *Ibid.*, para. 9.37.

5.23. Lastly, the Applicant claims that the obligation to fulfil the breached obligations should be maintained, referring to both the VCDR and general international law[324]. France recalls that the present dispute concerns only the VCDR, which indisputably remains in force with regard to relations between the Parties; the Applicant's claim thus adds nothing.

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5.24. To conclude this chapter, France reaffirms that it has in no way breached its obligations under the VCDR. If the Court were to decide otherwise, it would necessarily have to find, first, that it is not necessary to order the cessation of an instantaneous act and that guarantees of non-repetition are not required in the circumstances, and, second, that the contribution made by the Republic of Equatorial Guinea to the harm is such that its claims for reparation should be dismissed in their entirety. In the further and final alternative, if measures of reparation were to be ordered notwithstanding Equatorial Guinea's conduct, the only feasible option would be a measure of satisfaction consisting in a finding that there has been a violation of the Convention.

[324] *Ibid.*, paras. 9.39-9.40.

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SUBMISSIONS

For the reasons set out in this Counter-Memorial, and on any other grounds that may be produced, inferred or substituted as appropriate, the French Republic respectfully requests the International Court of Justice to reject all of the claims made by the Republic of Equatorial Guinea.

Paris, 6 December 2018

(Signed) Mr. François ALABRUNE,
Agent of the French Republic.

LIST OF ANNEXES