Note: This translation has been prepared by the Registry for internal purposes and has no official character

14578 Corr.

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

VOLUME I

3 January 2017

[Translation by the Registry]

TABLE OF CONTENTS

Page

1

INTRODUCTION

0.1 This introduction begins by describing the present stage of the proceedings before the International Court of Justice (Section I). It then discusses the importance of this case for the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") and the international legal order (Section II). The next section (Section III) sets out the structure of the Memorial, providing a brief description of the subjects that will be dealt with in each chapter.

I. Present stage of the proceedings before the Court

0.2. This case was brought by Equatorial Guinea against the French Republic (hereinafter "France") by means of an Application filed in the Registry of the Court on 13 June 2016[1]. The Application describes the dispute 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."[2]

0.3. Pursuant to Article 31, paragraph 3, of the Statute of the Court, Equatorial Guinea has chosen Mr. James Kateka to sit as judge *ad hoc* in the case.

0.4. By an Order of 1 July 2016, the Court fixed 3 January 2017 and 3 July 2017 as the respective time-limits for the filing of the written pleadings by Equatorial Guinea and France. This Memorial is filed in accordance with that Order.

2

0.5. After the issuance of an order dated 5 September 2016 referring Mr. Teodoro Nguema Obiang Mangue, the Vice-President of Equatorial Guinea in charge of National Defence and State Security, to the Paris *Tribunal correctionnel* for trial, Equatorial Guinea filed a Request for the indication of provisional measures with this Court on 29 September 2016[3]. Public hearings were held from 17 to 19 October 2016. On 26 October 2016, the Agent of Equatorial Guinea transmitted to the Registry of the Court the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue at those hearings[4].

0.6. By a letter dated 3 October 2016, the Vice-President of the Court, acting as President in the case, drew the attention of France, in accordance with Article 74, paragraph 4, of the Rules of Court, "to the need to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects".

---

[1]Application of the Republic of Equatorial Guinea instituting proceedings, dated 13 June 2016. It should be recalled that in 2012 Equatorial Guinea filed an Application instituting proceedings in the Registry of the Court, in which it asked France to recognize the Court's jurisdiction based on *forum prorogatum*. See Application instituting proceedings including a request for provisional measures, dated 25 Sept. 2012, Press Release No. 2012/26, 26 Sept. 2012.

[2]Application of the Republic of Equatorial Guinea instituting proceedings, para. 2.

[3]Request for the indication of provisional measures submitted by Equatorial Guinea, dated 29 Sept. 2016.

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

0.7. By its Order dated 7 December 2016, the Court unanimously indicated the following provisional measures:

> "France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability."[5]

0.8. In addition, the Court unanimously rejected France's request to remove the case from the General List[6].

0.9. These provisional measures are binding on France, including on its judicial authorities.

3

II. Importance of the case

0.10. As Equatorial Guinea explained during the public hearings on the request for the indication of provisional measures, it is important to be clear, from the outset, about what is involved in the present case and what is not. This case concerns the application, between Equatorial Guinea and France, of fundamental rules and principles of international law, including, in particular, those relating to sovereign equality, non-intervention in the domestic affairs of States, the immunity of certain holders of high-ranking office in a State and the immunity of State property, as well as the legal status of premises of diplomatic missions. All these closely linked rules and principles safeguard and underpin the peaceful conduct of relations among all States.

0.11. As in the case concerning *Jurisdictional Immunities of the State*[7], in which it was not necessary for the Court to examine the atrocities committed by German occupying forces, and that concerning the *Arrest Warrant*[8], in which the alleged violations of international humanitarian law and crimes against humanity were not at issue, so in this case the Court is not called upon to rule on any wrongful acts or omissions that may or may not have taken place.

0.12. Equatorial Guinea has pledged to fight corruption and all other forms of transnational organized crime committed in its territory. This is reflected, *inter alia*, in its Basic Law (Constitution)[9], in its legislation and in the national institutions established to that end. It has also become party to several international instruments, such as the United Nations Convention against Transnational Organized Crime[10] and Regulation No. 01/03-CEMAC-UMAC of the Central

---

[5] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Request for the indication of provisional measures,* Order of 7 Dec. 2016, para. 99.

[6] *Ibid.*

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

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

[9] Basic Law of Equatorial Guinea (new text of the Constitution of Equatorial Guinea, officially promulgated on 16 Feb. 2012, with the texts of the Constitutional Reform approved by referendum on 13 Nov. 2011) (Ann. 1). Article 15, para. 2, in the section entitled "Fundamental Principles of the State", reads: "Acts of corruption will also be punished by Law".

[10] United Nations, *Treaty Series (UNTS)*, Vol. 2225, p. 209 (I-39574)

4 African Economic and Monetary Community on the prevention and suppression of money laundering and the financing of terrorism in Central Africa[11].

0.13. France has repeatedly disregarded the most basic principles of international law in its dealings with Equatorial Guinea. This is particularly true of the French judicial authorities, including the *Cour de cassation*. They appear never to have seriously considered the important questions of international law raised before them. They have at times questioned Equatorial Guinea's intentions, as well as its political and other decisions taken in accordance with the Constitution and laws of Equatorial Guinea.

0.14. Throughout the criminal proceedings the French Government, and in particular the Ministry of Foreign Affairs, has shown itself unwilling to meet its obligation to uphold international law. It has remained passive in the face of the numerous decisions taken by the judicial authorities, decisions which contravene international law. It has also contributed to these breaches of international law by refusing, for example, to recognize the legal status of the premises of the Embassy of Equatorial Guinea in France.

0.15. All this has had significant and inevitable consequences on Equatorial Guinea's ability to freely conduct its international relations, as well as an adverse effect on the traditionally friendly bilateral relations between the two countries. Equatorial Guinea is concerned that this situation could deteriorate. For a number of years it has sought to co-operate with France in order to settle the dispute. However, the decisions of the French courts, including the recent order referring the Vice-President of Equatorial Guinea to the Paris *Tribunal correctionnel* for trial, and the French Ministry of Foreign Affairs' rejection of Equatorial Guinea's proposal to settle the dispute bilaterally, have left Equatorial Guinea with no choice but to have recourse to the International Court of Justice.

5 **III. Structure of the Memorial**

0.16. This Memorial consists of four parts divided into nine chapters.

0.17. After this introduction, Part One sets out the facts relating to the case. It is divided into four chapters.

0.18. Chapter 1 gives a brief presentation of Equatorial Guinea: its geography, its history, its economy, its constitution and government, and its relations with France.

0.19. Chapter 2 focuses on two essential factual elements. First, the position held by Mr. Teodoro Nguema Obiang Mangue in the Government of Equatorial Guinea from 2007 to date. Second, the status of the building located at 42 avenue Foch in Paris, both as premises of the diplomatic mission of Equatorial Guinea in France and as the property of Equatorial Guinea.

0.20. Chapter 3 describes the legal proceedings initiated in France against the Vice-President of Equatorial Guinea in charge of National Defence and State Security, and their consequences on the building located at 42 avenue Foch in Paris.

---

[11] Regulation No. 01/03-CEMAC-UMAC of the Central African Economic and Monetary Community (Ann. 2).

0.21. Chapter 4 sets out the many diplomatic exchanges that have taken place between Equatorial Guinea and France regarding the present dispute, as well as Equatorial Guinea's efforts to settle the dispute bilaterally.

0.22. Part Two addresses the jurisdiction of the Court to hear this case. It comprises only one chapter, Chapter 5. It looks at the two instruments on which Equatorial Guinea founds the Court's jurisdiction: the United Nations Convention against Transnational Organized Crime and the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.

0.23. Part Three identifies the violations of international law committed by France. It has three chapters.

6 0.24. Chapter 6 discusses the violations by France of the principles of sovereign equality and non-intervention in the domestic affairs of States, basic principles of the United Nations Charter and of general international law which are incorporated in the United Nations Convention against Transnational Organized Crime.

0.25. In Chapter 7, Equatorial Guinea addresses the violation by France of the immunity of the Vice-President of Equatorial Guinea in charge of National Defence and State Security.

0.26. Chapter 8 describes the violation by France of the immunity and inviolability of the building located at 42 avenue Foch in Paris, as the diplomatic mission of Equatorial Guinea in France and as the property of Equatorial Guinea.

0.27. Part Four is devoted to the international responsibility incurred by France as a result of the breach of its obligations to Equatorial Guinea. It consists of only one chapter, Chapter 9.

0.28 The Memorial concludes with Equatorial Guinea's submissions.

7

PART ONE

FACTS RELATING TO THE CASE

9

CHAPTER 1

EQUATORIAL GUINEA: GEOGRAPHY, HISTORY, ECONOMY, CONSTITUTION AND GOVERNMENT

1.1. This chapter gives a brief presentation of Equatorial Guinea: its geography (Section I), its history (Section II), its economy (Section III), its Constitution and the organization of its Government (Section IV), and its relations with France (Section V).

I. Geography and demographics

1.2. Equatorial Guinea is a country in Central Africa with a total surface area of 28,051 km², composed of two parts: the mainland territory, bordered by Gabon and Cameroon, where the economic capital, Bata, is to be found, and the insular region, including in particular the island of Bioko, where the administrative capital, Malabo, is located, and the island of Annobon.

1.3. Equatorial Guinea has an estimated population of 800,000 inhabitants, 80 per cent of whom are from the Fang ethnic group, and 20 per cent from the Bubi and Benga ethnic groups. Its official languages are Spanish, French and Portuguese. The population is 90 per cent Roman Catholic.

II. History

(a) The colonial period

1.4. In the fifteenth century, the islands and shores of present-day Equatorial Guinea were incorporated into the Portuguese territory of São Tomé. In 1778, Portugal, which had confined its activities to establishing a slave trading post on Annobon, ceded the islands of Annobon and Fernando Po (Bioko), together with part of the coast, to Spain in the Treaty of El Pardo.

1.5. That same year, the Spanish attempted to settle on Bioko and part of the coast, only to withdraw three years later. In 1827, the British, who were occupying the port of Santa Isabel
10 (Malabo), set up a Royal Navy base there as part of their campaign against the slave trade in the Gulf of Guinea, and settled a large number of freed slaves on Bioko. In 1843, the British transferred their anti-slave-trade naval base to Sierra Leone and the very next year the Spanish reclaimed the island, with the first Spanish governor taking control of the colony in 1858. Until 1898, however, the island served only as a place of deportation for political prisoners from Cuba. It was not until Spain lost its colonies in America and South-East Asia that it began to take an interest in the island's economic potential.

1.6. In 1885, Spain decreed a protectorate over the region. Spain's interests were recognized by France in 1900 and, two years later, bilateral agreements fixed the boundaries of Spain's possessions in Equatorial Africa (Rio Muni, Fernando Po, Elobey, Annobon and Corisco) which, when united in 1909, formed the colony of Spanish Guinea.

1.7. In the 1920s, the Spanish succeeded in completely subjugating the Fang people of the country's interior. Most of the land and people were entrusted to Catholic missionary societies, which developed cocoa plantations and then went on to exploit the timber of the equatorial forest.

1.8. In the face of rising nationalist demands in the 1950s, Spain was forced to change its colonial policy and, in 1959, incorporated the colony into its national territory under the name of the Equatorial Region, forming the two Spanish provinces of Rio Muni and Fernando Po, which were represented in the Madrid parliament. In 1963, the two provinces became self-governing and were known as Spanish Guinea. In 1964, a local government composed of moderate nationalists was given the task of administering the country. In 1968, faced with radical movements which sought to maintain the unity of the country, Spain decided to withdraw completely from the region and, following negotiations, a unitary constitution was approved and elections organized, which saw the defeat of the moderate nationalists.

(b) Independence

1.9. On 12 October 1968, Spanish Guinea gained independence and took the name Equatorial Guinea. Francisco Macias Nguema became the country's first president. In 1970, he
11 established a single-party régime and imposed a reign of terror such that around one third of the population was forced to flee the country.

1.10. On 3 August 1979, Colonel Teodoro Obiang Nguema Mbasogo overthrew Francisco Macias Nguema and became the new Head of State. In 1991, his political party (the Democratic Party of Equatorial Guinea, PDGE) introduced a multi-party system, which was given legal effect in 1992. He decreed a political amnesty, which enabled many dissidents to return to the country.

1.11. Equatorial Guinea has been a member of the United Nations since 12 November 1968. It is also a member of the African Union (AU), of which its Head of State was Chairperson in 2011, the Organisation internationale de la francophonie (OIF) and the Central African Economic and Monetary Community (CEMAC), whose parliament is based in Malabo. It is, in addition, a member of the Economic Community of Central African States (ECCAS), which includes Angola, Burundi, the Democratic Republic of the Congo, and São Tomé and Príncipe, as well as the member States of CEMAC.

1.12. Equatorial Guinea is party to numerous international instruments, including the 1981 African Charter on Human and Peoples' Rights, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1.13. A constant feature of Equatorial Guinea's foreign policy is the pursuit of good neighbourly relations with the countries of the sub-region, as demonstrated by the country's membership of a range of organizations. Since 1983, it has been part of the franc zone and thus shares the same currency — the CFA franc — with Cameroon, Gabon, Congo-Brazzaville, the Central African Republic and Chad.

1.14. The maritime areas under Equatorial Guinea's jurisdiction are ten times the size of its land territory. Equatorial Guinea fights tirelessly against maritime insecurity in the Gulf of Guinea.
12 Its President initiated the co-operation policy between the countries of the "delta region" — Cameroon, Gabon, São Tomé and Príncipe, and Equatorial Guinea — which has led to joint patrols.

III. Economy

1.15. Since the discovery of oil in 1996, Equatorial Guinea's economy has been focused entirely on exploiting hydrocarbons, which account for 99 per cent of the country's exports and 88 per cent of its GDP, which has increased tenfold over the last decade. Crude oil production is estimated at 400,000 barrels a day, making Equatorial Guinea the third largest oil producer in sub-Saharan Africa after Nigeria and Angola. As well as oil, Equatorial Guinea produces methanol and liquefied gas.

1.16. Construction and public works is the second largest sector of the economy. Activity in this sector is largely supported by substantial public investment in infrastructure.

1.17. The Government has launched a programme to diversify sources of growth by 2020, based on developing energy (the refining and hydroelectric industries), fishing, agriculture, tourism and financial services.

1.18. According to the International Monetary Fund (IMF), Equatorial Guinea's economy grew by 7.8 per cent in 2011 and by 5.3 per cent in 2012, before experiencing a severe recession in 2013 (-7.6 per cent) and 2015 (-10.1 per cent), as a result of the fall in oil prices and the drop in hydrocarbon production.

1.19. Equatorial Guinea is nonetheless classified by the World Bank as an upper-middle-income country on account of its GDP per capita, which was US$20,581.61 in 2013.

IV. Constitution and government

1.20. Following the presidential elections of 29 November 2009 — which all the observers (AU, ECCAS, OIF and the United Nations) judged to have been peaceful and transparent and to have allowed the opposition freedom of expression and which resulted in the re-election of President Teodoro Obiang Nguema Mbasogo — a significant reform of the Constitution was approved by referendum on 13 November 201[1] with 97.73 per cent of the vote.

13

1.21. Equatorial Guinea is a presidential republic. The first Constitution of Equatorial Guinea was adopted in 1968 and a second in 1973. The country's first democratic Constitution was adopted in 1982 and subsequently amended in 2009 and 2012. The new text of the Constitution, which was promulgated on 16 February 2012, provides, *inter alia*, for the establishment of new institutions, including the post of Vice-President of the Republic, the Senate, the Chamber of Deputies, the Defender of the People, the Accounts' Tribunal, the Constitutional Tribunal, the Council of the Republic, and the National Council for Economic and Social Development.

1.22. The Constitution of 16 February 2012, entitled the Basic Law of Equatorial Guinea, declares the following fundamental principles:

> "Equatorial Guinea is a sovereign, independent, republican, social and democratic State, in which the supreme values are unity, peace, justice, freedom and equality.

Political pluralism is recognized."[12]

"The State defends the sovereignty of the Nation, strengthens its unity and ensures respect of [the] fundamental rights of man and the promotion of the economic, social and cultural progress of its citizens."[13]

"The Equatoguinean State abides [by] the principles of International Law and reaffirms its attachment to the rights and obligations that arise from the Organizations and International Organizations [of] which it is a member."[14]

1.23. The Second Title, which is devoted to the "Powers and Organs of the State", states that: "The State exercises its sovereignty through the following powers: the Executive Power, the Legislative Power, and the Judicial Power"[15]. Chapter II, on the President of the Republic, sets out the prerogatives of the President of the Republic and provides that: "The President of the Republic is assisted by a Vice-President of the Republic, to whom he may delegate some of his Constitutional [powers][16]"; and that: "In the event of vacancy in power for the reasons [of resignation, expiry of the mandate, permanent physical or mental incapacity, or death], the Vice-President of the Republic assumes the functions of the President of the Republic"[17].

1.24. Chapter III on the Council of Ministers states that:

"The members of Government, together with the President of the Republic and Chief of Government, are:

(a) The Vice-President of the Republic

(b) The Prime Minister

(c) The Vice Prime Ministers

(d) The Ministers of State

(e) The Ministers

(f) The Delegated Ministers

(g) The Vice-Ministers

(h) The Secretaries of State".

V. Relations with France

1.25. Equatorial Guinea's bilateral relations with France have grown stronger, particularly in economic terms, making France a major partner. The French community in Equatorial Guinea has

---

[12]Basic Law of Equatorial Guinea (Ann. 1.), Art. 1.

[13]*Ibid.,* Art. 7.

[14]*Ibid.,* Art. 8.

[15]*Ibid.,* Art. 31.

[16]*Ibid.,* Art. 33, para. 3.

[17]*Ibid.,* Art. 45.

doubled, and in 2012 stood at 614 residents. France is Equatorial Guinea's fifth largest supplier behind Nigeria, China, Spain and the United States, and has seen its exports to the country increase by around 150 per cent since 2010. Exports from Equatorial Guinea to France, consisting almost exclusively of hydrocarbons, were worth in excess of €1.2 billion in the first nine months of 2012.

1.26. French companies have established themselves in the country and are active in most sectors of the economy: telecommunications, petroleum products distribution, oil-related activities, automobile distribution, hospitality, banking, air transport, etc.

1.27. The bilateral co-operation enjoyed by the two countries, which is based on a co-funding approach with 80 per cent of project costs being covered by the State of Equatorial Guinea, is innovative for Africa. Major contracts signed with French groups in the construction and public works sector attest to the success of this model: €1 billion in 2009; €500 million in 2010; and
15 €375 million in 2011.

1.28. It should be noted that Equatorial Guinea and France are bound by an Agreement on the mutual promotion and protection of investments, which was signed on 3 March 1982.

1.29. A distinctive feature of bilateral cultural co-operation is that it is almost 80 per cent funded by the State of Equatorial Guinea. To promote the use of French and the dissemination of French culture, the State of Equatorial Guinea has funded the construction of an Institut culturel d'expression française in Malabo, and another in Bata. It has also funded the establishment of a French school in Bata, "Le Concorde de Malabo", which is run by the Mission laïque française.

1.30. France, for its part, through its embassy in Malabo, offers a programme of student grants, traineeships for professors, teachers, researchers and senior staff in the Equatorial Guinean administration, and a social development fund, which provides funding for micro-projects.

1.31. Equatorial Guinea and France enjoy fruitful co-operation in the fields of security and defence. For example, France organizes training and restructuring programmes for the Equatorial Guinean police force and training for officers in the Equatorial Guinean army, in regional schools which are funded by Equatorial Guinea and managed by France.

1.32. In conclusion, Equatorial Guinea and France maintain strong co-operative relations, which are peaceful, friendly, trusting and mutually beneficial, such that Equatorial Guinea could hardly have foreseen the criminal proceedings and other unfriendly actions taken against its Vice-President and the premises of its diplomatic mission in France.

17

CHAPTER 2

OFFICIAL FUNCTIONS OF MR. TEODORO NGUEMA OBIANG MANGUE AND THE STATUS OF THE BUILDING LOCATED AT 42 AVENUE FOCH IN PARIS

2.1. This chapter deals with two factual issues which lie at the heart of the present proceedings: the official positions held by Mr. Teodoro Nguema Obiang Mangue, who is currently the Vice-President of Equatorial Guinea in charge of National Defence and State Security (Section I); and the status of the building located at 42 avenue Foch in Paris (Section II).

I. Mr. Teodoro Nguema Obiang Mangue, Vice-President of the Republic in charge of National Defence and State Security

2.2. From 1997 to 20 May 2012, Mr. Teodoro Nguema Obiang Mangue served as Minister for Agriculture and Forestry of Equatorial Guinea. On 21 May 2012 he was appointed Second Vice-President of the Republic in charge of Defence and State Security[18].

2.3. The appointment of Mr. Teodoro Nguema Obiang Mangue as Second Vice-President of the Republic in charge of Defence and State Security was announced as part of a broader government reshuffle, following changes to the Basic Law of Equatorial Guinea as approved by a national referendum on 13 November 2011. This constitutional reform provides for the creation of several government institutions through which the State performs its functions. These include the Vice-President of the Republic, the Senate, the Chamber of Deputies, a Council of Ministers, an Accounts' Tribunal, and a National Council for Economic and Social Development[19]. The day Mr. Teodoro Nguema Obiang Mangue was appointed Second Vice-President in charge of Defence and State Security, several other appointments were announced, including: the Prime Minister (in charge of administrative co-ordination), Mr. Vicente Ehate; the Vice-Prime Minister, Mr. Clemente Engonga Nguema Onguene; and the First Vice-President, Mr. Ignacio Milam Tang[20].

18

2.4. Under the Basic Law of Equatorial Guinea, the President of the Republic, who is the Head of State and exercises the executive powers of a Head of Government, is assisted by a Vice-President, to whom he may delegate some of his constitutional powers[21]. The appointment of the Vice-President by the President is ratified by both chambers of Parliament in plenum during an extraordinary session convened for that purpose[22]. If the President resigns, dies or becomes permanently physically or mentally incapable of exercising his functions, the Vice-President assumes his role[23]. The Vice-President is also a member of the Council of Ministers (along with the Prime Minister and other members of the Government), over which the President of the Republic presides[24]. After the Head of State, the Vice-President takes precedence over all other members of the executive, and supervises and monitors their actions.

---

[18] See Decree No. 64/2012, 21 May 2012 (Ann. 3).

[19] Basic Law of Equatorial Guinea (Ann. 1), Art. 32 (1). See also Chap. 1, paras. 1.23-1.24, above.

[20] See, respectively, Decrees Nos. 67/2012, 66/2012, 65/2012 and 63/2012, 21 May 2012 (Ann. 4).

[21] Basic Law of Equatorial Guinea (Ann. 1), Art. 33, paras. 1 and 3.

[22] *Ibid.,* Art. 33, para. 4.

[23] *Ibid.,* Art. 45, para. 2.

[24] *Ibid.,* Art. 46.

2.5. As the holder of the high-ranking office of Second Vice-President in charge of Defence and State Security, Mr. Teodoro Nguema Obiang Mangue had control and was head of the armed forces, police and immigration authorities in Equatorial Guinea. In practice, he ranked above the responsible ministers, who reported to him. He "represent[ed] the State of Equatorial Guinea and [had] the capacity to act on behalf of the State before other States and international organizations in respect of matters falling under the sectors of which he [was] in charge"[25].

2.6. As we shall see in Chapter 7, the function and powers of Mr. Teodoro Nguema Obiang Mangue, Second Vice-President in charge of Defence and State Security, were in fact to a large extent similar to some of those exercised by Heads of State, Heads of Government and Ministers for Foreign Affairs. In occupying that post, he acted as the representative of Equatorial Guinea in international negotiations and intergovernmental meetings; he was in charge of high-level diplomatic activities; he constantly communicated with representatives of other States; he frequently travelled abroad for such purposes; he exercised authority over the Minister for Foreign Affairs and the Minister for Defence, instructing them in the conduct of Equatorial Guinea's international relations; and he was recognized, solely by virtue of his office, as a representative of the State.

19

2.7. On 21 June 2016, following the presidential elections held in April of that same year, Mr. Teodoro Nguema Obiang Mangue was appointed (sole) Vice-President of Equatorial Guinea in charge of National Defence and State Security[26]. He took up his post the following day, 22 June 2016, after swearing an oath of office. In accordance with the procedure laid down in the Constitution, the appointment was ratified on 5 August 2016 by both chambers of Parliament in plenum, with 118 votes in favour, two against and no abstentions[27].

2.8. As will also be demonstrated in Chapter 7, as Vice-President of Equatorial Guinea in charge of National Defence and State Security, Mr. Teodoro Nguema Obiang Mangue continues to hold a high-ranking post, with responsibilities similar to some of those held by Heads of State, Heads of Government and Ministers for Foreign Affairs. He continues to exercise authority over matters which are fundamental to the sovereignty of Equatorial Guinea, and to that end represents Equatorial Guinea at international level. In that capacity, and under international law, he enjoys immunity *ratione personae*, which is reserved for a small circle of holders of high-ranking office in a State.

II. The building located at 42 avenue Foch in Paris

2.9. The dispute between Equatorial Guinea and France regarding the building located at 42 avenue Foch in Paris concerns whether that building enjoys immunity, both as premises of the diplomatic mission of Equatorial Guinea and as the property of that State, under international law and the Vienna Convention on Diplomatic Relations. In order to define the terms of the dispute between the two Parties on this specific point, it is appropriate to provide a brief description of the building (A), explain Equatorial Guinea's right of ownership of that property (B) and show that it is used for government non-commercial purposes (C), justifying the inviolability claimed by Equatorial Guinea.

20

[25]Institutional Declaration by the President of the Republic of Equatorial Guinea, 21 Oct. 2015 (Ann. 5).

[26]See Presidential Decree No. 55/2016, 21 June 2016 (Ann. 6).

[27]The ceremony took place at the Convention Centre, and was presided over by the President of the Senate, accompanied by his counterpart from the National Assembly (information available at www.guineaecuatorialpress.com/noticia.php?id=8336).

A. Description of the building located at 42 avenue Foch in Paris

2.10. A description of the building located at 42 avenue Foch in Paris can be found in the French proceedings initiated against the Vice-President of Equatorial Guinea. It was recorded as part of the investigations by the judicial and police authorities at the *Direction générale des finances publiques* (the French tax authorities) in 2011 and 2012. The referral order of 5 September 2016 describes the building as follows:

> "[T]he property [is] used for residential purposes, [was] built in 1890, and comprise[s] two main buildings with five upper floors plus a sixth floor with a mansard roof, as well as a building at the back of the plot, comprising garages at ground floor level, with accommodation above. The upper floors of the property form a triplex from the first to the third floors, with spacious volumes, and exceptional fixtures and fittings. They contain some 20 rooms, including four large living or dining areas, one master bedroom of approximately 100 m^2 with an impressive en-suite bathroom, a gym, a hammam, a discotheque with a movie screen, a bar, [. . .] a hair salon, two professional kitchens and several bedrooms with bathrooms.
>
> The fittings and decoration are described as ostentatious (large wooden windows, hardwood floors, fireplaces, marble, mirrors, gold-plated taps, coral and a very large glass or hardwood table). The triplex has its own lift, a staircase with an entrance hall, and marble hallways. Between the ground floor and the entresol, a duplex has been created, along with a games room and a home theatre. The fourth and fifth floors contain classical apartments, and the sixth floor contains staff quarters, some of which have been renovated. The building at the back of the plot contains six garages opening onto a courtyard.
>
> The total surface area recorded in the land registry documents is 2,835 m^2. The building is described as being in an excellent location in the northern part of the 16th arrondissement, in the Chaillot neighbourhood, close to Place Charles de Gaulle. Considering the surface area of the triplex (approximately 1,900 m^2) and its sumptuous interior fixtures and fittings, the property was considered to be highly exceptional."[28]

21 2.11. Leaving aside the deliberate use of superlatives by the French judicial authorities to describe it, the building was chosen by Equatorial Guinea because both its location and design made it suitable premises for a diplomatic mission.

B. Equatorial Guinea's acquisition of the right of ownership of the building located at 42 avenue Foch

2.12. Equatorial Guinea has already explained the circumstances in which it acquired ownership of the building in its reply to the question put by Judge Bennouna during the hearings on the request for the indication of provisional measures[29]. In this section it will show that Equatorial Guinea became the owner of the building at 42 avenue Foch on 15 September 2011 by acquiring shareholder rights in the five Swiss companies which co-owned it.

---

[28]Paris *Tribunal de grande instance,* Order for partial dismissal and partial referral of proceedings to the *Tribunal correctionnel*, 5 Sept. 2016, p. 13 (Ann. 7). A new order of 2 Dec. 2016 regularized that of 5 Sept. 2016. The regularized order is largely identical to that of 5 Sept. 2016; it simply includes, on p. 35, the articles of the French Penal Code under which the alleged unlawful acts are defined and rendered punishable. It is that new order which is reproduced in Ann. 7 to this Memorial.

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

2.13. In the course of the criminal proceedings in France, from which the present proceedings before the Court arose, both the French judicial authorities and the French Ministry of Foreign Affairs have sought to discredit Equatorial Guinea regarding the manner in which it acquired the building located at 42 avenue Foch in Paris. It cannot be stressed enough that such judgments about the acts of a sovereign State are inappropriate. What is more, France's own position has been far from consistent since the dispute arose. It has allowed its authorities to go to the building at 42 avenue Foch to obtain a visa to enter Equatorial Guinea and, through its tax authorities, it has collected taxes on the transfer between Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangue and the five Swiss companies. At the hearings on the request for provisional measures, through its Agents and counsel, it even acknowledged that it had dispatched a security team to the building on the occasion of the presidential elections held in April 2016 in Equatorial Guinea[30].

22 2.14. In order to clarify matters, it is necessary to recall the various stages in the process that led Equatorial Guinea to acquire the building at 42 avenue Foch.

2.15. On 19 September 1991, the building located at 42 avenue Foch in Paris was acquired by the following Swiss companies: Ganesha Holding SA, GEP Gestion Entreprise Participation SA, RE Entreprise SA, Nordi Shipping & Trading Co Ltd, and Raya Holdings SA[31].

2.16. On 18 December 2004, Mr. Teodoro Nguema Obiang Mangue became the sole shareholder of the five Swiss companies and thus acquired ownership of the building[32]. He entrusted a specialist firm with the management of the companies from 2005 to 2008. The property itself was managed by a company called Foch Services from 2007 to 2011.

2.17. On 15 September 2011, by way of an agreement on the transfer of shares and claims between Mr. Teodoro Nguema Obiang Mangue, transferor, on the one hand, and the Republic of Equatorial Guinea, transferee, represented by Mr. Miguel Edjang Angue, having the power of attorney of the President of the Republic of Equatorial Guinea dated 4 September 2011, on the other, Equatorial Guinea acquired the shares of the five Swiss companies which co-own the building located at 42 avenue Foch in Paris, for a purchase price of thirty-four million euros (€34,000,000)[33]. At no point has that transaction been called into question.

2.18. As the sole shareholder of these five Swiss companies, Equatorial Guinea became the owner of the building located at 42 avenue Foch in Paris on 15 September 2011.

2.19. It is to be noted that this transfer of shareholder rights constituted grounds for the amendment of the articles of association of the five companies, as a result of the conversion of

---

[30]CR 2016/15, 18 Oct. 2016, pp. 38-39, para. 25 (Ascensio).

[31]Paris *Tribunal de grande instance,* Order for partial dismissal and partial referral of proceedings to the *Tribunal correctionnel*, 5 Sept. 2016 (Ann. 7), p. 14.

[32]*Ibid.*, p. 15.

[33]Share and claims transfer agreement, signed 15 Sept. 2011 (Ann. 1 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016).

bearer shares into registered shares, in accordance with the minutes established on 19 September 2011 for each of the companies by Mr. Richard Rodriguez, a notary in Geneva[34].

23 2.20. On 19 September 2011, the amendment of the articles of association relating to the conversion of bearer shares into registered shares was duly recorded, for each of the five companies, in the Commercial Register of the Canton of Fribourg[35]. On the same day, the chairman of each of the five companies issued a share certificate to Equatorial Guinea stating that "[t]he Republic of Equatorial Guinea is listed in the share register of the company as the owner of these shares"[36].

2.21. On 17 October 2011, the transfer to Equatorial Guinea, as sole shareholder, of the shareholder rights in the five companies was officially recorded and registered in France by the main non-residents department of the French tax authority in Noisy-le-Grand, on a form entitled "Uncertificated transfer of shareholder rights subject to mandatory declaration".

2.22. This form, registered by Equatorial Guinea with the French tax authorities, states that Mr. Teodoro Nguema Obiang Mangue is the transferor of the shareholder rights and that the Republic of Equatorial Guinea is the transferee. It also cites, under the heading "form and name of the company", the five Swiss companies mentioned above, and, under the heading "seat of the company", the Canton of Fribourg in Switzerland. Finally, the heading "nature of the assets represented by the transferred shareholder rights" indicates "real estate".

24 2.23. The tax due in relation to this transfer of shareholder rights, estimated by the French tax authorities at three hundred and seventeen thousand, six hundred and seventy-two euros

---

[34]Minutes of the extraordinary general meetings dated 19 Sept. 2011 (Ann. 2 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016).

[35]Certified copies of entries in the Commercial Register of the Canton of Fribourg, dated 23 Sept. and 5 Oct. 2011 (Ann. 3 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016). Current entries for each of the companies are available online at the following links: GEP Gestion, Entreprise, Participation SA (https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcId13=CH-660-0474984-1&ofrcLanguage=2); Nordi Shipping & Trading Co. Ltd (https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcId13=CH-660-1390995-0&ofrcLanguage=2); RE Entreprise SA (https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcId13=CH-217-01355826&ofrcLanguage=2); Raya Holdings SA (https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcId13=CH-660-0956993-5&ofrcLanguage=2); Ganesha Holding SA (https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcId13=CH-217-0135878-7&ofrcLanguage=2).

[36]Share certificates dated 19 Sept. 2011 (Ann. 4 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016). Art. 686 of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 Mar. 1911 (status as of 1 Jan. 2016), concerning the share register, provides as follows:

> "1. The company keeps a share register of registered shares in which the names and addresses of the owners and usufructuaries are recorded. It must be kept in such a manner that it can be accessed at any time in Switzerland.
>
> 2. Entry in the share register requires documentary proof that the share was acquired for ownership or of the reasons for the usufruct thereof.
>
> 3. The company must certify such entry on the share certificate.
>
> 4. In relation to the company the shareholder or usufructuary is the person entered in the share register." *[Translation from the website of the Federal Council of the Swiss Confederation]*.

(€317,672), was paid in full by Equatorial Guinea[37]. The competent French authorities accepted the payment without demur.

2.24. The capital gains on the transfer of the shareholder rights, estimated at one million, one hundred and forty-five thousand, seven hundred and forty euros (€1,145,740) on a form entitled "Declaration of capital gains on the transfer of movable assets or shares in companies investing primarily in real property", was also paid in full by Equatorial Guinea to the French tax authorities.

2.25. The capital gains declaration registered by the French tax authorities on 20 October 2011 names the Republic of Equatorial Guinea as the "purchaser" of the securities of the five companies mentioned above[38].

2.26. It was therefore on 15 September 2011, the date of the agreement on the transfer of shares and claims, that Equatorial Guinea became the owner of the building located at 42 avenue Foch in Paris.

2.27. France thus recorded and registered the transfer of shareholder rights to Equatorial Guinea and collected the related taxes. It has never contested Equatorial Guinea's right of ownership of the property at 42 avenue Foch as stated in the deed of transfer.

2.28. Currently, 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, as is the case with all companies investing primarily in real estate whose registration documents do not identify company members[39]. The separate legal personality of the companies
25 does not preclude Equatorial Guinea's right of ownership. As the sole shareholder of those companies, Equatorial Guinea will necessarily be assigned their assets when they are liquidated[40]. As a result of the order of attachment (*saisie pénale*) registered by the Paris *Tribunal de grande instance* at the Land Registration Department of the 8th arrondissement of Paris on 31 July 2012, once the companies have been liquidated it might be legally impossible for Equatorial Guinea to register the building at 42 avenue Foch directly under its name as the owner of the property[41]. As we shall see in Chapter 8, however, that attachment is a violation of international law.

---

[37]Transfer of shareholder rights form registered by the French tax authorities on 17 Oct. 2011 (Ann. 5 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016).

[38]Capital gains declaration registered by the French tax authorities on 20 Oct. 2011 (Ann. 6 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016).

[39]Request for information from the Land Registration Department No. 2015H9665, dated 10 June 2015, p. 163 (Ann. 7 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016).

[40]The company Ganesha Holding SA is already in liquidation (see https://appls.fr.ch/hrcmatic/hrcintapp/externalCompanyReport.action?companyOfrcId13=CH-217-0135878-7&ofrcLanguage=2).

[41]Request for information from the Land Registration Department No. 2015H9665, dated 10 June 2015, p. 162, which refers to the attachment order of 31 July 2012 (Ann. 7 to the replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016).

C. Assignment of the building located at 42 avenue Foch in Paris as the premises of the diplomatic mission of Equatorial Guinea

2.29. The French judicial authorities, as well as the French Ministry of Foreign Affairs, have assumed that the building located at 42 avenue Foch is the property of Mr. Teodoro Nguema Obiang Mangue. As we have just demonstrated, this ignores both the subsequent transfer of rights between the Mr. Teodoro Nguema Obiang Mangue's companies and Equatorial Guinea and, as we shall see, the fact that the property is used in such a way that it enjoys protection under international law.

2.30. As Equatorial Guinea explained in its reply to the question put by Judge Donoghue during the hearings on the request for provisional measures, the building at 42 avenue Foch acquired diplomatic status as of 4 October 2011[42]. The diplomatic mission of Equatorial Guinea in France transferred all its offices there in July 2012, after allowing due time to prepare for that move. Thus, the building at 42 avenue Foch in Paris, which has a prominent plaque at its entrance that reads "Ambassade de la Guinée équatoriale" (Embassy of Equatorial Guinea) and the national emblem of Equatorial Guinea on its façade, serves as the premises of that country's diplomatic mission. It comprises the following offices:

26

— the private office of the Ambassador of Equatorial Guinea to France;

— the office of the military attaché and his secretary;

— the office of the first secretary;

— the office of the second secretary;

— the office of the economic adviser;

— the consular section; and

— the administrative section.

2.31. As the premises of the diplomatic mission of Equatorial Guinea, the building located at 42 avenue Foch therefore enjoys inviolability, both under the Vienna Convention on Diplomatic Relations and by virtue of the international custom protecting the property of a foreign State which is used or is intended to be used for government non-commercial purposes.

[42]Embassy of Equatorial Guinea, Note Verbale No. 365/11, 4 Oct. 2011 (Ann. 33).

27

CHAPTER 3

THE FRENCH PROCEEDINGS AGAINST THE VICE-PRESIDENT OF EQUATORIAL GUINEA AND THE BUILDING LOCATED AT 42 AVENUE FOCH IN PARIS

I. Origin of the criminal proceedings

3.1. The dispute between Equatorial Guinea and France arose from certain criminal proceedings initiated in France against Mr. Teodoro Nguema Obiang Mangue, Vice-President of Equatorial Guinea in charge of National Defence and State Security. In these proceedings, the French courts have seen fit to ignore a number of acts and decisions falling within the sole sovereignty and exclusive purview of Equatorial Guinea, extend their criminal jurisdiction to its territory, deny immunity from foreign criminal jurisdiction to the Vice-President in charge of National Defence and State Security, and disregard the legal status of the building located at 42 avenue Foch in Paris, both as the property of the State of Equatorial Guinea and as premises of its diplomatic mission in France.

3.2. For practical purposes, a timeline is included at the end of this Memorial, setting out the main steps in the criminal proceedings in France and the diplomatic exchanges most relevant to this case[43].

A. Overview of criminal proceedings in France and the rules governing the jurisdiction of French criminal courts in respect of money laundering

1. The conduct of criminal proceedings in France

3.3. First, it is important to explain to the Court how French criminal proceedings are conducted. As recalled by the Agent of France in the case concerning *Certain Criminal Proceedings in France*[44], French criminal proceedings comprise three stages. The first stage, the judicial police investigation (*enquête de police judiciaire*), also called the preliminary investigation (*enquête préliminaire*), is carried out by judicial police officers under the direction of the Public Prosecutor with a view to determining whether the facts in question warrant being referred to an investigating judge, an independent judicial officer whose task is to carry out a detailed investigation into the facts.

28

3.4. The second stage of proceedings, the preparatory investigation (*instruction préparatoire*), is under the authority of one or more investigating judges, depending on the complexity of the case. The investigating judge is seised by the Public Prosecutor by means of an instrument referred to as an "application to open an investigation" (*réquisitoire introductif*), which limits the investigating judge's jurisdiction to the facts cited therein. The investigating judge may nonetheless undertake any step he deems useful for the discovery of the truth and may, to that end, turn his attention to any person linked to the facts he is tasked with investigating. As we shall see, the investigating judge may hear witnesses, carry out searches and seizures, and issue a warrant for immediate appearance, or, as we shall also see, an arrest warrant.

---

[43] See pp. 125-133 below.

[44] CR 2003/21, 28 Apr. 2003, p. 7, para. 18.

3.5. To complete the preparatory investigation, the investigating judge may place under judicial examination (*mise en examen*, formerly known as *inculpation*) any persons against whom, according to the French Code of Criminal Procedure, "there is strong or concordant evidence making it probable that they may have taken part, as a perpetrator or accomplice, in the commission of the offences of which he has been seised"[45].

3.6. As the Agent of France recalled, it is important to note that placement under judicial examination can be defined "as the act by which the judge notifies an individual that he is officially the subject of a prosecution by reason of the evidence of guilt which exists against him"[46].

3.7. The third stage, the trial (*jugement*), begins when, upon completion of his investigation, the investigating judge considers that there is sufficient evidence against the person placed under judicial examination to justify his appearance before the trial court. Where the acts in question are characterized as offences, the trial court is seised by the investigating judge through an instrument known as a "referral order" (*ordonnance de renvoi*), since its purpose is to refer the person placed under judicial examination to be tried before the trial court.

29 **2. Rules governing the jurisdiction of French courts in respect of money laundering**

3.8. Before considering the question of the jurisdiction of French courts to punish the offence of money laundering, it is appropriate to recall the rules which govern the territorial jurisdiction of the French criminal courts.

3.9. As the Agent of France recalled in the aforementioned case, the jurisdiction of French criminal courts is "always subject to the verification of a link with France whose operation is circumscribed by conditions strictly laid down by law"[47].

3.10. First, since the territorial principle is dominant in French criminal law, French criminal courts have jurisdiction to try offences punished by French law when such offences are committed in French territory. An offence is also deemed to have been committed in French territory if one of its constituent elements took place there.

3.11. Second, with regard to offences committed outside French territory, French criminal courts have jurisdiction based on French nationality: when the perpetrator of an offence is a French national, the French criminal courts have "active" personal jurisdiction; when the victim is a French national, they have "passive" personal jurisdiction.

3.12. The personal jurisdiction of French criminal courts is subject to legal conditions, in that, except for felonies committed by a French national outside national territory, which give rise to the active personal jurisdiction of the French courts, as regards misdemeanours, that is, less serious offences, which are committed abroad, the French courts cannot exercise such personal jurisdiction unless the acts are also punishable under the law of the State in which they were perpetrated. And when the victim is a French national, French law only applies and the French

---

[45]French Code of Criminal Procedure, Art. 80-1. *[Translation by the Registry.]*

[46]CR 2003/21, 28 Apr. 2003, p. 10, para. 27.

[47]CR 2003/21, 28 Apr. 2003, p. 4, para. 10.

courts only have jurisdiction over felonies and misdemeanours committed abroad which are punishable by imprisonment[48].

30 3.13. Third, the initiation of criminal proceedings for misdemeanours before the French courts by virtue of personal jurisdiction, in respect of acts committed abroad, falls within the exclusive remit of the Public Prosecutor, who, under French law, is entrusted with defending public order, and not the victims themselves[49].

3.14. As regards the French courts' jurisdiction in respect of money laundering, the criteria established by the French *Cour de cassation* should be noted. Article 324-1 of the French Penal Code defines money laundering as:

> "the act of facilitating, by any means, the false justification of the source of the assets or income of the perpetrator of a felony or misdemeanour which has profited the perpetrator directly or indirectly. Money laundering also comprises the act of assisting in investing, concealing or converting the direct or indirect proceeds of a felony or misdemeanour." *[Translation by the Registry*.]

3.15. In sum, money laundering is what is known as a "derivative" offence, in that it presupposes that it has been established that the assets or income used were obtained through the commission of a previous offence (felony or misdemeanour), the "original offence", from which the act of money laundering, we repeat, merely derives.

3.16. According to the jurisprudence of the *Cour de cassation*, in order to exercise jurisdiction in respect of money laundering, the criminal courts must "identify precisely the constituent elements of the predicate crime or offence that has profited the perpetrator directly or indirectly"[50]. In a case concerning the laundering of the proceeds of corruption which had taken place abroad, the *Cour de cassation* found that "such acts constitute the punishable offence of corruption on the part of a person in a position of public authority. . . , the texts defining the offence of money laundering require neither that the offence which enabled the acquisition of the laundered sums should have taken place on national territory nor that the French courts should have jurisdiction to prosecute it"[51].

3.17. For the *Cour de cassation*, money laundering is thus an autonomous offence, and the French courts have jurisdiction over acts of money laundering committed in French territory, even
31 if the predicate offence was not committed in France and the French courts do not have jurisdiction

---

[48]French Penal Code, Art. 113-7.

[49]French Penal Code, Art. 113-8.

[50]*Cour de cassation*, *Chambre criminelle*, judgment of 25 June 2003, Appeal No. 02-86182. *[Translation by the Registry.]*

[51]*Cour de cassation*, *Chambre criminelle*, judgment of 24 Feb. 2010, *Bulletin criminelle* 2010 No. 37. *[Translation by the Registry.]*

over it, but on the condition that the predicate offence is established. Establishment of the predicate offence is equivalent to characterization of the original offences under French law[52].

3.18. In short, under French law, the offence of money laundering legally and necessarily requires the existence of a predicate or original offence, without which money laundering cannot be established.

B. Complaints by NGOs against five African Heads of State

3.19. On 28 March 2007, the French associations Sherpa, Survie and the Fédération des Congolais de la Diaspora filed a complaint with the Paris Public Prosecutor for acts of handling misappropriated public funds against: Omar Bongo, former President of the Republic of Gabon, who died on 8 June 2009; Denis Sassou Nguesso, President of the Republic of the Congo; Blaise Compaoré, former President of the Republic of Burkina Faso; Eduardo Dos Santos, President of the Republic of Angola; Teodoro Obiang Nguema, President of the Republic of Equatorial Guinea; and several members of their families.

3.20. On 12 November 2007, the complaint was dismissed by the Paris Public Prosecutor on the grounds that the offence was not sufficiently established.

3.21. On 9 July 2008, a second complaint was filed with the Paris Public Prosecutor by the French association Transparency International France and certain Franco-Congolese and Gabonese nationals.

3.22. On 3 September 2008, that complaint, which was against the same people and alleged the same wrongful acts as the complaint of 28 March 2007, was also dismissed by the Paris Public Prosecutor on the grounds that the offence was not sufficiently established.

32 3.23. On 2 December 2008, on the basis of the same facts, concerning only the Presidents of the Republic of Gabon, the Republic of the Congo and the Republic of Equatorial Guinea, and certain members of their families, including Mr. Teodoro Nguema Obiang Mangue, the association Transparency International France and a Gabonese national filed a complaint with civil-party application before the senior investigating judge of the Paris *Tribunal de grande instance*.

C. The initial position of the Paris Public Prosecutor regarding the lack of jurisdiction of French law and the French courts

3.24. On 8 April 2009, in response to a request for an opinion from the senior investigating judge, the Paris Public Prosecutor submitted that the complaint with civil-party application filed by Transparency International France on 2 December 2008 was inadmissible.

---

[52]In this regard see the referral order of 5 Sept. 2016 (Ann. 7), p. 32 ("The characterization of the initial offences must be undertaken under French law, once again because of the autonomy of the offence of money laundering. In other words, the original act committed abroad must be characterized as if it had been committed on the territory of the [French] Republic. Consequently, French law alone is competent to characterize not only the act of money laundering, but also the initial offence").

3.25. On 5 May 2009, the senior investigating judge issued an order in which he found Transparency International France's civil-party application admissible.

3.26. On 29 October 2009, ruling on the Public Prosecutor's appeal against the senior investigating judge's order on admissibility, the *Chambre de l'instruction* of the Paris *Cour d'appel* overturned the order of the senior investigating judge and declared Transparency International France's civil-party application inadmissible, on the grounds that the French association had not provided any supporting evidence permitting a finding that the alleged material harm might exist. The *Cour d'appel* also found that the only harm that Transparency International France could claim as a result of the perpetration of the offences in question, against which it sought to campaign, was not personal harm as opposed to detriment caused to the general interests of society, which is redressed by means of criminal prosecution by the Public Prosecutor's Office.

3.27. On 9 November 2010, ruling on the appeal lodged by Transparency International France, the *Cour de cassation* quashed the judgment of 29 October 2009 by the Paris *Cour d'appel* without referring it back, and ordered the case to be returned to the investigating judge of the Paris *Tribunal de grande instance* so that he could continue the investigation.

33 3.28. In its aforementioned judgment, the *Cour de cassation* ruled that Transparency International France's civil-party application was admissible on the grounds that the association could claim harm arising from the offences under investigation, especially the handling and laundering in France of assets paid for out of misappropriated public funds.

3.29. Accordingly, on 1 December 2010, the Paris Public Prosecutor requested that an investigating judge be assigned, and, by an order dated the same day, two investigating judges were assigned to conduct investigations into the acts cited in Transparency International France's complaint which were characterized as the misappropriation of foreign public funds.

3.30. On 4 July 2011, acting in the framework of the investigation that had been opened, the Public Prosecutor transmitted to the investigating judges an application for recharacterization, in which he expressed his opposition to an investigation into the case on legal grounds, stating:

> "Whereas the acts, as described by the complainant, relate to the acquisition and possession in France of movable and immovable property, which may have been paid for with monies derived from the misappropriation of foreign public funds, namely those of the States of Gabon, the Congo and Equatorial Guinea;
>
> Whereas the characterization of misappropriation of public funds as provided for in Article 432-15 of the Penal Code is applicable only to the misappropriation of French public funds, committed by persons in a position of public authority in France;
>
> Whereas these proceedings, assuming the facts to be established, concern the misappropriation of foreign public funds of Gabon, the Congo and Equatorial Guinea, committed by foreign authorities of Gabon, the Congo and Equatorial Guinea;
>
> Whereas the Article 432-15 offence is therefore inapplicable, and likewise the characterizations of complicity in and concealment of that offence . . ."[53]

---

[53] Paris *Tribunal de grande instance*, Public Prosecutor's Office, Application for characterization, 4 July 2011 (Ann. 8).

3.31. It should further be noted that the *Cour de cassation*'s judgment of 9 November 2010 addressed only the matter referred to it, that is, the civil-party application of Transparency International France. The *Cour de cassation* was not called upon to rule on the jurisdiction of French law and the French courts over acts — which, according to the report of the Public Prosecutor of Equatorial Guinea, have not been established — allegedly perpetrated in the territory
34 of a foreign State, by foreign nationals, against a foreign State, over which French law and the French courts have no jurisdiction whatsoever.

D. The report of the public prosecutor of Equatorial Guinea on the absence of any original offence committed in the territory of Equatorial Guinea

3.32. On 22 November 2010, the Public Prosecutor of Equatorial Guinea transmitted to the French investigating judges the findings of an inquiry he had conducted in Equatorial Guinea into the same acts, namely the original offences said to have been committed in Equatorial Guinean territory against the State of Equatorial Guinea and companies governed by Equatorial Guinean law.

3.33. In his report dated 22 November 2010, which was not translated into French until 3 February 2012 by one of the investigating judges, the Public Prosecutor of Equatorial Guinea states:

> "As Public Prosecutor of the Republic of Equatorial Guinea, in exercising the powers conferred on that office by the Basic Law of the State to defend the law in force and general interests, and in relation to the acts which are the subject of the complaint filed by the association Transparency International France (TI) et al. . . . I inform you of the following:
>
> FIRST. — Inquiries to date have been unable to determine the existence of any acts having a link or connection with those set forth in the complaint referenced above, which can be characterized as the criminal offence of misappropriation of public funds, which might be subject to prosecution or pending prosecution, having regard to the reports issued by the Ministry of Finance and the Budget.
>
> SECOND. — It has further been ascertained that the logging company SOMAGUI SL has only private shareholders and trades in legal commercial products, it being noted that it is up to date with its tax obligations, such that the State of Equatorial Guinea need not claim any damages arising from the misappropriation of public funds.
>
> Please hereby consider as duly submitted the report previously requested for the purpose of defending the interests of the Republic of Equatorial Guinea in the proceedings instituted in relation to the acts which are the subject of the complaint."[54]

35 3.34. However, notwithstanding that the report of the Public Prosecutor of Equatorial Guinea had found that no original offence had been committed in the territory of Equatorial Guinea against the State of Equatorial Guinea or against legal persons governed by Equatorial Guinean law, and notwithstanding that the Paris Public Prosecutor had objected, on relevant legal grounds, to the extension of the French courts' jurisdiction to the acts alleged by Transparency International France, the French courts saw fit to carry out several measures which violate the rights afforded to Equatorial Guinea under international law.

---

[54]Report of the Public Prosecutor of the Republic of Equatorial Guinea, 22 Nov. 2010 (Ann. 9).

3.35. The French courts do not appear so far to have taken note of the report of the Public Prosecutor of Equatorial Guinea.

II. The measures taken by the French courts against Mr. Teodoro Nguema Obiang Mangue and the building at 42 avenue Foch

A. The international arrest warrant of 13 July 2012 against Mr. Teodoro Nguema Obiang Mangue

3.36. On 22 May 2012, that is, the day after Mr. Teodoro Nguema Obiang Mangue was appointed to the high office of Second Vice-President of the Republic in charge of Defence and State Security, the judge in charge of investigating the complaint by Transparency International France saw fit to send him, through the French Ministry of Foreign Affairs, and mentioning his former function as Minister for Agriculture and Forestry, a summons to attend a first appearance in the French courts on 11 July 2012 for "offences of misuse of corporate assets, misappropriation of public funds, the unlawful taking of interest and breach of trust"[55].

3.37. On 20 June 2012, the Deputy Director of the Protocol Department of the French Ministry of Foreign Affairs replied to the investigating judge that he should amend the summons to reflect the functions now performed by Mr. Teodoro Nguema Obiang Mangue and transmit it in the usual manner[56].

36

3.38. On 25 June 2012, the investigating judge notified the Protocol Department that he would not follow the procedure recommended by the Deputy Director, stating that, in his opinion, "the procedure to be followed remains that provided for in Article 656 of the Code of Criminal Procedure", and repeated his request for the summons to be transmitted to Mr. Teodoro Nguema Obiang Mangue[57].

3.39. Faced with the investigating judge's insistence, on 26 June 2012 the Deputy Director of the Protocol Department informed him that, in light of his reply of 25 June, a Note Verbale had been sent to the Embassy of Equatorial Guinea in France regarding the summons of Mr. Teodoro Nguema Obiang Mangue[58].

3.40. On 9 July 2012, after receiving the Note Verbale from the Deputy Director of the Protocol Department, the Ambassador of Equatorial Guinea in France transmitted a Note Verbale, together with a letter in Spanish from the Minister for Foreign Affairs of Equatorial Guinea, to the French Ministry of Foreign Affairs notifying it that the Government of Equatorial Guinea would not authorize Mr. Teodoro Nguema Obiang Mangue to appear before the French courts, owing to his high office as Second Vice-President in charge of Defence and State Security[59].

---

[55]Summons to attend a first appearance, 22 May 2012 (Ann. 10).

[56]French Ministry of Foreign Affairs, Note Verbale No. 2777/PRO/PID, 20 June 2012 (Ann. 11).

[57]Letter from the investigating judges to the French Ministry of Foreign Affairs, 25 June 2012 (Ann. 12).

[58]French Ministry of Foreign Affairs, Note Verbale No. 2816/PRO/PID, 26 June 2012 (Ann. 13).

[59]Embassy of Equatorial Guinea, Note Verbale No. 472/12, 9 July 2012, accompanied by a letter of 6 July 2012 from the Equatorial Guinean Ministry of Foreign Affairs, International Co-operation and Francophone Affairs (Ann. 14).

3.41. On 10 and 11 July 2012, counsel for Mr. Teodoro Nguema Obiang Mangue and Equatorial Guinea also wrote to the two investigating judges assigned to the case to inform them that it was legally impossible for Mr. Teodoro Nguema Obiang Mangue to comply with the summons to appear before them[60], because of his full immunity from criminal jurisdiction and inviolability as Second Vice-President.

3.42. On 13 July 2012, after making a record of his failure to appear, the investigating judge issued an international arrest warrant against Mr. Teodoro Nguema Obiang Mangue, who was then
37 entered into the wanted persons file with a description of the alleged offences: "misuse of corporate assets, misappropriation of public funds, breach of trust".

3.43. On 13 June 2013, seised of an application for the annulment of the arrest warrant by Mr. Teodoro Nguema Obiang Mangue's counsel, the Paris *Cour d'appel* delivered a judgment in which it declined to cancel the warrant, finding Mr. Teodoro Nguema Obiang Mangue's application inadmissible because he lacked standing[61].

3.44. On 30 August 2013, at the request of Mr. Teodoro Nguema Obiang, and having examined the information provided to it, the Commission for the Control of Files of the International Criminal Police Organization (INTERPOL) notified Mr. Teodoro Nguema Obiang Mangue's counsel that the information concerning him had been deleted from INTERPOL's files[62]. The arrest warrant nevertheless remained in force and was not lifted until after Mr. Teodoro Nguema Obiang Mangue was placed under judicial examination.

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

3.45. On 10 July 2013, noting that the French courts had not made a request for mutual legal assistance in order to determine whether the offences said to have been committed in Equatorial Guinea had actually taken place, and anxious to preserve good bilateral relations between his country, Equatorial Guinea, and France, the President of the Republic of Equatorial Guinea officially invited the French investigating judges to come to Malabo, Equatorial Guinea, on a date convenient to them. The letter of invitation signed by the Minister of State for Missions was received on 15 July 2013 by the French investigating judges, who did not respond[63].

3.46. On 16 September 2013, given that the French investigating judges had disregarded the invitation from the Equatorial Guinean Government and in light of the intense media attention surrounding this case, which has tarnished and continues to tarnish the image of Equatorial Guinea,
38 the President of the Republic of Equatorial Guinea had no choice but to write in person to one of the investigating judges to inform him that he had taken note of the proposed hearing of the Second Vice-President in charge of Defence and State Security, in the context of a letter rogatory

[60]Letters from counsel for Mr. Teodoro Nguema Obiang Mangue and Equatorial Guinea, 10 and 11 July 2012 (Ann. 15).

[61]Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 13 June 2013 (Case No. 2012/08657) (Ann. 16), on the application for the annulment of the arrest warrant.

[62]Letter from INTERPOL, 30 Aug. 2013 (Ann. 17).

[63]Letter from the Minister of State for Missions, 10 July 2013 (Ann. 18).

(subsequently dated 14 November 2013), and that an investigating judge in Equatorial Guinea, Mr. Anatolio Nzang Nguema, was at their disposal to assist them with their investigations[64].

3.47. However, on 18 March 2014, instead of travelling to Equatorial Guinea to conduct their investigation, the French investigating judges decided to arrange for a hearing to be held in Malabo, which they attended from France by videoconference.

3.48. At the hearing, which, in accordance with the terms of the letter rogatory, was held "on the basis of the United Nations Convention against Transnational Organized Crime adopted in New York on 15 November 2000", Mr. Teodoro Nguema Obiang Mangue declined to give any substantive response and informed the investigating judge that:

> "In my capacity as Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security since 21 May 2012, and in accordance with international custom, I enjoy full jurisdictional immunity before foreign civil and criminal courts for the duration of my time in office.
>
> Since the Government of the Republic of Equatorial Guinea has not lifted or waived that immunity, it is impossible for me to respond to questions of any kind".

3.49. Following that brief hearing, the French investigating judge notified Mr. Teodoro Nguema Obiang Mangue that he was being placed under judicial examination for the offences of misappropriation of public funds, misuse of corporate assets, breach of trust, corruption, money laundering, handling offences and complicity[65]. On 19 March 2014, the arrest warrant was lifted by the French courts.

3.50. Since then, all of Mr. Teodoro Nguema Obiang Mangue's assets that had been attached were sold by the French courts at public auction on 8 July 2013, and the proceeds of the sale, over €7,400,000, currently remain on deposit in France for administration by a court of law.

39 C. The search and attachment carried out at the building at 42 avenue Foch

3.51. When heard on 27 January 2011 in his capacity as a civil-party applicant by one of the investigating judges assigned to the case, the President of Transparency International France stated that his association had information concerning a building in Paris which was likely to belong to Mr. Teodoro Nguema Obiang Mangue, and urged the French courts to take provisional measures rapidly to prevent the dissipation of the respondent's assets.

3.52. Accordingly, on 28 September 2011, whereas the said building located at 42 avenue Foch in Paris had recently been acquired by the State of Equatorial Guinea for use by its diplomatic mission in France, the French courts ordered the attachment of items of property belonging to Mr. Teodoro Nguema Obiang Mangue, who was in Equatorial Guinea, where he had held office as Minister for Agriculture and Forestry since 1997.

---

[64] Letter from the President of Equatorial Guinea to the investigating judge, 16 Sept. 2013 (Ann. 19).

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

3.53. That same day, the Ambassador of Equatorial Guinea in France protested to the French Ministry of Foreign Affairs[66]. During their investigation, the judges saw fit to carry out coercive measures against the building located at 42 avenue Foch, even though, as the property of the State of Equatorial Guinea, the said building was not used for private-law activities.

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.

3.55. On 4 October 2011, Equatorial Guinea was thus obliged to notify the French Ministry of Foreign Affairs, through its Embassy in Paris, that the building located at 42 avenue Foch was designated for diplomatic use within the meaning of the Vienna Convention[67].

40 3.56. On 5 October 2011, the police returned to the premises and noted the presence, at the entrance, of two signs marked "Republic of Equatorial Guinea — Embassy premises" which officials from the Embassy of Equatorial Guinea had posted for information.

3.57. On 14 February 2012, the French courts had the building located at 42 avenue Foch searched once again.

3.58. On 16 February 2012, the Deputy Director of the Protocol Department of the French Ministry of Foreign Affairs transmitted to the French Minister of Justice, for the attention of the investigating judges, a Note Verbale from the Ambassador of Equatorial Guinea, and repeated that, in France's view, the building at 42 avenue Foch was subject to ordinary law[68].

3.59. On 25 April 2012, the Embassy of Equatorial Guinea in France sent the investigating judge a copy of a letter dated 9 March 2012 that had been sent by the Equatorial Guinean Minister of Justice to the French Minister of Justice, in which he expressed strong concern about the violations of international law committed by the French courts against Equatorial Guinea. The Embassy also sent a letter directly to the French Minister for Foreign Affairs[69].

3.60. On 19 July 2012, notwithstanding the information provided by Equatorial Guinea to both the investigating judges and the French Government regarding the identity of its owner and its designation for use by the diplomatic mission, the building at 42 avenue Foch was attached with a view to confiscation by the French courts[70].

---

[66]See Chapter 4, para. 4.3.

[67]See Chapter 4, para. 4.4.

[68]French Ministry of Foreign and European Affairs, Note Verbale No. 778/PRO/PID, 16 Feb. 2012 (Ann. 21).

[69]Embassy of Equatorial Guinea, Note Verbale No. 340/12, 25 Apr. 2012 (Ann. 22); Embassy of Equatorial Guinea, Note Verbale No. 339/12, 25 Apr. 2012 (Ann. 23); Embassy of Equatorial Guinea, Note Verbale No. 338/12, 25 Apr. 2012 (Ann. 24).

[70]Order of attachment of real property (*saisie pénale immobilière*), 19 July 2012 (Ann. 25).

3.61. All appeals against the attachment were definitively dismissed.

3.62. Similarly, the civil-party application filed by Equatorial Guinea, which claimed harm relating to the attachment of its building despite the fact that it was not used for private-law
41 activities, was also dismissed by the French courts: in a judgment dated 13 June 2013[71], ruling on an appeal lodged by Equatorial Guinea against an order of the investigating judge dated 26 September 2012 that had declared its civil-party application inadmissible, the Paris *Cour d'appel* dismissed Equatorial Guinea's application. The *Cour d'appel* noted in this regard that, in so far as it refuted the existence of acts of misappropriation of public funds committed in its territory and rejected the idea of having to claim damages, the Republic of Equatorial Guinea was declaring that it had suffered no harm since no punishable offence had been committed in its territory.

3.63. It is noteworthy that the French courts draw the logical conclusions from the fact that no offence of misappropriation of public funds was committed against Equatorial Guinea in order to deny it civil-party status, on the grounds that there is no harm, yet they refrain from drawing the same conclusions in order to cease their investigation of the same acts, which they nevertheless admit have not been established.

III. The denial of Mr. Teodoro Nguema Obiang Mangue's immunity from criminal jurisdiction and his referral before the *Tribunal correctionnel*

A. Mr. Teodoro Nguema Obiang Mangue's arguments before the French courts

3.64. It is important to note that, in his appeal against a judgment of the Paris *Cour d'appel* of 16 April 2015, Mr. Teodoro Nguema Obiang Mangue contended that under international custom, like Heads of State, certain holders of high-ranking office in a State enjoy personal immunity which protects them from all prosecution while they are in office, for any act whatsoever committed while in office or before taking office, regardless of whether the act is related to the exercise of the State's sovereignty. He added that, owing to his rank as Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, and the functions attached thereto, which effectively lead him to carry out missions in which he represents that State abroad and which are directly related to the exercise of its sovereignty, in the context of inter-State
42 co-operation (notably military and, for example, in places where the State has peacekeeping contingents), by virtue of international custom and for as long as he holds that office, Mr. Teodoro Nguema Obiang Mangue enjoys personal immunity from all prosecution, regardless of any offences alleged against him. He noted that, in considering only the implementation of substantive immunity attaching to acts of the State and of its agents without applying international custom relating to the status of the Head and high-ranking representatives of a foreign State, the *Chambre de l'instruction* of the *Cour d'appel* had violated the said custom, together with the aforementioned articles and principles[72].

B. The grounds for denying criminal immunity

3.65. Having acquired the status of party to the criminal proceedings as a result of his placement under judicial examination, on 1 August 2014 Mr. Teodoro Nguema Obiang Mangue

---

[71]Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 13 June 2013 (Case No. 2012/08462) (Ann. 26), on the appeal of the order finding Equatorial Guinea's civil-party application inadmissible.

[72]Statement of case of 16 Sept. 2015 (Ann. 27).

filed an application before the *Chambre de l'instruction* of the Paris *Cour d'appel* seeking the annulment of the proceedings against him, on the basis of the personal immunity from jurisdiction attached to his functions as a high-ranking representative of Equatorial Guinea during his time in office.

3.66. By a judgment dated 16 April 2015, the *Chambre de l'instruction* of the Paris *Cour d'appel* dismissed his application on the grounds that the acts attributed to him fell exclusively within the scope of his private life in France and were committed over a period of time preceding his new functions; that the same analysis must prevail with regard to the distinct capacity of Minister for Agriculture and Forestry, which office he held during the period in which the alleged offences were committed; that the French Ministry of Foreign Affairs had stated that he was not a diplomatic agent in France; that he was not registered with the Protocol Department and was therefore subject to ordinary law; that, as regards his functions as Second Vice-President, it was to be noted that this capacity was conferred on Mr. Teodoro Nguema Obiang Mangue on 21 May 2012, on which date the procedural measures, such as the initial summons of 22 January 2012, could have led the individual concerned to expect that he might be placed under judicial examination, or that an arrest warrant might be issued against him; that the appointment of Teodoro Nguema Obiang Mangue to his new functions of Second Vice-President appeared to be concomitant with the first summonses sent by the French investigating judges to the individual concerned, suggesting an "appointment of convenience", such as to prevent the criminal proceedings from continuing; that, while the International Court of Justice, in its Judgment of 14 February 2002, had held that immunity from jurisdiction may indeed bar prosecution for a certain period of time, it could be inferred that the principle of absolute criminal immunity attaching to the person cannot continue indefinitely; that, consequently, the immunity claimed by Mr. Teodoro Nguema Obiang Mangue did not apply to acts of money laundering committed in the context of his private life, before he took up his functions[73].

43

3.67. On 15 December 2015, ruling on an appeal lodged by Mr. Teodoro Nguema Obiang Mangue against the aforementioned judgment of the Paris *Cour d'appel*, the *Cour de cassation* rendered a judgment dismissing the appeal, stating that Mr. Teodoro Nguema Obiang Mangue:

> "Second Vice-President of the Republic of Equatorial Guinea, cannot complain that the *Chambre de l'instruction* denied him the benefit of immunity from criminal jurisdiction for the reasons set out in the argument, of which some, relating to the circumstances of his appointment, are irrelevant but overabundant;
>
> Whereas, indeed, the judgment and the related procedural documents show that, first, the functions of the applicant are not those of a Head of State, Head of Government or Minister for Foreign Affairs, and, secondly, all the alleged offences, the proceeds thereof having been laundered in France, and should they be established, were committed for personal gain before he took up his current functions, at a time when he was performing the functions of the Minister for Agriculture and Forestry."[74]

IV. Final submissions, referral order, summons to appear and hearing of 24 October 2016

3.68. It is in these circumstances that, following the final submissions filed by the Financial Prosecutor on 23 May 2016 seeking separation of the complaints, and either their dismissal or their

---

[73] Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 16 Apr. 2015 (Ann. 28), pp. 14-15.

[74] *Cour de cassation*, *Chambre criminelle*, judgment of 15 Dec. 2015 (Ann. 29).

referral to the *Tribunal correctionnel*[75], the investigating judges, by an order of 5 September 2016, referred Mr. Teodoro Nguema Obiang Mangue before the Paris *Tribunal correctionnel* to be tried, alone, for having:

> "assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms . . ."[76].

44

3.69. On 21 September 2016, the Paris Financial Prosecutor issued a summons to Mr. Teodoro Nguema Obiang Mangue, ordering him to appear on 24 October 2016 before the 32nd *Chambre correctionnelle* of the Paris *Tribunal de grande instance* for a hearing on the merits[77].

3.70. On 29 September 2016, Equatorial Guinea filed a Request for the indication of provisional measures with the Court, asking that France suspend all the criminal proceedings brought against the Vice-President of Equatorial Guinea, and refrain from launching new proceedings against him, which might aggravate or extend the dispute submitted to the Court; and that France ensure that the building located at 42 avenue Foch in Paris is treated as premises of the diplomatic mission in France.

3.71. At the hearing of 24 October 2016, the Paris *Tribunal correctionnel* adjourned the trial of the Vice-President of Equatorial Guinea until the hearings scheduled for the following dates: 2 January 2017 at 1.30 p.m., 4 January 2017 at 9 a.m., 5 January 2017 at 1.30 p.m., 9 January 2017 at 1.30 p.m., 11 January 2017 at 9 a.m. and 12 January 2017 at 1.30 p.m.

---

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

[76]Referral order of 5 Sept. 2016 (Ann. 7), p. 35.

[77]Financial Prosecutor at the Paris *Tribunal de grande instance*, Summons, 21 Sept. 2016 (Ann. 31).

45

CHAPTER 4

DIPLOMATIC EXCHANGES AND EQUATORIAL GUINEA'S EFFORTS TO SETTLE THE DISPUTE BILATERALLY

4.1. The criminal proceedings against Mr. Teodoro Nguema Obiang Mangue in France and their consequences on the building at 42 avenue Foch have given rise to multiple exchanges between Equatorial Guinea and France. In the course of these exchanges, Equatorial Guinea has sought to inform the French authorities of the status of Mr. Teodoro Nguema Obiang Mangue and of the building located at 42 avenue Foch in Paris and has protested against their conduct, which is contrary to France's international obligations (Section I).

4.2. The persistence of such conduct led to the conclusion that a dispute existed between Equatorial Guinea and France regarding the interpretation and application of the relevant rules of international law on immunities, sovereign equality and non-intervention in the domestic affairs of other States. Equatorial Guinea therefore proposed to France that they settle the dispute on the basis of Articles I and II of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations, and Article 35 of the United Nations Convention against Transnational Organized Crime of 15 November 2000, ratified by both States. This proposal went unheeded (Section II).

I. Information given to the French authorities on the status of Mr. Teodoro Nguema Obiang Mangue and the building at 42 avenue Foch in Paris, and Equatorial Guinea's protests at the conduct of those authorities

4.3. As we have seen, on 28 September 2011, following the attachment of certain movable assets inside the property comprising the building located at 42 avenue Foch in Paris, Equatorial Guinea protested to the French authorities, in particular the Minister for Foreign Affairs[78], since the French courts had instructed the police to enter the premises, notwithstanding the protests on the spot of the Ambassador of Equatorial Guinea, who had gone there immediately[79].

46

4.4. On 4 October 2011, Equatorial Guinea was thus obliged to notify the French Ministry of Foreign Affairs, through its Embassy in Paris, that the building located at 42 avenue Foch was designated for diplomatic use within the meaning of the Vienna Convention on Diplomatic Relations. The relevant passage of the correspondence reads:

> "The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs . . . and has the honour to inform it that the Embassy has for a number of years had at its disposal a building located at 42 avenue Foch, Paris (16th arr.), which it uses for the performance of the functions of its diplomatic mission, a fact which it has hitherto not formally notified to your Department."[80]

---

[78]Embassy of Equatorial Guinea, letter delivered in person to Mr. Alain Juppé, Minister of State, Minister for Foreign Affairs, 28 Sept. 2011 (Ann. 32).

[79]Final submissions of 23 May 2016 (Ann. 30), pp. 13-14; Referral order of 5 Sept. 2016 (Ann. 7), pp. 12-13.

[80]Embassy of Equatorial Guinea, Note Verbale No. 365/11, 4 Oct. 2011 (Ann. 33).

4.5. On 5 October 2011, the police returned to the premises and noted the presence, at the entrance, of two signs marked "Republic of Equatorial Guinea — Embassy premises"[81], which agents from the Embassy of Equatorial Guinea had posted for information.

4.6. On 11 October 2011, the French Ministry of Foreign Affairs responded to the Note Verbale of 4 October 2011 in these terms:

> "The Protocol Department recalls 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. The Protocol Department thus regrets that it is unable to grant the Embassy's request."[82]

47 4.7. That same day, the French Ministry of Foreign Affairs issued a second Note to the senior judges in charge of the investigation, containing the following information regarding, among other things, the status of the building at 42 avenue Foch:

> "The above-mentioned building is not included among those covered by the Vienna Convention on Diplomatic Relations of 18 April 1961. It is assigned neither to the chancellery of the Republic of Equatorial Guinea, nor to the residence of the Ambassador or of an agent of the Embassy.
>
> . . . . . .
>
> For 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."[83]

4.8. In the same correspondence, in response to a query from the jointly assigned senior investigating judges about Mr. Teodoro Nguema Obiang Mangue's status, the Ministry replied in these terms:

> "Mr. Teodoro NGUEMA OBIANG . . . is not a diplomatic agent active in France. He is not registered with the Protocol Department and is therefore considered as being subject to ordinary law.
>
> Since Mr. NGUEMA OBIANG is the Minister for Agriculture of the Republic of Equatorial Guinea, if a hearing of the person concerned is envisaged in connection with the ongoing investigation, the Protocol Department should be contacted prior to

---

[81] Final submissions of 23 May 2016 (Ann. 30), p. 17; Referral order of 5 Sept. 2016, (Ann. 7), p. 16.

[82] French Ministry of Foreign and European Affairs, Note Verbale No. 5007/PRO/PID, 11 Oct. 2011 (Ann. 34).

[83] French Ministry of Foreign and European Affairs, Note Verbale No. 5009/PRO/PID, 11 Oct. 2011 (Ann. 35).

such a request being made, so that it may check whether Mr. NGUEMA OBIANG is in France as part of a special mission."[84]

4.9. 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[85]. The reason for this change in
48 accommodation was that the dwelling at 46 rue des Belles Feuilles notified to UNESCO was unfit for habitation, and the dignity of Ms Bindang Obiang's new functions required a better residence.

4.10. The Embassy of Equatorial Guinea housed its Chargée d'affaires *a.i.* at 42 avenue Foch precisely because it considered that as from 4 October 2011 the building would enjoy inviolability as premises of the diplomatic mission. When the French authorities' intruded on the premises on 14 February 2012, the Chargée d'affaires protested on the spot and by a Note Verbale addressed to the French Ministry of Foreign Affairs[86]. Equatorial Guinea's Minister for Foreign Affairs, International Co-operation and Francophone Affairs also reacted that same day by Note Verbale. He wrote to his French counterpart to express his "regret that . . . the residence of the Chargée d'affaires and Permanent Representative of Equatorial Guinea to UNESCO in Paris is the subject of intervention by the investigating judge and the French police, without any preliminary inquiry that would justify such action" and to ask the French Government to respect the 1961 Vienna Convention on Diplomatic Relations[87].

4.11. France was informed at the highest level of State that Equatorial Guinea had acquired the building at 42 avenue Foch and assigned it to its diplomatic mission. In a letter dated 14 February 2012, President Obiang wrote as follows, apparently without receiving any response, to his French counterpart, President Sarkozy:

> "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.
>
> At this time, the building in question is a property that was lawfully acquired by the Government of Equatorial Guinea and is currently used by the Representative to UNESCO, who is in charge of the Embassy's property. The said property is afforded
> **49** legal and diplomatic protection under the Vienna Convention and the bilateral agreements signed by the two States."[88]

4.12. In a Note Verbale of 31 October 2011, France refused to recognize the validity of Ms Bindang Obiang's appointment as Chargée d'affaires *a.i.*[89], thus justifying the trespass

---

[84] *Ibid.*

[85] Embassy of Equatorial Guinea, Note Verbale No. 387/11, 17 Oct. 2011 (Ann. 36).

[86] Embassy of Equatorial Guinea, Note Verbale No. 173/12, 14 Feb. 2012 (Ann. 37).

[87] Equatorial Guinean Ministry of Foreign Affairs, International Co-operation and Francophone Affairs, Note Verbale No. 251/012, 14 Feb. 2012 (Ann. 38).

[88] Letter from the President of the Republic of Equatorial Guinea to His Excellency Nicolas Sarkozy, President of the French Republic, 14 Feb. 2012 (Ann. 39).

[89] French Ministry of Foreign and European Affairs, Note Verbale No. 5393 PRO/PID, 31 Oct. 2011 (Ann. 40).

committed by its agents in the building. Ms Bindang Obiang, who was very upset by the circumstances of the subsequent search carried out on 14 February 2012, also hastened to write to UNESCO that same day[90] to ensure that the organization took account of her change of address from 46 rue des Belles Feuilles to 42 avenue Foch in Paris.

4.13. On 14 February 2012, the French courts had the building in question searched. The next day, 15 February 2012, by a Note Verbale, the Ambassador of Equatorial Guinea to France asked the French Ministry of Foreign Affairs for police protection on behalf of the Equatorial Guinean Deputy Minister for Foreign Affairs, who was staying in Paris at the time and was to "visit the property of the Government of Equatorial Guinea at 42 avenue Foch".

4.14. On 16 February 2012, the French Ministry of Foreign Affairs transmitted the Note Verbale from the Ambassador of Equatorial Guinea to the French Ministry of Justice, for the attention of the investigating judges, stating:

> "Please find enclosed a copy of Note Verbale No. 185/12 dated 15 February 2012 from the Embassy of the Republic of Equatorial Guinea which was transmitted today by the Minister Delegate for Foreign Affairs, International Co-operation and Francophone Affairs of that country at a meeting at the Ministry of Foreign and European Affairs with the Director for Africa and the Indian Ocean.
>
> The French party reiterated at that time that the building referred to above was subject to ordinary law."[91]

50 4.15. On 27 February 2012, in response to a Note Verbale from the French Ministry of Foreign Affairs transmitted to the Embassy of Equatorial Guinea on 2 February 2012, summoning Mr. Teodoro Nguema Obiang Mangue to appear before the French courts, the Embassy of Equatorial Guinea repeated its protests relating to France's violation of its rights, in these terms:

> "The Embassy of Equatorial Guinea informs the Ministry of Foreign and European Affairs that due to serious violations of its sovereignty committed in the context of the proceedings in which his testimony is requested, the Government of Equatorial Guinea does not, as matters now stand, authorize the Minister of State for Agriculture and Forestry, Mr. Teodoro NGUEMA OBIANG MANGUE, to comply with the summons for his first appearance before the Paris *Tribunal de grande instance* on 1 March 2012 at 2.30 p.m."[92]

4.16. On 12 March 2012, the Embassy of Equatorial Guinea in France transmitted to the French Minister of Justice and Liberties a letter dated 9 March 2012 addressed to his French counterpart by the Equatorial Guinean Minister of Justice, in which he expressed his serious concern regarding the violations of international law committed by the French courts against Equatorial Guinea[93].

---

[90]United Nations Educational, Scientific and Cultural Organization (UNESCO), Note Verbale No. ERI/PRO/12/L.45, 15 Feb. 2012 (Ann. 41).

[91]French Ministry of Foreign and European Affairs, Note Verbale No. 778/PRO/PID, 16 Feb. 2012 (Ann. 21).

[92]Embassy of Equatorial Guinea, Note Verbale No. 218/12, 27 Feb. 2012 (Ann. 42).

[93]Embassy of Equatorial Guinea, Note Verbale No. 247/12, 12 Mar. 2012 (Ann. 43).

4.17. That same day, the Embassy also sent a letter to the French Minister for Foreign Affairs in response to the Ministry's Note Verbale of 11 October 2011. It pointed out to the French Ministry of Foreign Affairs that "the régime for the protection of diplomatic premises is declaratory in nature, such that the mere designation of premises by any diplomatic mission is sufficient for those premises to be afforded the benefit of such protection . . ."[94].

4.18. On 28 March 2012, the French Ministry of Foreign Affairs transmitted to the Embassy of Equatorial Guinea a Note Verbale with the following response:

> "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.
>
> **51** 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."[95]

4.19. On 25 April 2012, the Embassy of Equatorial Guinea sent two letters, respectively, to the senior investigating judges and to the Paris Public Prosecutor, in which Equatorial Guinea once again protested against the position of the French Ministry of Foreign Affairs and notified them that a further Note Verbale had been sent to the Ministry[96]. In the latter Note Verbale, also dated 25 April, the Embassy reasserted Equatorial Guinea's right to the protection of its diplomatic premises located at 42 avenue Foch in these terms:

> "The Ministry did not challenge the claim that the protection of diplomatic premises was declaratory in nature, arising under the Vienna Convention of 18 April 1961.
>
> — However, in order to deny protection, the Ministry of Foreign Affairs indicated that in accordance with a 'constant practice of France', the official recognition of the status of diplomatic premises would be determined on the date of the 'effective' assignment of the said premises to the offices of the diplomatic mission, notified by Note Verbale.
>
> — The Republic of Equatorial Guinea recalled that the international treaties by which France is bound, including the Vienna Convention of 18 April 1961, take precedence over French statutes and regulations, and therefore over French practice.

---

[94]Embassy of Equatorial Guinea, Note Verbale No. 249/12, 12 Mar. 2012 (Ann. 44).

[95]French Ministry of Foreign and European Affairs, Note Verbale No. 134/PRO/PID, 28 Mar. 2012 (Ann. 45).

[96]Embassy of Equatorial Guinea, Note Verbale No. 340/12, 25 Apr. 2012 (Ann. 22); Embassy of Equatorial Guinea, Note Verbale No. 339/12, 25 Apr. 2012 (Ann. 23).

— Accordingly, the Republic of Equatorial Guinea also recalled that that 'practice' invoked by the Ministry did not stand as an obstacle to the diplomatic protection of the premises located at 42 avenue Foch in Paris as from 4 October 2011, the date of the declaration by the Republic of Equatorial Guinea to the Protocol Department.

— In any event, in the Note Verbale of 4 October 2011 in which it advised the Protocol Department that it had premises located at 42 avenue Foch, Paris, for which it was requesting diplomatic protection, the Republic of Equatorial Guinea expressly stated that the premises had already been effectively assigned to the diplomatic mission of Equatorial Guinea.

52 It follows from the foregoing that:

— The premises located at 42 avenue Foch in Paris should necessarily have had the benefit of diplomatic protection as from 4 October 2011.

— As the Ministry did not believe that it had to ensure that protection, measures of spoliation of the property of the Republic of Equatorial Guinea occurred, denying it the enjoyment of the said property.

— The justifications provided by the Ministry to refuse its protection set mere practice up against an international Convention and therefore cannot be accepted by the Republic of Equatorial Guinea . . ."[97]

4.20. On 2 May 2012, the French Ministry of Foreign Affairs responded to the Embassy by referring it to its previous Note Verbale[98].

4.21. On 20 June 2012, a letter from the French Ministry of Foreign Affairs to the French Minister of Justice and for the attention of the senior investigating judges was copied to the Embassy of Equatorial Guinea. The letter was in response to the request to transmit a summons to appear to Mr. Teodoro Nguema Obiang Mangue, sent by the French courts through diplomatic channels. In its letter, the Ministry of Foreign Affairs asked the investigating judges to amend "the wording of the summons, as regards the functions performed by the person concerned". The letter adds:

> "As I indicated in my Note No. 2617/PRO/PID dated 14 June 2012, Mr. Teodoro NGUEMA OBIANG M[A]NGUE, who was indeed Minister for Agriculture and Forestry, was appointed Second Vice-President in charge of Defence and State Security on 21 May 2012 by the President of the Republic of Equatorial Guinea (decree No. 64/2012 dated 21 May 2012).
>
> The summons should therefore be amended as regards this particular point."[99]

4.22. This letter shows that France was aware of Mr. Teodoro Nguema Obiang Mangue's appointment as Second Vice-President of Equatorial Guinea and had taken formal note of it. The

---

[97]Embassy of Equatorial Guinea, Note Verbale No. 338/12, 25 Apr. 2012 (Ann. 24).

[98]French Ministry of Foreign and European Affairs, Note Verbale No. 1946/PRO/PID, 2 May 2012 (Ann. 46).

[99]French Ministry of Foreign Affairs, Note Verbale No. 2777/PRO/PID, 20 June 2012 (Ann. 11).

53 procedure for transmitting the summons was explained to the judicial authorities by the Ministry of Foreign Affairs, as follows:

> "in this instance and contrary to what was done in February, in the absence of an agreement between France and the Republic of Equatorial Guinea, the Ministry of Foreign Affairs asks that you use the traditional channel of transmission, i.e., that you transmit the summons to the Public Prosecutor's Office and to the Principal Prosecutor's Office (*parquet general*) in Paris, which will forward it to the Ministry of Justice (copied on this letter), which will in turn transmit it to the Ministry of Foreign Affairs.
>
> It will then be for that Ministry, in particular, the department in charge of mutual legal assistance at the Directorate for French Nationals Abroad and Consular Administration (DFAE), to transmit it to our Embassy, which will be responsible for delivering it to the Equatorial Guinean authorities. In parallel, and to ensure that the authorities of the requested State are fully informed, a copy of the said summons may be sent simultaneously to the Embassy of the Republic of Equatorial Guinea in Paris."[100]

4.23. On 9 July 2012, the Embassy of Equatorial Guinea transmitted a letter from the Ministry of Foreign Affairs of Equatorial Guinea to the French Ministry of Foreign Affairs, further to the summons addressed to Mr. Teodoro Nguema Obiang Mangue by the French Ministry of Foreign Affairs on 25 June 2012 through the diplomatic channels described above[101]. The letter from the Minister for Foreign Affairs of Equatorial Guinea explained that, because of his rank, Mr. Teodoro Nguema Obiang Mangue could not comply with the summons, and stated that, in order to clarify the facts, Equatorial Guinea was prepared to receive a letter rogatory from the French authorities[102].

4.24. On 19 July 2012, notwithstanding the information provided by Equatorial Guinea both to the investigating judges and to the French Government regarding the identity of the owner of the building at 42 avenue Foch and its assignment to the diplomatic mission, the building in question was attached with a view to confiscation by the French courts.

54 4.25. On 27 July 2012 and 2 August 2012, the Embassy of Equatorial Guinea again recalled, by Notes Verbales, that the building at 42 avenue Foch in Paris was assigned to the premises of its diplomatic mission. The Note of 27 July reads as follows:

> "The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs . . . and has the honour to inform it that, 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."[103]

4.26. The wording of the Note Verbale of 2 August 2012 is clear:

---

[100] *Ibid.*

[101] Embassy of Equatorial Guinea, Note Verbale No. 472/12, 9 July 2012, accompanied by a letter of 6 July 2012 from the Equatorial Guinean Ministry of Foreign Affairs, International Co-operation and Francophone Affairs (Ann. 14).

[102] *Ibid.*

[103] Embassy of Equatorial Guinea, Note Verbale No. 501/12, 27 July 2012 (Ann. 47).

"The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs . . . and has the honour to inform it that, further to its preceding Notes Verbales, it hereby confirms that its chancellery is indeed located at the following address: 42 avenue FOCH, Paris (16th arr.), a building that it uses as the official offices of its diplomatic mission in France."[104]

4.27. On 6 August 2012, the French Ministry of Foreign Affairs again refused to recognize the diplomatic status of the said premises, justifying its refusal on the grounds that the building "was the subject of an attachment order (*ordonnance de saisie pénale immobilière*), dated 19 July 2012"[105].

4.28. On that basis, France refused to take preventive measures to ensure the protection of the premises of the Embassy of Equatorial Guinea, as provided for in Article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations. In response to a request from the Ambassador of Equatorial Guinea to provide protection for the Embassy's premises on the occasion of the presidential elections of April 2016 in Equatorial Guinea, the French Ministry of Foreign Affairs wrote on 27 April 2016:

"The Ministry of Foreign Affairs and International Development — Protocol Department — . . . acknowledges receipt of Note Verbale No. 230/2016 from the Embassy dated 21 April 2016, in which it was informed at very short notice that voting for the presidential election in Equatorial Guinea would be held in France on Sunday 24 April 2016.

55 The Protocol Department avails itself of this opportunity to recall that the Ministry of Foreign Affairs and International Development 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."[106]

4.29. In a Note Verbale received by the French Ministry of Foreign Affairs on 12 May 2016, the Embassy of Equatorial Guinea reasserted its rights once again:

"The Embassy reiterates the notification made by Note Verbale of 11 October 2011 to the effect that the building located at 42 avenue Foch in Paris (16th arr.) has indeed been assigned to the diplomatic mission of the Republic of Equatorial Guinea in France, and that this was done pursuant to international law, which places restrictions on the freedom to establish a diplomatic mission in the receiving State only in specific circumstances.

The Embassy avails itself of this opportunity to recall that the building located at 42 avenue Foch in Paris (16th arr.) has effectively been occupied by the diplomatic mission of the Republic of Equatorial Guinea in France since October 2011; that this is, moreover, the address at which requests for visas to enter Equatorial Guinea are submitted by members of the French Government, such as the State Secretary for Development and Francophone Affairs, who made an official visit to Equatorial Guinea from 8 to 9 February 2015; that a law enforcement unit went to that same

[104]Embassy of Equatorial Guinea, Note Verbale No. 517/12, 2 Aug. 2012 (Ann. 48).

[105]French Ministry of Foreign Affairs, Note Verbale No. 3503/PRO/PID, 6 Aug. 2012 (Ann. 49), para. 2.

[106]French Ministry of Foreign Affairs and International Development, Note Verbale No. 2016-313721/PRO/PIDC, 27 Apr. 2016 (Ann. 50).

address on 13 October 2015 to provide protection for the diplomatic mission during a protest by members of the Equatorial Guinean opposition in France.

The Embassy observes that this contradiction, between the Ministry's position and the French Government's conduct in relation to the legal nature of the building located at 42 avenue Foch in Paris (16th arr.), should not be to the detriment of the Republic of Equatorial Guinea."[107]

4.30. It should be noted that the various legal remedies sought against the attachment of the building in question and in respect of the immunity of Mr. Teodoro Nguema Obiang Mangue were all rejected: first by a judgment of the Paris *Cour d'appel* dated 13 June 2013[108]; then by the judgments of the French *Cour de cassation* dated 19 February and 5 March 2014, following the appeal lodged against the aforementioned judgment of the Paris *Cour d'appel* and the contested
56 arrest warrant issued against the Second Vice-President of Equatorial Guinea[109]; and finally by a judgment of the *Cour de cassation* of 15 December 2015 dismissing the Vice-President's appeal against the judgment of the Paris *Cour d'appel* dated 16 April 2015[110].

4.31. As can be seen, France has obdurately refused to recognize the status of both Mr. Teodoro Nguema Obiang Mangue and the building at 42 avenue Foch in Paris. With regard to the building, France has persistently refused to respect its inviolability, notwithstanding the explanations and formal request of Equatorial Guinea, which invoked the established rules of international law and protested against their violation by the French authorities. It then became evident that a dispute had arisen between Equatorial Guinea and France regarding the interpretation and application of the relevant rules in that area. Since the dispute could not be settled by the two States bilaterally, Equatorial Guinea proposed to France that they resort to the treaty mechanisms available for that purpose, but to no avail.

4.32. Equatorial Guinea continued to protest when France decided to refer Mr. Teodoro Nguema Obiang Mangue before the Paris *Tribunal correctionnel* on 5 September 2016; once again France demonstrated no desire to settle the dispute bilaterally.

II. Equatorial Guinea's offer and France's refusal to settle the dispute through conciliation or arbitration

4.33. To ensure that its diplomatic services continue to function smoothly and to preserve the good relations between the two countries, Equatorial Guinea took the initiative to propose to France that they settle the dispute between them through conciliation or arbitration.

4.34. Meetings were held between the Embassy of Equatorial Guinea and the French Ministry of Foreign Affairs in January 2016, in an attempt to settle bilaterally the dispute between
57 Equatorial Guinea and France relating to the consequences of the so-called "ill-gotten gains" case.

---

[107] Embassy of Equatorial Guinea, Note Verbale No. 3168/2016, received 12 May 2016 (Ann. 51).

[108] Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 13 June 2013 (Case No. 2012/07413) (Ann. 52), Application for annulment.

[109] *Cour de cassation*, *Chambre criminelle*, judgment of 5 Mar. 2014 (Ann. 53), p. 13 (on the contested attachments); *Cour de cassation*, *Chambre criminelle*, judgment of 19 Feb. 2014 (Ann. 54) (on the contested arrest warrant against the Vice-President).

[110] *Cour de cassation*, *Chambre criminelle*, judgment of 15 Dec. 2015 (Ann. 29); Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 16 Apr. 2015 (Ann. 28).

4.35. Following those meetings, by a Note Verbale from its Ambassador dated 6 January 2016, Equatorial Guinea repeated its offer to settle the dispute amicably[111].

4.36. In the absence of any response from France, Equatorial Guinea sent the French Ministry of Foreign Affairs another Note Verbale dated 2 February 2016, in which it suggested arbitration under the auspices of the Permanent Court of Arbitration in The Hague, in accordance with that Court's Optional Conciliation Rules and Optional Rules for Arbitrating Disputes between Two States[112].

4.37. By a Note Verbale from the Ministry of Foreign Affairs dated 17 March 2016, France replied that it declined to do so in these words:

> "The Ministry recalls the attachment of France to its bonds of friendship with the Republic of Equatorial Guinea.
>
> It further recalls that the facts mentioned in the Embassy's Note Verbale have been the subject of court decisions in France and remain the subject of ongoing legal proceedings.
>
> It draws the Embassy's attention to the fact that the French authorities cannot challenge those decisions or influence those proceedings.
>
> They are, therefore, unable to accept the offer of settlement by the means proposed by the Republic of Equatorial Guinea."[113]

4.38. The foregoing exchanges demonstrate that the proceedings relating to the so-called "ill-gotten gains" case have given rise to a dispute between Equatorial Guinea and France relating to the legal status of the building located at 42 avenue Foch in Paris. Equatorial Guinea's position has been consistent since the start of the said "case":

58

— in September 2011, through a transfer from Mr. Teodoro Nguema Obiang Mangue, it acquired the shareholder rights in the companies which owned the building located at 42 avenue Foch;

— in October 2011, it informed France, by Note Verbale, that the building was assigned to the offices of Equatorial Guinea's diplomatic mission in France;

— also in October 2011, it took the first step towards using the building for the performance of the functions of its diplomatic mission by housing a member of its diplomatic staff there, namely, its Chargée d'affaires *a.i.*;

— in July 2012, it notified France that all the offices of its diplomatic mission had effectively been moved to 42 avenue Foch;

— finally, it protested continuously against the actions of France which infringed or were likely to infringe the inviolability of the premises of its diplomatic mission located at 42 avenue Foch.

---

[111]Embassy of Equatorial Guinea, Note Verbale No. 012/16, 6 Jan. 2016 (Ann. 55).

[112]Embassy of Equatorial Guinea, Note Verbale No. 062/16, 2 Feb. 2016 (Ann. 56).

[113]French Ministry of Foreign Affairs and International Development, Note Verbale No. 2016-208753/PRO/PIDC, 17 Mar. 2016 (Ann. 57).

PART TWO

THE JURISDICTION OF THE COURT

61

CHAPTER 5

THE JURISDICTION OF THE COURT

5.1. The Court has jurisdiction in the present case both under Article 35 of the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000 (hereinafter the "Palermo Convention") (Section I), and under the provisions of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, done at Vienna on 18 April 1961 (hereinafter the "Optional Protocol")[114] (Section II).

5.2. The Order indicating provisional measures dated 7 December 2016 was issued by the Court a few days before the text of this Memorial was finalized. Equatorial Guinea was unable to examine it in detail and reserves the right to address the jurisdiction of the Court in greater detail at a later date.

I. The United Nations Convention against Transnational Organized Crime

5.3. The Palermo Convention gives the Court jurisdiction to entertain Equatorial Guinea's Application. The procedural requirements for a dispute to be submitted to the Court, as set out in Article 35, paragraph 2, of the Convention, are met (A). The Court also has jurisdiction *ratione materiae*, under the provisions of the Palermo Convention, to rule on violations of the principles of sovereign equality and non-intervention, including the rules of international law on the immunity enjoyed by States (B). Lastly, the Palermo Convention is applicable to the facts underlying the dispute between Equatorial Guinea and France (C).

62

A. The procedural requirements for submitting a dispute to the Court are met

5.4. Equatorial Guinea and France are both parties to the Palermo Convention: it was ratified by France on 29 October 2002 and by Equatorial Guinea on 7 February 2003. The Convention entered into force on 29 September 2003.

5.5. Article 35, paragraph 2, of the Palermo Convention provides:

> "2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court."

5.6. The Court's jurisdiction exists under this provision since the dispute between the Parties could not be settled through negotiation within a reasonable time, and since the Parties were also unable to agree on the organization of arbitration. These two requirements are met.

---

[114] *UNTS*, Vol. 500, p. 243 (I-7312).

5.7. As shown in Chapter 4, Equatorial Guinea made every possible effort to settle the dispute through negotiation. Finally, on 6 January 2016, the Embassy of Equatorial Guinea in France proposed to the French Ministry of Foreign Affairs, by Note Verbale, that they settle the entire dispute through conciliation or arbitration, in accordance with Article 35 of the Palermo Convention[115]. On 2 February 2016, the Embassy of Equatorial Guinea transmitted to the Ministry of Foreign Affairs, by Note Verbale, a memorandum setting out Equatorial Guinea's position on the questions forming the subject of the present dispute[116].

5.8. On 17 March 2016, the Ministry of Foreign Affairs responded to the Note Verbale of 2 February 2016, explaining that it was "unable to accept the offer of settlement by the means
63 proposed by the Republic of Equatorial Guinea" on the grounds that "the facts mentioned have been the subject of court decisions in France and remain the subject of ongoing legal proceedings"[117]. By that Note, France gave Equatorial Guinea official notification of its refusal to settle the dispute between the two States by means of negotiation and arbitration.

B. The Court's jurisdiction under the Palermo Convention to consider the violations by France of the principles of sovereign equality, non-intervention and State immunity

5.9. In its Order dated 7 December 2016, the Court decided that it did not have prima facie jurisdiction under Article 35, paragraph 2, of the Palermo Convention to entertain Equatorial Guinea's claim in respect of the immunity of Mr. Teodoro Nguema Obiang Mangue. With regard to Article 4 of the Convention in particular, the Court considered that "[t]he provision does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities", and that "[a]ccordingly, any dispute which might arise with regard to 'the interpretation or application' of [that article] could relate only to the manner in which the States parties carry out their obligations under that Convention"[118]. The Court concluded that "prima facie, a dispute capable of falling within the provisions of the Convention . . . and therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties"[119]. This conclusion of the Court gave rise to differing views among the judges[120].

5.10. Equatorial Guinea respectfully submits that the Court's "summary consideration of . . . Article 4 of the Palermo Convention" did not lead it to the correct conclusion regarding its jurisdiction, a conclusion which was reached "after making a brief summary of the views of the
64 Parties"[121]. The Court's interpretation of Article 4, in paragraph 49 of the Order, indeed "begs a number of questions"[122]. Equatorial Guinea did not suggest that Article 4 creates new rules concerning the immunities of holders of high-ranking office in a State. It does, however, consider that that provision incorporates rules of customary international law concerning such immunities. As we shall see below, those rules derive from the principle of sovereign equality. In performing

---

[115]Embassy of Equatorial Guinea, Note Verbale No. 012/16, 6 Jan. 2016 (Ann. 55).

[116]Embassy of Equatorial Guinea, Note Verbale No. 062/16, 2 Feb. 2016 (Ann. 56).

[117]French Ministry of Foreign Affairs and International Development, Note Verbale No. 2016-208753/PRO/PIDC, 17 Mar. 2016 (Ann. 57).

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

[119]*Ibid*., para. 50.

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

[121]*Ibid*., separate opinion of Judge *ad hoc* Kateka, paras. 6-7.

[122]*Ibid*., separate opinion of Judge Xue.

its obligations under the Palermo Convention, each State party is bound to respect the principle of sovereign equality, including the rules of immunity. The dispute between Equatorial Guinea and France concerning the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue, and the dispute concerning the status of the building located at 42 avenue Foch in Paris as State property used or intended for use by the State for government non-commercial purposes, are disputes which raise the question of whether France has complied with Article 4 of the Convention. The answer to this question depends on the interpretation and application of Article 4, read in conjunction with other provisions of the Convention, and the application of the rules of general international law relating to the jurisdictional immunities of the State. These rules are incorporated into Article 4 of the Palermo Convention through the reference to the principles of sovereign equality and non-intervention.

5.11. A dispute exists between Equatorial Guinea and France with regard to the interpretation and application of the Palermo Convention, particularly the application of Article 4, read in conjunction with other provisions of the Convention. Article 4 provides:

> "Article 4. Protection of sovereignty
>
> 1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."

65 5.12. The purpose of this provision, as its heading indicates, is to protect the sovereignty of the States parties to the Palermo Convention. According to the United Nations *Legislative Guide*: "Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory."[123]

5.13. Article 4, paragraph 1, establishes a treaty obligation to respect the principles of sovereign equality of States and non-intervention in the domestic affairs of States in carrying out the terms of the Palermo Convention. The effect of this provision is to incorporate these fundamental principles into the Convention, as they exist, in particular, in the Charter of the United Nations and general international law.

5.14. The incorporation of other rules of international law in the provisions of a treaty by reference or referral is not exceptional. This technique has been considered by international jurisprudence on several occasions. Such is the case, for example, of the arbitral tribunals constituted in accordance with Annex VII of the United Nations Convention on the Law of the Sea[124] and the International Tribunal for the Law of

---

[123] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 2005) (Ann. 58**)**, p. 17, para. 33.

[124] See, for example: *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)* (PCA Case No. 2014-02), Arbitral Award of 14 Aug. 2015, para. 188 ("Article 293 (1) does not extend the jurisdiction of a tribunal. Rather, it ensures that, in exercising its jurisdiction under the Convention, a tribunal can give full effect to the provisions of the Convention. For this purpose, some provisions of the Convention directly incorporate other rules of international law . . ."); *Chagos Marine Protected Area* (PCA Case No. 2011-03), Arbitral Award of 18 Mar. 2015, para. 316; *Guyana* v. *Suriname* (PCA Case No. 2004-04), Arbitral Award of 17 Sept. 2007, para. 406.

the Sea[125]. The Court itself has not ruled out the possibility of rules of customary international law being incorporated into a treaty. While the Court determined in the *Oil Platforms* case that Article I of the Treaty of Amity, Economic Relations and Consular Rights of 15 August 1955 did not have the effect of incorporating into the treaty all of the provisions of international law
66 concerning peaceful relations between the States in a general sense[126], this was because of the wording and purpose of that provision, and the structure of the treaty in question. However, as we shall see below, this reasoning cannot be applied to the Palermo Convention and Article 4 thereof.

5.15. The principles of sovereign equality and non-intervention include important specific rules of international law, notably those on jurisdictional immunities. As the Court has held:

> "the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States . . . Exceptions to the immunity of the State represent a departure from the principle of sovereign equality."[127]

5.16. Consequently, Article 4, paragraph 1, of the Palermo Convention also requires respect for the rules governing the immunity enjoyed by States when a State seeks to carry out its obligations under the Convention. Such an important and essential part of the content of the principle of sovereign equality cannot be dispensed with tacitly[128], and in any event States cannot be expected to reproduce the entire content of this fundamental principle of international law each time they refer to it. In the present case, it was more specifically the immunity from foreign criminal jurisdiction *ratione personae* enjoyed by certain holders of high-ranking office in a State and the immunity from execution of State property which France failed to respect. The violation of these rules under Article 4 of the Palermo Convention is addressed in Chapters 6, 7 and 8.

5.17. At the public hearings on the request for the indication of provisional measures, France contended that Article 4 of the Palermo Convention is simply a "general guideline . . . which clarifies the *manner* in which the other provisions of the treaty should be implemented, but which does not impose on States any specific obligation, the violation of which the other parties to the Convention could invoke before this Court . . ."[129]. In that connection, it referred to the *Oil*
67 *Platforms* case, in which the Court determined that the first article of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran "cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning [peaceful and

---

[125] *M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 155 ("In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.").

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

[127] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 99, para. 57.

[128] *Elettronica Sicula S.p.A. (ELSI)*, *Judgment, I.C.J. Reports 1989*, p. [42], para. 50.

[129] CR 2016/15, 18 Oct. 2016, p. 21, para. 12 (Pellet).

friendly relations between the two States]" and that it "must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied"[130].

5.18. This line of reasoning cannot, however, be applied to Article 4 of the Palermo Convention. The first article of the 1955 Treaty has a very broad scope and is drafted in vague terms[131], which led the Court to conclude, after analysing the said Treaty as a whole, that it merely fixes an objective. In contrast, Article 4 of the Palermo Convention is drafted as a clear and specific obligation. The interpretation put forward by France is at odds with the ordinary meaning of the provision. Moreover, as France has recognized[132], Article 4 of the Palermo Convention in no way establishes the Convention's objective. It is Article 1 of the Convention which must be regarded as fixing an objective for interpretation purposes. Article 4 thus constitutes an independent obligation[133], which sets out what the States parties to the Palermo Convention should do or should not do in applying it. This obligation is an important and integral part of the legal régime established by the Convention. The Court appears to have adopted this approach in its Order dated 7 December 2016, in which it considered that disputes might arise with regard to the interpretation and application of Article 4, in so far as such disputes concern the manner in which States perform their obligations under the Convention[134].

68 5.19. France also contended that the second paragraph of Article 4 of the Palermo Convention establishes the effect to be given to the first paragraph[135]. However, there is nothing in the text of Article 4 which suggests that the second paragraph 2 is merely the consequence of the first. In fact, the interpretation put forward by France deprives Article 4, paragraph 1, of any *effet utile*[136]. Both the structure and wording of Article 4 clearly show that France's argument is baseless. As we shall see in greater detail in Chapter 6, the principles of sovereign equality and non-intervention concern the protection of the areas of jurisdiction and prerogatives of the State which are reserved or exclusive under international law, not domestic law. Accordingly, Article 4, paragraph 2, must be regarded as providing additional protection for State sovereignty, but by no means as specifying the scope of Article 4, paragraph 1.

5.20. Provisions similar or identical to Article 4 of the Palermo Convention can be found in other treaties on criminal matters entered into within the framework of the United Nations. Notable examples include the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and

---

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

[131] This provision reads: "There shall be firm and enduring peace and sincere friendship between the United States . . . and Iran."

[132] CR 2016/15, 18 Oct. 2016, p. 22, para. 12 (Pellet).

[133] The *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* confirm the independent nature of this obligation: "There are also other provisions that protect national prerogatives and sovereignty set forth elsewhere in the Convention" (Ann. 58, p. 17, para. 34).

[134] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, Request for the indication of provisional measures, Order of 7 Dec. 2016, para. 49. See also the separate opinion of Judge Xue, para. 4.

[135] CR 2016/17, 19 Oct. 2016, p. 10, para. 7 (Pellet).

[136] The principle of *effet utile* has been repeatedly recognized as a fundamental principle of treaty interpretation. See: *Lighthouses case between France and Greece*, *Judgment, 1934, P.C.I.J., Series A/B*, *No. 62*, p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 35, para. 66; *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 22, para. 52; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994*, p. 6, para. 51.

Psychotropic Substances[137], the 1997 International Convention for the Suppression of Terrorist Bombings[138], the International Convention for the Suppression of the Financing of Terrorism of 1999[139], the 2003 United Nations Convention against Corruption (whose Article 4 is identical to
69 Article 4 of the Palermo Convention)[140] and the International Convention for the Suppression of Acts of Nuclear Terrorism of 2005[141]. These conventions and related work confirm the scope of Article 4 of the Palermo Convention as it is explained in the foregoing paragraphs. They also illustrate the great importance that States attach to these fundamental principles of international law and to their observance by all States, including in carrying out the terms of treaties in the field of international criminal law.

5.21. Article 4 of the Palermo Convention is inspired by Article 2, paragraphs 2 and 3, of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[142]. The *Commentary* on the latter Convention, prepared by the United Nations, states:

> "2.12 Paragraph 2 reiterates universally accepted and well-established principles of international law concerning the sovereign equality and territorial integrity of States and non-intervention in the domestic affairs of States. These closely related principles, enshrined in the Charter of the United Nations . . .
>
> 2.13 The rationale for restating these principles in article 2 lies in the fact that the Convention . . . goes much further than previous drug control treaties in matters of law enforcement and mutual legal assistance.
>
> 2.14 . . . care has been taken throughout the Convention to ensure that disputes or friction between parties do not arise because of a failure to comply strictly with the said principles . . .
>
> . . . . . .

---

[137] *UNTS*, Vol. 1582, p. 209 (I-27627). Article 2, paras. 2 and 3, of the Convention read:

> "2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law."

[138] *UNTS*, Vol. 2149, p. 256 (I-37517), Article 17: "The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."

[139] *UNTS*, Vol. 2178, p. 197 (I-38349), Article 20: "The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."

[140] *UNTS*, Vol. 2349, p. 41 (I-42146).

[141] *UNTS*, Vol. 2445, p. 89 (I-44044), Article 21: "The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."

[142] Germany made the first proposal to insert a sovereignty protection clause in the Palermo Convention, making reference to Article 2, paragraphs 2 and 3, of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. See *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2008) (Ann. 59), p. 27, footnote 25, and p. 37; Proposals and contributions received from Governments for the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (A/AC.254/5) (Ann. 60), p. 3. These provisions were placed in a separate article (Article 4) following a proposal by Poland.

> 2.17 . . . The principle of non-intervention excludes all kinds of territorial encroachment . . . It also prohibits the exertion of pressure in a manner inconsistent with international law in order to obtain from a party 'the subordination of the exercise of its sovereign rights' . . .
>
> 2.18 It would be futile to attempt to draw up a comprehensive catalogue of possible violations of those principles that might result from an arbitrary, indiscriminate application of specific provisions of the Convention. Occurrences that are open to dispute will have to be approached and resolved on a case-by-case basis in the light of the development of international law."[143]

70

5.22. It should be noted that, during the negotiation of the Palermo Convention, the States decided to dedicate a separate article (Article 4) to the sovereignty protection clause, despite Germany's initial proposal to follow the example of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which includes this clause in the article concerning the scope of the Convention[144]. This is further proof that, as we have explained above, Article 4 of the Palermo Convention is an independent obligation.

5.23. Article 4 of the United Nations Convention against Corruption is identical to Article 4 of the Palermo Convention[145]. The *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, prepared by the United Nations, explains the scope of the article as follows:

> "31. The Convention against Corruption respects and protects the sovereignty of States parties. Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory.
>
> 32. An interpretative note indicates that the principle of non-intervention is to be understood in the light of Article 2 of the Charter of the United Nations (A/58/422/Add.1, para. 10).
>
> 33. There are also other provisions that protect national prerogatives and sovereignty set forth elsewhere in the Convention . . ."[146]

5.24. The States parties to the Convention against Corruption have confirmed through subsequent practice that Article 4, paragraph 1, of the convention is a specific, independent obligation. For example, the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, adopted under Resolution 3/1 of the Conference of the States Parties, state "[i]n conformity with article 4 of the Convention, the Mechanism shall not serve as an instrument for interfering in the domestic affairs of States parties but shall respect the principles of equality and sovereignty of States parties . . ." and that "governmental experts [and the secretariat] shall bear in mind article 4, paragraph 1, of the

71

---

[143] *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (United Nations, 2000) (Ann. 61), pp. 38-40, paras. 2.12-2.18.

[144] *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (Ann. 59), p. 37.

[145] *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (United Nations, 2012) (Ann. 62), p. 63.

[146] *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (United Nations, 2012) (Ann. 63), paras. 31-33.

Convention"[147]. The same is true of the prospective mechanism for the review of the implementation of the Palermo Convention[148].

5.25. The sovereignty protection clause was also inserted in the treaties aimed at combatting terrorism mentioned above. This insertion was not contested by the States that took part in the negotiation of those instruments, and any proposed amendment was rejected[149]. It should also be noted that the two provisions of Article 4 (paragraphs 1 and 2) of the Palermo Convention form separate articles in the said treaties. This is further evidence that they are two distinct obligations, as we have contended above.

5.26. In brief, the States parties to the Palermo Convention undertook to respect the principles of sovereign equality of States and non-intervention in the domestic affairs of States, as they exist in general international law, including the Charter of the United Nations, in carrying out their obligations under the Convention.

72 C. The application of the Palermo Convention in the present case

5.27. Article 4 of the Palermo Convention does not require respect for the principles of sovereign equality and non-intervention, or the rule of State immunity which flows from them, in a general sense. That is a treaty obligation only in terms of the application of the Convention. In the present case, the aim of the measures taken by France against the Vice-President of Equatorial Guinea and the building located at 42 avenue Foch in Paris is to apply the Palermo Convention, contrary to what France claimed during the public hearings on the request for the indication of provisional measures[150]. Consequently, those measures should have been reflected upon in seeking to give effect to the obligation provided for under Article 4 of the Convention. This was not the case; hence, France has violated the Palermo Convention.

5.28. According to Article 3 of the Palermo Convention, the Convention applies to the prevention, investigation and prosecution of the offences established thereunder. This provision must be interpreted in conjunction with Article 34 of the Convention, which provides that State parties must take the necessary measures to ensure the implementation of their obligations, including but not limited to legislative and administrative measures. The article also specifies that the offences established in the Convention shall be established in the domestic law of each State independently of their transnational nature or the involvement of an organized criminal group.

---

[147] *Mechanism for the Review of Implementation of the United Nations Convention against Corruption — Basic Documents* (United Nations, 2011) (Ann. 64), pp. 5 and 15.

[148] See the resolution "Mechanism for the review of the implementation of the United Nations Convention against Transnational Organized Crime and Protocols thereto", uncorrected, 17-21 Oct. 2016 (CTOC/COP/2016/L.5) (Ann. 65), para. 3 (l); Report on the meeting to explore all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 6-7 June 2016 (CTOC/COP/WG.8/2016/2) (Ann. 66), para. 8 (1), and para. 19; Resolution 5/5 of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime (Ann. 67), para. 5 (1).

[149] During the negotiations of the International Convention for the Suppression of Terrorist Bombings, for example, a proposal by the Republic of Korea to replace the express reference to the principles of sovereign equality and non-intervention with the term "purposes and principles of the Charter of the United Nations" was rejected (Report of the Working Group on Measures to Eliminate International Terrorism (A/C.6/52/L.3) (Ann. 68), p. 24). With regard to the International Convention for the Suppression of the Financing of Terrorism, France proposed the first draft convention, which provided for the sovereignty protection clause (see letter dated 3 Nov. 1998 from the Permanent Representative of France to the United Nations addressed to the Secretary-General (A/C.6/53/9)).

[150] CR 2016/17, 19 Oct. 2016, p. 11, para. 9 (Pellet).

5.29. France is seeking, first and foremost, to prosecute a criminal offence which, under Article 6 of the Palermo Convention, must be criminalized: money laundering[151]. The criminalization of this offence, and the establishment of jurisdiction for the purpose of criminal prosecution (Article 15), is subject to observance of the principles of sovereign equality and non-intervention (Article 4). It should be noted that the laws applied by the French courts in the present case are deemed by France to apply the provisions of the Palermo Convention. This is **73** evidenced in particular by France's considerations at the time it decided to ratify the Convention[152], and by the French Government's communications to the United Nations concerning the legislative measures adopted in order to give effect to the Convention[153].

5.30. France asserted that the Palermo Convention "does not constitute a jurisdictional basis for the exercise of criminal jurisdiction", and that "the proceedings against Mr. Obiang were not initiated on the basis of that Convention"[154]. Yet France is notably seeking to carry out its obligation under Article 11, paragraph 2, of the Convention, which requires that it

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

As the *Legislative Guides* for the Palermo Convention explain:

> "Harmonizing legal provisions on transnational crimes . . ., detecting the offences, identifying and arresting the culprits . . . are all indispensable components of a concerted, global strategy against serious crime. Yet they are not sufficient. After all of the above has taken place, it is also necessary to ensure that the prosecution, treatment and sanctioning of offenders around the world is also comparatively symmetric and consistent with the harm they have caused . . .
>
> . . . . . .

---

[151]France gives effect to this obligation by means of Arts. 324-1 to 324-6 of the French Penal Code.

[152]Report on behalf of the Foreign Affairs, Defence and Armed Forces Committee on the bill authorizing ratification of the United Nations Convention against Transnational Organized Crime (Annex to the minutes of the meeting of 31 Jan. 2002) (Ann. 69), pp. 11-15:

> "French legislation provides for most of the offences that the Convention requires to be introduced into the criminal law of the States Parties.
>
> ……..
>
> As regards **money laundering** (Article 6), the definition given in the Palermo Convention, which draws heavily on the 1990 Council of Europe Convention, is consistent with Articles 324-1 (money laundering) and 321-1 (handling offences) of the Penal Code. It should be noted that under domestic law, handling offences and money laundering apply to the proceeds of any felony or misdemeanour, which satisfies Article 6 §2.
>
> ……..
>
> France was among the very first countries to sign this Convention, which does not entail any new obligations for our country. Indeed, our criminal legislation is in full conformity with the provisions of the text and provides, in particular, for the criminalization of the various offences set out in the Convention."

[153]A non-exhaustive list of certain legislative provisions which France considers to give effect to the Convention is available at: https://www.unodc.org/cld/v3/sherloc/. France has communicated legislative measures relating to Articles 5, 10, 11, 12, 13, 15, 16, 18, 19, 20, 23 and 27 of the Convention.

[154]CR 2016/15, 18 Oct. 2016, p. 22, para. 13 (Pellet).

74

> It is essential, however, to ensure that at least a minimum level of deterrence is applied by the international community . . . Therefore, in addition to harmonizing substantive provisions, States need to engage in a parallel effort with respect to the issues of prosecution, adjudication and punishment . . .
>
> Article 11 addresses this important aspect of the fight against transnational organized crime . . . This article . . . also requires that States make an effort to ensure that any discretionary powers they have under domestic law is used to deter the offences covered by the Convention . . .
>
> [Article 11, paragraph 2] refers to discretionary prosecutorial powers available in some States. These States must make an effort to encourage the application of the law to the maximum extent possible in order to deter the commission of the four main offences covered by the Convention . . .”[155]

5.31. By initiating criminal proceedings against the Vice-President of Equatorial Guinea for criminal offences which he allegedly committed, the French courts have sought to fulfil this obligation, which is closely linked to one of the objectives of the Convention: preventing and fighting transnational organized crime. This is a clear effort by France to exercise its jurisdictional authority and apply its criminal law to the maximum extent possible in order to deter money laundering. However, it cannot give effect to this obligation in disregard of Article 4 of the Convention.

5.32. The facts described in Chapter 3 also show that France is taking action to give effect to other provisions of the Convention, including Article 12 (Confiscation and seizure), Article 14 (Disposal of confiscated proceeds of crime or property) and Article 18 (Mutual legal assistance). Concerning Article 18 in particular, the French authorities sent a request for mutual legal assistance to Equatorial Guinea, which was expressly based on the Palermo Convention[156]. Equatorial Guinea granted this request in a spirit of co-operation, but did not waive its immunities. During the questioning at first appearance via videoconference, the French investigating judge in charge of the case expressly stated that they were acting on the basis of the Palermo Convention[157]. It follows

75

that the French courts were acting under the Palermo Convention when they initiated criminal proceedings against the Vice-President of Equatorial Guinea and adopted measures of execution against the building located at 42 avenue Foch in Paris. Particularly given that there is no treaty on judicial co-operation between the two States.

5.33. The fact that the French courts did not systematically mention the Palermo Convention in the criminal proceedings is not a pertinent argument: international law does not require that States expressly refer to the international obligations they seek to fulfil in their domestic law; in the absence of an obligation to do otherwise, States remain free to choose how they give effect to their obligations.

---

[155] *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Ann. 58), pp. 142-145, paras. 261, 262, 264, 275. The same obligation is provided for in Article 30, paragraph 3, of the United Nations Convention against Corruption and Article 3, paragraph 6, of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[156] See Chapter 3, paras. 3.48-3.49. It should be noted that there are no other treaties on judicial co-operation between Equatorial Guinea and France.

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

5.34. In conclusion, the facts which gave rise to the present dispute occurred during efforts by France to apply the Palermo Convention. Since that Convention is applicable to the facts in the present case, the Court has jurisdiction to rule on Equatorial Guinea's Application.

II. The Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes

5.35. The Optional Protocol also constitutes a basis of jurisdiction for the Court to entertain Equatorial Guinea's Application. The preconditions laid down by the provisions of the Protocol for a dispute to be submitted to the Court in certain instances are satisfied (A). The dispute between Equatorial Guinea and France concerns the interpretation and application of several provisions of the 1961 Vienna Convention on Diplomatic Relations (hereinafter the "VCDR") (B)[158].

A. The preconditions for the seisin of the Court are satisfied

5.36. France and Equatorial Guinea are parties to the VCDR: France ratified the Convention on 31 December 1970 and Equatorial Guinea acceded to it on 30 August 1976. Both States are
76 also parties to the Optional Protocol: France ratified the Protocol on 31 December 1970 and Equatorial Guinea acceded to it on 4 November 2014.

5.37. In the preamble to the Optional Protocol, the States parties expressed

> "their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period".

5.38. The first article of the Protocol provides:

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

5.39. Articles II and III of the Optional Protocol do not restrict Equatorial Guinea's right to bring this case before the Court.

5.40. Article II provides:

> "The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application."

5.41. Article III provides:

---

[158] *UNTS*, Vol. 500, p. 97 (I-7310).

"1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.

2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application."

77 5.42. In sum, the Protocol provides that, within a period of two months after one party has notified its opinion to the other that a dispute exists, the parties may agree to resort to an arbitral tribunal or a conciliation procedure. In the present case, on 6 January and 2 February 2016, Equatorial Guinea proposed to France that they settle the dispute through conciliation and arbitration[159]. On 17 March 2016, France rejected that invitation[160].

5.43. As we have shown above, Equatorial Guinea's attempt to institute a conciliation procedure or resort to arbitration was in vain, since it met with France's refusal. Consequently, the procedural requirements are met and Equatorial Guinea's right to bring before the Court the proceedings initiated by the Application instituting proceedings of 13 June 2016 is irrefutable.

B. The dispute between Equatorial Guinea and France concerns the interpretation and application of the Vienna Convention on Diplomatic Relations

5.44. During the public hearings on the request for the indication of provisional measures, France argued that the Court did not have prima facie jurisdiction to entertain Equatorial Guinea's claim with regard to the building located at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission in France, because the request was "implausible and frivolous"[161].

5.45. France contended that the building located at 42 avenue Foch in Paris "was not, on the critical date, part of the 'premises of the [diplomatic] mission' of Equatorial Guinea in Paris", and that "it never legally acquired the status of 'premises of the mission'". It added that the building "is private property"[162]. Finally, and above all, relying on its own interpretation of the facts, France maintained that Equatorial Guinea had sought to "disguise" a private building as property for
78 diplomatic use, which allegedly constitutes an "abuse of process"[163]. For these reasons, in its view, the Court does not have jurisdiction under the VCDR and the Optional Protocol.

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

---

[159]See para. 5.6 above.

[160]See para. 5.7 above.

[161]CR 2016/15, 18 Oct. 2016, p. 26, para. 17 (Pellet).

[162]*Ibid*., pp. 26-27, para. 19 (Pellet).

[163]*Ibid*., p. 29, para. 24 (Pellet).

5.47. France's argument, according to its interpretation of the facts, that Equatorial Guinea's actions constitute an "abuse of process" is irrelevant in determining the Court's jurisdiction. The factual issues relating to the building located at 42 avenue Foch in Paris are closely linked to the merits of the case and will be addressed in greater detail in Chapter 8. France itself acknowledged, at the end of its oral arguments at the hearings on the request for the indication of provisional measures, that the question of whether the building enjoys diplomatic protection is an issue for the merits[164].

5.48. Thus, there is clearly a dispute between Equatorial Guinea and France regarding the interpretation and application of the VCDR, and the Court has jurisdiction to entertain it.

Conclusion

5.49. For the reasons set out in this chapter, the Court has jurisdiction to entertain the dispute brought before it under Article 35 of the United Nations Convention against Transnational Organized Crime and under Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes.

79

[164]CR 2016/17, 19 Oct. 2016, p. 13, para. 12 (Pellet).

81

PART THREE

VIOLATIONS OF INTERNATIONAL LAW BY FRANCE

83

CHAPTER 6

VIOLATION OF THE PRINCIPLES OF SOVEREIGN EQUALITY AND NON-INTERVENTION

6.1. In this chapter, Equatorial Guinea contends that, by initiating criminal proceedings against the Vice-President of Equatorial Guinea in charge of National Defence and State Security, and by taking measures of execution against the building located at 42 avenue Foch in Paris, France has violated its obligation to implement the Palermo Convention in a manner consistent with the principle of sovereign equality of States and the principle of non-intervention in the domestic affairs of States, as provided for in Article 4 of the Convention.

6.2. This chapter is divided into four sections. Section I deals briefly with the principles of sovereign equality and non-intervention, explaining their content as it relates to the present dispute. The subsequent sections are devoted to showing the manner in which France has violated Article 4 of the Palermo Convention.

6.3. As regards the facts underlying the present dispute, France has taken it upon itself to judge certain actions and decisions that fall within the sole sovereignty and exclusive jurisdiction of Equatorial Guinea under international law. Under the principle of sovereign equality, it must refrain from such conduct (Section II).

6.4. France has also sought to extend its criminal jurisdiction to wrongful acts allegedly committed in Equatorial Guinea, by Equatorial Guineans, and whose victims were said to be Equatorial Guineans or the Equatorial Guinean State. This constitutes a violation of sovereign equality, and the jurisdiction flowing therefrom, and of the principle of non-intervention. In exercising that criminal jurisdiction, France has also breached its obligation to co-operate with Equatorial Guinea, as required by the Palermo Convention (Section III).

84 6.5. Finally, and above all, France has violated the principles of sovereign equality and non-intervention by failing to respect the jurisdictional immunities to which Equatorial Guinea is entitled, in respect of both its Vice-President in charge of National Defence and State Security, and its property (Section IV).

I. The principles of sovereign equality of States and non-intervention in the domestic affairs of States

6.6. The principles of sovereign equality and non-intervention are widely recognized by States, the Court and legal scholars. For the purposes of this chapter, they can be summarized as follows: under the principle of sovereign equality of States, each State has the fundamental right to ensure respect for its personality, freely choose and develop its political, social, economic and cultural systems, and freely develop and conduct its foreign relations. The principle of non-intervention is a corollary of sovereign equality and aims to ensure that it is respected. It prohibits States from intervening in affairs which fall within the sole sovereignty and exclusive jurisdiction of another State. Intervention is unlawful when it involves the use of means of constraint, which are not limited to the use of force.

6.7. The principle of sovereign equality is one of the fundamental principles of the international legal order. It is the first of the principles contained in the Charter of the United Nations, Article 2, paragraph 1, of which provides:

> "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:
>
> 1. The Organization is based on the principle of sovereign equality of all its Members."

6.8. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter the "Declaration on Friendly Relations") reaffirms this important principle:

> "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.
>
> 85 In particular, sovereign equality includes the following elements:
>
> a. States are judicially equal;
>
> b. Each State enjoys the rights inherent in full sovereignty;
>
> c. Each State has the duty to respect the personality of other States;
>
> d. The territorial integrity and political independence of the State are inviolable;
>
> e. Each State has the right freely to choose and develop its political, social, economic and cultural systems;
>
> f. Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States."[165]

6.9. Adopted by consensus, the Declaration on Friendly Relations expresses what the States considered to be the law in force at the time of its adoption. It continues to occupy an important place in contemporary international law[166]. The Court has recognized the particular importance of this declaration[167].

---

[165] Resolution 2625 (XXV) of the United Nations General Assembly, 24 Oct. 1970.

[166] *Ibid*., Section 3:

> "The General Assembly . . . [d]eclares further that: The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles."

[167] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits*, *Judgment, I.C.J. Reports 1986*, p. 107, para. 203 ("the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be 'basic principles' of international law . . ."); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004 (I)*, p. 171, paras. 87-88; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *Judgment, I.C.J. Reports 2005*, pp. 226-227, paras. 162-164.

6.10. In the case concerning *Jurisdictional Immunities of the State,* the Court recalled the fundamental nature of the principle of sovereign equality of States: "the principle of sovereign equality of States, which, as Article 2, paragraph 1 of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order"[168].

6.11. The principle of non-intervention in the domestic affairs of States, a corollary of the principle of sovereign equality[169], also constitutes a fundamental principle of international law. Its
86 observance is a condition *sine qua non* for the smooth functioning of international relations and the realization of the purposes and principles of the United Nations.

6.12. This principle has repeatedly been proclaimed by the United Nations General Assembly[170], which reflects its normative character. In particular, the Declaration on Friendly Relations establishes that:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law . . ."[171]

6.13. Resolution 67/1 of the General Assembly ("Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International levels"), adopted on 24 September 2012, provides in part:

> "We, Heads of State and Government, and heads of delegation have gathered at United Nations Headquarters in New York on 24 September 2012 . . .
>
> . . . . . .
>
> 3. . . . We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, . . . non-interference in the internal affairs of States . . ."[172].

6.14. States have attached and continue to attach great importance to the principles of sovereign equality and non-intervention. Without being exhaustive, attention should be drawn to

---

[168] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, *Judgment, I.C.J. Reports 2012 (I)*, p. 123, para. 57.

[169] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits*, *Judgment, I.C.J. Reports 1986*, p. 106, para. 202.

[170] The General Assembly has adopted some 35 resolutions relating to these principles. See Mr. Jamnejad, Mr. Wood, "The Principle of Non-intervention", *Leiden Journal of International Law*, Vol. 22 (2009), p. 351.

[171] Resolution 2625 (XXV). See also *Corfu Channel*, *Judgment, I.C.J. Reports 1949*, p. 35; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Jurisdiction and Admissibility*, *Judgment, I.C.J. Reports 1984,* p. 392, para. 73; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits*, *Judgment, I.C.J. Reports 1986*, p. 14, paras. 202 and 205; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *Judgment, I.C.J. Reports 2005*, p. 168, para. 164.

[172] Resolution 67/1 of the United Nations General Assembly, 24 Sept. 2012 (Ann. 70).

87 the many important treaties which expressly mention these principles[173], the Final Act of the Conference on Security and Co-operation in Europe of 1975[174], the Declarations of the Non-Aligned Movement[175] and the recent Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law of 25 June 2016[176].

6.15. The criminal proceedings initiated against the Vice-President of Equatorial Guinea and the measures of constraint adopted against the building which houses the Embassy of Equatorial Guinea in Paris constitute a serious violation by France of the principles of sovereign equality and non-intervention. These criminal proceedings and measures of constraint also highlight the incompatibility between these principles and the manner in which the French courts apply the legislation which gives effect to the relevant provisions of the Palermo Convention.

II. France has taken it upon itself to judge actions and decisions that fall within the sole sovereignty and exclusive jurisdiction of Equatorial Guinea

6.16. The principle of sovereign equality prohibits the national courts of one State from judging the sovereign acts of another. In the present case, the French courts acted in a manner inconsistent with this principle, by taking it upon themselves to judge certain actions and decisions falling within the sole sovereignty and exclusive jurisdiction of Equatorial Guinea.

6.17. First, the French courts disregarded the 2012 appointment of Mr. Teodoro Nguema Obiang Mangue as Second Vice-President of the Republic in charge of Defence and State Security, considering it an "appointment of convenience". Similarly, the French courts have also failed to take into account his appointment in June 2016 as Vice-President in charge of National Defence and State Security.

88 6.18. France has also refused to take account of the information provided by the Equatorial Guinean authorities, according to which the predicate offences linked to the offence of money laundering allegedly committed in France were not committed in the territory of Equatorial Guinea.

6.19. Lastly, France has presumed that Equatorial Guinea acted in bad faith in acquiring ownership of the building located at 42 avenue Foch in Paris through the transfer of the shareholder rights in five Swiss companies, and has called into question Equatorial Guinea's decision to use that building for the purposes of its diplomatic mission in France.

---

[173] Aside from the treaties mentioned in Chapter 5, the following treaties are of particular importance: Charter of the United Nations (Article 2, para. 1); Charter of the Organization of American States (Article 3, para. *(e)*, and Article 19); Treaty on European Union (Title I); Constitutive Act of the African Union (Article 4); Charter of the Association of Southeast Asian Nations (Article 2, para. 2); Pact of the League of Arab States (Article 8); Charter of the Organisation of Islamic Cooperation (Article 2, paras. 2 and 4); Vienna Convention on Diplomatic Relations (Article 41, para. 1), etc.

[174] Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1975 (Ann. 71), pp. 3 and 5.

[175] Bali Commemorative Declaration on the 50th Anniversary of the Establishment of the Non-Aligned Movement (NAM 2011/Doc.7/Rev.1), 23-27 May 2011 (Ann. 72), p. 3; Declaration of the 8th Summit of Heads of State or Government of the Member Countries of the Non-Aligned Movement, 1-6 Sept. 1986 (Ann. 73), para. 286.

[176] Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016 (Ann. 74), paras. 2, 4 and 8.

6.20. The facts set out below are indicative of France's stance towards Equatorial Guinea and the way in which it has disregarded Equatorial Guinea's sovereignty and exclusive jurisdiction in the criminal proceedings which are the subject of the present dispute:

(i) the *Chambre de l'instruction* of the Paris *Cour d'appel*, in its judgment dated 16 April 2015, described Mr. Teodoro Nguema Obiang Mangue's appointment to the post of Second Vice-President in charge of Defence and State Security, as an "appointment of convenience"[177].

(ii) The *Cour de cassation*, in its judgment dated 5 December 2015, held that Mr. Teodoro Nguema Obiang Mangue "cannot complain that the *Chambre de l'instruction* denied him the benefit of immunity from criminal jurisdiction for the reasons set out in the argument, of which some, relating to the circumstances of his appointment, are irrelevant but overabundant"[178]. Yet the French courts continued to refer to his appointment as an "appointment of convenience".

(iii) In her final submissions of 23 May 2016, the Financial Prosecutor considered that the transfer of Mr. Teodoro Nguema Obiang Mangue's shareholder rights in the Swiss companies which co-owned the building located at 42 avenue Foch in Paris to the Government of Equatorial Guinea appeared to be "legal window-dressing intended to prevent the property from being attached"[179]. The transfer of the shareholder rights (and thus Equatorial Guinea's acquisition of those rights) and Mr. Teodoro Nguema Obiang Mangue's appointment as Second Vice-President in charge of Defence and State Security were also considered to be "steps . . . taken in an attempt to protect the private assets of the son of the President of the Republic of Equatorial Guinea from the judicial attachment measures . . ."[180]

89

(iv) In the referral order of 5 September 2016, the investigating judges completely ignored the fact that, since 26 June 2016, Mr. Teodoro Nguema Obiang Mangue has been the Vice-President of Equatorial Guinea in charge of National Defence and State Security. They thus implicitly disregarded his appointment. The investigating judges also stated that the transfer of the shareholder rights "has all the marks of legal window-dressing intended as an attempt to protect the building from an attachment measure"[181].

(v) The stance taken by the French courts was confirmed by France at the hearings on the request for the indication of provisional measures, when it adopted the term "legal window-dressing", used in the referral order of 5 September 2016, with regard to Equatorial Guinea's assignment of the building located at 42 avenue Foch in Paris for the purposes of its diplomatic mission in France[182].

(vi) The French courts ignored the information provided by the Public Prosecutor of Equatorial Guinea, in accordance with Article 15, paragraph 5, and Article 18, paragraph 4, of the Palermo Convention, which indicated that none of the predicate

---

[177] Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 16 Apr. 2015 (Ann. 28), p. 15.

[178] *Cour de Cassation*, *Chambre criminelle*, judgment of 15 Dec. 2015 (Ann. 29), p. 3.

[179] Final submissions of 23 May 2016 (Ann. 30), p. 21.

[180] *Ibid*., p. 32.

[181] Referral order of 5 Sept. 2016 (Ann. 7), p. 33.

[182] CR 2016/15, 18 Oct. 2016, p. 29, para. 26 (Pellet).

offences alleged against the Vice-President of Equatorial Guinea had been committed in Equatorial Guinea[183].

(vii) The French Government equally ignored the Note Verbale of 2 February 2016, whereby Equatorial Guinea reminded France that, according to the Equatorial Guinean judicial authority, "investigations conducted in Equatorial Guinea establish that none of the predicate offences under judicial investigation in France has been found to have taken place on the territory of Equatorial Guinea, against either natural or legal persons, and still less against the State of Equatorial Guinea, in relation to what the French courts have characterized as the misappropriation of public funds"[184].

90

(viii) Lastly, France failed to take account of the letter dated 14 February 2012 sent by the President of Equatorial Guinea to his French counterpart, informing him that Equatorial Guinea had acquired the building located at 42 avenue Foch in Paris and that the building was assigned for the purposes of its diplomatic mission in France[185].

6.21. And yet, the appointment of high-ranking representatives of Equatorial Guinea, the decision to acquire a building for the purposes of a diplomatic mission and the establishment of criminal offences allegedly committed in the territory of Equatorial Guinea fall within the sole sovereignty and exclusive jurisdiction of Equatorial Guinea. These acts and decisions are closely linked to Equatorial Guinea's right to freely conduct its foreign relations and exercise its jurisdiction over its own territory and the acts which occur there.

6.22. There is no rule of international law that limits Equatorial Guinea's rights in these matters — rights which derive from the principle of sovereign equality of States — and that entitles France to take it upon itself to judge them. Consequently, Equatorial Guinea is sole judge[186] and France should have refrained from issuing such intrusive and incorrect judgments.

6.23. The facts set out above reveal France's clear disregard for Equatorial Guinea's exclusive jurisdiction. This has resulted in the subordination of Equatorial Guinea's sovereign rights. As we shall see below, this subordination was effected through measures of constraint, which constitutes unlawful intervention.

91

III. France has gone beyond the bounds of its criminal jurisdiction

6.24. France has unilaterally gone beyond the bounds of its criminal jurisdiction to entertain and characterize alleged criminal offences (the predicate offences associated with money laundering) which are said to have been committed in the territory of Equatorial Guinea, by nationals of Equatorial Guinea, and whose victims are Equatorial Guineans or the State of Equatorial Guinea. This is a violation of the principles of sovereign equality and non-intervention, since France has no basis for jurisdiction, under either the Palermo Convention or general international law, to characterize the alleged offences and determine them to have been established. Moreover, by ignoring the information provided by the Public Prosecutor of Equatorial Guinea

---

[183]Report of the Public Prosecutor of the Republic of Equatorial Guinea, 22 Nov. 2010 (Ann. 9).

[184]Embassy of Equatorial Guinea, Note Verbale No. 062/16, 2 Feb. 2016 (Ann. 56), p. 5.

[185]Letter from the President of the Republic of Equatorial Guinea to His Excellency Nicolas Sarkozy, President of the French Republic, 14 Feb. 2012 (Ann. 39).

[186]*Nationality Decrees Issued in Tunis and Morocco*, *Advisory Opinion, 1923*, *P.C.I.J., Series B*, *No. 4*, pp. 23-24.

with regard to the said offences, France has violated its obligation under the Palermo Convention to co-operate with Equatorial Guinea.

6.25. Equatorial Guinea takes seriously any offence that might be committed in its territory. However, the question is whether France can extend its criminal jurisdiction in this instance, despite the investigations conducted by the Equatorial Guinean authorities. Equatorial Guinea does not believe so.

6.26. It is well established in international law that a State may extend its criminal jurisdiction only in special circumstances[187]. Any extension of a State's criminal law in the absence of such circumstances constitutes a violation of the principles of sovereign equality and non-intervention[188]. In the present case, none of the circumstances that would give rise, under international law, to the extraterritorial application of French law has been established. The predicate offences that France must determine to exist before prosecuting money laundering (misuse of corporate assets, misappropriation of public funds, breach of trust and corruption) were not committed in its territory. None of its nationals is either a victim of the alleged predicate offences or involved in their commission. Moreover, France cannot consider itself to be the State affected or injured by the so-called offences: its internal and external security are not threatened in any way.

92

6.27. The fact that the French courts are seeking to characterize such offences, and not prosecute them, makes no difference: either way, France is exercising criminal jurisdiction. In practice, France's characterization of the offences, which is necessary for the offence of money laundering to be prosecuted criminally, is tantamount to the French courts establishing the wrongful acts allegedly committed in Equatorial Guinea. It will lead to the imposition of a custodial sentence, even if it is for money laundering and not for the predicate offences.

6.28. The nature of the alleged offences — misappropriation of public funds, in particular — merits attention. Equatorial Guinea considers that, by their nature, the offences in question are offences whose sole victim would be the State of Equatorial Guinea. Consequently, only the State of Equatorial Guinea is competent to take cognizance of them and in a position to determine whether they have been committed. As one national high court has held:

> "The effective prosecution of serious abuses of office or corruption must indeed be possible in the state which is primarily affected by them and the affected state should also be granted international judicial assistance in accordance with the provisions of international public law . . . In the case which is now under consideration however alleged corruption in the broader sense of the word (or alleged abuses of office) are to be prosecuted by a third state instead of by the affected state . . . In accordance with the general principles of international law a domestic criminal justice system should avoid intervening in the affairs of other states. The right to judicial assistance does not support any unlimited 'extra-territorial' application

---

[187] See: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, separate opinion of President Guillaume, paras. 15-16, and joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 6, 41, 60; Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015), pp. 9-25.

[188] See in this regard: Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law (Ann. 74), para. 4 ("The Russian Federation and the People's Republic of China condemn extraterritorial application of national law by States not in conformity with international law as another example of violation of the principle of non-intervention in the internal affairs of States"); Hazel Fox, Philippa Webb, *The Law of State Immunity, Revised and Updated Third Edition* (Oxford University Press, 2013), p. 91.

> of domestic general criminal law to the activities of high-ranking foreign office-holders within their spheres of responsibility . . .
>
> In the case under consideration circumspection is required from the perspective of the law relating to the provision of judicial assistance, especially as the USA is demanding the extradition of the former Minister for Nuclear Energy of another state. The USA is maintaining its extradition request against the wishes of Russia. It intends to instigate criminal proceedings on the basis of the accusation that the former Russian Minister for Nuclear Energy misappropriated state funds in Russia. In this connection questions are raised in relation to the economic, nuclear and security sovereignty of Russia; in addition, the functional immunity of the fugitive former Cabinet member is being questioned. The Government of the Russian Federation has taken diplomatic steps to prevent the extradition of the fugitive desired by the USA's justice authorities and at the same time has submitted an independent complaint to the Federal Court in relation to the admission of the USA's request . . . These circumstances also militate for the extradition of the former Russian government member to Russia."[189]

93

6.29. It is hard to see how France, as a third State, could be competent and better placed than Equatorial Guinea to determine whether such original offences were committed. The Palermo Convention, and international law in general, do not confer that jurisdiction on France. Indeed, while the Convention does establish obligations concerning criminalization, the establishment of jurisdiction and criminal prosecution for the offence of money laundering, it makes no provision for the jurisdiction of States parties in respect of predicate offences[190]. However, as required by Article 4, any characterization of predicate offences must be carried out in a manner consistent with the principles of sovereign equality and non-intervention, including rules which determine the criminal jurisdiction of States, as described above. In the present case, these principles and rules do not enable France to rule on the alleged predicate offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption; Equatorial Guinea alone has jurisdiction to do so.

6.30. Finally, and even if it did have jurisdiction to characterize and determine the existence of the predicate offences, France has violated certain provisions of the Palermo Convention intended to ensure co-operation between States parties. Given the circumstances of the present case, such co-operation was and continues to be particularly necessary. France's failure to co-operate effectively aggravates its violation of the principles of sovereign equality and non-intervention.

6.31. As we mentioned above, the offences which France claims Mr. Teodoro Nguema Obiang Mangue committed in Equatorial Guinea were investigated by the Public Prosecutor of Equatorial Guinea. These investigations led the Public Prosecutor to conclude that none of the predicate offences had been committed. The Public Prosecutor's report, containing his findings in this regard, was transmitted to the French authorities for consideration in accordance with Article 18 of the Palermo Convention. However, the report was ignored. Under the obligation of co-operation deriving from the Palermo Convention and the principles of sovereign equality and non-intervention, France should have taken account of the information provided by Equatorial Guinea regarding the commission of the offences in question.

94

---

[189] *Adamov (Evgeny)* v. *Federal Office of Justice*, Appeal Judgment, Case No. 1A 288/2005, ILDC 339 (CH 2005), 22 Dec. 2005, Swiss Federal Supreme Court, paras. 3.4.3-3.4.4. See also para. 3.4.2.

[190] The Palermo Convention simply defines the term "proceeds of crime" as "any property derived from or obtained, directly or indirectly, through the commission of an offence" (Article 2 *(e)*).

6.32. Article 18, paragraph 1, of the Palermo Convention establishes that "States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention . . .". Paragraph 4 of the same article further provides that:

> "the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings . . ."

Finally, Article 15, paragraph 5, prescribes that:

> "[i]f a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation [or] prosecution . . . in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions".

These provisions, interpreted in the light of the purpose of the Convention[191], give rise to an obligation of co-operation and consultation between Equatorial Guinea and France, which has not been upheld by France in the present case.

6.33. The Equatorial Guinean authorities informed the French authorities of the findings of their investigations, because they thought that the findings would help France conclude the criminal proceedings initiated against the Vice-President of Equatorial Guinea. Since money laundering is a derivative offence, a person cannot be convicted if the predicate or original offences have not been established to exist[192].

95 6.34. Article 15, paragraph 5, of the Palermo Convention establishes that, in light of the information provided by Equatorial Guinea, Equatorial Guinea and France must, "as appropriate", consult one another with a view to co-ordinating their actions. In the present case, it is necessary for Equatorial Guinea and France to consult one another, given that Equatorial Guinea has exclusive jurisdiction to determine whether the alleged predicate offences — misappropriation of public funds, in particular — were committed. Even assuming that Equatorial Guinea did not have exclusive jurisdiction to do so and that French law applied to the alleged predicate offences which occurred only in Equatorial Guinea, it would still be necessary for the two States to co-operate, since Equatorial Guinea would be the only State in a position to determine whether the offences were committed.

6.35. The only possible outcome of the consultation and co-operation that must take place between France and Equatorial Guinea is the actual receipt by the French authorities of the report of the Public Prosecutor of Equatorial Guinea. They must take account of that report and, accordingly, put an end to the criminal proceedings against the Vice-President of Equatorial Guinea, since the French courts would be unable to affirm the existence of the predicate offences of which he stands accused. This is without prejudice to the fact that the French courts must also put

---

[191] As a reminder, Article 1 of the Palermo Convention provides: "The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively". It is, in particular, the transnational nature of the offences covered by the Convention which make co-operation an essential factor in suppressing them. France thus cannot attempt to combat transnational organized crime alone; doing so would carry the risk of trespassing on the sovereignty of other States.

[192] See Chapter 3, paras. 3.14-3.18.

an end to the criminal proceedings in view of the immunity from foreign criminal jurisdiction of the Vice-President of Equatorial Guinea.

IV. France has violated Equatorial Guinea's jurisdictional immunity by adopting measures of constraint against its Vice-President and the premises of its diplomatic mission

6.36. As we shall see in the chapters that follow, France has not respected the jurisdictional immunities to which Equatorial Guinea is entitled under international law. More specifically, it has violated the immunity from foreign criminal jurisdiction *ratione personae* enjoyed by the Vice-President of Equatorial Guinea and the immunity from execution enjoyed by the building located at 42 avenue Foch in Paris as State property (Chapters 7 and 8). Since State immunities derive from the principle of sovereign equality, France's refusal to recognize them also constitutes a clear violation of the principles that must be respected under Article 4 of the Palermo Convention.

96 6.37. The exercise of criminal jurisdiction by France and its failure to respect the immunities to which Equatorial Guinea is entitled have resulted in several measures of constraint being taken against Equatorial Guinea. These measures were described in Chapter 3 above and will be further discussed in the chapters that follow. They include, for example, the issuance of an arrest warrant against the Vice-President of Equatorial Guinea, the search and attachment of the building located at 42 avenue Foch in Paris, and the order of 5 September 2016 referring the Vice-President to the Paris *Tribunal correctionnel* for trial. As regards the present chapter, it should simply be noted that these measures served and continue to serve to subordinate Equatorial Guinea's rights deriving from the principle of sovereign equality. The existence of an element of constraint, required in order for intervention to be considered unlawful, is therefore established.

Conclusion

6.38. This chapter has demonstrated how France has violated and continues to violate its obligation to respect the principles of the sovereign equality of States and non-intervention in the domestic affairs of States, as provided for under Article 4 of the Palermo Convention.

97

CHAPTER 7

VIOLATION OF THE IMMUNITY OF THE VICE-PRESIDENT OF EQUATORIAL GUINEA IN CHARGE OF NATIONAL DEFENCE AND STATE SECURITY

7.1. In this chapter, Equatorial Guinea contends that by failing to respect the immunity from foreign criminal jurisdiction *ratione personae* enjoyed by certain holders of high-ranking office in a State, France has violated and continues to violate Article 4 of the Palermo Convention.

7.2. As explained in Chapter 2, at the time the criminal proceedings were initiated before the French courts, Mr. Teodoro Nguema Obiang Mangue was the Minister for Agriculture and Forestry of Equatorial Guinea. On 22 May 2012, as part of a major government reshuffle, he was appointed Second Vice-President in charge of Defence and State Security. As Second Vice-President and, since 22 June 2016, Vice-President of Equatorial Guinea in charge of National Defence and State Security, Mr. Teodoro Nguema Obiang Mangue was and remains a holder of high-ranking office in the State, who, by virtue of his position and functions, enjoys immunity from foreign criminal jurisdiction *ratione personae* under international law.

7.3. The change in Mr. Teodoro Nguema Obiang Mangue's status following the filing of Equatorial Guinea's Application did not put an end to its dispute with France. On the contrary, now, as before, the criminal proceedings in France against Mr. Teodoro Nguema Obiang Mangue are being conducted in violation of his immunity *ratione personae* and, consequently, in violation of an obligation owed to Equatorial Guinea by France.

7.4. Section I of this chapter recalls the rules of international law on the immunity from foreign criminal jurisdiction of certain holders of high-ranking office in a State, in so far as they are relevant to the present case. It demonstrates in detail that a small circle of holders of high-ranking office in a State, including holders of very senior positions such as those held by Mr. Teodoro Nguema Obiang Mangue, the Vice-President of Equatorial Guinea in charge of National Defence and State Security, enjoy immunity from foreign criminal jurisdiction *ratione personae* throughout their time in office. Section II then shows that in this instance the French authorities have acted in breach of those rules of international law and contrary to Article 4 of the Palermo Convention.

98

I. The immunity from foreign criminal jurisdiction *ratione personae* of certain holders of high-ranking office in a State

7.5. As Chapter 6 showed, the principle of sovereign equality of States, which, as the Court has recognized, is "one of the fundamental principles of the international legal order"[193], finds expression in a number of well-established rules of international law. Those rules include the immunity of the State and the immunity of its representatives. They serve to prevent the courts of a State from exercising their adjudicative and enforcement jurisdiction over another State, in accordance with the maxim *par in parem non habet imperium.* They also seek to guarantee respect for the principle of non-intervention in the domestic affairs of another State.

[193] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I),* p. 123, para. 57.

7.6. There is no need here for a lengthy exposition of the immunity of State officials from foreign criminal jurisdiction. It is a traditional notion in international law that comprises two distinct concepts: personal or statutory immunity (*ratione personae*) and functional or material immunity (*ratione materiae*). In neither case is immunity a question of courtesy or of national law: immunity exists as a right under international law, which imposes a corresponding obligation on States to refrain from exercising their jurisdiction. The immunity belongs to the State of the official, and that State alone may dispose of it.

7.7. Whereas immunity *ratione materiae* applies to State officials during and after their period in office in respect of acts they have performed in an official capacity, immunity *ratione personae* is granted solely to a small circle of State officials throughout the time that they hold
99 office and applies to all their acts (both private and official). Immunity *ratione personae* and immunity *ratione materiae* are procedural in nature: they bar the exercise of jurisdiction (if that jurisdiction exists), but do not constitute a defence on the merits. Consequently, they do not affect the possible criminal responsibility of State officials, or the international responsibility of the State itself; they are not such as to decide disputes on the merits, but rather guarantee that those disputes are dealt with in an appropriate forum.

7.8. Under customary international law immunity *ratione personae*, which allows no exceptions, extends not only to the Head of State, Head of Government and Minister for Foreign Affairs, but also to certain other holders of high-ranking office in a State who perform similar functions, and in particular those whose portfolio includes defence. Immunity is not granted for personal benefit, but rather to enable its beneficiaries to perform their duties freely and effectively on behalf of the State, and to guarantee, in the common interest, that international relations are not disrupted.

7.9. The following sections will examine: *(a)* the relevant conventional provisions; *(b)* the jurisprudence of the Court; *(c)* statements made by States; *(d)* other State practice (national legislation and decisions of national courts); *(e)* academic writings; and *(f)* the work of the International Law Commission on the "immunity of State officials from foreign criminal jurisdiction".

A. Conventional provisions

7.10. The rule that, in addition to the Head of State, the Head of Government and the Minister for Foreign Affairs, "other persons of high rank" enjoy this special status under international law is reflected, *inter alia*, in Article 21 of the Convention on Special Missions, which was adopted by the General Assembly of the United Nations on 8 December 19[6]9:

> "Article 21
> Status of the Head of State and persons of high rank
>
> 1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.
>
> **100** 2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by

the present Convention, the facilities, privileges and immunities accorded by international law."[194]

7.11. That rule is also reflected in Article 50 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975):

"Article 50
Status of the Head of State and persons of high rank

1. The Head of State or any member of a collegial body performing the functions of Head of State under the constitution of the State concerned, when he leads the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to Heads of State.

2. The Head of Government, the Minister for Foreign Affairs or other persons of high rank, when he leads or is a member of the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to such persons."[195]

B. The jurisprudence of the Court

7.12. This present state of international law has been confirmed by the jurisprudence of the Court. In the case concerning the *Arrest Warrant*, it declared that

"in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal"[196].

101 7.13. The Court recalled that statement in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters,* in which it said that it

"has already recalled in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* case 'that in international law it is firmly established that . . . certain holders of high-ranking office in a State, such as the Head of State . . . enjoy immunities from jurisdiction in other States, both civil and criminal' (*Judgment, I.C.J. Reports 2002,* pp. 20-21, para. 51)"[197].

The words "such as" indicate that the Court does not consider that, in international law, immunity *ratione personae* is limited to the Head of State, Head of Government and Minister for Foreign Affairs. It did not seek to define a closed list of the beneficiaries of immunity *ratione personae.* Rather, the Court suggested that the circle extends beyond the three holders of high-ranking office in a State that it mentions, and provided important guidance.

---

[194] *UNTS,* Vol. 1400, I-23431, p. 231.

[195] Certified copy available at https://treaties.un.org/doc/Treaties/1975/03/19750317%2008-17%20AM/Ch_III_11p.pdf.

[196] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* pp. 20-21, para. 51.

[197] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* pp. 236-237, para. 170.

7.14. The circle of holders of high-ranking office in a State, who, by virtue of their status, enjoy immunity *ratione personae* in other States, is no doubt narrow. A high rank is not enough: representation of a State at international level by virtue of that high rank in essential matters of sovereign prerogative is equally important. These criteria based on function and representation are easily met by the positions of Head of State, Head of Government and Minister for Foreign Affairs. In the modern era, they may also be met by other very high-ranking State officials who are actively involved in conducting the State's international relations in areas such as national defence.

7.15. Thus, in addition to the Head of State, the Head of Government and the Minister for Foreign Affairs, immunity *ratione personae* is also granted to those holders of high-ranking office in a State who represent the State at international level by virtue of their rank and whose functions make it essential for them to travel abroad. The nature of their functions requires that immunity: such holders of high-ranking office in a State are regularly called upon to conduct activities in connection with the State's international relations, such as high-level diplomatic activities and international negotiations. They have to be in constant communication with their governments, provide leadership to representatives of the State abroad, and be capable of communicating at any time with representatives of other States. Finally, they are recognized as representatives of their States at the highest level solely by virtue of their office[198]. Any interference in their capacity to discharge their duties would affect the State's capacity to conduct its international relations at the highest level through the people of its choice, and is therefore prohibited. This serves to guarantee the proper conduct of international relations, which is necessary for peaceful co-existence and co-operation between States.

102

7.16. It is not difficult, therefore, to distinguish between the narrow category of holders of high-ranking office in a State who enjoy immunity *ratione personae,* and other State officials who do not. In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, for example, the Court had no difficulty in confirming that the Djiboutian *procureur de la République* and Head of National Security, whose functions were essentially internal, did not benefit from immunity *ratione personae*[199]. Similarly, in the case concerning *Certain Criminal Proceedings in France*, in which the Court referred to the immunities of President Sassou Nguesso as Head of State of the Republic of the Congo, the same conclusion was not drawn in respect of General Oba, the Minister of the Interior[200].

7.17. The Court's jurisprudence on the scope of personal immunity and its application to certain holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs, reflects international law as it currently stands. It is indisputable that such full immunity does not signify impunity, as the Court made clear in the case concerning the *Arrest Warrant*[201]. Immunity does not preclude criminal proceedings at national level, the waiver of immunities, criminal proceedings after the end of office, or criminal proceedings before international criminal courts. Thus, a balance is struck between the need to maintain the proper conduct of international relations and immunities from foreign criminal jurisdiction, on the one hand, and the need to ensure individual responsibility for violations of the law, on the other.

103

---

[198] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* pp. 21-22, para. 53.

[199] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* pp. 243-244, para. 194.

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

[201] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 25-26, para. 61.

C. Statements by States

7.18. Since 2008 during the annual debates of the Sixth Committee of the General Assembly of the United Nations on the reports of the International Law Commission on the "Immunity of State officials from foreign criminal jurisdiction", most of the States taking the floor have expressed their support for the Court's Judgment in the case concerning the *Arrest Warrant*, that is, for the rule that immunity *ratione personae* is absolute and applies not only to Heads of State, Heads of Government and Ministers for Foreign Affairs, but also to a limited number of other senior officials of a State with a similar rank and functions. Several States have noted the need to clarify the law. Some States have accepted the draft article provisionally adopted by the International Law Commission, according to which only Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae*, which, it is argued, is in any event a proposal *de lege ferenda.* However, it is likely that some of those States did not think to consider positions such as vice-president in charge of national defence and State security. A careful reading of their statements reveals that they were more concerned about the fact that the criterion for extending such immunity to other holders of high-ranking office in a State was not clear. Some of the States which supported the draft article nevertheless conceded that it was possible to extend immunity *ratione personae* beyond Heads of State, Heads of Government and Ministers for Foreign Affairs.

7.19. France has officially recognized that customary international law requires immunity *ratione personae* to be applied to certain holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs. In 2011, before the Sixth Committee, it stated that:

> "In the case of immunity *ratione personae*, the Commission should identify, based on judgments of the International Court of Justice, the criteria for determining which officials other than the so-called troika, to use the Special Rapporteur's term, might enjoy such immunity *de lege lata*."[202]

104

7.20. In 2013, following the International Law Commission's provisional adoption of the draft article referring solely to Heads of State, Heads of Government and Ministers for Foreign Affairs as beneficiaries of immunity *ratione personae,* France expressed the view that such an approach was too restrictive:

> "However, a query may be raised about the proposed, rather restrictive identification of those officials other than the 'troika' who might benefit from immunity *ratione personae.* With particular regard to the judgments of the International Court of Justice in *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters*, the interpretation given in the report seems reductive and does not seem to take full account of recent practice and the opinions expressed by many delegations in 2012.
>
> There is no doubt that a close link exists between the fact that troika members enjoy immunity *ratione personae* and that, by virtue of their functions, they are fully authorised to represent their State and are not required to produce full powers, as the Vienna Convention on the Law of Treaties puts it. However, this delegation considers that this fact should not serve as a pretext for sidestepping a more detailed examination of the other criteria envisaged by the International Court of Justice. The

[202]Statement by France before the Sixth Committee, [26] Oct. 2011, Ann. 75; also contained in the summary record of the 20th meeting, 26 Oct. 2011, doc. A/C.6/66/SR.20, para. 44. See also statement by France before the Sixth Committee, 29 Oct. 2008, Ann. 76; also contained in the summary record of the 19th meeting, 29 Oct. 2008, doc. A/C.6/63/SR.19, paras. 12-15.

> fact that 'certain high-ranking officials' may benefit from the rules on immunity *ratione materiae* or special arrangements, such as those for special missions, when they are on an official visit to a third State does not exhaust the subject. In contrast, this delegation agrees with the view that in all events any extension of immunity *ratione personae* should benefit only a small circle of 'high-ranking officials'."[203]

7.21. France adopted a similar position before the Court in the case concerning *Certain Criminal Proceedings in France.* In its oral arguments, France did not suggest that immunity *ratione personae* applied solely to Heads of State, Heads of Government and Ministers for Foreign Affairs, but rather that General Pierre Oba, the Congolese Minister of the Interior, did not enjoy such immunity because "[his] duties [were], by definition, essentially internal and . . . 'involv[ed] less frequent foreign travel'"[204].

105

7.22. This position was again expressed before the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, in which France recognized that immunity *ratione personae* is granted to State officials if "such immunities are indispensable to those missions being carried out [by them] and provided they are inherent to the functions concerned"[205]. In arguing that the *procureur de la République* and the Head of National Security of Djibouti did not enjoy such immunity, France took greater account of their functions than of their titles. It explained in this regard that "those duties are not of a kind to exonerate those performing them from their obligations in criminal matters"[206]. The Court summarized France's position as follows:

> "In response to Djibouti's initial argument, France considers firstly that the *procureur de la République* and the Head of National Security do not, given the essentially internal nature of their functions, enjoy absolute immunity from criminal jurisdiction or inviolability *ratione personae*."[207]

D. Other State practice: national legislation and decisions of national courts

7.23. In these proceedings, the legislation of States that have adopted laws on the immunity of holders of high-ranking office in a State constitutes a particularly important State practice. Generally speaking, such national legislation does not restrict the immunity *ratione personae* of holders of high-ranking office in a State to Heads of State, Heads of Government and Ministers for Foreign Affairs. Rather, it provides that such immunity should be granted in accordance with general international law. This is true, for example, of Germany's Judicial Systems Act[208], the Netherlands' Law on International Crimes[209], Finland's Penal Code[210], South Africa's Diplomatic

106

---

[203]Statement by France before the Sixth Committee, 28 Oct. 2013, Ann. 77; also contained in the summary record of the 17th meeting, 28 Oct. 2013, doc. A/C.6/68/SR.17, paras. 115-116.

[204]CR 2003/21, 28 Apr. 2003, p. 27, para. 24 (Pellet). See also CR 2003/23, 29 Apr. 2003, p. 8 ("[h]is functions and duties are essentially domestic in nature, obviously, and he is far less exposed to the need for foreign travel than a Foreign Minister" ([Abraham])).

[205]CR 2008/5, 25 Jan. 2008, p. 46, para. 63 (Pellet). See also *ibid.*, p. 44, para. 61.

[206]*Ibid.*, p. 42, para. 58 (Pellet).

[207]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* pp. 241-242, para. 186.

[208]Judicial Systems Act (*Gerichtsverfassungsgesetz*) of 27 Jan. 1877, *Reichsgesetzblatt,* 1877, p. 41, Sec. 20. See also the Basic Law for the Federal Republic of Germany, Sec. 25.

[209]Wet internationale misdrijven, Art. 16.

[210]Penal Code of Finland, 39/1889, Sec. 15.

Privileges and Immunities Act[211], the Czech Republic's Code of Criminal Procedure[212] and Belgium's Code of Criminal Procedure[213]. Spain's legislation[214], on the other hand, identifies only Heads of State, Heads of Government and Ministers for Foreign Affairs as beneficiaries of immunity *ratione personae.*

7.24. The decisions of national courts on the immunity of holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs, also constitute a particularly important State practice. They may equally be relevant by virtue of Article 38, paragraph 1 *(d)*, of the Statute of the Court. These decisions show that national courts also take the view that customary international law confers immunity *ratione personae* on certain holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs, and that they have interpreted the Court's Judgment in the *Arrest Warrant* case in that way. They also shed light on the criteria for determining which holders of high-ranking office fall within the small circle of beneficiaries of immunity *ratione personae.*

7.25. In the *Joola* case, the *Chambre criminelle* of the French *Cour de cassation* recognized that immunity *ratione personae* applies to certain holders of high-ranking office in a State, other than the Head of State, Head of Government and Minister for Foreign Affairs. The case concerned the shipwreck of the *Joola* off the coast of Gambia on 26 September 2002. Arrest warrants were issued on 12 September 2008 on charges of manslaughter, unintentional injuries and failure to assist those in peril, against, among others, the former Prime Minister and the Minister for the Armed Forces of Senegal. The *Chambre de l'instruction* cancelled the arrest warrants. In its judgment of 16 June 2009, it maintained that

107

> "international custom, which bars States from being prosecuted by a foreign State, applies to certain holders of high-ranking office in a State, such as the Head of State and Head of Government, regardless of whether or not they enjoy immunity from criminal jurisdiction in their own country; that this custom also applies to those ministers whose office is such that, like the Head of State and Head of Government, they are recognized by international law as having the capacity to represent a State solely by virtue thereof; that, throughout their time in office, they enjoy full immunity from criminal jurisdiction and inviolability abroad . . . ; that in this instance, at the time of the acts, Mame L . . . M . . . and N . . . I . . . held the offices of Prime Minister and Minister for the Armed Forces of the Republic of Senegal respectively, and were no longer performing those functions at the time that an arrest warrant was issued against them by a French investigating judge; that, while it appears that those two persons did not have direct responsibility for the operation of the *Joola*, there is information to suggest that they issued instructions relating thereto in the performance of their political duties . . . ; that the same immunity must be accorded to N . . . I . . . , as the former Armed Forces Minister of Senegal, performing the functions of a minister for defence; that, given the specific nature of his duties and the international focus of his activities, the Minister must be able to perform his functions freely on behalf of the State which he represents; that he frequently has to travel abroad to represent the Head of State, who is the head of the armed forces, on visits to troops from his country who are stationed abroad, as well as during the incessant armed

---

[211]Diplomatic Privileges and Immunities Act 37 of 2001, Art. 4, para. 2 *(a)*.

[212]Zákon č. 141/1961 Sb. o trestním řízení soudním (trestní řád), Sec. 10.

[213]Code of Criminal Procedure, Preliminary Title, Chap. I, Art. 1*bis*, para. 1.

[214]Ley Orgánica 16/2015 sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España, 27 Oct. 2015.

> conflicts between States, in particular on the African continent, and in connection with participation in multinational forces, which requires regular contact with his counterparts from other States . . .”[215].

The *Cour de cassation* subsequently rejected an appeal against the above judgment, taking the view that the decision of the *Chambre de l'instruction* was well founded[216].

7.26. In 2007, in the course of criminal proceedings initiated against the former Defense Secretary of the United States, Mr. Donald Rumsfeld, before the Paris *Tribunal de grande instance*, the French Public Prosecutor (and the French Minister for Foreign Affairs) recognized that immunity *ratione personae* extends to defence ministers. Although the case concerned immunity
108 *ratione materiae* rather than immunity *ratione personae* (since Mr. Rumsfeld had already left office), the Prosecutor's language and reasoning suggest that he had immunity *ratione personae* in mind when he wrote:

> “The Ministry of Foreign Affairs has indicated that, under the rules of customary international law, as established by the International Court of Justice, immunity from criminal jurisdiction of Heads of State and Government and Ministers for Foreign Affairs continues to apply, after they have left office, in respect of acts performed in an official capacity, and that as a former Secretary of Defense, Mr. Rumsfeld should, by extension, enjoy the same immunity in respect of acts performed in the exercise of his functions.”[217]

7.27. In the *Bemba* case, the Brussels *Tribunal correctionnel* recognized in 2004 that the Vice-President of the Democratic Republic of the Congo benefited from immunity *ratione personae*. The *Tribunal correctionnel* found:

> “Whereas it is clearly established in international law that certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunity from criminal jurisdiction in other States;
>
> Whereas, according to the Judgment of 14 February 2002 of the International Court of Justice in the 'Yerodia' case, immunity and inviolability protect the persons concerned from any act by the authorities of another State which would impede them from performing their functions; whereas such immunity from jurisdiction prohibits any judicial procedure and is a bar to proceedings;
>
> . . . . . .
>
> Whereas, in this instance, Gombo Bemba, in his capacity as Vice-President, currently enjoys the status of a person of high rank in the Congolese State;
>
> Whereas the Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo establishes that the Presidency, comprising the President and four Vice-Presidents, shall provide the necessary and exemplary leadership in the interests of national unity;

---

[215] Paris *Cour d'appel*, *Chambre de l'instruction,* judgment of 16 June 2009, in *Revue générale de droit international public*, 2011-2012, pp. 595-596. *[Translation by the Registry.]*

[216] *Cour de cassation, Chambre criminelle*, judgment of 19 Jan. 2010, in *Revue générale de droit international public*, 2011-2012, p. 600.

[217] Letter from the Public Prosecutor concerning the *Rumsfeld* case, 16 Nov. 2007 (Ann. 78).

> Whereas Gombo Bemba, who is in charge of the Economic and Financial Commission, does indeed seem to have a mandate to provide representation abroad . . . ;
>
> **109** Whereas, therefore, given the doubt caused by uncertainty in customary international law, which appears to be evolving, the benefit of which must be given to the defendant . . . , this application should be allowed . . ."[218]

7.28. In the *Nezzar* case (2012), the Swiss Federal Criminal Court found that a serving Minister for Defence benefited from full immunity *ratione personae* during his time in office. The Federal Criminal Court relied, *inter alia*, on "the broad interpretation provided by the ICJ in the Yerodia case", and concluded that:

> "A.'s membership of the collegiate government (HCE) should suffice for him to be accorded immunity *ratione personae* during his term of office. This question does not warrant further clarification, however, since according to the broad interpretation provided by the ICJ in the Yerodia case, an interpretation adopted by certain national courts . . . and by the ILC . . . , immunity *ratione personae* during the term of office does not apply exclusively to the troika. The serving minister for defence also enjoys that immunity. As such, A. already benefited from immunity *ratione personae* during the time that he held that office."[219]

7.29. In the *Adamov* case (2005), the Swiss Federal Supreme Court recognized that a Minister for Atomic Energy could benefit from immunity *ratione personae*[220].

7.30. The United Kingdom's courts have also recognized the immunity *ratione personae* of certain holders of high-ranking office in a State, other than Heads of State, Heads of Government and Ministers for Foreign Affairs. In *Re Mofaz* (2004)[221], a district judge declined to issue an arrest warrant against the Israeli Minister for Defence, relying, *inter alia*, on the Court's Judgment in the *Arrest Warrant* case. The court found that:

> "11. . . . State immunity has only to date been recognized to shield the conduct of certain individuals. The International Court of Justice in the Arrest Warrant case (*Congo* v. *Belgium*) held that such immunity extended to the serving Head of State, Head of Government and the Foreign Minister. However, what is clear from paragraph 51 of the judgment is that the court did not need to consider immunity in
>
> **110** relation to any other minister. Paragraph 51 reads:
>
> 'The [C]ourt would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both

---

[218] Brussels *Tribunal correctionnel* (44th *Chambre*), judgment of 21 May 2004, Registry No. 3474, in *Revue Belge de Droit International,* Vol. 40, 2007, pp. 185-187. *[Translation by the Registry.]*

[219] *A.* v. *Ministère Public de la Confédération*, Swiss Federal Criminal Court, 25 July 2012, BB.2011.140, para. 5.4.2. *[Translation by the Registry.]* At the time of the Federal Criminal Court's decision, the person who was the subject of the criminal proceedings had already left office, which is why the court decided that he no longer benefited from immunity *ratione personae*.

[220] *Adamov (Evgeny)* v. *Federal Office of Justice*, appeal judgment, Case No. 1A 288/2005, *ILDC* 339 (CH 2005), 22 Dec. 2005, Swiss Federal Supreme Court, para. 3.4.2 (*obiter dictum*).

[221] *Re Mofaz*, Bow Street Magistrates' Court, 12 Feb. 2004, 128 *ILR* 709.

civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.'

Two points arise from that. The use of the words 'such as' the Head of State, Head of Government and Minister for Foreign Affairs indicate to me that other categories could be included. In other words, those categories are not exclusive. Additionally, the last line made it absolutely clear that it was only the Minister of Foreign Affairs that fell to the Court to consider — no other office holder."

7.31. In *Re Bo Xilai* (2005)[222], a court of first instance once again adopted the reasoning of the Court in the case concerning the *Arrest Warrant* and found that the Chinese Minister for International Trade enjoyed immunity *ratione personae*:

"5. The real issue in this case is whether the proposed defendant is immune from prosecution. I am told that Mr Bo is the Minister for Commerce including International Trade for the People's Republic of China. As such, I have concluded his functions are equivalent to those exercised by a Minister for Foreign Affairs and, adopting the reasoning of the International Court of Justice in the case of *Democratic Republic of Congo* v. *Belgium*, I reach the conclusion that under the customary international law rules Mr Bo has immunity from prosecution as he would not be able to perform his functions unless he is able to travel freely."

7.32. In *Re Ehud Barak* (2009), a court of first instance of the United Kingdom found, for similar reasons, that Mr. Barak, the Israeli Minister for Defence and incumbent Vice-Prime Minister, enjoyed immunity *ratione personae*[223]. The judge dealing with the case declined to issue an arrest warrant against him, indicating that his functions were similar to those of a Minister for Foreign Affairs, and that consequently he benefited from immunity *ratione personae* under customary international law. He also explained that Mr. Barak would not be capable of performing his duties effectively if he were subject to criminal proceedings before the British courts[224].

111

7.33. The fact that there is no national case law contradicting the foregoing is also significant[225].

7.34. In order better to define the criteria for determining the small circle of holders of high-ranking office in a State who enjoy immunity *ratione personae*, it may also be helpful to refer to other decisions by national courts. In the spirit of the Court's Judgments in the cases concerning the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters*, such practice limits personal immunity to a narrow circle of holders of high-ranking office in a State, and prevents the abuse of this immunity conferred by international law.

---

[222] *Re Bo Xilai*, Bow Street Magistrates' Court, 8 Nov. 2005, 128 *ILR* 713.

[223] As described in Elizabeth H. Franey, *Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law,* Lambert Academic Publishing (LAP), 2011, p. 131 (the decision, dated 29 Sept. 2009, has not been officially published).

[224] *Ibid.*

[225] See also *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I),* pp. 134-135, para. 77.

7.35. In the case of *Khurts Bat and Mongolia (intervening)* v. *Investigating Judge of the German Federal Court and Secretary of State for Foreign and Commonwealth Affairs (intervening)*[226], for example, the London appellate court rejected the argument that the Head of the Office of National Security in Mongolia enjoyed immunity *ratione personae* by virtue of his functions. The appellate court referred to the Judgment in the case concerning the *Arrest Warrant*:

> "The words 'such as', whilst indicating that the list is not limited to those they identify [i.e. Heads of State and Government and Minister for Foreign Affairs], also carries with it the implication that in order to fall within that narrow circle it must be possible to attach to the individual in question a similar status."[227]

The Court went on to say that it was clear that:

> "Mr. Khurts Bat falls outwith that narrow circle. In British terms he is a civil servant whose counterparts, so the United Kingdom contends, would be someone of director level, at a mid-rank in the FCO. The documents showing his job description and his authority, shown to the court by the Government of Mongolia, underline his status as an administrator far removed from the narrow circle of those who hold the high-ranking office to be equated with the State they personify and with those identified by the International Court of Justice."[228]

112

7.36. In Belgium in 2003, in a case concerning Mr. Ariel Sharon, the incumbent Prime Minister of Israel, and Mr. Amos Yaron, the Director General of the Israeli Ministry of Defence, the *Cour de cassation* found that only the Prime Minister, Mr. Sharon, enjoyed immunity *ratione personae* by virtue of his functions[229].

7.37. The Supreme Court of the Netherlands held in *H.* v. *Public Prosecutor* (2008) that a *Deputy Minister* of State Security did not benefit from immunity *ratione personae*[230].

7.38. In the United States, the courts have addressed this question in civil proceedings, in which they have declined to grant immunity *ratione personae* to the Solicitor General of the Philippines (1987)[231] and to the Minister for Food, Agriculture and Labour of Pakistan (2003)[232].

E. Academic writings

7.39. The Vancouver Resolution (2001) of the Institut de droit international on "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law"

---

[226] *Khurts Bat* v. *Investigating Judge of the German Federal Court and others,* [2011] EWHC 2029 (Admin).

[227] *Ibid.*, para. 59.

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

[229] *H.S.A., V.A.S. and Y.A., Cour de cassation* of Belgium, 12 Feb. 2003, No. P.02.1139.F, 127 *ILR* 121.

[230] *H.* v. *Public Prosecutor,* Hoge Raad der Nederlanden [HR] (Supreme Court of the Netherlands), 8 July 2008, Decision No. LJN: BG1476, Case No. 07/10063, File No. I.L.D.C. 1071 (NL 2008), para. 7.2.

[231] *Republic of Philippines* v. *Marcos*, 665 F. Supp. 793, 797-798 (N.D. Cal. 1987).

[232] *I.T. Consultants, Inc.* v. *The Islamic Republic of Pakistan*, 351 F.3d 1184, 1191-1192 (D.C. Cir. 2003).

contains a "without prejudice" clause, which seeks to preserve the "immunities to which other members of the government may be entitled on account of their official functions"[233].

113 7.40. Several authors have also maintained that immunity *ratione personae* extends beyond the Head of State, Head of Government and Minister for Foreign Affairs. They regard the Court's Judgment in the case concerning the *Arrest Warrant* as a reaffirmation of the customary international law in force[234], although some express reservations about their position[235].

---

[233]Institut de droit international, Session of Vancouver (2001), Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, 26 Aug. 2001, Art. 15, para. 2. The resolution is available at http://www.justitiaetpace.org/idiE/resolutionsE/2001_van_02_en.PDF.

[234]See, for example, James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 2012, p. 500

> ("It is well established that serving heads of state enjoy immunity *ratione personae* from foreign criminal jurisdiction for international crimes as they do for domestic crimes. Other 'holders of high-ranking office in a State' are also now recognized as enjoying this same immunity, although given the functional basis for recognition of immunity *ratione personae* the category of officials enjoying immunity on these grounds has no obvious limit. It appears that this privileged group extends to heads of government, defence ministers, and ministers for commerce and international trade.") (references omitted);

Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit International Public*, 8th edition, L.G.D.J., 2009, p. 497

> ("State immunities are intended to guarantee respect for a State's sovereignty when its agents, its legislation or its property have a direct link to the territorial sovereignty of another State. *Stricto sensu*, the immunities of the State protect any of its property that is in a foreign territory and any of its acts that are contested abroad. They nevertheless extend to State officials, be they diplomatic or consular agents, but only in that specific capacity . . . , or 'certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs' (ICJ, Judgment of 4 Feb. 2002, *Arrest Warrant of 11 April 2000,* para. 51; Judgment of 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters,* para. 170)." *[Translation by the Registry]*);

Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo* v. *Belgium* Case", in *European Journal of International Law*, Vol. 13, 2002, p. 864 ("[immunity *ratione personae*] is intended to protect only *some categories* of state officials, namely diplomatic agents, heads of state, heads of government, perhaps (in any case under the doctrine set out by the Court) foreign ministers and possibly even other senior members of cabinet"); Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law,* Oxford University Press, 2014, p. 5 ("[t]he wording of the ICJ judgment in the *Arrest Warrant* case suggests that personal immunity may extend beyond Foreign Ministers to other very senior State representatives"); Bing Bing Jia, "The Immunity of State Officials for International Crimes Revisited", in *Journal of International Criminal Justice*, Vol. 10, 2012, p. 1,310 ("[t]he Court did not define, and there has been no certainty with regard to, the class of officials that may come under this type of immunity [i.e. immunity *ratione personae*]"); Andrew Sanger, "Immunity of State Officials from the Criminal Jurisdiction of a Foreign State", in *International and Comparative Law Quarterly*, Vol. 62, 2013, p. 198 ("[i]t is clear from the words 'such as' that the ICJ did not consider this immunity [*ratione personae*] to apply only to heads of State, heads of government and foreign ministers"); Roman A. Kolodkin, "Immunity of the State and of Officials Thereof in Judgments of the International Court of Justice", in N. Iu. Erpyleva and M.E Gashi-Butler (eds.), *Liber Amicorum in Honour of Professor William Butler*, Wildy, Simmonds & Hill, 2014, p. 335 ("the group of high-ranking persons enjoying immunity [*ratione personae*] is not limited, in the view of the ICJ, to the 'troika', which is clearly indicated by the use of the words 'such as'"); Huikang Huang, "On Immunity of State Officials from Foreign Criminal Jurisdiction", in *Chinese Journal of International Law*, Vol. 13, 2014, p. 9 ("[i]t is worth noting that in the Arrest Warrant case, the Court did not rule out the possibility of immunity ratione personae for other senior officials in addition to the *troika*"); Elizabeth Helen Franey, "Immunity from the criminal jurisdiction of national courts", in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar Publishing, 2015, p. 216 ("by using the term 'such as', the ICJ was not limiting the high State officials entitled to immunity [*ratione personae*] to those three offices [of Head of State, Head of Government and Minister for Foreign Affairs], rather those three offices are quoted as examples of those to whom such immunity is granted"); Gionata Piero Buzzini, "Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti* v. *France* Case", in *Leiden Journal of International Law*, Vol. 22, 2009, p. 460 ("the wording used by the Court in its . . . judgment in the *Arrest Warrant* case, whereby the door seemed to be left open to the possible recognition of immunity *ratione personae* to certain high-ranking state officials other than heads of state, heads of government and ministers for foreign affairs").

114 7.41. To cite just one example, Fox and Webb have written that:

> "The tendency in practice has . . . been to expand the categories of high-ranking officials benefiting from immunity *ratione personae.*
>
> . . . . . .
>
> [The] view that only the head of State or government should benefit from immunity *ratione personae* is too narrow and fails to take into account that other high-ranking officials similarly need to travel to represent their State at the highest levels."[236]

The authors therefore suggest that

> "for a State official, other than the *troika*, to enjoy immunity *ratione personae* depends on a three-stage analysis: (i) the exercise of the official's powers abroad; (ii) immunity as indispensable for carrying out such functions; and (iii) the authorization of the official to represent the State as to its position in foreign relations, including responsibility for matters which occur outside the State's territory"[237].

F. The current work of the International Law Commission

7.42. As regards the work of the International Law Commission on the topic "Immunity of State officials from foreign criminal jurisdiction", in 2013 it provisionally adopted a draft article entitled "Persons enjoying immunity *ratione personae*". The draft article provides that Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction, but makes no reference to other holders of high-ranking office in a State. It is important to remember that the Commission's work is still at a relatively early stage, since it has not yet completed its first reading of the draft articles on the subject. In any event, it cannot be argued that the provisionally adopted text reflects the *lex lata* on immunity *ratione personae*, which is enjoyed by a small circle of holders of high-ranking office in a State under customary international law.

7.43. The Commission included the topic "Immunity of State officials from foreign criminal jurisdiction" in its long-term programme of work in 2006. The following year, it decided to
115 include it in its current programme of work and appointed a Special Rapporteur.

7.44. The Memorandum prepared by the Codification Division (2008) noted that the Court, in its general statement on "holders of high-ranking office in a State" which enjoy immunity from jurisdiction in other States, "seemed to leave the door open for [the] possibility" that other high-ranking State officials would enjoy immunity *ratione personae* from foreign criminal

---

[235]See, for example, Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", in *European Journal of International Law*, Vol. 21, 2011, pp. 821 and 825 (although the authors suggest that the Court's Judgment in the case concerning the *Arrest Warrant* was "erroneous and unjustified", they also acknowledge that "[t]he use of the words 'such as' [by the Court] suggests that the list of senior officials entitled to this immunity [*ratione personae*] is not closed", and that the Judgment must be interpreted as "extending such broad immunity *ratione personae* to other ministers").

[236]Hazel Fox and Philippa Webb, *The Law of State Immunity,* 3rd ed.*,* Oxford University Press, 2013, pp. 559 and 560.

[237]*Ibid.*, p. 560.

jurisdiction while in office[238]. The Memorandum also noted that "the provision of the United Nations Convention on Jurisdictional Immunities of States and their Property safeguarding the immunity *ratione personae* of the heads of State does not make any reference to other officials, but the preparatory works show that the Commission had left the question open"[239].

7.45. In his preliminary report (2008), the Special Rapporteur recognized that "[i]nternational custom is the basic source of international law in this sphere"[240]. The Rapporteur repeatedly contended that immunity *ratione personae* extends beyond Heads of State, Heads of Government and Ministers for Foreign Affairs, to some other holders of high-ranking office in a State[241].

116 7.46. When he presented his preliminary report to the International Law Commission, the Special Rapporteur once again drew attention to the small circle of State officials who enjoy immunity *ratione personae*, and added that:

> "The Commission had already wrestled with the problem of defining the circle of high-ranking State officials enjoying a special status under international law during the preparation of its sets of draft articles on special missions, on representation of States in their relations with international organizations and on the prevention and punishment of crimes against internationally protected persons. It had at that time been unable and unwilling to resolve the problem, and it was unlikely to be solved now by drawing up a list of the officials concerned. In general, such a determination belonged to the realm of States' domestic law. It would appear to require the definition of criteria which, if met by a State official, gave him or her personal immunity, and in the absence of which that official did not enjoy such immunity. It was his understanding that France, and Mr Pellet, had referred to such criteria during the oral pleadings in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* case, when it had been submitted that personal immunity could be enjoyed only by those high-ranking State officials an essential and predominant part of whose functions was representation of their Government in international relations. The question arose, however, whether that was the sole precondition required to enable such an official to enjoy personal immunity. He was not convinced that it was. . . .

---

[238]Immunity of State officials from foreign criminal jurisdiction, Memorandum by the Secretariat, doc. A/CN.4/596, p. 90, para. 132; see also para. 138.

[239]*Ibid.*, para. 133.

[240]Preliminary report on immunity of State officials from foreign criminal jurisdiction, doc. A/CN.4/601, para. 31.

[241]*Ibid.*, para. 82 ("The immunity *ratione personae* of a Head of State, Head of Government, minister for foreign affairs and some other high-ranking officials essentially encompasses immunity *ratione materiae.*"); para. 109 ("As already mentioned, all State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction and only some officials enjoy immunity *ratione personae.* It has not yet been possible to define this category of officials."); para. 117 ("The fact that there are other high-ranking officials — apart from Heads of State, Heads of Government and ministers for foreign affairs — who under customary international law enjoy personal immunity from foreign criminal jurisdiction was confirmed in paragraph 51 of the judgment of ICJ in the *Arrest Warrant* case, mentioned in paragraph 11 above. It is obvious that, although the Court also did not say precisely which high-ranking officials — apart from Heads of State, Heads of Government and ministers for foreign affairs — enjoy immunity from foreign jurisdiction, it clearly confirmed that the category of such officials is not limited to the three mentioned."); and para. 130 *(d)* and *(e)* ("The high-ranking officials who enjoy personal immunity by virtue of their post include primarily Heads of State, Heads of Government and ministers for foreign affairs; an attempt may be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoy immunity *ratione personae.* It will be possible to single out such officials from among all high-ranking officials, if the criterion or criteria justifying special status for this category of high-ranking officials can be defined").

> In the Russian Federation, for example, the First Deputy Head of Government dealt with foreign economic and policy matters along with the President, the Head of Government and the Minister for Foreign Affairs. That was a higher and more important position within the Government than that of Minister for Foreign Affairs. In many instances he represented the Government in the international arena and gave instructions to the Minister for Foreign Affairs, even though foreign policy matters could not be said to predominate among his concerns. Would it not be strange to affirm that the Minister for Foreign Affairs of the Russian Federation enjoyed personal immunity, whereas the First Deputy Head of Government did not? The question arose whether the importance of the functions carried out by a high-ranking official in terms of safeguarding State sovereignty should not also be a criterion, in addition to representation of the Government in international relations, for the inclusion of such an official among those who enjoyed personal immunity."[242]

7.47. During the discussion in plenary that year (2008), the members of the Commission were divided on the question of which holders of high-ranking office in a State should enjoy immunity *ratione personae.* It appears that this question was linked to the more general issue of whether the Commission should address the topic from the point of view of codification of
117 international law, progressive development, or both. Summarizing the debate, the Special Rapporteur noted:

> "With regard to immunity *ratione personae*, some members took the view that only Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed such immunity. Others, while admitting that other officials might also enjoy immunity *ratione personae*, cautioned the Commission against venturing beyond the limits of the 'troika'. At least two members held that, even if officials other than the troika enjoyed such immunity, the Commission should not mention them explicitly lest it prejudge the situation regarding other categories of persons who might enjoy personal immunity. At the same time, several members of the Commission — indeed perhaps the majority — considered that, in the light of current trends in the conduct of affairs of State, the Commission would have difficulty in confining its study to the troika. However, even those who were in favour of extending its scope felt that the Commission should exercise very great caution. State officials who might enjoy immunity *ratione personae* had been cited, for example, ministers of defence, ministers of foreign trade, Presidents of Parliaments, Vice-Presidents and judges. The question of immunity for officials representing the constituent units of federal States had also been raised. Many members had proposed, as an alternative to listing State officials who enjoyed immunity *ratione personae*, the definition of criteria that could be invoked to determine the categories of eligible persons. He suggested that, in deciding on the approach to be adopted, a more thorough analysis of the judgment rendered by the ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters* case should be undertaken."[243]

---

[242] *Yearbook of the International Law Commission (YILC)*, 2008, Vol. I, pp. 177-178, paras. 74-75; also contained in the summary record of the 2982nd meeting, 22 July 2008, doc. A/CN.4/SR.2982, paras. 74-75.

[243] *YILC*, 2008, Vol. I, p. 232, para. 29; also contained in the summary record of the 2987th meeting, 30 July 2008, doc. A/CN.4/SR.2987, para. 29.

7.48. Responding to the criticism of the Court's Judgment in the case concerning the *Arrest Warrant* by several members of the Commission[244], the Special Rapporteur said that:

> "With regard to the approach and methodology to be adopted, he was convinced, contrary to some members of the Commission, that the judgment of the ICJ in the *Arrest Warrant* case was correct and important and that it provided a clear picture of the current state of international law in the area under consideration. The judgment had been adopted by 13 votes to 3, an overwhelming majority. . . .
>
> He would continue to base his analysis of the foregoing issues on the sources used to prepare the preliminary report, namely: State practice, including legislation and judicial decisions; decisions of international courts and tribunals (particularly the ICJ); and academic writings. Decisions of national courts were another important
118 source, not only in themselves but also because the material considered by the courts frequently reflected the position of the States concerned."[245]

7.49. The Commission did not consider the topic in 2009 or 2010. In 2011, it had before it the Special Rapporteur's second and third reports (the third report addressed the procedural aspects of the topic). In his second report, which once again examined the question of immunity *ratione personae*, the Special Rapporteur proceeded "on the assumption that it is enjoyed by the so-called threesome (Head of State, Head of Government and minister for foreign affairs), as well as by certain other high-ranking State officials"[246]. He went on to clarify that:

> "The existence of this immunity is explained by the importance of the relevant post to the State, the exercise of its sovereignty and its representation in international relations. In the modern world, the importance of the posts of Head of Government, Minister for Foreign Affairs and possibly certain other officials is, from this point of view, entirely commensurate with the importance of the Head of State."[247]

7.50. During the debate in plenary in 2011, the approach that the Commission should take on the topic, that is, whether it should address it from the perspective of codification or progressive development, was still the subject of controversy. Summing up the debate, the Special Rapporteur noted, *inter alia*, that:

> "Opinions had varied on who should enjoy personal immunity. Claims that ministers of foreign affairs or even the troika did not or should not enjoy immunity could not, in his view, be supported by objective political and legal analysis. The debate had revealed little support for such a position within the Commission. Several members had said that the group of officials who enjoyed personal immunity should be restricted to the troika. However, he had already drawn attention to a ruling of the International Court of Justice suggesting that, in addition to the troika, other high-level officials enjoyed personal immunity. Several rulings of national courts which recognized that personal immunity was enjoyed not only by the troika, but also by

---

[244] See, in particular, *YILC*, 2008, Vol. I, pp. 185-186, paras. 7, 11-12 (Pellet), p. 187, para. 17 (Dugard), p. 224, para. 76 (Pellet); also contained in the summary record of the 2983rd meeting, 23 July 2008, doc. A/CN.4/SR.2983, paras. 7, 11-12 (Pellet) and para. 17 (Dugard); and summary record of the 2986th meeting, 29 July 2008, doc. A/CN.4/SR.2986, para. 76 (Pellet).

[245] *YILC*, 2008, Vol. I, pp. 233-234, paras. 39-40; also contained in the summary record of the 2987th meeting, 30 July 2008, doc. A/CN.4/SR.2987, paras. 39-40.

[246] Second report on immunity of State officials from foreign criminal jurisdiction, doc. A/CN.4/631, p. 20, para. 35.

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

other high-level officials, such as ministers of defence and ministers of trade, were based on that ruling. The favourable disposition of governments had been taken into account by national courts in reaching such decisions, which were now facts of law.

119 The logic behind those decisions resulted in part from global changes: important State functions, including representation of the State in international relations, were no longer the exclusive preserve of the troika. He was not aware of any legal rulings to the effect that absolutely no officials other than the troika enjoyed personal immunity. To what extent, then, was a restrictive approach grounded in law?

Several members of the Commission had underscored the need for care and rigour in addressing the issue, and that was obviously the right approach. Indeed, he had applied it in formulating the proposals in his preliminary report on establishing the criteria that high-level officials other than the troika had to meet in order to enjoy personal immunity and in the suggestion in his third report that a distinction should be made between such individuals and the troika for procedural aspects of immunity, despite the fact that personal immunity was the same for both groups."[248]

7.51. In 2012, the Commission appointed a new Special Rapporteur to replace the former one, who was no longer a member of the Commission. In her preliminary report that year, the new Special Rapporteur noted that in previous debates on the topic members of the Commission had expressed diverging views on the question of which State officials could enjoy immunity *ratione personae*[249]. Moreover, she expressed the view that the Commission should address the topic from the perspectives of both codification and progressive development[250].

7.52. In 2013, in her second report[251], the Special Rapporteur addressed the "normative elements" of immunity *ratione personae*. She suggested (but did not define) a general analytical framework comprising "all the norms, principles and values of international law that are relevant to the topic under consideration"[252]. She described what she understood as

"a strict interpretation that links and restricts immunity *ratione personae* to Heads of State, Heads of Government and ministers for foreign affairs" and

120 "a broader interpretation whereby immunity might also be enjoyed by other senior State officials, including, as often suggested, other members of the Government such as ministers of defence, ministers of trade and other ministers whose office requires them to play some role in international relations, either generally or in specific international forums, and who must therefore travel outside the borders of their own country in order to perform their functions"[253].

---

[248]Provisional summary record of the 3[1]15th meeting, 29 July 2011, doc. A/CN.4/SR.3115, p. 6.

[249]Preliminary report on the immunity of State officials from foreign criminal jurisdiction, prepared by Ms Concepción Escobar Hernández, doc. A/CN.4/654, paras. 33-34 and 62 ("However, there are still points of contention, particularly with regard to two key issues: the list of persons who could enjoy immunity *ratione personae,* and the question of whether immunity is absolute or restricted.")

[250]*Ibid.*, para. 77.

[251]Second report on the immunity of State officials from foreign criminal jurisdiction*,* by Ms Concepción Escobar Hernández, doc. A/CN.4/661.

[252]*Ibid.*, para. 7 *(c)*. See also para. 8 ("some members of the Commission voiced reservations regarding inclusion of the principles and values of current international law as an analytical tool").

[253]*Ibid.*, para. [57].

Then, based on her own reading of the Court's Judgments in the cases concerning the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters*[254], and of State practice[255], and given "the impossibility of drawing up an exhaustive list"[256], the Special Rapporteur considered that "the subjective scope of immunity from foreign criminal jurisdiction *ratione personae* should be limited to Heads of State, Heads of Government and ministers for foreign affairs". She accordingly proposed a draft article to that effect[257].

7.53. During the debate in plenary on the Special Rapporteur's second report, the question of which State officials enjoy immunity *ratione personae* continued to be controversial. Several members expressed their disagreement with the Special Rapporteur's "restrictive approach", and suggested that the relevant international practice had not been sufficiently examined in the report. Summarizing the debate, the Special Rapporteur reiterated that the Commission should "approach the topic from the dual perspective of *lex lata* and *lege ferenda*"[258]. She also took note of members' varying views on the State officials which enjoy immunity *ratione personae*[259].

121 7.54. At that same session, the Commission's Drafting Committee provisionally adopted the draft article mentioned in paragraph 7.42 above[260].

7.55. The debates in the Drafting Committee are not recorded, but the statement of the Chairman of the Drafting Committee clearly indicates that the text provisionally adopted by the Committee (and subsequently by the Commission on first reading) was the result of a compromise: it is clear that the text did not reflect a consensus on the content of positive law regarding immunity *ratione personae*. The statement describes that disagreement:

> "You will also recall that there was significant debate in Plenary regarding whether the draft article proposed by the Special Rapporteur properly identified the State officials who enjoy immunity *ratione personae* under international law. Several members indicated that, contrary to the draft article proposed by the Special Rapporteur, immunity *ratione personae* now extends beyond the *troika* as there was practice to that effect. On the other hand, some other members disputed whether Ministers for Foreign Affairs enjoy immunity *ratione personae* under customary international law. This matter was raised in the Drafting Committee. The commentary will provide examples of State practice and case law in respect of the *troika*. In provisionally adopting the text of draft article 3 limited to the *troika*, it was recognized that other high-ranking officials of the State may benefit from immunity under rules of international law relating to special missions. The commentary to draft article 3 would clarify this point.
>
> A reservation was nevertheless expressed regarding draft article 3 as a whole. It was contended that the Drafting Committee, as well as the Commission in Plenary, had not given adequate consideration to whether the list of persons in draft article 3

---

[254] *Ibid.*, para. 62.

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

[256] *Ibid.*, paras. 64-66.

[257] *Ibid.*, para. 67.

[258] Provisional summary record of the 3170th meeting, 24 May 2013, doc. A/CN.4/SR.3170, p. 3.

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

[260] Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, doc. A/CN.4/L.814, p. 1.

precisely reflected the state of international law on this subject. Such a point of view was opposed by some members."[261]

7.56. As demonstrated above, it is not only within the International Law Commission that the provisionally adopted draft article is deemed not to reflect the customary international law in force. A clear majority of States also consider that the text does not represent customary international law as it presently stands[262]. Several States have explicitly requested the Commission to return to this issue.

122

II. The Vice-President of Equatorial Guinea in charge of National Defence and State Security enjoys immunity *ratione personae*

7.57. Mr. Teodoro Nguema Obiang Mangue's position within Equatorial Guinea's constitutional system was described in Chapter 2 above. Owing to his high rank and official functions in the service of Equatorial Guinea, both as Second Vice-President in charge of Defence and State Security (from 2012 to 2016) and in his present post as Vice-President in charge of National Defence and State Security (since 22 June 2016), Mr. Teodoro Nguema Obiang Mangue belonged and continues to belong to the circle of holders of high-ranking office in a State who, under international law, enjoy full immunity from foreign criminal jurisdiction *ratione personae.* It goes without saying that Equatorial Guinea has never waived the immunity of its Vice-President.

7.58. As Second Vice-President in charge of Defence and State Security, Mr. Teodoro Nguema Obiang Mangue represented Equatorial Guinea and had the authority to act on behalf of that State by virtue of his high rank. Being in charge of the State's armed forces, he was entrusted with functions of crucial importance, which are closely linked to the protection of Equatorial Guinea's sovereignty. His functions required him to represent his country on a regular basis in international negotiations and intergovernmental meetings at the highest level, and he frequently had to travel abroad in that capacity and for such purposes. In the performance of his official functions, he regularly issued instructions to the Minister for Foreign Affairs and the Minister for Defence of Equatorial Guinea, as well as to other high-ranking State officials.

7.59. In 2015, for example, as a representative of the Head of State, His Excellency Obiang Nguema Mbasogo, he headed the Equatorial Guinean delegation (which included the Minister for Foreign Affairs) at the seventieth session of the United Nations General Assembly[263]. That same year, he paid an official visit to São Tomé and Príncipe to participate in the commemoration of the anniversary of its independence. During his visit, he met the Head of State and the Prime Minister, with whom he discussed the establishment of air and sea links between the two countries. During the same year, he led a high-level delegation in response to an invitation from the King of Swaziland to take part in the anniversary celebrations of the founding of the Swaziland Royal Police Academy. This was the Second Vice-President's second visit to that country, having led a delegation there in 2012 (which included the Vice-Ministers for Defence and National Security), when he held a number of meetings with the King and Queen of Swaziland.

123

---

[261] Statement of the Chairman of the Drafting Committee, Mr. Dire Tladi, 7 June 2013, pp. [12]-13, available at http://legal.un.org/docs/?path=../ilc/sessions/65/pdfs/immunity_of_state_officials_dc_statement_2013.pdf&lang=E. See also the commentary to draft Article 3: Report of the International Law Commission, Sixty-fifth session, doc. A/68/10, pp. 62-63, para. 8.

[262] See para. 7.18 above.

[263] Note Verbale from the Permanent Mission of the Republic of Equatorial Guinea to the United Nations to the Protocol and Liaison Service of the United Nations, 7 Sept. 2015 (Ann. 79).

7.60. In 2014, he visited the Central African Republic at the head of a delegation which included, among others, the Minister for Defence and the Minister Delegate at the Presidency of the Republic in charge of External Security, to take part in the repatriation of Equatorial Guinea's troops which had participated in the African Union's international peace and stabilization mission in the Central African Republic (MISCA). In 2013, he paid an official visit to Côte d'Ivoire to participate in the commemoration of the 53rd anniversary of its independence. The Second Vice-President headed a delegation which notably included the Vice-Minister in charge of National Security. During this visit, he met the President of the National Assembly and the Prime Minister of Côte d'Ivoire, before being received by the Head of State. That same year, in Angola, he met the Head of State, to whom he transmitted a message from the President of Equatorial Guinea and with whom he discussed matters relating to co-operation in human resources training in the maritime security sector. In 2013, he went to China where he met the Chinese Vice-President to discuss bilateral co-operation in the area of defence and security. That same year, in South Africa, the Second Vice-President held a meeting with the Head of State, and had talks with South Africa's Defence Secretary about matters relating to military co-operation.

7.61. Thus, as Second Vice-President in charge of Defence and State Security, Mr. Teodoro Nguema Obiang Mangue's high rank and functions were to a large extent similar to those of a Head of State, Head of Government or Minister of Foreign Affairs. In that capacity, he
124 represented Equatorial Guinea at international level on a regular basis; he was in charge of high-level diplomatic activities; he regularly travelled abroad; he exercised authority over the Minister for Foreign Affairs and Minister for Defence, instructing them in matters relating to the conduct of Equatorial Guinea's international relations; he communicated with the representatives of other States; and he was recognized, solely by virtue of his high rank, as a representative of the State. It is the effective performance of such functions in the service of the State, by very high-ranking individuals freely chosen by the State, which international law protects. Consequently, as Second Vice-President in charge of Defence and State Security, Mr. Teodoro Nguema Obiang Mangue enjoyed full immunity from foreign criminal jurisdiction throughout his time in office.

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

7.63. Mr. Teodoro Nguema Obiang Mangue continues to enjoy that full immunity as the serving Vice-President of Equatorial Guinea in charge of National Defence and State Security. The examples given below of his official activities since he took office demonstrate that his present position, like his previous one, is among the highest-ranking offices in a State, the holders of which enjoy immunity *ratione personae* under international law.

7.64. On 30 June 2016, shortly after his appointment, the Vice-President in charge of National Defence and State Security held a meeting with France's Ambassador to Equatorial Guinea, Mr. Christian Bader, to discuss military co-operation. In his present post, Mr. Teodoro Nguema Obiang Mangue's duties include overseeing the implementation of the bilateral treaty on military co-operation between Equatorial Guinea and France of 9 March 1985. France, which protects the port of Malabo and whose naval ships operate in the Gulf of Guinea, regularly supplies Equatorial Guinea with military equipment as well as military and security training. The French Ambassador was the first diplomat to congratulate the Vice-President on his appointment. During the meeting, the Vice-President was accompanied by the Minister for National Defence, who is junior to him.

125 7.65. On 26 July 2016, the Vice-President met the Prime Minister of Equatorial Guinea and gave him instructions for effectively co-ordinating the administration of the government. On 26 September 2016, the Vice-President held a further meeting with the Prime Minister of Equatorial Guinea, during which the latter reported on recent activities in the public administration. The Vice-President issued him with fresh instructions on the smooth running of the State administration.

7.66. On 30 July 2016, the Vice-President led a high-level Equatorial Guinean delegation at a summit of CEMAC Heads of State, which was attended by presidents and other high-ranking representatives of the Community's member States, including the Presidents of the Republic of the Congo, the Central African Republic and the Republic of Gabon, and the Prime Ministers of Chad and Cameroon.

7.67. In August 2016, the Vice-President paid an official visit to Brazil, where he held high-level meetings on the subject of military co-operation.

7.68. On 28 September 2016, the Vice-President held a meeting with the Minister for Foreign Affairs and Co-operation, the Deputy Minister for National Security and the Secretary of State to discuss the operation of Equatorial Guinea's diplomatic missions abroad and how to ensure their effectiveness.

7.69. In October and November 2016, the Vice-President was in charge of co-ordinating preparations for the African Union-Arab World Summit, which was taking place in Equatorial Guinea.

7.70. In November 2016, the Vice-President headed an official delegation to Egypt, where he held meetings with the Egyptian President and Prime Minister to discuss strengthening the relations of friendship and co-operation between the two States. He also delivered a message to them from the President of Equatorial Guinea. That same month, the Vice-President chaired the annual meeting of the United Nations Development Programme for 2016 in Sipopo, Equatorial Guinea.

7.71. As the above examples show, in his present position, Mr. Teodoro Nguema Obiang Mangue holds one of the highest-ranking offices in Equatorial Guinea, whose functions are clearly of an international nature. He is one of the State's principal representatives at international **126** level, subordinate only to the Head of State. Foreign travel is inherent to his functions, and essential to enable him to perform them. He plays an active role in the conduct of Equatorial Guinea's international relations in respect of questions of the utmost national importance. He represents Equatorial Guinea solely by virtue of his office, and his statements can create international obligations for Equatorial Guinea. Just as it did previously, when he was Second Vice-President in charge of Defence and State Security, international law accords him immunity *ratione personae* so that he can perform his official functions on behalf of Equatorial Guinea.

7.72. International law imposes on France (as it does on other States) a positive international obligation to respect and protect the full immunity and inviolability of Mr. Teodoro Nguema Obiang Mangue throughout his time in office. The criminal proceedings initiated in France, which, as we saw in Chapter 3, have subjected Mr. Teodoro Nguema Obiang Mangue to coercive acts of authority, constitute a flagrant breach of that obligation.

7.73. The judgment of the French *Cour de cassation* dated 12 December 2015, which (contrary to the positions adopted by other representatives of the French Government[264]) held that, because Mr. Teodoro Nguema Obiang Mangue was not a Head of State, Head of Government or Minister for Foreign Affairs, he did not enjoy immunity *ratione personae,* is thus contrary to international law and to the fundamental principle of the sovereign equality of States.

7.74. The fact that France has expressed an opinion on Mr. Teodoro Nguema Obiang Mangue's appointment, in a manner contrary to international law, does not absolve France of its obligation to take all necessary measures to avoid any violation of the full immunity *ratione personae* enjoyed by the latter during his time in office. International law does not require (nor does it allow) the legitimacy of the status of holders of high-ranking office in a State who enjoy immunity *ratione personae* to be examined before conferring such immunity upon them[265]. Furthermore, the fact that the French courts considered it necessary to describe the Vice-President's appointment as an "appointment of convenience" in order to deny his immunity suggests that they have recognized that a holder of such a high-ranking office in a State should in fact enjoy that immunity.

127

7.75. The fact that the French courts characterized the alleged acts of Mr. Teodoro Nguema Obiang Mangue as acts falling within the scope of his private life is also irrelevant. As both Second Vice-President in charge of Defence and State Security and Vice-President in charge of National Defence and State Security, he enjoyed and continues to enjoy immunity *ratione personae*, which allows no exceptions. That immunity applies to all his acts, including any that are alleged to have taken place before he took office.

7.76. The criminal proceedings in France have constituted and continue to constitute an impediment to the performance of Mr. Teodoro Nguema Obiang Mangue's functions. More specifically, the fact that the French authorities previously had no hesitation in issuing an arrest warrant against him, when he was Second Vice-President in charge of Defence and State Security, deters him from travelling abroad, including to France, when he is obliged to do so to perform his official functions. This is seriously hampering his capacity to perform his international and representative functions, and thus to conduct Equatorial Guinea's international relations effectively.

Conclusion

7.77. Under international law, Mr. Teodoro Nguema Obiang Mangue enjoys immunity from foreign criminal jurisdiction *ratione personae* and complete inviolability during his term of office as Vice-President in charge of National Defence and State Security. The same was true when he held the office of Second Vice-President in charge of Defence and State Security. Such immunity is essential for the effective performance of his official functions on behalf of Equatorial Guinea, which are similar to those of a Head of State, Head of Government or Minister for Foreign Affairs. It enables the exercise of sovereign prerogatives at international level and serves, more generally, to maintain friendly international relations. Equatorial Guinea's position is confirmed by the Court's consistent jurisprudence and State practice, including that of France.

128

---

[264] See paras. 7.19-7.22 above.

[265] See in this regard the recent judgment of the Court of Appeal of England and Wales (Civil Division), in which that court held that "[t]here is no support in the relevant international instruments or the case law for a functional review by a court where there is a challenge to a claim to immunity by a diplomat or Permanent Representative" (*Al-Juffali* v. *Estrada: Secretary of State for Foreign and Commonwealth Affairs intervening*, [2016] EWCA Civ. 176, para. 25).

7.78. The criminal proceedings in France constitute a flagrant violation of Mr. Teodoro Nguema Obiang Mangue's immunity *ratione personae,* of Equatorial Guinea's rights under positive international law, and of the fundamental principles of the international legal order.

129

CHAPTER 8

THE VIOLATION OF INTERNATIONAL LAW IN RESPECT OF THE BUILDING AT 42 AVENUE FOCH IN PARIS

8.1 In this chapter, we shall show that France has violated its international obligations to Equatorial Guinea in respect of the building at 42 avenue Foch. These obligations derive from the Palermo Convention, the 1961 Vienna Convention on Diplomatic Relations and general international law. The building located at 42 avenue Foch enjoys protection under international law both as premises of Equatorial Guinea's diplomatic mission (Section I) and as property of the Equatorial Guinean State (Section II).

I. The failure to respect the inviolability of the building at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission

8.2 In the context of the criminal proceedings initiated in France against Mr. Teodoro Nguema Obiang Mangue, France took several measures of constraint against the premises assigned to Equatorial Guinea's diplomatic mission, as established in Chapters 2 and 3 of this Memorial. In so doing, it has violated the principle of inviolability of the premises of Equatorial Guinea's diplomatic mission guaranteed by the Vienna Convention on Diplomatic Relations and customary international law (A). France has persisted in its violations by claiming, first, that the building located at 42 avenue Foch in Paris fell within the private domain of Mr. Teodoro Nguema Obiang Mangue and, second, that it had not consented to the building being assigned as premises of Equatorial Guinea's diplomatic mission. These arguments cannot justify the unlawfulness of France's actions. Respect for the principle of inviolability depends neither on ownership of the premises of the diplomatic mission, nor on any consent by France — requirements which do not exist under the VCDR (B). Only the use of and the intention to use property as premises of the diplomatic mission entitle the property to the protection guaranteed by general international law.

130

A. France's violations in respect of the building at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission

8.3. The importance of respecting the principles of international law that govern diplomatic and consular relations was recalled by the Court in its Judgment on the merits in the case concerning *United States Diplomatic and Consular Staff in Tehran.* That case was "unique and of very particular gravity" not only because of the conduct of private individuals or groups of individuals involved in the attack on the United States Embassy, but because of the conduct of "the government of the receiving State itself"[266]. The Court recalled yet again "the extreme importance of the principles of law" which it was called upon to apply in that case[267].

8.4. The principle of inviolability of the premises of a diplomatic mission is guaranteed by the provisions of Article 22 of the VCDR, which states:

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

---

[266] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 43, para. 92.

[267] *Ibid.*

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

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

8.5. The customary nature of the rule protecting the premises of diplomatic missions was affirmed by the Court in its Judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran*, in the following terms: "In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law."[268]

131 8.6. The rule of inviolability imposes two types of obligations on the receiving State. The first type comprises two obligations of restraint: first, the obligation not to enter the premises of the diplomatic mission without the consent of the head of the mission, and, second, the obligation not to take any measure of constraint against such premises. The second type comprises the duty to take all necessary steps to protect the premises and prevent any attacks that might be perpetrated against them by uncontrolled elements[269].

8.7. The inviolability guaranteed by Article 22 of the VCDR means that police, process servers, safety inspectors, etc. may not enter the premises without the consent of the head of the mission. The premises of the mission may not be searched or inspected in any way[270]. Writs cannot be served within the premises of the mission but only through diplomatic channels[271].

8.8. Inviolability under Article 22 of the VCDR is an absolute obligation[272]. It does not allow exceptions, even for serious offences or when there is a risk of grave and imminent public danger. At the time the Convention was being prepared, the States decided that the principle would not include an exception for grave and imminent public danger, since they considered it dangerous that such circumstances should ultimately be determined by the receiving State. The States considered that the risk of violating the principle of inviolability was highest in exceptional circumstances. This principle is thus intended to be applied absolutely and preference is given to co-operation with the head of the mission in order to enter the Embassy's premises in the event of grave and imminent danger[273].

8.9. When the conditions governing the application of the principle of inviolability of the premises of a diplomatic mission are met, a State which refuses to enforce a judicial decision in favour of individual litigants against a diplomatic mission is not acting in violation of international

---

[268] *Ibid.*, p. 32, para. 62.

[269] *Ibid.*, p. 30, para. 61; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *Judgment, I.C.J. Reports 2005*, p. 168, para. 334.

[270] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (L.G.D.J., 2009), p. 835.

[271] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012), p. 403.

[272] *Yearbook of the International Law Commission*, 1958, Vol. II, pp. 95-96; Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edition (Oxford University Press, 2016), p. 3.

[273] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edition (Oxford University Press, 2016), p. 119.

132 law. In a case in which the plaintiffs invoked the failure to execute a decision recognizing their title to a building that had been assigned by Romania to the diplomatic mission of Russia, the European Court of Human Rights (hereinafter "ECtHR") ruled that:

> "The Court is not aware of any trend in international law towards a relaxation of the rule that foreign States are immune from execution in respect of their property serving as the premises of consular or diplomatic missions in the forum State. Regard being had to the rules of international law set out above, the Romanian Government cannot therefore be required to override against their will the rule of State immunity, which is designed to ensure the optimum functioning of diplomatic missions (*ne impediatur legatio*) and, more generally, to promote comity and good relations between sovereign States."[274]

8.10 Even when it is suspected that the premises of a mission are being used in a manner incompatible with the functions of the mission, the premises are still not subject to intrusion by officials of the receiving State[275]. A State which notes that the premises of a diplomatic mission are being used in a manner incompatible with the functions of the mission has other options than violating the immunity of the premises. For example, when gunshots were fired from the premises of Libya's diplomatic mission in London in 1984, the United Kingdom decided to break off diplomatic relations between the two countries. The premises continued, however, to enjoy inviolability seven days after relations were broken off. Even though the diplomats left the premises two days before the end of that period, the British authorities maintained the inviolability of the premises and did not enter them to carry out any searches relating to the shooting until the full seven days had elapsed[276].

8.11. In 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.

133 **1. By entering the building located at 42 avenue Foch, the French authorities have violated the prohibition on entering the premises of Equatorial Guinea's diplomatic mission without the consent of the head of the mission**

8.12. France has, on several occasions, violated the prohibition, established under Article 22 of the Vienna Convention on Diplomatic Relations and customary international law, on entering the premises of Equatorial Guinea's diplomatic mission without the consent of the head of the mission.

8.13. The French authorities first entered the building in September and October 2011. This is described in the final submissions of 23 May 2016, which are reproduced verbatim in the referral order of 5 September 2016:

---

[274]ECtHR, *Manoilescu and Dobrescu* v. *Romania and Russia* (dec.), No. 60861/00 (3 Mar. 2005), paras. 73-81.

[275]Article 41, paragraph 3, of the VCHR provides: "The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State".

[276]Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edition (Oxford University Press, 2016), p. 147.

"The address listed on the many invoices discovered during the investigation led investigators to 42 avenue Foch in Paris, where numerous luxury vehicles belonging to Teodoro NGUEMA OBIANG MANGUE — establishing a clear link between the person concerned, his vehicle collection and the townhouse — were discovered and seized (D. 483). Accordingly, on 28 September and 3 October 2011, 18 luxury vehicles stored in the courtyard of the property on avenue Foch and in car parks located in Paris (16th arrondissement) were seized (D. 416).

During this initial on-site inspection at 42 avenue Foch, the investigators learned that Teodoro NGUEMA OBIANG MANGUE was absent — he was abroad — and the keys to the luxury vehicles were in the possession of his right-hand man.

At the site, they received a visit from the Ambassador of Equatorial Guinea and a French lawyer introducing himself as the counsel representing that State; they arrived in a vehicle with diplomatic plates. They contested the inventory operation that was under way and the seizure of the vehicles, invoking the principle of the sovereignty of the State of Equatorial Guinea, notwithstanding Teodoro NGUEMA OBIANG MANGUE's capacity as owner (D. 421).

. . . . . .

By a judgment of 19 November 2012, the *Chambre de l'instruction* confirmed the seizure of the vehicles. On 19 July 2012, ten of the seized vehicles were handed over to AGRASC (agency for the management and recovery of seized and confiscated assets) to be sold prior to judgment (D. 637, 708, 879)."[277]

134 8.14. As can be seen from this extract, the French police and judicial authorities entered the building used for the purposes of Equatorial Guinea's diplomatic mission to conduct searches on 28 September and 3 October 2011. This intrusion was not authorized by Equatorial Guinea, which protested on the spot through its Ambassador and the Embassy's counsel. The French authorities made no enquiries at all regarding Equatorial Guinea's use or intended use of the building located at 42 avenue Foch. Indeed, since the building had been acquired by the Equatorial Guinean State with the intention of using it for the performance of the functions of its diplomatic mission, the French authorities should have refrained from entering the building when faced with opposition from the Ambassador of Equatorial Guinea. This opposition was also notified in writing, in a letter delivered in person to the French Minister for Foreign Affairs, Mr. Alain Juppé, on 28 September 2011[278].

8.15. 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. Such was the thrust of a 2001 Belgian judgment concerning a villa that was no longer being used to house Congolese diplomats, but which the Brussels *Cour d'appel* recognized as being entitled to protection under the VCDR because the Democratic Republic of the Congo, which was renovating the villa, had expressed its intention, when faced with a measure of execution, to use the villa for its diplomatic mission. In that regard, the *Cour d'appel* held:

---

[277]Final submissions of 23 May 2016 (Ann. 30), pp. 13-14; Referral order of 5 Sept. 2016 (Ann. 7), pp. 12-13.

[278]Embassy of Equatorial Guinea in France, letter delivered in person to Mr. Alain Juppé, Minister of State, Minister for Foreign Affairs, 28 Sept. 2011 (Ann. 32).

"19. . . . Where the appellant argues in these circumstances that the property falls within its public domain, this decision as to its use is sufficient for assuming that the legal principle concerned must be applied. For the period preceding its standing empty, it must therefore be decided that the building was being used by the sending State for diplomatic activities, a function that belongs to national sovereignty and is for that reason not subject to seizure.

20. As far as the subsequent period is concerned, 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. The parties NV Segrim and Red Mountain nonetheless argue that due to the dilapidation of the building and its standing empty, it has lost is original designated use and therefore no longer enjoys immunity from execution.

21. The structural state of the building is in principle irrelevant when determining whether or not it has ceased to fall within the public domain of the sending State. It is sufficient that the foreign State's sovereign decision as to use is not contradicted by actual practice. The parties Segrim and Red Mountain adduce no
135 facts in this connection from which it must be inferred that the designated use is not supported in practice. On the contrary, it is clear from the documents submitted by the appellant that appreciable contract works were carried out most recently in 1998 and 1999 in order to remedy the condition of the building, which confirms the designated use as indicated by the Congolese State. These contract works were, moreover, commenced before the disputed attachment was made.

22. Even should it therefore be evident that diplomatic personnel do not at present effectively again live in the building as yet, it still cannot be inferred from this on account of the remedial work undertaken that it has finally ceased to serve as a diplomatic residence and has therefore lost its designated use.

23. Consequently, by virtue both of article 22 (3) of the Vienna Treaty and of customary international law, the property seized continues to enjoy immunity from execution."[279]

8.16. The practice of other States supports the judgment of the Brussels *Cour d'appel*. 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[280]. For example, a 2003 agreement between the United States and China on the construction of the United States Embassy provided that the building would enjoy inviolability from the date of delivery of possession[281]. Practice is similar in the United Kingdom, where, once the urban planning authorities approved the construction of a building, it enjoyed inviolability from the time it was at the disposal of the Embassy and was intended for use as premises of the diplomatic mission[282].

---

[279]Brussels *Cour d'appel*, *Democratic Republic of the Congo* v. *Segrim NV*, judgment of the 8th Chamber, 11 Sept. 2001, RW 2002 03, 1509, ILDC 41 (BE 2001), paras. 19-23.

[280]Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edition (Oxford University Press, 2016), p. 146.

[281]*Ibid*.

[282]*Ibid*., p. 147.

This is how complete appropriation for use by the mission should be understood. Article 22 would be given too narrow an interpretation if use alone were to constitute the starting-point for inviolability. Practice also shows that this starting-point includes the definite intention to use a building as premises of a diplomatic mission. Without drawing this intention out for too long: a series of German decisions issued following the Second World War emphasized that the intention
136 should not be too remote[283]. Equatorial Guinea's conduct is consistent with this interpretation, since it acted promptly to notify France that the building at 42 avenue Foch in Paris was assigned to the premises of its diplomatic mission.

8.17. In 2012, the French authorities once again entered the building at 42 avenue Foch without the consent of the head of Equatorial Guinea's diplomatic mission, specifically from 14 to 23 February 2012. The final submissions of 23 May 2016 and the referral order of 5 September 2016 describe these intrusions in the following terms:

> "On 5 October 2011, the investigators returned to 42 avenue Foch in Paris for an on-site inspection. At the entrance porch, they noted the presence of two makeshift signs marked 'République de Guinée Équatoriale — locaux de l'ambassade' (Republic of Equatorial Guinea — Embassy premises). The building's caretaker explained to them that, the previous day, a driver and two employees of the Embassy of the Republic of Equatorial Guinea had come to the premises in a MERCEDES with diplomatic plates and had affixed the signs on all of the entrances to the upper floors and outbuildings belonging to Teodoro NGUEMA OBIANG MANGUE (D. 476).
>
> The townhouse was searched. The operation lasted for several days, from 14 to 23 February 2012."[284]
>
> "A search of the premises was conducted as of 14 February 2012. A number of valuable items were seized.
>
> In a letter of 25 April 2012 addressed to the investigating judges and the Paris Public Prosecutor, subsequent to the investigators' search, the Embassy of the Republic of Equatorial Guinea claimed that the premises at 42 avenue Foch in Paris should enjoy diplomatic protection since they had been declared as diplomatic premises on 4 October 2011. The Embassy contested the assessment of the Ministry of Foreign Affairs, taking the view that official recognition of the status of diplomatic premises was determined once the premises had been effectively assigned to the services of the diplomatic mission. It had no hesitation in characterizing the attachment measures as the 'plundering of Equatorial Guinea's assets' (D. 631).
>
> All the converging evidence gathered during the investigation points to the fact that these steps were taken in an attempt to protect the private assets of the son of the President of the Republic of Equatorial Guinea from the judicial attachment measures undertaken in the building, which is the private property of Teodoro NGUEMA
> **137** OBIANG MANGUE and is for his personal use, by claiming that it should enjoy diplomatic protection."[285]

8.18. It should be noted, as evidenced by this extract, that Equatorial Guinea once again protested against the French police and judicial authorities' intrusion into the building at

---

[283] *Ibid*., p. 146.

[284] Final submissions of 23 May 2016 (Ann. 30), p. 17; Referral order of 5 Sept. 2016, (Ann. 7), p. 16.

[285] Referral order of 5 Sept. 2016 (Ann. 7), p. 31.

42 avenue Foch. They should have refrained from entering, given that the Embassy of Equatorial Guinea had taken visible steps to make it clear that the building at 42 avenue Foch in Paris was henceforth assigned to its diplomatic premises. The words "makeshift signs" used by the French authorities to describe the means used to indicate the diplomatic nature of the building are of little importance. Nor can much significance be attached to the provisional nature of the signs, given that the building had been acquired only recently. With no distinguishing sign, the building would be exposed to acts of intrusion. As the VCDR provides, "[t]he mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport"[286]. This provision gives Equatorial Guinea the freedom to place on a building any sign that enables officials of the receiving State to identify the premises of its diplomatic mission.

8.19. Lastly, a third intrusion into the building took place on 19 July 2012[287]. On that occasion, the French authorities searched and attached the building, which has since been subject to confiscation.

8.20. These intrusions into the building in September and October 2011 occurred despite Equatorial Guinea's protests on the spot and in writing, and those in February and July 2012 took place after 4 October 2011, the date on which Equatorial Guinea notified the Protocol Department of the French Ministry of Foreign Affairs that the building located at 42 avenue Foch was assigned to the premises of its diplomatic mission[288]. The French authorities could not, therefore, have been unaware of the building's diplomatic nature. The intrusion into the building from 14 to 23 February and on 19 July 2012 actually occurred after the judicial authorities had received notice from the French Ministry of Foreign Affairs denying Equatorial Guinea diplomatic status for the building at 42 avenue Foch[289].

138

8.21. It follows from the foregoing that the French authorities should not have entered the building at 42 avenue Foch, given that the representatives of Equatorial Guinea voiced their opposition on the spot and the building bore a sign indicating its use as premises of the diplomatic mission. Nor did they have the right to enter the building, since Equatorial Guinea had informed France, on 4 October 2011, that it was using the building for the performance of the functions of its diplomatic mission in France. France's conduct is particularly unacceptable considering that the intrusion of its police and judicial authorities into the building also involved acts of constraint prohibited by Article 22, paragraph 3, of the VCDR. As the Court held in the case concerning *United States Diplomatic and Consular Staff in Tehran*, "disregard[ing] and set[ting] at naught the inviolability of a foreign Embassy" is "unique and of very particular gravity" when it is done by "the government of the receiving State itself"[290].

---

[286]VCHR, Article 20.

[287]Final submissions of 23 May 2016 (Ann. 30), p. 31; Referral order of 5 Sept. 2016 (Ann. 7), p. 31.

[288]Embassy of Equatorial Guinea, Note Verbale No. 365/11, 4 Oct. 2011 (Ann. 33).

[289]French Ministry of Foreign and European Affairs, Note Verbale No. 5009/PRO/PID, 11 Oct. 2011 (Ann. 35).

[290]*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 43, para. 92.

2. By searching and attaching the building at 42 avenue Foch, France has violated the prohibition on subjecting the premises of Equatorial Guinea's diplomatic mission to measures of constraint

8.22. Article 22, paragraph 3, of the VCDR provides: "The premises of the mission . . . shall be immune from search, requisition, attachment or execution". France nevertheless had no hesitation in violating this provision by searching and attaching the building at 42 avenue Foch. As we have seen, after the French police authorities intruded into the premises of Equatorial Guinea's diplomatic mission on 28 September 2011 and 3 October 2011, the building was searched and numerous items of property were attached. Further intrusions and searches took place over a
139 number of days, from 14 to 23 February 2012, when once again numerous items of property were attached.

8.23. These repeated actions culminated on 19 July 2012, when the French authorities searched and then attached the building. The final submissions of 23 May 2016, reproduced in the referral order, describe the measures of constraint and the circumstances in which they were taken, in the following terms:

> "On 19 July 2012, after the premises had been searched, the investigating judges duly issued an attachment order under the Code of Criminal Procedure, on the grounds that the investigations had demonstrated that the building at 42 avenue Foch in Paris (16th arr.), 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 further noted that Teodoro NGUEMA OBIANG MANGUE enjoyed free disposal of the said building, setting out all the evidence from the investigations showing that he was the real owner of the building and enjoyed free disposal thereof within the meaning of Article 131-21 of the Penal Code. The building could therefore be confiscated as the product of the investment, concealment or conversion of proceeds of the offences of misappropriation of public funds, misuse of corporate assets and breach of trust.
>
> Hearing the appeal of Teodoro NGUEMA OBIANG MANGUE, the *Chambre de l'instruction* upheld the order."[291]

8.24. Search and attachment are measures of constraint expressly prohibited by Article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations. These violations of the principle of inviolability of premises are those most likely to interfere with the performance of the functions of Equatorial Guinea's diplomatic mission. Search and attachment are coercive acts. They come under the purview of the judicial authorities in criminal matters and may be carried out even without the consent of the person they are directed against. Search and attachment also have a significant effect on the property rights of Equatorial Guinea, which finds itself deprived of the peaceful enjoyment and free disposal of its property[292]. In fact, the property is now liable to be
140 confiscated at any moment and sold, should the Vice-President be tried and convicted and his sentence include the confiscation of the building.

---

[291] Final submissions of 23 May 2016 (Ann. 30), p. 31; Referral order of 5 Sept. 2016 (Ann. 7), p. 31.

[292] In his attachment order, the senior investigating judge at the Paris *Tribunal de grande instance* recalled that "pursuant to Article 706-145 of the Code of Criminal Procedure, no one may validly dispose of assets attached in a criminal proceeding and that, in addition, once the attachment has been recorded in the competent mortgage registry, the attachment is binding on third parties and suspends or prohibits any and all civil execution proceedings in respect of that property", Order of attachment of real property (*saisie pénale immobilière*), 19 July 2012 (Ann. 25), p. 12.

8.25. In short, by entering, searching and attaching the building at 42 avenue Foch in Paris — the premises of Equatorial Guinea's diplomatic mission — the French police and judicial authorities acted in violation of the principle of inviolability of the premises of a State's diplomatic mission, as set out in the provisions of Article 22 of the VCDR.

B. Private ownership of the building and France's lack of consent to the assignment of the building as Equatorial Guinea's diplomatic premises do not justify France's failure to respect its inviolability

8.26. In denying Equatorial Guinea's claim to the inviolability of the premises of its diplomatic mission, France argued that Mr. Teodoro Nguema Obiang Mangue had ownership of the building at 42 avenue Foch and, further, that it had not consented to the building being assigned as premises of Equatorial Guinea's diplomatic mission. None of the grounds put forward by France negates the principle of inviolability of the premises of diplomatic missions. Respect for this rule is not subject to ownership by the State of the property used as premises of its diplomatic mission. Nor is inviolability dependent on the receiving State's consent to the building's assignment, but solely on its use or the intention to use it for the purposes of a diplomatic mission.

1. Private ownership of the building at 42 avenue Foch does not preclude its inviolability by France

8.27. When the French authorities entered the building at 42 avenue Foch in Paris for the first time on 28 September 2011, they ignored the protests of the Ambassador of Equatorial Guinea because they believed that Mr. Teodoro Nguema Obiang Mangue was the owner. The final
141 submissions of 23 May 2016 mention that Equatorial Guinea's Ambassador and counsel, who were present at the site, "contested the inventory operation that was under way and the seizure of the vehicles, invoking the principle of the sovereignty of the State of Equatorial Guinea, notwithstanding Teodoro Nguema Obiang Mangue's *capacity as owner* . . ."[293].

8.28. Equatorial Guinea wrote to the investigating judges and the Public Prosecutor on 25 April 2012, following the second search conducted from 14 to 23 February 2012, to notify them that the building was supposed to enjoy inviolability, but this was completely disregarded by the French judicial authorities. In the final submissions requesting Mr. Teodoro Nguema Obiang Mangue's referral for trial and in the order of 5 September 2016 which effectively proceeds with that referral, the prosecuting authorities continued to argue that the building was private property to avoid having to respect its inviolability:

> "All the converging evidence gathered during the investigation points to the fact that these steps were taken in an attempt to protect the private assets of the son of the President of the Republic of Equatorial Guinea from the judicial attachment measures undertaken in the building, which is the private property of Teodoro NGUEMA OBIANG MANGUE and is for his personal use, by claiming that it should enjoy diplomatic protection."[294]

8.29. The search and the attachment of 19 July 2012 were carried out on the same basis. The French authorities maintained that their investigations had shown that the building at 42 avenue Foch was owned by six Swiss and French companies and that Mr. Teodoro Nguema

---

[293] Final submissions of 23 May 2016 (Ann. 30), p. 13; Referral order of 5 Sept. 2016 (Ann. 7), p. 12 (emphasis added).

[294] Final submissions of 23 May 2016 (Ann. 30), p. 31; Referral order of 5 Sept. 2016 (Ann. 7), p. 31.

Obiang Mangue "enjoyed free disposal [of the said building] . . . [,] that he was the real owner" and that "[t]he building could therefore be confiscated . . ."[295].

8.30. The position of the French judicial authorities is based on advice from the French Ministry of Foreign Affairs, which, having been notified by Equatorial Guinea on 4 October 2011 that the building at 42 avenue Foch was assigned to the premises of its diplomatic mission, responded in a Note Verbale that it was unable to recognize the diplomatic status of the property because it fell "within the private domain"[296]. France has misinterpreted the facts of the present case and the relevant provisions of the VCDR.

142

8.31. Regarding the facts of the present case, it is important to note that the building at 42 avenue Foch no longer belonged to Mr. Teodoro Nguema Obiang Mangue when Equatorial Guinea gave notification, on 4 October 2011, that it was assigned as premises of its diplomatic mission. Reference should be made to the facts relating to the building set out in Chapter 2. For the record, it should be recalled that on the date of the notification in question, Equatorial Guinea had become the owner of the building following the transfer of shareholder rights on 15 September 2011[297]. The President of Equatorial Guinea himself notified his French counterpart of the acquisition. This transfer of rights was registered with the French tax authorities according to standard procedure. The conclusion drawn by the French Ministry of Foreign Affairs that the building fell within the private domain is thus simply wrong, as is the French courts' disregard for the building's inviolability on the pretext that it was owned by Mr. Teodoro Nguema Obiang Mangue.

8.32. The VCDR, for its part, guarantees the inviolability of the premises of diplomatic missions without requiring them to be owned by the sending State. The relevant terms of the Convention are unambiguous: "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"[298]. The Convention also provides that "the receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way"[299]. The sending State may thus acquire the premises of its diplomatic mission other than through ownership of property, in particular by renting. Ownership is indeed often impossible in certain countries[300]. If inviolability were made dependent on the sending State's ownership of the building, it would deprive Article 21 of the Convention of its substance and considerably narrow the scope of protection offered by this principle.

143

8.33. Consequently, even assuming that the building at 42 avenue Foch in Paris was owned by Mr. Teodoro Nguema Obiang Mangue — *quod non* — French officials would still not have the right to enter, search or attach it, given that it was acquired for use as premises of Equatorial Guinea's diplomatic mission.

---

[295]Final submissions of 23 May 2016 (Ann. 30), p. 31; Referral order of 5 Sept. 2016 (Ann. 7), p. 31.

[296]French Ministry of Foreign and European Affairs, Note Verbale No. 5007/PRO/PID, 11 Oct. 2011 (Ann. 34).

[297]Agreement on the transfer of shares and claims, signed on 15 Sept. 2011 (Annex 1 to the reply to the question put by Judge Bennouna, 26 Oct. 2016).

[298]VCHR, Art. 1 *(i)*.

[299]VCHR, Art. 21 (1). See also Art. 25.

[300]Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edition (Oxford University Press, 2016), p. 16.

2. Respect for the inviolability of the premises of a diplomatic mission is not dependent on the consent of the receiving State

8.34. The VCDR does not subject the assignment of the premises of a diplomatic mission to the consent of the receiving State. Nor does it subject the principle of inviolability to the accomplishment of any kind of judicial or administrative formality. To recall, according to Article 1 *(i)* of the Convention, diplomatic premises are the buildings or parts of buildings and the land ancillary thereto which are "used for the purposes of the mission".

8.35. As a courtesy, and so that the receiving State might properly fulfil its obligation under Article 22, paragraph 2, of the Convention, Equatorial Guinea notified the Protocol Department of the French Ministry of Foreign Affairs that it had acquired the building at 42 avenue Foch and that it was using it as the premises of its diplomatic mission. The Convention requires neither such notification nor the consent of the receiving State[301]. The *travaux préparatoires* show that the receiving State's role in the acquisition and assignment of the premises of a mission was discussed during the consideration of the International Law Commission's draft Article 19, which was to become Article 21. The majority of States wanted to limit the role of the receiving State, considering that it would place too great a burden on the receiving State if it were compelled to acquire premises for the sending State's diplomatic mission. The general intention was therefore
144
that the receiving State should not intervene unless the sending State was experiencing difficulties, legal ones in particular[302]. At no point was the need for the receiving State's consent to the acquisition and assignment of the premises of the diplomatic mission raised.

8.36. 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[303]. 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 of premises within the same locality, is not subject to the consent of the receiving State[304].

8.37. Even assuming that the Convention's silence were to give France discretion in this matter — *quod non* — the exercise of the power in question remains, as the Court found in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, subject "to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties"[305]. If the texts are silent, States must exercise their discretion in a manner that is reasonable and consistent with the requirements of good faith.

---

[301] *Ibid*.

[302] *United Nations Conference on Diplomatic Intercourse and Immunities*, Vienna, 2 Mar.-14 Apr. 1961, *Official Records*, Vol. I: *Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole*, Geneva, 1962, pp. 133-135.

[303] Article 12 of the VCHR provides: "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".

[304] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edition (Oxford University Press, 2016), p. 16.

[305] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, *Judgment, I.C.J. Reports 2008*, p. 229, para. 145.

8.38. The diplomatic exchanges between France and the Embassy of Equatorial Guinea regarding the status of the building at 42 avenue Foch attest to the bias with which France handled Equatorial Guinea's requests. Indeed, on 4 October 2011, Equatorial Guinea wrote to the French Ministry of Foreign Affairs to inform it that the Embassy used the building at 42 avenue Foch "for
145 the performance of the functions of its diplomatic mission"[306]. In that letter, Equatorial Guinea called on France to "ensure the protection of those premises" against intrusion or interference by private individuals[307]. On 10 October 2011, the office of the senior investigating judge at the Paris *Tribunal de grande instance* transmitted a letter to the French Ministry of Foreign Affairs, in which he asked to be informed "whether all or part of the building located at 42 avenue Foch 75016 Paris has been declared by the authorities of the Republic of Equatorial Guinea as being assigned to the use of that country's diplomatic mission, or whether a request is currently under consideration"[308].

8.39. The French Ministry of Foreign Affairs responded to both letters the same day, at the same time, that is, on 11 October 2011 at 10.02 a.m. It wrote to Equatorial Guinea in these terms:

> "2. The Protocol Department recalls 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. The Protocol Department thus regrets that it is unable to grant the Embassy's request."[309]

8.40. The Protocol Department, having noted Equatorial Guinea's request of 4 October 2011, responded in the negative to the senior investigating judges in these terms:

> "For 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 will inform the French Government that it is officially recognized in accordance with the relevant provisions of the Vienna Convention of 18 April 1961 on Diplomatic Relations."[310]

146 8.41. This response from the French Ministry of Foreign Affairs is curious, to say the least. Under the VCDR and customary international law, the diplomatic status of a building depends only on its use or intended use. It is surprising that while Equatorial Guinea gave specific notice that it was using and would continue to use the building as premises of its diplomatic mission, there is no mention of this in the Ministry's letter to the judicial authorities. Furthermore, the so-called "verifi[cations] that the building is actually assigned to a diplomatic mission"[311], which France undertakes to determine inviolability, were never carried out by the French Ministry of Foreign Affairs. The Ambassador of Equatorial Guinea was thus the only person who could attest to the use of and the intention to use the building at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission. France did not base its requirement of verification on any legal grounds, under either national law or international law. Not only is the VCDR silent on this matter,

---

[306]Embassy of Equatorial Guinea, Note Verbale No. 365/11, 4 Oct. 2011 (Ann. 33), first paragraph.

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

[308]Request for information from the senior investigating judges to the Ministry of Foreign Affairs, 10 Oct. 2011 (Ann. 80).

[309]French Ministry of Foreign and European Affairs, Note Verbale No. 5007/PRO/PID, 11 Oct. 2011 (Ann. 34).

[310]French Ministry of Foreign and European Affairs, Note Verbale No. 5009/PRO/PID, 11 Oct. 2011 (Ann. 35).

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

but France 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.

8.42. In some Western countries, legislation and/or guides and published guidelines subject the assignment of the premises of a diplomatic mission to the approval of the receiving State. Such
147 is the case, in particular, in Canada[312], Spain[313], the United States[314], the United Kingdom[315], Switzerland[316] and Sweden[317]. It is the same in India[318] and South Africa[319]. In any event, in terms of their object and scope, these national rules are intended 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. Indeed, the formalities for acquiring premises for diplomatic missions are usually designed to safeguard certain interests of the receiving State, such as national security, agricultural land or urban development in general. Thus, it is not permitted for a diplomatic mission to be established in a sensitive area or near sensitive buildings or to acquire agricultural land. Similarly, the purpose of prior authorization for assignment is to group embassies and consulates in areas where the receiving State will be best able to fulfil its duty of protection under the VCDR.

8.43. It should also be noted that the aforementioned countries' administrative formalities primarily concern the acquisition of real property for embassies and consulates. It should be recalled that, in the present case, Equatorial Guinea's acquisition of the building at 42 avenue Foch is not included in the complaints that are the subject of the criminal proceedings before the French courts, since Equatorial Guinea's ownership of the building has never been formally contested. What is at issue is rather the question of respect for the principle of inviolability of the premises of the diplomatic mission owned by Equatorial Guinea. The question is whether France's consent is required for Equatorial Guinea to assign a building as premises of its diplomatic mission. The VCDR does not impose any condition of consent, and only the use of or intention to use the
148 building as premises of the diplomatic mission determines whether the principle of inviolability applies.

---

[312] *Guidelines on Property: Acquisition, Disposition and Development of Real Property in Canada by a Foreign State*, version in force on 1 Mar. 2016, section 3 (available at: http://www.international.gc.ca/protocol-protocole/policies-politiques/establishment_diplomatic_missions_consular_posts_canada.aspx).

[313] *Practical Guide for the Diplomatic Corps accredited in Spain*, Madrid, 2010, point 11, pp. 71-73 (available at: http://www.exteriores.gob.es/Portal/es/ServiciosAlCiudadano/SiViajasAlExtranjero/Documents/guia_practica_ingles_2010.pdf).

[314] Foreign Mission Act 1982, sections 4305 and 4306 (available at: http://www.state.gov/documents/organization/17842.pdf).

[315] Diplomatic and Consular Premises Act 1987, entry into force in 1988 (available at: http://origin-www.legislation.gov.uk/ukpga/1987/46/body).

[316] Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State, adopted on 22 June 2007, entered into force on 1 Jan. 2008, Art. 16 (1) (available at: https://www.admin.ch/opc/en/classified-compilation/20061778/index.html) and Ordinance to the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State, adopted on 7 Dec. 2007, entered force on 1 Jan. 2008 (available at: https://www.admin.ch/opc/en/classified-compilation/20072457/index.html).

[317] *Diplomatic Guide*, section 10 (available at: http://www.government.se/government-of-sweden/ministry-for-foreign-affairs/diplomatic-portal/diplomatic-guide/).

[318] *Acquisition and Transfer of Immovable Property in India*, p. 2 (available at: https://www.mea.gov.in/images/pdf/acquisition-and-transfer-of-immovable-property-in-india.pdf).

[319] Department of International Relations and Co-operation, Policy on the Management of Diplomatic Immunities and Privileges in the Republic of South Africa, section 1.4 (available at: http://www.dirco.gov.za/protocol/policy_dip_immun_privilege_2011a.pdf).

8.44. In any event, the practice of the few States mentioned above constitutes an exception. Most countries do not impose any particular formalities for the premises of a diplomatic mission to be recognized as inviolable. France does not have or has not issued any special legislation on State immunities or diplomatic missions. Equatorial Guinea is not aware of any practice requiring diplomatic missions to obtain the consent of the French Ministry of Foreign Affairs in order to assign a building as premises of its diplomatic mission.

8.45. Furthermore, the national practices cited above require notification for the sole purposes of applying tax advantages, public safety measures or urban planning rules[320]. There is no reason to believe that the French authorities' refusal to take account of Equatorial Guinea's notification pursues any of these aims. As we have seen, the French Ministry of Foreign Affairs refused to recognize the diplomatic status of the building at 42 avenue Foch on the pretext that it fell within the private domain and, further, that it was the subject of measures of attachment. We have amply demonstrated that the principle of inviolability depends not on ownership of the building but on its use for the purposes of a diplomatic mission. Equatorial Guinea thus considers that the building at 42 avenue Foch has been inviolable since 4 October 2011, long before the attachment in 2012, which France cites as grounds not to heed Equatorial Guinea's notification. The procedures used by France regarding consent to the assignment of a building as premises of a diplomatic mission are not only obscure, but also appear to apply in a manner that is discourteous and inconsistent with the fundamental norms of international law.

8.46. The 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, whether the criterion of "declaratory effect", as advanced by Equatorial Guinea, or that of being "actually assigned"[321], as advanced by France, is applied. Equatorial Guinea considers that the criterion of being "actually
149 assigned" — relied on by France to refuse the protection that was requested — was satisfied from the time its Embassy gave notice, by Note Verbale of 4 October 2011, that it was using and that it had the intention to use the building as its diplomatic premises. Assignment consists in giving a purpose or a function to a person or property. That was the subject of the Note Verbale of 4 October 2011. That the premises were actually assigned is demonstrated by the fact that Equatorial Guinea protested on the spot and in writing at the time of the initial searches on 28 September and 3 October 2011. Then, on 17 October 2011, Equatorial Guinea informed France that following the end of Ambassador Edjo Ovono Frederico's mission, the Chargée d'affaires *a.i.*, Ms Bindang Obiang, who is also Equatorial Guinea's Permanent Delegate to UNESCO, was rehoused at 42 avenue Foch[322]. The reason for this change in accommodation, as we have seen, was that her official accommodation as Special Representative, located at 46 rue des Belles Feuilles, was unfit for habitation and that the dignity of Ms Bindang Obiang's new functions required a better residence.

8.47. To determine whether Equatorial Guinea considered the building at 42 avenue Foch to be protected by the rule of inviolability at that time, it is irrelevant to determine whether the appointment of Ms Bindang Obiang was contrary to the VCDR or to argue that the address in question was not notified to UNESCO, as claimed by France in a Note Verbale of 31 October 2011[323]. Ms Bindang Obiang did not deem it necessary to notify UNESCO, because she had relocated in her capacity as Chargée d'affaires, not Special Representative. She thus

---

[320]Jean Salmon, *Manuel de droit diplomatique* (Bruylant, 1994), p. 187.

[321]French Ministry of Foreign and European Affairs, Note Verbale No. 5009/PRO/PID, 11 Oct. 2011 (Ann. 35), p. 2.

[322]Embassy of Equatorial Guinea, Note Verbale No. 387/11, 17 Oct. 2011 (Ann. 36).

[323]French Ministry of Foreign and European Affairs, Note Verbale No. 5393 PRO/PID, 31 Oct. 2011 (Ann. 40).

considered herself to be protected by the VCDR as a member of the diplomatic staff of the Embassy of Equatorial Guinea.

8.48. All the Embassy offices effectively moved to 42 avenue Foch in 2012. Equatorial Guinea made sure to inform France of the move by a Note Verbale of 27 July 2012[324], reiterated on 2 August 2012[325]. The building at 42 avenue Foch has since been officially used, without interruption, as Equatorial Guinea's Embassy in France. It is to this address that French officials wishing to visit Equatorial Guinea submit their requests for entry visas. The French Embassy in
150 Malabo informs French citizens who wish to visit Equatorial Guinea that Equatorial Guinea's Embassy in Paris is located at 42 avenue Foch[326].

8.49. Equatorial Guinea has been consistent in the steps it has taken to have the building located at 42 avenue Foch in Paris recognized as having the status of premises of its diplomatic mission:

— it protested in writing and on the spot when the French authorities carried out the first search measures in the building on 28 September and 3 October 2011;

— it announced to the French Ministry of Foreign Affairs on 4 October 2011 that it had assigned the property as premises of its diplomatic mission;

— it housed the Chargée d'affaires *a.i.* in the building from 17 October 2011;

— on 14 February 2012, its Head of State informed the French Head of State that it had acquired the building and assigned it to its diplomatic mission;

— finally, it transferred all its Embassy offices there on 27 July 2012.

8.50. In sum, the power to verify that premises are actually assigned to a diplomatic mission, as claimed by France, is arbitrary. Such a power is not consistent with the VCDR, which, moreover, does not provide for it. Only the sending State's express waiver of the principle of inviolability authorizes the receiving State to take measures of constraint against the premises of a diplomatic mission. Equatorial Guinea has never waived its rights to the building at 42 avenue Foch in Paris, either as premises of its diplomatic mission or as State property enjoying immunity from jurisdiction and execution in the forum State.

151 II. The failure to respect the immunity of the building at 42 avenue Foch in Paris as property of Equatorial Guinea used for government non-commercial purposes

8.51. As the property of Equatorial Guinea, the building at 42 avenue Foch enjoys the protection that international law affords to the property of foreign States against measures of execution by the forum State (A). By entering, searching and attaching the building in question, France breached its international obligations to Equatorial Guinea (B).

---

[324]Embassy of Equatorial Guinea, Note Verbale No. 501/12, 27 July 2012 (Ann. 47).

[325]Embassy of Equatorial Guinea, Note Verbale No. 517/12, 2 Aug. 2012 (Ann. 48).

[326]Online: http://www.ambafrance-gq.org/Visa-d-entree-en-Guinee-Equatoriale.

A. International law and national jurisprudence protect the property of foreign States from measures of execution by the forum State

8.52. Protection of the property of foreign States from measures of execution by the forum State is based on customary international law, which is incorporated into the Palermo Convention.

8.53. In determining the law applicable to the protection of the property of foreign States against measures of execution by the forum State, the jurisprudence of the Court is particularly relevant. With regard to Villa Vigoni, a property of the German State located in Italy and used as a cultural centre, and on which a legal charge had been entered so that the property could be used to make reparation to victims of the Second World War, the Court found:

> "[t]hat there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim . . ."[327].

8.54. With this negative formulation, the Court recalls the customary international law which provides that immunity from execution is granted to the property of foreign States, unless they expressly waive that immunity or the property is used other than for government non-commercial
152 purposes. As recognized by the Court itself, there are no other exceptions to this principle:

> "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict"[328].

8.55. What is more, immunity from execution admits no exception based on the application of peremptory norms of international law. In the view of the Court, immunity, which is procedural in character, does not conflict with the rules of *jus cogens*, which are substantive in character[329].

8.56. We shall not linger over the conventions that have not yet entered into force or do not apply[330]. Nor shall we linger over international doctrine[331], which tends to concur with the Court regarding the immunity of the property of foreign States. Suffice it to recall that in a judgment of 2014, the ECtHR ruled that "the recent judgment of the ICJ in *Germany* v. *Italy* . . . must be

---

[327] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, *Judgment, I.C.J. Reports 2012 (I)*, p. 148, para. 118.

[328] *Ibid.*, p. 139, para. 91.

[329] *Ibid.*, p. 140, para. 93 and p. 141, para. 95.

[330] See United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2004, Articles 5, 6, 18, 19; European Convention on State Immunity, 16 May 1972, Article 23; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, Article 55 (United Nations, *Treaty Series*, Vol. 330, p. 5 (I-4739)).

[331] See, in particular, Carabiber, Report to the International Law Association on State Immunity, *I.L.A. Report of the 45th Conference*, 1952, Articles 22, 23, 25, p. 213; Résolution de l'Institut de droit international sur l'immunité de jurisdiction et d'exécution forcées des États étrangers (Session of Aix-en-Provence, 1954), Article 5; Resolution of the Institute of International Law on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement (Session of Basel, 1991), Article 4 (2) *(a)*.

considered by this Court as authoritative as regards the content of customary international law"[332]. Customary international law is in fact clear about the applicable criterion: the exception to a State's immunity in respect of its property depends either on waiver by the State or on the use of the property other than for government non-commercial purposes[333]. The practice of States subsequent to the Court's 2012 Judgment is not at variance with this conclusion.

153 8.57. A significant number of States adhere to the principle of restrictive immunity as opposed to absolute immunity[334]. Frequently drawing on national legislation[335], the principle of restrictive immunity means that immunity does not apply when the act of the State is commercial in nature or when the property in question is used for commercial purposes[336]. Waiver by the beneficiary State constitutes another exception to the principle of State immunity. In most cases, immunity from jurisdiction is thus understood in a broad sense as including immunity from execution, even though a waiver of immunity from jurisdiction is not equivalent to a waiver of immunity from execution[337]. In this respect, the property of a diplomatic mission enjoys special protection, and Article 22, paragraph 3, of the VCDR thus reinforces the general rule of State immunity[338]. Since Equatorial Guinea has not waived its immunity in respect of the building at 42 avenue Foch, we shall focus on showing that its use of the property is consistent with the rule of State immunity that France had and continues to have a duty to respect.

8.58. National courts apply varied criteria to ascertain whether property is used for government non-commercial purposes. Depending on the situation, they may take into account the nature of the act or the objective pursued to make an assessment regarding the criterion of commercial character. Applying the criterion of the nature of the act, the German Constitutional
154 Court found that the withholding of a portion of the salary of a teacher who was employed by a Greek private school and remunerated by the Greek State was a tax measure that fell within the

---

[332]ECtHR, *Jones and others* v. *United Kingdom*, Nos. 34356/06 and 40528/06 (14 Jan. 2014), para. 198.

[333]ECtHR, *Manoilescu and Dobrescu* v. *Romania and Russia* (dec.), No. 60861/00 (3 Mar. 2005); James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012), pp. 502-503; Jean Combacau and Serge Sur, *Droit international public* (L.G.D.J., 2014), pp. 250-251.

[334]Jean d'Aspremont, "Premises of Diplomatic Missions", *Max Planck Encyclopedia of Public International Law* (2009), para. 36; Roger O'Keefe and Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property*: *A Commentary* (Oxford University Press, 2013), pp. xxxvii and xxxix. For national jurisprudence, see *I Congreso del Partido* [1983] 1 AC 244, p. 276D; *Trendex Trading Corp.* v. *Central Bank of Nigeria*, [1977] Q.B. 529, *aff'd* [1977] 2 W.L.R. 356; *Hispano American Mercantil S.A.* v. *Central Bank of Nigeria* [1979], 2 Lloyd's L.R. 277; *NML Capital Ltd* v. *Republic of Argentina*, judgment of the Supreme Court of 6 July 2011, [2011] UKSC 31, ILDC 1805 (UK 2011).

[335]Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (United States); State Immunity Act, R.S.C., 1985, c. S-18, Art. 11 (Canada); South African Foreign States Immunity Act (1982) (South Africa); State Immunity Act (Cap 313, 1985 Rev Ed), section 15 (2) (Singapore).

[336]On the affirmation of this principle, see in Germany: *The Philippine Embassy case*, 65 *ILR* 140, *UN Legal Materials* 297, 13 Dec. 1977; in Canada: *Republic of Iraq* v. *Export Development Corp., 2003 CanLII 4633 (QC CA)*, http://canlii.ca/t/602x (Court of Appeal of Quebec); in Spain: *Abott* v. *Republic of South Africa*, Spanish Constitutional Court, 2nd Chamber, 1 July 1992, 113 *ILR* 413; in France: *Civ. 1ère*, 1 Oct. 1985, *Société Sonatrach* v. *Migeon*; *Civ. 1ère*, 14 Mar. 1984, *Société Eurodif* v. *Islamic Republic of Iran*; in the United Kingdom: *Trendex Trading Corp.* v. *Central Bank of Nigeria*, [1977] Q.B. 529, *aff'd* [1977] 2 W.L.R. 356.

[337]*Kuwait Airways Corp.* v. *Iraq*, 2010 CSC 40 (CanLII), para. 19; *AF-CAP Incorporated* v. *Congo and ors*, Case No. 03-50506, Case No. 03-50560, judgment of the Court of Appeals (5th Circuit), 17 Sept. 2004, 383 F.3d 361 (5th Cir. 2004), ILDC 119 (US 2004). For a contrary opinion, see *Creighton Ltd* v. *Minister of Finance of Qatar*, *Cour de cassation*, *1er chambre civile*, 6 July 2000.

[338]Jean d'Aspremont, "Premises of Diplomatic Missions", *Max Planck Encyclopedia of Public International Law* (2009), para. 36. See also Belgian *Cour de cassation*, *Argentina* v. *NML Capital Ltd,* Judgment No. C/11/0688/F of 22 Nov. 2012, ILDC 2055 (BE 2012).

sovereignty of the Greek State. The teacher, who had won the case before the German labour courts, was unable to have the decision enforced against Greek property in Germany[339].

8.59. In a 2015 case[340], the High Court of Australia was called on to clarify the notion of use for government non-commercial purposes with regard to a measure of execution against the bank accounts of the State of Nauru. The High Court found that use for commercial purposes refers to the reason why, objectively, the property is used[341]. It concluded that Nauru was immune from execution because the reasons for which its bank accounts were in use were not commercial purposes[342].

8.60. The Federal Court of Canada, which has jurisdiction over disputes relating to subjects covered by federal laws, ruled in 2015 that the order of an adjudicator for employment disputes, which granted reparations to a former employee of the United States Consulate who claimed she had been unjustly dismissed, ran counter to the rule of immunity. The Federal Court ruled that "[t]he respondent's duties within the financial operation of the consulate, however administrative
155 they may be, engaged elements of trust and confidentiality, and were thus integral to the operations of the consulate"[343].

8.61. We thus observe a flexible approach to the notion of acts or use for government non-commercial purposes, such that even an act or commercial use whose ultimate purpose is a sovereign function is likely to give rise to entitlement to immunity. This approach is in line with the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides that, in assessing the criterion of commercial character:

> "reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction"[344].

8.62. Moreover, national jurisprudence generally considers that property which is used for the performance of the functions of a diplomatic mission is presumed to be used for government non-commercial purposes. Property assigned as such, or which is also owned by the State, must

---

[339] *Request by Greece, Interim order on constitutional complaint*, 16 Oct. 2013, 2 BvR 736/13, ILDC 2752 (DE 2013). For the decision on the merits, see *Request by Greece, Final decision on constitutional complaint*, 17 Mar. 2014, 2 BvR 736/13, *NJW* 2014, 1723, *WM* 2014, 768. With regard to the criterion of the nature of the act, see in France: *Cass. 1ère civ*. 25 Jan. 2005, No. 03-18176, D.2005, p. 616, concl. J. Sainte-Rose, *Rev. crit. DIP* 2006, p. 123, note H. Muir Watt; *Cass. civ. 1ère*, 19 Nov. 2008, No. 07-10570, D. 2008. AJ. 3012, obs. I. Gallmeister; in Austria: *E AG* v. *S*, Appeal judgment, 23 Jan. 2001, Regional Civil Court, 40 R7/01b, ILDC 357 (AT 2001); in Latvia: *VČ* v. *Embassy of the Russian Federation in Latvia*, Appeal judgment on jurisdiction, 12 Dec. 2007, case No. SKC-237, No. 10 (514), ILDC 1063 (LV 2007); in the United Kingdom: *NML Capital Ltd* v. *Republic of Argentina*, judgment of 6 July 2011, [2011] UKSC 31, ILDC 1805 (UK 2011).

[340] *Firebird Global Master Fund II Ltd* v. *Republic of Nauru*, 2 Dec. 2015, [2015] HCA 43.

[341] *Ibid.*, para. 115.

[342] *Ibid.*, para. 128. Similarly, see *AF-CAP Incorporated* v. *Congo and ors*, Court of Appeals (5th Circuit), Case No. 03-50506, Case No. 03-50560, 17 Sept. 2004, 383 F.3d 361 (5th Cir. 2004), ILDC 119 (US 2004). In support of the theory of the nature of the act, see *Mortimer Off Shore Services Ltd.* v. *Federal Republic of Germany*, United States Court of Appeals, Second Circuit, 26 July 2010, 615 F 3d 97 (2nd Cir 2010), ILDC 1797 (US 2010).

[343] *United States of America* v. *Zakhary,* 2015 FC 335 (CanLII), para. 33. See, in Israel, the case *Her Majesty the Queen in Right of Canada* v. *Edelson and ors*, judgment of the Supreme Court, 3 June 1997, PLA 7092/94, 51 (1) PD 625, ILDC 577 (IL 1997).

[344] Article 2 (2).

therefore enjoy State immunity[345]. Such is the law in Botswana[346], France[347] and Russia[348], for example. In the spirit of this presumption, it falls to the head of the diplomatic mission to certify that the property is used for government non-commercial purposes, which implies that the burden of proof is shifted to the person who alleges the use is private in nature[349]. In this regard, on the strength of a certificate produced by Iraq stating that the funds deposited into the account of its
156 diplomatic mission would not be used for commercial purposes, the Supreme Court of the United Kingdom decided that there was an unrebutted presumption that the funds were immune[350]. The jurisprudence of the *Cour de cassation* takes a similar stance[351].

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

8.64. The importance of the property's use for government non-commercial purposes as grounds for applying immunity from execution appears, moreover, to extend beyond the presumption of the public interest of diplomatic property. Thus, property enjoys immunity if it is used in considerable part, but not necessarily predominantly, for official purposes. This was the thrust of a Swedish judgment of 2011 which, having found that Articles 18 and 19 of the 2004 United Nations Convention were customary in nature, ruled that the use of 15 of the 48 units in a building did not constitute considerable use entitling the diplomatic property of the Russian Federation to immunity from execution[352]. If it had been used in considerable part for non-commercial purposes, it would have been granted immunity from execution.

8.65. Finally, a foreign State's immunity from execution is not denied simply because the property belongs to an entity owned by the State. In a 2011 case, the Indian Supreme Court found, in respect of Ethiopian Airlines, that an entity owned by a foreign State is not entitled to immunity
157 for acts of a commercial nature[353]. It can be inferred from this that a sovereign act carried out by

---

[345]Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edition (Oxford University Press, 2016), p. 16.

[346]*Angola* v. *Springbok Investments (Pty) Ltd*, judicial review appeal, High Court of Botswana, 12 Oct. 2003, MISCA No. 4/2002, ILDC 7 (BW 2003).

[347]*Cass. 1ère civ.*, 28 Sept. 2011, No. 09-72057, D. 2011. 2412, *RD bancaire et fin.* 2012, p. 39, note S. Piedelièvre; *Rev. crit. DIP* 2012, p. 124, note H. Gaudemet-Tallon.

[348]Federal Law No. 297-FZ of 3 Nov. 2015 on the jurisdictional immunities of foreign States and the property of foreign States in the Russian Federation, Article 16 (1) (1).

[349]United Kingdom State Immunity Act 1978, section 13 (5); *AIG Capital Partners Inc. and Another* v. *Kazakhstan*, [2005] EWHC 2239 (Comm.), 129 *ILR* 589. But see in France: *Cass. 1ère civ.*, 1 Oct. 1985, No. 84-13605, *Bull. civ.*, I, No. 236, p. 211, *JCP*, 1986, II, 20566, concl. Gulphe, note Synvet, *JDI*, 1986, 170, note Oppetit, *RCDIP*, 1986, 527, note Audit.

[350]*SerVaas Incorporated* v. *Rafidian Bank and others*, United Kingdom Supreme Court, [2012] UKSC 40.

[351]*Cass. 1ère civ.*, 28 Sept. 2011, No. 09-72057, D. 2011. 2412, *RD bancaire et fin.* 2012, p. 39, note S. Piedelièvre, *Rev. crit. DIP* 2012, p. 124, note H. Gaudemet-Tallon. With respect to the Embassy's bank accounts, the *Cour de cassation* specifically found that "[t]he funds allocated to diplomatic missions are presumed to be in the public interest . . . the bank accounts of an Embassy are presumed to be allocated to the performance of the functions of the diplomatic mission, so a creditor who wishes to attach them must provide evidence that such property is used for private or commercial activity". *[Translation by the Registry.]*

[352]*Sedelmayer* v. *Russian Federation*, judgment of the Swedish Supreme Court, 1 July 2011, ILDC 1673 (SE 2011), NJA 2011 475.

[353]*Ethiopian Airlines* v. *Ganesh Narain Saboo*, 9 Aug. 2011, [2011] INSC 731, para. 71. See in the United Kingdom: *Trendex Trading Corp.* v. *Central Bank of Nigeria*, [1977] Q.B. 529, *aff'd* [1977] 2 W.L.R. 356.

an entity belonging to a State — tax collection, for example — would be covered by immunity. Since the criterion of use is fundamental, this conclusion can be fully transposed to the immunity of property[354]. Thus, even if the property belongs to a private individual, the sole determining factor is whether it is used for government non-commercial purposes. According to the *travaux préparatoires* of the 2004 United Nations Convention, State property benefiting from immunity includes not only property that a State owns but also property in its possession or control[355].

B. By entering, searching and attaching the building at 42 avenue Foch, France has breached its obligations to Equatorial Guinea

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

8.67. As previously recalled, Equatorial Guinea became the owner of the building at 42 avenue Foch on 15 September 2011, by acquiring Mr. Teodoro Nguema Obiang Mangue's shareholder rights in the companies that owned the building. In so doing, it became the companies' sole shareholder. It is of little importance, for the purpose of applying the rule of foreign State immunity, that France considers the transaction carried out by Equatorial Guinea and the companies that owned the building at 42 avenue Foch to be mere "legal window-dressing". As we saw in Chapter 6, this position runs counter to the principle of sovereign equality of States, and, in any event, Equatorial Guinea's acquisition of the building has never been formally contested before the French courts. What is more, application of the rule of immunity from execution depends on how the State uses the property[356].

158

8.68. Indeed, this conventional criterion[357] is codified by the 2004 United Nations Convention, which affords protection from execution to the property of a foreign State which is used for government non-commercial purposes. This wording, adopted by the Court in the case concerning *Jurisdictional Immunities of the State*, gives States the latitude to define a wide range of property as belonging to the category protected by immunity. Protection is therefore not limited to property used for purely sovereign purposes. It is to be noted that it extends to forms of government service that might be said to have no direct, or at least no obvious, involvement in State sovereignty. For example, property assigned to cultural services or to education and training. This approach thus requires sovereignty to be understood in a broad sense.

---

[354]This is the view of the United States Court of Appeals, 11th Circuit: *Venus Lines Agency* v. *CVG Industria Venezolana de Aluminio*, 210 F.3d 1309 (11th Cir. 2000). See also Chester Brown and Roger O'Keefe, "Part IV: State Immunity From Measures of Constraint in Connection with Proceedings Before a Court", *in* Roger O'Keefe and Christian J. Tams (dir.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property*: *A Commentary* (Oxford University Press, 2013), p. 291.

[355]Chester Brown and Roger O'Keefe, "Article 18: State immunity from pre-judgment measures of constraint", *in* Roger O'Keefe and Christian J. Tams (dir.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property*: *A Commentary* (Oxford University Press, 2013), p. 300.

[356]Jean Combacau and Serge Sur, *Droit international public* (L.G.D.J., 2014), p. 251.

[357]*United States, France and United Kingdom* v. *Dollfus Mieg et Cie. S.A. etc*. [1952] I All England Reports p. 572, cited by J.-F Lalive, "L'immunité de juridiction des États et des organisations internationales", *Recueil des cours*, Vol. 84, 1953, p. 225; John Foster, "La théorie anglaise du droit international privé", *Recueil des cours*, Vol. 65, 1938, p. 480; George Grenville Phillimore, "Immunité des États au point de vue de la juridiction ou de l'exécution forcée", *Recueil des cours*, Vol. 8, 1925, p. 465; Hazel Fox and Philippa Webb, *The Law of State Immunity, Revised and Updated Third Edition* (Oxford University Press, 2013), p. 137.

8.69. In any event, once it has been established that property is used for sovereign purposes, State immunity applies. The ECtHR has found, with regard to private property which the complainants alleged had been unlawfully assigned to the Embassy of the Russian Federation, that under international law exceptions to immunity do not apply to property used "in accordance with [a State's] sovereign power *(jure imperii)*"[358]. Such property is granted "the fullest State immunity"[359], with the result that attachment of the property indisputably constitutes "a violation of customary international law . . ."[360].

159 8.70. The history of the use of the building at 42 avenue Foch, at least since it was acquired by Equatorial Guinea, does not point to commercial use of any kind. As we demonstrated in Chapter 2 of this Memorial, all of the diplomatic and consular services of Equatorial Guinea's diplomatic mission are housed there, the Ambassador of Equatorial Guinea and the staff of Equatorial Guinea's mission attend to their daily affairs there, and, most significantly, these premises are where people, including French officials, go to request a visa to enter Equatorial Guinea. In using it as the premises of its diplomatic mission, Equatorial Guinea is effectively performing, without interruption, the principle functions which international law recognizes to be sovereign in nature. There is no valid exception in the case at hand which would effectively prevent the application of the rule of immunity from execution. France's conduct must be found to be contrary to customary international law.

Conclusion

8.71. As a conclusion to this chapter, in light of the foregoing arguments, Equatorial Guinea reiterates that:

— France's refusal to recognize the diplomatic status of the building located at 42 avenue Foch in Paris is contrary to the provisions of the Vienna Convention on Diplomatic Relations and general international law;

— by entering the building at 42 avenue Foch, the French authorities have disregarded the principle of inviolability of the premises of Equatorial Guinea's diplomatic mission, as established under international law;

— by attaching the building at 42 avenue Foch, France has breached the prohibition, under international law, of subjecting Equatorial Guinea's property to measures of constraint;

— by entering, searching and attaching the building at 42 avenue Foch, France has breached its obligations to Equatorial Guinea under international law.

---

[358]ECtHR, *Manoilescu and Dobrescu* v. *Romania and Russia* (dec.), No. 60861/00 (3 Mar. 2005), para. 76. In paragraph 77, the Court states: "It is sufficient for the property to be 'used for the purposes of the mission' of the foreign State for the above principles to apply, a condition that appears to have been satisfied in the instant case, seeing that the property in question is used by officials of the . . . embassy . . .".

[359]John Foster, "La théorie anglaise du droit international privé", *Recueil des cours*, Vol. 65, 1938, p. 480. *[Translation by the Registry.]*

[360]Max Sørensen, "Principes de droit international public : cours general", *Recueil des cours*, Vol. 101, 1960, p. 172. *[Translation by the Registry.]*

161

PART FOUR

FRANCE'S INTERNATIONAL RESPONSIBILITY

163

CHAPTER 9

FRANCE'S INTERNATIONAL RESPONSIBILITY AS A CONSEQUENCE OF THE BREACH OF ITS OBLIGATIONS TO EQUATORIAL GUINEA

9.1. It is a fundamental rule of the law of international State responsibility that "[e]very internationally wrongful act of a State entails the international responsibility of that State"[361]. The various breaches by France of its obligations, as established in Chapters 6, 7 and 8 above, constitute internationally wrongful acts and therefore entail its international responsibility (Section I). Consequently, Equatorial Guinea is justified in requesting that France put an end to these violations of international law and make reparation for the harm that it has suffered on account of these wrongful acts (Section II).

I. France's international responsibility and the harm suffered by Equatorial Guinea

9.2. This section will show that France's breaches of its international obligations, as established in the preceding chapters, engage its responsibility under international law as reflected in the jurisprudence of the Court for this type of violation (A) and that Equatorial Guinea has suffered various forms of harm on account of these multiple violations (B).

A. The violations established by Equatorial Guinea engage France's responsibility, in accordance with the jurisprudence of the Court and the rules of international law

9.3. The criminal proceedings in France relating to the so-called "ill-gotten gains" case have violated the rights of Equatorial Guinea. Equatorial Guinea had hoped that the threat of arrest
164 hanging over its Vice-President would recede and that a cessation of the proceedings against him, by virtue of a decision reflecting his personal immunity, would remove that sword of Damocles. However, this has not happened. On the contrary, the risk of Mr. Teodoro Nguema Obiang Mangue being arrested is now greater than ever, since the order of 5 September 2016 referring him to the Paris *Tribunal correctionnel*, followed by the summons of 21 September 2016 requesting that the Association of Bailiffs "serve a summons to appear" on him[362], which has necessarily increased the threat that he faces. That threat may now materialize shortly, given that at a hearing on 24 October 2016 the 32nd *Chambre criminelle* of the Paris *Tribunal correctionnel* — before which France maintained that it was not bound by the decisions of the Court — scheduled the trial hearings in the Nguema Obiang Mangue case from 2 to 12 January 2017[363]. This situation has placed considerable restrictions on the movements of the Vice-President of Equatorial Guinea and affected both the independence and freedom of that country in the conduct of its international relations. Just as the Court found in the *Arrest Warrant* case that "the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities . . . engaged Belgium's international responsibility"[364], it should also find that the issue and circulation of an arrest warrant against the Vice-President of Equatorial Guinea by the French authorities, and the criminal proceedings in general, engage France's international responsibility.

---

[361] International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission 2001*, Vol. II, Part Two, p. 26 (hereinafter "2001 Draft Articles"), Art. 1.

[362] Financial Prosecutor at the Paris *Tribunal de grande instance*, Summons, 21 Sept. 2016 (Ann. 31).

[363] Record of the hearing at the Paris *Tribunal correctionnel* held on 24 Oct. 201[6] (Ann. 81).

[364] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 31, para. 75.

9.4. As regards the failure to respect the inviolability of the premises of the diplomatic mission, the Court concluded an examination of Iran's breaches of its obligations towards the United States in the *United States Diplomatic and Consular Staff in Tehran* case by finding that

> "Iran, by committing successive and continuing breaches of the obligations laid upon it . . . has incurred responsibility towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States . . ."[365].

165 9.5. In the present case, by searching the building at 42 avenue Foch, France's judicial authorities have infringed the inviolability of the premises of a sovereign State's diplomatic mission. Notwithstanding the letter to the investigating judges dated 25 April 2012[366], in which the Embassy of Equatorial Guinea asserted the diplomatic status of the building at 42 avenue Foch, it was searched again, before being made the subject of an attachment order issued by the investigating judges[367]. As in the aforementioned case concerning *United States Diplomatic and Consular Staff in Tehran*, France has, by committing these "successive . . . breaches of the obligations laid upon it", incurred international responsibility towards Equatorial Guinea.

9.6. France's international responsibility is engaged with regard to the immunity of States and their property. Indeed, since Equatorial Guinea had already demonstrated that it had become the owner of the building at 42 avenue Foch on 15 September 2011[368], by acquiring the shareholder rights held by various companies, and that it was not using the building for commercial purposes, the attachment of that building on the orders of the French courts is a clear violation of international law, which engages France's international responsibility.

9.7. That was the position adopted by the Court when it was asked to rule on a similar situation in the case concerning *Jurisdictional Immunities of the State*[369]. After concluding, on the basis of its analysis, that "the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany"[370], the Court stated, *inter alia*, that for the reasons set out in Sections III, IV and V of its Judgment, it would "uphold Germany's first three requests, which ask it to declare, in turn, that . . . Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni". And as regards Germany's fourth submission asking "the Court to adjudge and declare that, in view of the
166 above, Italy's international responsibility is engaged", the Court declared: "There is no doubt that the violation by Italy of certain of its international legal obligations entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed."[371]

9.8. France's actions are particularly serious given that the present case relates not to measures of execution under civil law, as in the aforementioned case, but to measures under

---

[365] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 41-42, para. 90.

[366] Referral order of 5 Sept. 2016 (Ann. 7), p. 31.

[367] *Ibid.*, p. 31; Order of attachment of real property (*saisie pénale immobilière*), 19 July 2012 (Ann. 25).

[368] Share and claims transfer agreement, signed 15 Sept. 2001 (Ann. 1 to the reply to the question put by Judge Bennouna, 26 Oct. 2016).

[369] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 107, para. 15.

[370] *Ibid.*, p. 145, para. 107.

[371] *Ibid.*, pp. 152-153, paras. 135-136.

criminal law, namely, coercive and repressive actions. Under French law, attachment (*saisie pénale*) constitutes a genuine punishment in itself. Not only does it render the property unavailable for use, it also infringes the right of ownership, since it prevents the property from potentially being disposed of for the benefit of the State[372]. Similarly, the search and attachment of the building at 42 avenue Foch engages France's responsibility towards Equatorial Guinea.

B. The harm suffered by Equatorial Guinea

9.9. Equatorial Guinea has suffered both material and moral harm.

1. Material harm

9.10. The material harm suffered by Equatorial Guinea results from the following: the fact that it is difficult for Equatorial Guinea to rely on its Vice-President to conduct the international affairs of his country which fall within his remit or are assigned to him by the President of the Republic; the fact that it cannot safely use its building at 42 avenue Foch as premises of its diplomatic mission or dispose of it as property in order to ensure the fulfilment of its commitments to third parties; and the cost of the multiple judicial proceedings made necessary by the failure to respect the immunity of both its Vice-President and the aforementioned building.

167

9.11. As regards the Vice-President of Equatorial Guinea, the form that the criminal proceedings have taken has prevented him from carrying out his international functions, notably in the area of national defence and security. Equatorial Guinea's intention in appointing such a high-ranking individual was that he would play a full role in driving its foreign policy at an economic, political, sociocultural and military level and would assist the President of the Republic in fulfilling his international tasks. Equatorial Guinea has invested significant resources in order to allow the Vice-President to carry out the tasks that fall within his remit or are assigned to him in this context. By preventing him from functioning, France is impeding Equatorial Guinea's ability to participate fully in international relations, particularly in the area of defence and security, and thereby causing it reparable harm.

9.12. As regards the building, it was acquired by Equatorial Guinea to serve as premises of its diplomatic mission. A situation where it is unable to perform that function will result in financial losses, notably in terms of the cost of acquiring it, the taxes paid and the cost of maintenance.

9.13. As regards the cost of proceedings, it should be noted that these began in 2007, being brought initially against Equatorial Guinea's Head of State, and then against Mr. Teodoro Nguema Obiang Mangue alone, who was then State Minister for Agriculture and Forestry. The proceedings have continued to this day, despite the fact that he became Vice-President of Equatorial Guinea in 2012 and has asserted his personal immunity since then. All in all, the multiple proceedings against the Vice-President before the French criminal courts, which have resulted in the judicial attachment of the building at 42 avenue Foch, have involved more than ten different procedural steps, some of which have culminated in court decisions. By continuing the proceedings against Mr. Teodoro Nguema Obiang Mangue, Vice-President of

[372]In his attachment order, the senior investigating judge at the Paris *Tribunal de grande instance* recalled that "pursuant to Article 706-145 of the Code of Criminal Procedure, no one may validly dispose of assets attached in a criminal proceeding and that, in addition, once the attachment has been recorded in the competent mortgage registry, the attachment is binding on third parties and suspends or prohibits any and all civil execution proceedings in respect of that property", Order of attachment of real property (*saisie pénale immobilière*), 19 July 2012 (Ann. 25), p. 12.

Equatorial Guinea, notwithstanding his immunity, France has eliminated the procedural effectiveness of the protection granted by immunity. Instead of a swift and cost-efficient settlement, the failure to respect that immunity has forced Equatorial Guinea to engage the services of numerous counsel over a period of almost ten years in order to follow and deal with those
168 multiple proceedings, causing considerable expense in the form of fees paid to lawyers and counsel and court costs, which merit reparation by France.

2. Moral harm

9.14. In claiming that the appointment of the Second Vice-President of Equatorial Guinea was "an appointment of convenience"[373] aimed solely at allowing Mr. Teodoro Nguema Obiang Mangue to evade criminal proceedings before the French courts, France has taken it upon itself to judge the appropriateness of the appointments made by the President of Equatorial Guinea. That is why its courts — disregarding that appointment, which is a matter of State sovereignty — have initiated and continued criminal proceedings against the Vice-President of Equatorial Guinea, despite all protests. In so doing, France presumes to tell an independent and sovereign State how to manage both its domestic affairs and its international relations. These actions, and the disputed criminal proceedings in general, have caused harm to Equatorial Guinea and violated its dignity and honour.

9.15. In the *Arrest Warrant* case, the Court granted the Democratic Republic of the Congo's request for it to rule that the arrest warrant issued against its Minister for Foreign Affairs was unlawful and to order reparation for the moral injury that the warrant had caused it "as a result of the opprobrium 'thus cast upon one of the most prominent members of its Government'"[374]. In the Court's view, "the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law"[375]. In this regard, the Court did not subscribe to Belgium's view that an INTERPOL Red Notice had not been requested until Mr. Yerodia had ceased to hold ministerial office, considering that, given the nature and purpose of the warrant, its international circulation "effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign
169 Affairs and was furthermore liable to affect the Congo's conduct of its international relations"[376]. In any event, the mere circulation of the warrant, "whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo" and therefore entailed Belgium's international responsibility, as the Court ruled in the operative part of its Judgment:

> "The Court has already concluded . . . that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form

---

[373] Final submissions of 23 May 2016 (Ann. 30), p. 30, replicating the wording used by the *Chambre de l'instruction* in its ruling on the application submitted by Mr. Teodoro Nguema Obiang Mangue on 31 July 2014, seeking the annulment of his placement under judicial examination on the basis of his immunity.

[374] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 26, para. 64.

[375] *Ibid.*, p. 29, para. 70.

[376] *Ibid.*, p. 29, para. 71.

of satisfaction which will make good the moral injury complained of by the Congo."[377]

9.16. In the present case, the arrest warrant issued on 13 July 2012 and circulated by France — and which remained in force until 19 March 2014[378] — and the ongoing criminal proceedings in France concern a member of Equatorial Guinea's executive, a person of higher rank than the Minister for Foreign Affairs and the Prime Minister. The moral harm suffered by Equatorial Guinea is thus particularly serious. Serious harm has also been caused by the 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, as well as by the repeated violations of its immunity from execution and jurisdiction in respect of the building at 42 avenue Foch, which houses those premises. Moral damage may be purely moral, as in the case of an insult to the flag, interference in the affairs of a State or the exercise of extraterritorial legislative jurisdiction, or it may result from material damage[379]; the latter is characterized as legal or political harm[380].

9.17. Equatorial Guinea wishes to reiterate that, from every point of view, the actions of the French public authorities have, in all these various respects, caused it moral harm.

170 **II. France's obligation to make reparation for the harm caused to Equatorial Guinea**

9.18. An internationally wrongful act entails various types of consequences requiring reparation. As the Permanent Court of International Justice stated in its 1927 Judgment in the *Factory at Chorzów* case, which the present Court has recalled on several occasions, "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form"[381]. The 2001 Articles on State Responsibility recall the principle of full reparation for an internationally wrongful act[382]. That principle, which is the subject of established international jurisprudence, means that the reparation granted by the Court must "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[383].

9.19. The principle of full reparation that emerges from jurisprudence provides for various forms of reparation[384]. Not only is France under an obligation to provide restitution, compensation or satisfaction, as appropriate, for the various internationally wrongful acts that are attributable to

---

[377] *Ibid.*, p. 31, para. 75.

[378] Referral order of 5 Sept. 2016 (Ann. 7), p. 8.

[379] Raphaële Rivier, *Droit international*, Paris (PUF, 2013), pp. 601-602.

[380] *Rainbow Warrior (New Zealand* v. *France)*, Award of 30 Apr. 1990, *Reports of International Arbitral Awards*, Vol. XX, p. 267, para. 109.

[381] *Factory at Chorzów (Claim for Indemnity), Jurisdiction, Judgment, 1927, P.C.I.J., Series A, No. 9*, p. 21.

[382] 2001 Draft Articles, Art. 31 (1).

[383] *Factory at Chorzów (Claim for Indemnity), Merits, Judgment, 1928, P.C.I.J., Series A, No. 17*, p. 47; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 485, para. 48; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, pp. 232-233, para. 460; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 59, para. 119; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 257, para. 259; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 197-198, paras. 151-152.

[384] 2001 Draft Articles, Art. 34.

it, it also remains subject to the obligations that it has breached, since the rules that establish those obligations remain in force[385]. Moreover, it is understood that the various forms of reparation may be granted separately or in combination[386].

9.20. As a consequence of its international responsibility, France is required to: cease its breaches of the obligations owed to Equatorial Guinea under international law and re-establish the previous situation (A); give satisfaction to Equatorial Guinea for the harm that its conduct has
171 caused (B); compensate Equatorial Guinea for all harm resulting from its internationally wrongful acts (C); and, finally, perform the obligations that it has breached, since it remains subject to them (D).

A. France is under an obligation to cease its violations in respect of Equatorial Guinea and re-establish the previous situation

9.21. As the International Law Commission highlights in its commentary on the 2001 Articles on State Responsibility, "[t]he continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (*a*) of article 30)"[387]. The conditions for invoking France's obligation to cease its breaches of the obligations it owes to Equatorial Guinea are met in the present case: first, the breaches at issue have a continuing character; and second, the obligations that have been breached remain in force[388].

9.22. Equatorial Guinea considers that, in so far as the obligations owed to it remain in force, France must immediately cease its breaches of them and offer Equatorial Guinea guarantees of non-repetition, in order to prevent further breaches[389].

9.23. While it is not always easy to distinguish between cessation and reparation, as the International Law Commission acknowledges[390], citing the opinion of Judge Keith in the *Rainbow Warrior* case[391], Equatorial Guinea believes that such a distinction is possible in the present case, as it will demonstrate below.

172 9.24. In the case concerning *Jurisdictional Immunities of the State*, Germany sought to draw the consequences, in terms of reparation, of the violations established by the Court. This included a request that the Court "order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable". The Court upheld this request in the following terms, which deserve to be reproduced in their entirety:

---

[385] 2001 Draft Articles with commentaries, *Yearbook of the International Law Commission 2001*, Vol. II, Part Two, p. 31 (hereinafter "2001 Draft Articles with commentaries"), p. 88, para. (2) of the commentary on Art. 29.

[386] 2001 Draft Articles with commentaries, p. 95, para. 2 of the commentary on Art. 34.

[387] *Ibid.*

[388] *Rainbow Warrior (New Zealand* v. *France)*, Award of 30 Apr. 1990, *Reports of International Arbitral Awards*, Vol. XX, pp. 270-271, para. 114. See also 2001 Draft Articles, Art. 30; 2001 Draft Articles with commentaries, p. 88.

[389] 2001 Draft Articles, Art. 30.

[390] See 2001 Draft Articles with commentaries, p. 89, paras. 7-8.

[391] *Rainbow Warrior (New Zealand* v. *France)*, Award of 30 Apr. 1990, *Reports of International Arbitral Awards*, Vol. XX, p. 217, separate opinion of Judge Kenneth Keith, 82 *ILR*, p. 584, para. 16 ("Could I simply say that I am not sure, for instance, about the validity of the distinction [between cessation and restitution] in theory or in practice.").

"According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 *(a)* of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.

It follows accordingly that the Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect."[392]

9.25. In the same vein, the Court ruled in the *Arrest Warrant* case that the appropriate reparation consisted of having Belgium "cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated"[393]. To the extent that the French criminal
173 proceedings against the Vice-President of Equatorial Guinea remain open and the building at 42 avenue Foch remains under attachment, reparation similar to that required of Belgium in the *Arrest Warrant* case would be appropriate.

9.26. The obligation to cease violations is based on the premise that the violations giving rise to Equatorial Guinea's Application are still extant[394]. As Equatorial Guinea has indicated, the French criminal proceedings against the Vice-President remain open, and he could now be tried at any time, following his referral to the Paris *Tribunal correctionnel* by the order of 5 September 2016 and the issuance of a summons instructing the Vice-President to appear at a hearing on the merits of the case on 24 October 2016[395]. In addition, the attachment of the building at 42 avenue Foch means that it remains legally impossible for its owner to dispose of that property. What is more, the building is now threatened with confiscation and sale by the French State.

---

[392] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 153-154, para. 137.

[393] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 33, para. 78.

[394] *Ibid.*, pp. 31-32, para. 76.

[395] See the referral order of 5 Sept. 2016 (Ann. 7); Financial Prosecutor at the Paris *Tribunal de grande instance*, Summons, 21 Sept. 2016 (Ann. 31).

B. France is under an obligation to give satisfaction to Equatorial Guinea for the harm caused by its wrongful act

9.27. As noted above, Equatorial Guinea has suffered severe moral harm on account of France's conduct. It is therefore entitled to demand that France give it satisfaction for the harm thus caused.

9.28. According to the work of the International Law Commission, satisfaction for injury caused by an internationally wrongful act is only required "insofar as it cannot be made good by restitution or compensation"[396]. Satisfaction may take various forms, such as an acknowledgment of the breach, an expression of regret or a formal apology[397], but must not be out of proportion to
174 the injury or humiliating to the responsible State[398]. The choice of one or other of those remedies will depend on the circumstances of each case[399].

9.29. In light of the circumstances of the present case, France owes Equatorial Guinea satisfaction for the harm caused to it by France's wrongful act. As the International Law Commission noted, international jurisprudence and State practice have made this an established form of reparation where the injured State has suffered non-material harm[400]. In its award in the *Rainbow Warrior* case, the Arbitral Tribunal observed:

> "There is a long established practice of States and International Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities."[401]

9.30. In its commentary on Article 37 of the 2001 Articles, the International Law Commission refers at length to State practice, which "also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State"[402]. It cites the examples of insults to the symbols of a State and the national flag, violations of sovereignty or territorial integrity, attacks on ships or aircraft, ill-treatment of or attacks on Heads of State or Government or diplomatic or consular representatives or other protected persons, and violations of the premises of embassies or consulates or of the residences of members of foreign diplomatic missions[403].

9.31. As was shown in Section I (B) (2) of this chapter, France's wrongful acts have caused
175 Equatorial Guinea moral harm. Some of the acts at issue cannot be made good by restitution or compensation. This is precisely the case with the infringement of sovereignty resulting from the issuance of an arrest warrant against the current Vice-President of Equatorial Guinea and the search

---

[396] 2001 Draft Articles, Art. 37 (1).

[397] 2001 Draft Articles, Art. 37 (2).

[398] 2001 Draft Articles, Art. 37 (3).

[399] 2001 Draft Articles with commentaries, pp. 105-107.

[400] 2001 Draft Articles with commentaries, p. 105.

[401] *Rainbow Warrior (New Zealand* v. *France)*, Award of 30 Apr. 1990, *Reports of International Arbitral Awards*, Vol. XX, pp. 272-273, para. 122.

[402] 2001 Draft Articles with commentaries, p. 106, para. 4 of the commentary on Art. 37.

[403] *Ibid.*

of its diplomatic premises. Although a finding by the Court to the effect that a violation has indeed occurred may constitute a form of satisfaction[404], Equatorial Guinea believes that the circumstances of the present case are such that the Court should order France to offer assurances or guarantees of non-repetition.

9.32. In the *Rainbow Warrior* case, it was recognized that although, in principle, the guarantee of non-repetition applies to instances of material damage, it can also be applied to instances of moral damage[405]. In a number of cases, the Court has itself found requests for guarantees of non-repetition to be admissible, although those requests have not been granted[406]. Even in the presence of general guarantees, the Court may, in light of the particular character of the violations in question, order the responsible State to give more specific assurances[407]. In its recent jurisprudence, the Court has made the granting of guarantees and assurances of non-repetition dependent on the demonstration of "special circumstances . . . which the Court must assess on a case-by-case basis"[408].

9.33. Equatorial Guinea considers that the circumstances of the present case are such that an order of non-repetition is essential. First of all, the violations have been carried out by judicial authorities, which could see their misinterpretation of international law reinforced. In addition, France's intransigence in the face of repeated protests by Equatorial Guinea shows that it believes itself to be entitled to take action that violates the rights of Equatorial Guinea. What is more, the criminal proceedings at issue in the present case are ongoing, such that a trial resulting in a conviction and an arrest warrant could take place at any moment.

176

C. France is under an obligation to compensate Equatorial Guinea for all harm resulting from its internationally wrongful act

9.34. According to international jurisprudence, and that of the Court in particular, the choice of the form of reparation reflects the aim to ensure full reparation, rather than the nature of the harm suffered, although that criterion may be taken into account. Thus, Equatorial Guinea considers itself justified in claiming compensation for the material and moral harm that it has suffered on account of France's wrongful acts.

---

[404] See *Corfu Channel, Judgment, I.C.J. Reports 1949*, p. 36; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 31, para. 75 ("The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo."); and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 245, para. 204 ("The Court determines that its finding that France has violated its obligation to Djibouti under Article 17 constitutes appropriate satisfaction.").

[405] *Rainbow Warrior (New Zealand* v. *France)*, Award of 30 Apr. 1990, *Reports of International Arbitral Awards*, Vol. XX, p. 271.

[406] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 452, para. 318; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 511; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, pp. 68-69, para. 149.

[407] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* pp. 513-514, para. 125.

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

9.35. As regards moral harm, the Court recognized in its 2012 Judgment in the case concerning *Ahmadou Sadio Diallo* that non-material injury could be established "even without specific evidence"[409]. It went on to state:

> "Quantification of compensation for non-material injury necessarily rests on equitable considerations. As the umpire noted in the *Lusitania* cases, non-material injuries 'are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages' (*RIAA*, Vol. VII, p. 40)."[410]

9.36. Jurisprudence has often regarded non-material harm resulting from violations of international law as compensable when a natural person is involved[411]. That approach can be transposed, *mutatis mutandis*, to a legal person. That may be true of a case such as this, where the harm suffered has the same characteristics. As in the *Lusitania* case, France's actions have humiliated Equatorial Guinea and harmed its reputation, its dignity and its honour. As in *Gutiérrez-Soler*, in which the reparation of harm stemmed from an attack on the victim's "core values", France's wrongful act has violated Equatorial Guinea's core rights, namely, its right to sovereign equality and non-interference, as well as the immunity of its Vice-President and its property. These acts have caused significant upheaval of a non-pecuniary nature in relations between the two States.

177

9.37. As regards the reparation of material harm, Equatorial Guinea 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 in relation to the building at 42 avenue Foch, the paralysis of its Vice-President's international activities as a result of the criminal prosecution, and the criminal proceedings brought against him by France.

D. France remains under a duty to perform the obligations it has breached

9.38. France's violation of the VCDR and the Palermo Convention has not had the effect of ending its obligations towards Equatorial Guinea[412]. Even repeated and substantial violations do not automatically result in the ending of the legal relations that they establish between States parties[413]. There is nothing to indicate that France intended it to be otherwise, in infringing Equatorial Guinea's rights under the conventions in question. No other form of reparation that France may offer can eliminate the requirement to perform the obligation that it has breached, as codified by Article 29 of the Articles on Responsibility of States for Internationally Wrongful Acts. In its commentary on that article, the International Law Commission writes:

> "As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal

---

[409] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 334, para. 21.

[410] *Ibid.*, p. 334-335, para. 24.

[411] *Opinion in the Lusitania Cases (United States* v. *Germany)*, 1 Nov. 1923, *Reports of International Arbitral Awards*, Vol. VII, p. 40; *Gutiérrez-Soler* v. *Colombia*, Inter-American Court of Human Rights, Series C, No. 132, para. 82; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 334, para. 21.

[412] Vienna Convention on the Law of Treaties, Art. 60.

[413] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 68, para. 114.

178 relation established by the primary obligation disappears. Even if the responsible State complies with its obligations . . . to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached."[414]

9.39. There is no doubt, therefore, that France is fully bound by the obligations placed on it by customary international law and treaty law, in particular the 1961 Convention on Diplomatic Relations and the associated Protocol. This is not only because those obligations remain, notwithstanding their violation by the Respondent, but also because the violation is continuing, since France considers that international law permits both its refusal to take account of the immunity of the Vice-President of Equatorial Guinea and its refusal to respect the status of the building at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission.

9.40. In any event, even if France decided to withdraw from its commitments under the international instruments relevant to the present case, that would have prospective effect only, with the obligations whose fulfilment is at issue here being owed prior to their violation[415]. It also goes without saying that most of the obligations owed to Equatorial Guinea (inviolability of its diplomatic mission, immunity from execution of its property, non-interference in its internal affairs and sovereign equality) are part of general international law — specifically, customary international law. The continuing nature of the requirement to perform those obligations is reinforced by the fact that they form part of the fundamental rules governing relations between States.

9.41. Finally, it should be noted that Equatorial Guinea's interest in having the rule of international law respected in the present case is not a theoretical one. On the contrary, it is of great practical significance. France must continue to fulfil its commitments, in so far as the wrongful act denounced by Equatorial Guinea persists, causing Equatorial Guinea continuing harm. The attachments carried out in respect of the building at 42 avenue Foch remain in force. France is thus continuing to contest the building's status as premises of the diplomatic mission and property of the State of Equatorial Guinea. Likewise, the criminal proceedings against its Vice-President continue to violate his diplomatic immunity, which is guaranteed by customary international law. All in all, this is an unacceptable violation of sovereign equality and the principle of
179 non-interference in States' internal affairs. Ultimately, France's duty to respect its international obligations is a fundamental legal requirement as much as a practical necessity dictated by the pursuit of peaceful and friendly relations between the two States.

Conclusion

9.42. As a conclusion to this chapter, in light of the foregoing arguments, Equatorial Guinea contends that:

— by initiating criminal proceedings in France against its Vice-President and by refusing to recognize the diplomatic status of the building at 42 avenue Foch in Paris, France has caused it moral harm;

— by limiting, through those proceedings, the ability of its Vice-President to conduct his country's international affairs, undisturbed, and to perform the international functions assigned

---

[414] 2001 Draft Articles with commentaries, p. 88, para. 2 of the commentary on Art. 29.

[415] *Rainbow Warrior (New Zealand* v. *France)*, Award of 30 Apr. 1990, *Reports of International Arbitral Awards*, Vol. XX, p. 266.

to him by Equatorial Guinea's Head of State, France is causing Equatorial Guinea moral and material harm;

— by depriving it of the peaceful use of the premises of its diplomatic mission and by preventing it, as a result of the attachment, from disposing of those premises, France is causing Equatorial Guinea moral and material harm;

— France must put an end to all these violations, continue to perform its obligations towards Equatorial Guinea, cease those violations that are ongoing and offer guarantees of non-repetition;

— finally, France must give satisfaction to Equatorial Guinea by such means as the Court may indicate and provide compensation for the moral and material harm suffered.

181 **SUBMISSIONS**

For the reasons set out in this Memorial, the Republic of Equatorial Guinea respectfully requests the International Court of Justice:

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

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

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

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

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

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

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

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

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

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

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

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

183

*

* *

Equatorial Guinea reserves the right to modify or amend these submissions, as appropriate, in accordance with the provisions of the Statute and the Rules of Court.

The Hague, 3 January 2017

(Signed) Mr. Carmelo NVONO NCA,

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

185 **TIMELINE**

2007

28 March	The associations Sherpa, Survie and the Fédération des Congolais de la Diaspora filed a complaint with the Paris Public Prosecutor against a number of African Heads of State and members of their families for acts of handling misappropriated public funds.
18 June	A preliminary investigation was entrusted to the OCRGDF (the serious financial crime squad) with the aim of identifying the assets of those named in the complaint and determining the circumstances in which they had been acquired.
12 November	The complaint of 28 March 2007 was dismissed by the Paris Public Prosecutor on the grounds that the offences were not sufficiently established.

2008

9 July	A second complaint against the same people and alleging the same wrongful acts was filed with the Paris Public Prosecutor by the French association Transparency International France and certain individuals.
3 September	The complaint of 9 July 2008 was dismissed by the Paris Public Prosecutor on the grounds that the offences were not sufficiently established.
2 December	The association Transparency International France and a Gabonese national filed a third complaint with civil-party application before the senior investigating judge of the Paris *Tribunal de grande instance*, against only the Presidents of the Republic of Gabon, the Republic of the Congo and the Republic of Equatorial Guinea, and members of their families, including Mr. Teodoro Nguema Obiang Mangue.

2009

8 April	The Paris Public Prosecutor submitted that the complaint filed on 2 December 2008 was inadmissible.
186 5 May	The senior investigating judge issued an order finding Transparency International France's action admissible.
7 May	The Paris Public Prosecutor appealed the order of the senior investigating judge, limiting the appeal to the admissibility of Transparency International France's civil-party application.
29 October	The *Chambre de l'instruction* of the Paris *Cour d'appel* overturned the order of the senior investigating judge and declared Transparency International France's civil-party application inadmissible.

2010

9 November	The *Cour de cassation* quashed the judgment of 29 October 2009 by the Paris *Cour d'appel* without referring it back, and declared Transparency International France's civil-party application admissible.
22 November	The Public Prosecutor of Equatorial Guinea transmitted to the French investigating judges the findings of an inquiry he had conducted into the wrongful

acts allegedly committed in Equatorial Guinea. The Public Prosecutor's report (in Spanish) found that none of the offences had been committed in Equatorial Guinea (Ann. 9).

1 December — The Paris Public Prosecutor requested that an investigating judge be assigned to conduct the investigations into the acts cited in Transparency International France's complaint that were characterized as the misappropriation of foreign public funds. By an order of the same day, two investigating judges were assigned to the case.

2011

4 July — The Public Prosecutor transmitted to the investigating judges an application for recharacterization, in which he expressed his opposition to an investigation into the case on legal grounds. He maintained that French law was not applicable to the original offences (Ann. 8).

15 September — By way of an agreement on the transfer of shares and claims, Equatorial Guinea acquired the shares of five Swiss companies that co-owned the building located at 42 avenue Foch in Paris.

28 September — Vehicles kept in the courtyard of the building at 42 avenue Foch were attached.

187

28 September — The Ambassador of Equatorial Guinea in France sent a letter to the French Minister for Foreign Affairs, protesting strongly against the violations of Equatorial Guinea's sovereignty under the guise of a judicial investigation following the events that took place the same day (Ann. 32).

3 October — More vehicles kept in the courtyard of the building at 42 avenue Foch were attached.

4 October — The Embassy of Equatorial Guinea in France notified the French Ministry of Foreign Affairs that the building located at 42 avenue Foch in Paris was assigned to and used for the purposes of its diplomatic mission in France (Ann. 33).

10 October — The senior investigating judges sent a letter to the French Ministry of Foreign Affairs, enquiring whether the building located at 42 avenue Foch had been declared by Equatorial Guinea as being assigned for diplomatic use or if a request was under consideration, and whether Mr. Teodoro Nguema Obiang Mangue, then Minister for Agriculture and Forestry of Equatorial Guinea, enjoyed diplomatic immunity (Ann. 80).

11 October — The French Ministry of Foreign Affairs replied to the Embassy of Equatorial Guinea that it did not recognize the building located at 42 avenue Foch as premises of the diplomatic mission of Equatorial Guinea, since it fell within the private domain (Ann. 34).

11 October — The French Ministry of Foreign Affairs informed the senior investigating judges that the building located at 42 avenue Foch had never been recognized as forming part of the diplomatic mission of Equatorial Guinea. The Ministry repeated that the building fell within the private domain and further noted that Mr. Teodoro Nguema Obiang Mangue was subject to ordinary law (Ann. 35).

17 October — The transfer to Equatorial Guinea, as sole shareholder, of the shareholder rights in five Swiss companies was officially recorded and registered in France by the main

non-residents department of the French tax authority in Noisy-Le-Grand, on a form entitled "Uncertificated transfer of shareholder rights subject to mandatory declaration". The tax due on this transfer (€317,672) was paid in full by Equatorial Guinea.

17 October — The Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that the Embassy would be headed by Ms Bindang Obiang as Chargée d'affaires *a.i.* and that her official residence was on the premises of Equatorial Guinea's diplomatic mission, located at 42 avenue Foch (Ann. 36).

188

20 October — The capital gains on the transfer of shareholder rights in five Swiss companies, estimated at one million, one hundred and forty-five thousand, seven hundred and forty euros (€1,145,740) on a form entitled "Declaration of capital gains on the transfer of movable assets or shares in companies investing primarily in real property", was paid in full by Equatorial Guinea to the French tax authorities.

31 October — The French Ministry of Foreign Affairs replied to the Note Verbale of 17 October 2011, stating that the designation of Ms Bindang Obiang as Chargée d'affaires *a.i.* was contrary to the Vienna Convention on Diplomatic Relations, and that France had never recognized the building at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission in France (Ann. 40).

2012

23 January — Mr. Teodoro Nguema Obiang Mangue was summoned by the investigating judges to attend a first appearance on 1 March 2012.

3 February — The investigating judges ordered the translation into French of the report of the Public Prosecutor of Equatorial Guinea dated 22 November 2010 (Ann. 9).

14 February — The President of Equatorial Guinea sent a letter to his French counterpart, stating that the building located at 42 avenue Foch was the property of Equatorial Guinea assigned for the purposes of its diplomatic mission in France (Ann. 39).

14 February — The building at 42 avenue Foch was searched. The search lasted a number days, from 14 to 23 February 2012, and a large amount of property was attached. The Chargée d'affaires *a.i.* of the Embassy protested on the spot against the search conducted that same day.

14 February — The Chargée d'affaires *a.i.* of the Embassy of Equatorial Guinea in France protested against the search of 14 February 2012 by Note Verbale to the French Ministry of Foreign Affairs (Ann. 37).

14 February — The Ministry of Foreign Affairs of Equatorial Guinea protested against the search of 14 February 2012 by Note Verbale to the French Ministry of Foreign Affairs (Ann. 38).

14 February — The Permanent Delegation of Equatorial Guinea to UNESCO informed that organization that the official residence of Equatorial Guinea's Permanent Delegate was at 42 avenue Foch (Ann. 41).

189

15 February — The Embassy of Equatorial Guinea sent a Note Verbale to the French Ministry of Foreign Affairs, seeking police protection for the Minister Delegate for Foreign Affairs of Equatorial Guinea, who was to visit the property of the Government of Equatorial Guinea located at 42 avenue Foch.

15 February — The Embassy of Equatorial Guinea asked France, by Note Verbale, to take all necessary measures to put an end to the violations of the Vienna Convention on Diplomatic Relations. It reaffirmed that the building located at 42 avenue Foch was part of the premises of Equatorial Guinea's diplomatic mission in France.

16 February — The French Ministry of Foreign Affairs transmitted Equatorial Guinea's Note Verbale of 15 February 2012 seeking police protection to the French Minister of Justice and the senior investigating judges, and reiterated that the building located at 42 avenue Foch fell within the private domain (Ann. 21).

17 February — The senior investigating judge informed the OCRGDF (the serious financial crime squad) that the Minister Delegate for Foreign Affairs of Equatorial Guinea might visit the building at 42 avenue Foch when the search operations had finished.

20 February — The French Ministry of Foreign Affairs reiterated, by Note Verbale to the Embassy of Equatorial Guinea, that the building located at 42 avenue Foch was not part of the premises of Equatorial Guinea's diplomatic mission in France.

27 February — The Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that, because of the serious violations of Equatorial Guinea's sovereignty committed during criminal proceedings, the Government of Equatorial Guinea was not authorizing Mr. Teodoro Nguema Obiang Mangue to respond to the summons to attend a first appearance before the Paris *Tribunal de grande instance* on 1 March 2012.

12 March — The Embassy of Equatorial Guinea transmitted a letter from the Ministry of Justice of Equatorial Guinea to the French Ministry of Foreign Affairs, dated 9 March 2012. In that letter, the Ministry of Justice stated that Equatorial Guinea had owned the building at 42 avenue Foch since 15 September 2011 and that it had been assigned for the purposes of its diplomatic mission since 4 October 2011. The Ministry of Justice also protested against the violations of international law committed by the French courts (Ann. 43).

190

12 March — By Note Verbale to the French Ministry of Foreign Affairs, the Embassy of Equatorial Guinea contested the Note Verbale of 11 October 2011. It reaffirmed that the building located at 42 avenue Foch was used for the purposes of its diplomatic mission. It also explained that the régime for the protection of diplomatic premises was declaratory, and that therefore merely designating premises was sufficient for them to be afforded diplomatic protection (Ann. 44).

28 March — The French Ministry of Foreign Affairs contested the Note Verbale dated 12 March 2012, explaining that official recognition of the status of "premises of the mission" was determined on the date, notified by Note Verbale, that the assignment of the said premises to the offices of the diplomatic mission took place, i.e., at the time the mission effectively moved into the premises (Ann. 45).

28 March — The Embassy of Equatorial Guinea replied to the Note Verbale dated 28 March 2012, reaffirming its position regarding the building located at 42 avenue Foch.

25 April — The Embassy of Equatorial Guinea sent a letter to the Paris Public Prosecutor, which was also transmitted to the senior investigating judge, in which it contested the refusal by the French Ministry of Foreign Affairs to recognize the diplomatic status of the building located at 42 avenue Foch, and requested that the Prosecutor take all appropriate measures to ensure the protection of the building (Anns. 22

and 23).

25 April — The Embassy of Equatorial Guinea sent a Note Verbale to the French Ministry of Foreign Affairs, once again stating its position regarding the diplomatic status of the building located at 42 avenue Foch (Ann. 24).

2 May — The French Ministry of Foreign Affairs replied to the Note Verbale dated 25 April 2012, referring to the terms of its Note Verbale dated 28 March 2012 (Ann. 46).

21 May — Mr. Teodoro Nguema Obiang Mangue was appointed Second Vice-President of Equatorial Guinea in charge of Defence and State Security, as part of a government reshuffle following changes to the Basic Law of Equatorial Guinea as approved by national referendum on 13 November 2011 (Ann. 3).

22 May — The judge in charge of investigating the complaint by Transparency International France sent a further summons, through the French Ministry of Foreign Affairs, for Mr. Teodoro Nguema Obiang Mangue to attend a first appearance in the French courts on 11 July 2012 for "offences of misuse of corporate assets, misappropriation of public funds, the unlawful taking of interest and breach of trust" (Ann. 10).

191

20 June — The Deputy Director of the Protocol Department of the French Ministry of Foreign Affairs replied to the investigating judge that he should amend the summons to reflect the functions now performed by Mr. Teodoro Nguema Obiang Mangue and transmit it in the usual manner (Ann. 11).

25 June — The investigating judge notified the Protocol Department that he would not follow the procedure recommended by the Deputy Director, stating that "the procedure to be followed remains that provided for in Article 656 of the Code of Criminal Procedure" and repeating his request for the summons to be transmitted to Mr. Teodoro Nguema Obiang Mangue (Ann. 12).

26 June — The Deputy Director of the Protocol Department informed the investigating judge that, in light of his reply of 25 June 2012, a Note Verbale had been sent to the Embassy of Equatorial Guinea regarding the summons of Mr. Teodoro Nguema Obiang Mangue (Ann. 13).

9 July — The Ambassador of Equatorial Guinea in France transmitted a Note Verbale to the French Ministry of Foreign Affairs, accompanied by a letter from the Minister for Foreign Affairs of Equatorial Guinea, notifying it that the Government of Equatorial Guinea would not authorize Mr. Teodoro Nguema Obiang Mangue, as Second Vice-President in charge of Defence and State Security, to appear before the French courts (Ann. 14).

10-11 July — Counsel for Mr. Teodoro Nguema Obiang Mangue and Equatorial Guinea wrote to the investigating judges assigned to the case to inform them that it was legally impossible for Mr. Teodoro Nguema Obiang Mangue to comply with the summons that had been sent to him, because of his immunity as Second Vice-President in charge of Defence and State Security (Ann. 15).

13 July — The investigating judge issued an international arrest warrant against Mr. Teodoro Nguema Obiang Mangue, who was then entered into the wanted persons file with a description of the alleged offences: "misuse of corporate

assets, misappropriation of public funds, breach of trust".

19 July — The building located at 42 avenue Foch was attached with a view to confiscation by the French courts (Ann. 25).

192

27 July — The Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that the offices of the Embassy had already been moved into the building at 42 avenue Foch (Ann. 47).

2 August — The Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs that its chancellery was indeed located in the building at 42 avenue Foch (Ann. 48).

6 August — The French Ministry of Foreign Affairs informed the Embassy of Equatorial Guinea that it could not officially recognize the building at 42 avenue Foch as the seat of its chancellery, since it was the subject of an attachment order (Ann. 49).

25 September — Equatorial Guinea filed an Application instituting proceedings including a request for provisional measures with the Registry of the International Court of Justice, seeking, *inter alia*, the annulment by the French Government of the proceedings and investigative measures against Mr. Teodoro Obiang Nguema Mbasogo, President of Equatorial Guinea, and Mr. Teodoro Nguema Obiang Mangue, Second Vice-President of Equatorial Guinea. Equatorial Guinea invited France to consent to the Court's jurisdiction, which France failed to do.

26 September — The investigating judge declared Equatorial Guinea's civil-party application inadmissible.

19 November — The Paris *Cour d'appel*, before which an appeal had been lodged against a decision by the investigating judge of 23 April 2012 refusing to return the attached property, justified the said decision on the grounds of suspected offences of misappropriation of funds from the State of Equatorial Guinea and from an Equatorial Guinean company.

2013

13 June — The Paris *Cour d'appel* delivered a judgment in which it declined to cancel the arrest warrant issued against Mr. Teodoro Nguema Obiang Mangue and found the latter's application inadmissible because he lacked standing (Ann. 16).

13 June — Ruling on an appeal lodged by Equatorial Guinea with a view to having the procedural measures declared null and void, the Paris *Cour d'appel* delivered a judgment in which it found the issuance of the arrest warrant against Mr. Teodoro Nguema Obiang Mangue to be in order and declined to grant him personal immunity from foreign jurisdiction as Second Vice-President in charge of Defence and State Security. It further found that the measures taken against the building located at 42 avenue Foch were in order (Ann. 52).

193

13 June — Ruling on an appeal lodged by Equatorial Guinea against the order of the investigating judge dated 26 September 2012 declaring its civil-party application inadmissible, the Paris *Cour d'appel* upheld the dismissal of Equatorial Guinea's request (Ann. 26).

10 July — On behalf of the President of Equatorial Guinea, the Minister of State for Missions sent a courtesy invitation to the senior investigating judge, asking him to

come to Malabo to clarify information that had been overlooked concerning the alleged original offences (Ann. 18).

30 August — At the request of Mr. Teodoro Nguema Obiang Mangue, and having examined the information provided to it, the Commission for the Control of Files at the International Criminal Police Organization (INTERPOL) notified Mr. Teodoro Nguema Obiang Mangue's counsel that the information concerning him had been deleted from INTERPOL's files (Ann. 17).

16 September — The President of Equatorial Guinea wrote in person to the investigating judge and informed him of the appointment of a judge to execute the letter rogatory (Ann. 19).

14 November — The investigating judges sent an international letter rogatory to the judicial authorities of Equatorial Guinea, seeking the judicial examination *(mise en examen)* of Mr. Teodoro Nguema Obiang Mangue, on the basis of the Palermo Convention.

2014

7 February — The Paris Public Prosecutor relinquished the case to the Financial Prosecutor, "owing to the nature of the offences and the great complexity of the facts at issue".

5 March — The *Cour de cassation* dismissed the appeal against the judgment of the Paris *Cour d'appel* dated 13 June 2013 lodged by Equatorial Guinea and the companies of which it is the sole shareholder (Ann. 53).

18 March — Mr. Teodoro Nguema Obiang Mangue was placed under judicial examination by the investigating judges during a hearing by videoconference, held in execution of an international letter rogatory dated 14 November 2013 on the basis of the Palermo Convention. Mr. Teodoro Nguema Obiang Mangue declined to answer the judges' questions, stating that he enjoyed immunity as the Second Vice-President in charge of Defence and State Security (Ann. 20).

19 March — The arrest warrant against Mr. Teodoro Nguema Obiang Mangue was lifted.

194

31 July — Mr. Teodoro Nguema Obiang Mangue submitted an application to the *Chambre de l'instruction* of the Paris *Cour d'appel*, seeking the annulment of his placement under judicial examination on the basis of his immunity and a declaration of inadmissibility of the initial civil-party application.

2015

16 April — The *Chambre de l'instruction* of the Paris *Cour d'appel* dismissed Mr. Teodoro Nguema Obiang Mangue's application seeking the annulment of the proceedings brought against him on the basis of the personal immunity attached to his functions as a high representative of the Republic of Equatorial Guinea and during the time he exercised those functions (Ann. 28).

10 November — Counsel for Mr. Teodoro Nguema Obiang Mangue filed a motion for a finding of: (1) partial inadmissibility of the complaint with civil-party application dated 2 December 2008, in respect of all acts unrelated to the misappropriation of public funds; (2) lack of jurisdiction of the investigating judges over acts of laundering the proceeds of offences committed in the territory of a foreign State; and

(3) personal immunity attached to Mr. Teodoro Nguema Obiang Mangue's functions.

26 October — The Government of Equatorial Guinea made an offer of conciliation and arbitration to the French Ministry of Foreign Affairs.

7 December — All the requests of 10 November 2015 were rejected on the grounds that the *Cour de cassation* had already ruled on the admissibility of the civil-party application, and that the other requests were not such as could be submitted to an investigating judge at that stage of the investigation.

15 December — The *Cour de cassation* confirmed the judgment of 16 April 2015 of the *Chambre de l'instruction* of the Paris *Cour d'appel*, recognizing the regularity of the proceedings, in particular the admissibility of Transparency International France's civil-party application and Mr. Teodoro Nguema Obiang Mangue's placement under judicial examination (Ann. 29).

2016

2 January — Meeting at the French Ministry of Foreign Affairs with the Ambassador of Equatorial Guinea to discuss the possibility of resolving the dispute between the two States through diplomatic channels or by conciliation.

195

6 January — The Embassy of Equatorial Guinea sent a Note Verbale to the French Ministry of Foreign Affairs, repeating the offer of conciliation and arbitration made on 26 October 201[5] (Ann. 55).

11 January — Second meeting at the French Ministry of Foreign Affairs to discuss the dispute between the two States.

2 February — The Embassy of Equatorial Guinea transmitted to the French Ministry of Foreign Affairs a memorandum regarding the offer to settle the dispute between Equatorial Guinea and France (Ann. 56).

17 March — The French Ministry of Foreign Affairs, by Note Verbale to the Embassy of Equatorial Guinea, rejected the offer of settlement through the channels proposed by Equatorial Guinea (Ann. 57).

22 March — Third meeting at the French Ministry of Foreign Affairs to discuss the dispute between the two States.

27 April — The French Ministry of Foreign Affairs sent a Note Verbale to the Embassy of Equatorial Guinea, recalling that it did not regard the building at 42 avenue Foch as forming part of the premises of Equatorial Guinea's diplomatic mission (Ann. 50).

12 May — The French Ministry of Foreign Affairs received a Note Verbale from the Embassy of Equatorial Guinea, in which the Embassy repeated that the building at 42 avenue Foch had indeed been assigned to the diplomatic mission of Equatorial Guinea since 2011. Equatorial Guinea also noted that France's position on the legal nature of the said building was contradictory (Ann. 51).

23 May — The Financial Prosecutor at the Paris *Tribunal de grande instance* addressed her final submissions *(réquisitoire définitif)* to the senior investigating judges, seeking separation of the complaints, and either their dismissal or their referral to the

Tribunal correctionnel (Ann. 30).

13 June — Equatorial Guinea instituted the present proceedings against France before the International Court of Justice.

21 June — Mr. Teodoro Nguema Obiang Mangue was appointed Vice-President of Equatorial Guinea in charge of National Defence and State Security, following the presidential elections held in April 2016 (Ann. 6).

196

5 September — The Paris *Tribunal de grande instance* issued an order for partial dismissal and partial referral of proceedings before the Paris *Tribunal correctionnel*, finding against Mr. Teodoro Nguema Obiang Mangue (Ann. 7).

12 September — By Note Verbale to the French Ministry of Foreign Affairs, the Embassy of Equatorial Guinea protested against the referral order of 5 September 2016.

21 September — The Financial Prosecutor issued a summons, ordering Mr. Teodoro Nguema Obiang Mangue to appear before the 32nd *Chambre correctionnelle* of the *Tribunal correctionnel* on 24 October 2016 (Ann. 31).

29 September — Equatorial Guinea filed a Request for the indication of provisional measures with the International Court of Justice.

17-19 October — Public hearings at the International Court of Justice on the request for provisional measures.

24 October — The 32nd *Chambre correctionnelle* of the *Tribunal correctionnel* fixed 2, 4, 5, 9, 11 and 12 January 2017 as the dates for the trial hearings in the case concerning Mr. Teodoro Nguema Obiang Mangue (Ann. 81).

7 December — The Court issued an Order indicating provisional measures to the effect that France should, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea in France enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations.

_____

197

ATTESTATION

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

The Hague, 3 January 2017

(Signed) Mr. Carmelo NVONO NCA,

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

199

LIST OF ANNEXES

1. Basic Law of Equatorial Guinea (new text of the Constitution of Equatorial Guinea, officially promulgated on 16 February 2012, with the texts of the Constitutional Reform approved by referendum on 13 November 2011)

2. Regulation No. 01/03-CEMAC-UMAC of the Central African Economic and Monetary Community

3. Decree No. 64/2012, 21 May 2012

4. Decrees Nos. 67/2012, 66/2012, 65/2012 and 63/2012, 21 May 2012

5. Institutional Declaration by the President of the Republic of Equatorial Guinea, 21 October 2015

6. Presidential Decree No. 55/2016, 21 June 2016

7. Paris *Tribunal de grande instance*, Order for partial dismissal and partial referral of proceedings to the *Tribunal correctionnel*, 5 September 2016 (regularized by order of 2 December 2016)

8. Paris *Tribunal de grande instance*, Public Prosecutor's Office, Application for characterization, 4 July 2011

9. Report of the Public Prosecutor of the Republic of Equatorial Guinea, 22 November 2010

10. Summons to attend a first appearance, 22 May 2012

11. French Ministry of Foreign Affairs, Note Verbale No. 2777/PRO/PID, 20 June 2012

12. Letter from the investigating judges to the French Ministry of Foreign Affairs, 25 June 2012

13. French Ministry of Foreign Affairs, Note Verbale No. 2816/PRO/PID, 26 June 2012

14. Embassy of Equatorial Guinea, Note Verbale No. 472/12, 9 July 2012, together with the letter of 6 July 2012 from the Equatorial Guinean Ministry of Foreign Affairs, International Co-operation and Francophone Affairs

15. Letters from counsel for Mr. Teodoro Nguema Obiang Mangue and Equatorial Guinea, 10 and 11 July 2012

16. Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 13 June 2013 (Case No. 2012/08657)

17. Letter from INTERPOL, 30 August 2013

18. Letter from the Minister of State for Missions, 10 July 2013

19. Letter from the President of Equatorial Guinea to the investigating judge, 16 September 2013

20. Record of questioning at first appearance and placement under judicial examination, 18 March 2014

200

21. French Ministry of Foreign and European Affairs, Note Verbale No. 778/PRO/PID, 16 February 2012

22. Embassy of Equatorial Guinea, Note Verbale No. 340/12, 25 April 2012

23. Embassy of Equatorial Guinea, Note Verbale No. 339/12, 25 April 2012

24. Embassy of Equatorial Guinea, Note Verbale No. 338/12, 25 April 2012

25. Order of attachment of real property (*saisie pénale immobilière*), 19 July 2012

26. Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 13 June 2013 (Case No. 2012/08462)

27. Statement of case of 16 September 2015

28. Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 16 April 2015

29. *Cour de Cassation*, *Chambre criminelle*, judgment of 15 December 2015

30. Paris *Cour d'appel*, National Financial Prosecutor's Office, Final submissions seeking separation of the complaints, and either their dismissal or their referral to the *Tribunal correctionnel*, 23 May 2016

31. Financial Prosecutor at the Paris *Tribunal de grande instance*, Summons, 21 September 2016

32. Embassy of Equatorial Guinea, letter delivered in person to Mr. Alain Juppé, Minister of State, Minister for Foreign Affairs, 28 September 2011

33. Embassy of Equatorial Guinea, Note Verbale No. 365/11, 4 October 2011

34. French Ministry of Foreign and European Affairs, Note Verbale No. 5007/PRO/PID, 11 October 2011

35. French Ministry of Foreign and European Affairs, Note Verbale No. 5009/PRO/PID, 11 October 2011

36. Embassy of Equatorial Guinea, Note Verbale No. 387/11, 17 October 2011

37. Embassy of Equatorial Guinea, Note Verbale No. 173/12, 14 February 2012

38. Equatorial Guinean Ministry of Foreign Affairs, International Co-operation and Francophone Affairs, Note Verbale No. 251/012, 14 February 2012

39. Letter from the President of the Republic of Equatorial Guinea to His Excellency Nicolas Sarkozy, President of the French Republic, 14 February 2012

40. French Ministry of Foreign and European Affairs, Note Verbale No. 5393/PRO/PID, 31 October 2011

41. United Nations Educational, Scientific and Cultural Organization (UNESCO), Note Verbale No. ERI/PRO/12/L.45, 15 February 2012

42. Embassy of Equatorial Guinea, Note Verbale No. 218/12, 27 February 2012

43. Embassy of Equatorial Guinea, Note Verbale No. 247/12, 12 March 2012

201

44. Embassy of Equatorial Guinea, Note Verbale No. 249/12, 12 March 2012

45. French Ministry of Foreign and European Affairs, Note Verbale No. 134/PRO/PID, 28 March 2012

46. French Ministry of Foreign and European Affairs, Note Verbale No. 1946/PRO/PID, 2 May 2012

47. Embassy of Equatorial Guinea, Note Verbale No. 501/12, 27 July 2012

48. Embassy of Equatorial Guinea, Note Verbale No. 517/12, 2 August 2012

49. French Ministry of Foreign Affairs, Note Verbale No. 3503/PRO/PID, 6 August 2012

50. French Ministry of Foreign Affairs and International Development, Note Verbale No. 2016-313721/PRO/PIDC, 27 April 2016

51. Embassy of Equatorial Guinea, Note Verbale No. 3168/2016, received 12 May 2016

52. Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 13 June 2013 (Case No. 2012/07413)

53. *Cour de cassation*, *Chambre criminelle*, judgment of 5 March 2014

54. *Cour de cassation*, *Chambre criminelle*, judgment of 19 February 2014

55. Embassy of Equatorial Guinea, Note Verbale No. 012/16, 6 January 2016

56. Embassy of Equatorial Guinea, Note Verbale No. 062/16, 2 February 2016

57. French Ministry of Foreign Affairs and International Development, Note Verbale No. 2016-208753/PRO/PIDC, 17 March 2016

58. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations, 2005) (excerpt)

59. *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2008) (excerpt)

60. Proposals and contributions received from Governments for the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (A/AC.254/5) (excerpt)

61. *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (United Nations, 2000) (excerpt)

62. *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (United Nations, 2012) (excerpt)

63. *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (United Nations, 2012) (excerpt)

64. *Mechanism for the Review of Implementation of the United Nations Convention against Corruption — Basic Documents* (United Nations, 2011) (excerpt)

202

65. Resolution "Mechanism for the review of the implementation of the United Nations Convention against Transnational Organized Crime and Protocols thereto", uncorrected, 17-21 Oct. 2016 (CTOC/COP/2016/L.5) (excerpt)

66. Report on the meeting to explore all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 6-7 June 2016 (CTOC/COP/WG.8/2016/2) (excerpt)

67. Resolution 5/5 of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 18-22 October 2010 (excerpt)

68. Report of the Working Group on Measures to Eliminate International Terrorism (A/C.6/52/L.3), 10 October 1997 (excerpt)

69. Report on behalf of the Foreign Affairs, Defence and Armed Forces Committee on the bill authorizing ratification of the United Nations Convention against Transnational Organized Crime (Annex to the minutes of the meeting of 31 January 2002)

70. Resolution 67/1 of the United Nations General Assembly, 24 September 2012

71. Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1975 (excerpt)

72. Bali Commemorative Declaration on the 50th Anniversary of the Establishment of the Non-Aligned Movement (NAM 2011/Doc.7/Rev.1), 23-27 May 2011

73. Declaration of the 8th Summit of Heads of State or Government of the Member Countries of the Non-Aligned Movement, 1-6 September 1986 (excerpt)

74. Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016

75. Statement by France before the Sixth Committee, [26] October 2011

76. Statement by France before the Sixth Committee, 29 October 2008

77. Statement by France before the Sixth Committee, 28 October 2013

78. Letter from the Public Prosecutor concerning the *Rumsfeld* case, 16 November 2007

79. Note Verbale from the Permanent Mission of the Republic of Equatorial Guinea to the United Nations to the Protocol and Liaison Service of the United Nations, 7 September 2015

80. Request for information from the senior investigating judges to the Ministry of Foreign Affairs, 10 October 2011

81. Record of the hearing at the Paris *Tribunal correctionnel* held on 24 October 201[6]
