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14580 Corr.

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING IMMUNITIES AND CRIMINAL PROCEEDINGS

(EQUATORIAL GUINEA *v.* FRANCE)

MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

VOLUME III

(Annexes 30-81)

3 January 2017

[Translation by the Registry]

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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

[Translation]

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*

Prosecution No.: 08.337096017

Investigation No.: 2292/10/12

The Financial Prosecutor,

Having regard to the documents relating to the investigation of:

(1) Mr. Teodoro NGUEMA OBIANG MANGUE

Born 25 June 1969 in Akoakam Esangui, Mongomo District, Wele Nzas Province, Equatorial Guinea

Parents: Teodoro OBIANG NGUEMA MBASOGO and Constance MANGUE NSUE OKOMO

Equatorial Guinean national

Second Vice-President of the Republic in charge of Defence and State Security

Address: Malabo, Equatorial Guinea, choosing as his address for service the offices of Emmanuel MARSIGNY, Counsel, 203 bd Saint Germain, 750[0]7 Paris

ARREST WARRANT (Arrest warrant of 11 July 2012)

Under judicial examination for: laundering the proceeds of a felony or misdemeanour, in this instance misuse of corporate assets, misappropriation of public funds, breach of trust and corruption; (Questioning at first appearance of 18 March 2014, D. 1860, 1866)

Counsel: Emmanuel MARSIGNY, Thierry MAREMBERT, Patrick KLUGMAN, Jean-Marie VIALA;

(2) Mourad BAAROUN

Born 12 December 1967 in Tunis, Tunisia

Parents: Ahmed and Messaouda GMIR

Steward

Address: 27 B rue Louis Rolland, 92120 Montrouge

Tunisian national

***TEMOIN ASSISTE* (legally represented witness)**

In respect of: complicity in laundering misused corporate assets or the proceeds of breach of trust; (Questioning at first appearance on 19 December 2012, D. 895)

Counsel: Jean REINHART;

(3) Aurélie DELAURY, née DERAND

Born 4 January 1971 in L'HAY LES ROSES (Val-de-Marne)

Parents: Robert and Denise CRONIER

Chief executive (*gérante*) of a company

Address: c/o Ms Maud TOUITOU, Counsel, 25 rue du Louvre, 75001 Paris

French national

TEMOIN ASSISTEE

In respect of: complicity in laundering misused corporate assets or the proceeds of breach of trust, complicity in laundering misappropriated public funds; (Questioning at first appearance on 27 February 2013, D. 944)

Counsel: Maud TOUITOU;

(4) SOCIETE GENERALE (legal person)

Acting through its legal representative

Registered office: 29 boulevard Haussmann, 75009 Paris

Represented by Dominique BOURRINET, General Counsel for the Société Générale group

TEMOIN ASSISTE

In respect of: laundering the proceeds of a felony or misdemeanour; (Questioning at first appearance on 30 July 2015, D. 2801)

Counsel: Jean REINHART;

(5) Franco CANTAFIO

Born 27 September 1963 in Saint-Maurice (Val-de-Marne)

Parents: Rocci CANTAFIO and Carmela FRAIETTA

Chief executive (*gérant*) of a company

French national

Address: offices of Mr. Jean LAUNAY, 37 rue Jean-Baptiste Pigalle, 75009 PARIS

UNDER JUDICIAL SUPERVISION (Order of 20 February 2013)

Under judicial examination for: complicity in laundering misappropriated public funds, handling misappropriated public funds (Questioning at first appearance on 20 February 2013, D. 923)

Counsel: Jean LAUNAY;

(6) Martine DUMONT (formerly NICOLAS)

Born 19 August 1946 in the 12th arrondissement of Paris

Parents: Robert and Monique TAQUET

Chief executive (*gérante*) of a non-commercial property company (*société civile immobilière — SCI*)

French national

Address: 32 rue Princesse, 75006 Paris

AT LIBERTY

Under judicial examination for: Concealment of the laundering of misappropriated public funds (Questioning at first appearance on 11 April 2013, D. 1018)

Counsel: Céline LASEK;

(7) Robert FAURE

Born 15 August 1944 in Alger, Algeria

Parents: Albert and Maria Esther BONTHOUX

Retired

French national

Address: offices of Ms Karine MELCHER-VINCKEVLEUGER, 14 boulevard du Général Leclerc, 92527 Neuilly-sur-Seine Cedex

UNDER JUDICIAL SUPERVISION

Under judicial examination for: complicity in laundering misappropriated public funds, handling misappropriated public funds (Questioning at first appearance on 11 April 2013, D. 1019)

Counsel: Karine MELCHER-VINCKEVLEUGER;

(8) Daniel MENTRIER

Born 5 August 1945 in the 15th arrondissement of Paris

Parents: André and Suzanne LARTIGUAUD

Retired

Address: offices of Mr Marc Michel ROUX, 5 rue Grignan, 13005 Marseille

French national

AT LIBERTY

Under judicial examination for: complicity in laundering misappropriated public funds, handling misappropriated public funds (Questioning at first appearance on 4 September 2014, D. 2277)

Counsel: Marc-Michel LE ROUX;

(9) Bertrand GRANDJACQUES

Born 12 March 1954 in Solanches (Haute Savoie)

Parents: Jean and Andrée VITTET

Business management consultant

Address: 23 rue du Capitaine Baud, 74940 Annecy-le-Vieux

French national

TEMOIN ASSISTE

In respect of: complicity in laundering misappropriated public funds, handling misappropriated public funds (Questioning at first appearance on 29 July 2015, D. 2795)

Counsel: N/A

(10) Philippe CHIRONI

Born 27 April 1954 in the 17th arrondissement of Paris

Parents: Robert and Monique CORBEL

Chief executive (*directeur*) of a company

Address: offices of Mr HENRIQUET, 13 rue du docteur Lancereaux, 75008 Paris

French national

AT LIBERTY

Under judicial examination for: misappropriation of public funds (Questioning at first appearance on 1 September 2015, D. 2847)

Counsel: Michel HENRIQUET, 13 rue du docteur Lancereaux, 75008 Paris;

CIVIL-PARTY APPLICANTS:

— Transparency International France, represented by Daniel LEBEGUE

Counsel: William BOURDON

— **Gabonese Republic**, represented by the Minister for the Budget, Public Accounts and the Civil Service

Counsel: Pierre HAIK and Eric DUPOND-MORETTI.

*

Having regard to the notification order of 6 August 2015 requesting an opinion on the separation of the complaints concerning the Equatorial Guinean chapter (D. 2838);

Having regard to the submissions of 7 August 2015 seeking separation of the complaints in the chapter relating to Equatorial Guinea in the interest of the proper administration of justice (D. 2839);

Having regard to the notification order for partial determination of 11 August 2015 (D. 2841);

*

Whereas the investigation has established the following facts:

1. Origin of the proceedings

On 28 March 2007, the associations SHERPA and SURVIE, and the Fédération des Congolais de la Diaspora, filed complaints 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.

The complaints concern Omar BONGO, former President of the Gabonese Republic, who died on 8 June 2009, Denis SASSOU NGUESSO, President of the Republic of the Congo, Blaise COMPAORE, President of Burkina Faso, Teodore OBIANG, President of the Republic of Equatorial Guinea, Eduardo DOS SANTOS, President of the Republic of Angola, and several members of their families.

According to the complainants, these Heads of State, during or after their terms of office, acquired or procured the acquisition of immovable property on French territory and accumulated movable assets through the intermediary of French banks and/or foreign banks with operations in France. Their immovable assets in France, in Paris in particular, which are described as being of considerable value, could not have been financed by their official remuneration alone while, at the same time, their countries were facing systemic corruption. Therefore, these individuals and members of their families, who own assets or enjoy their use, can be suspected of handling misappropriated public funds (D. 2, 40).

A large number of documents — primarily press clippings — referring to several properties owned by these Heads of State in France, were filed in support of the complaints.

On 18 June 2007, a preliminary investigation was entrusted to the OCRGDF (the serious financial crime squad) with the aim of identifying the suspects' assets and determining the circumstances in which they had been acquired (D. 75, 79).

The initial investigations confirmed the existence of assets of considerable value in France.

For example, a collection of luxury vehicles was discovered, in the names of, among others, Wilfrid NGUESSO, nephew of the President of the Congo, and Teodoro NGUEMA OBIANG MANGUE, son of the President of Equatorial Guinea and Minister for Agriculture and Forestry in his country (D. 80).

In particular, it appeared that Teodoro NGUEMA OBIANG MANGUE had acquired some 15 vehicles in France for an estimated total of over €5.7 million. For example, he ordered three Bugatti Veyron vehicles, with a unit price of more than €1 million, from the manufacturer in Alsace. Two vehicles were purchased on 27 February 2007 (€1,196,000) and 20 December 2006 (€1 million), and a third vehicle, which was in production as at 30 July 2007, had been ordered (for €1 million) with a down payment of €300,000 (D. 147).

Similarly, he purchased a Rolls Royce Phantom Limousine (€381,000) in France on 11 February 2005, a Maserati Coupé F1 Cambiocorsa (€82,000) on 15 February 2005 and a Maserati MC12 (€709,000) on 2 July 2005 (D. 153).

The arrangements used to pay for these vehicles appeared unusual and were such as to be suspicious. Several of the vehicles were paid for by Teodoro NGUEMA OBIANG through transfers from SOMAGUI FORESTAL, a Guinean logging company.

During the preliminary investigation, substantial immovable assets were also discovered, in the names of individuals likely to be members of the families of Omar BONGO and Denis SASSOU NGUESSO.

Numerous active bank accounts were also identified in the names of individuals likely to be members of the families of the Heads of State concerned.

With regard to Teodoro NGUEMA OBIANG MANGUE, the investigators were informed that a criminal investigation had been opened in the United States, regarding the assets that he had accumulated in that country (D. 149, 151).

As regards the criminal status of the individuals concerned, the investigation confirmed that only incumbent Heads of State could claim inviolability and absolute immunity from criminal jurisdiction abroad (see above).

On 12 November 2007, the Paris Public Prosecutor, finding that the offences were not sufficiently established, decided to take no further action relating to the complaint (D. 3-25, 75, 154-1). By a notice of discontinuance issued on 13 November 2007, the complainants' counsel was notified that the investigations had not established any criminal offences, including, in particular, the offence of handling misappropriated public funds which had been cited in the complaint (D. 155).

On 2 December 2008, on the basis of the same facts, concerning only the Presidents of the Gabonese Republic, the Republic of the Congo and the Republic of Equatorial Guinea, Transparency International France and Grégory NGBWA MINTSA, a Gabonese national, filed a complaint with civil-party application before the senior investigating judge of the Paris *Tribunal de grande instance*.

With regard to the admissibility of its civil-party application, Transparency International France contended that, according to the *Cour de cassation*'s interpretation of the provisions of Article 2 of the Code of Criminal Procedure, the associations' civil-party applications, including those of the associations that were not accredited, were admissible in so far as the alleged offences undermined the collective interests that the associations aimed to defend. According to

Transparency International France, the alleged offences, which were characterized as the handling of misappropriated public funds and fell within the scope of corruption as defined by the United Nations, directly undermined the interests that it defended, since they were in direct opposition to its campaigns to fight corruption.

The association considered that its complaint with civil-party application was admissible and should be allowed, failing which the associations would be given unjustified differential treatment depending on the interests that they represented.

Grégory NGBWA MINTSA stated that he intended to file a civil-party application, first, in the place and stead of the Gabonese State, and, second, in respect of the personal harm he had suffered as a Gabonese taxpayer.

On 8 April 2009, the senior investigating judge requested an opinion of the Paris Public Prosecutor, who submitted that the complaint was inadmissible (D. 22).

By an Order of 5 May 2009, the senior investigating judge found Transparency International France's action admissible and dismissed that of Grégory NGBWA MINTSA. According to the judge, the documents produced by the association demonstrated — in respect of its work, in particular — that its objectives of preventing and fighting corruption were genuine. He highlighted the association's numerous activities, especially those aimed at ensuring restitution of the so-called "ill-gotten" gains, demonstrating that it was suffering personal, economic harm caused directly by the offences it alleged, which undermined the collective interests that it defended and that constituted the very foundation of its campaign.

The investigating judge considered that even though the fight against corruption was also one of the general interests of society for which redress was to be ensured by the Public Prosecutor's Office, this could not deprive an association that had been created specifically to fight corruption of the right to file a civil-party application if, as in the present case, the association demonstrated personal harm directly related to its purpose under its charter. He added that the ability to file a civil-party application was an even more effective means of ensuring this fight, by allowing legal action to be taken outside the countries that may have been directly concerned by the acts of misappropriation.

In contrast, however, the judge considered that Grégory NGBWA MINTSA had not demonstrated personal, direct harm, since any misappropriation of public funds deprived only the Gabonese State of resources, and that he had not been authorized to bring a civil action in the name of the State of Gabon (D. 28).

On 7 May 2009, the Paris Public Prosecutor appealed this decision, limiting the appeal to the admissibility of Transparency International France's civil-party application.

By a judgment of 29 October 2009, the *Chambre de l'instruction* of the Paris *Cour d'appel* overturned the senior investigating judge's decision and declared the association's civil-party application inadmissible. In the court's view, the association — a legal person separate from Transparency International — had not provided any supporting evidence permitting a finding that the alleged material harm might exist, and the only harm that it 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. It also reasoned that the interpretation put forward by the contested civil-party applicant would have the effect of obviating the purpose of the French legislative and regulatory framework governing the accreditation of associations. Ultimately, in these circumstances, although the Public Prosecutor's Office did not have exclusive power to pursue criminal prosecution, and although the object of the association

was entirely legitimate, its civil-party application with respect to the defence of the general interests falling within the purview of the Public Prosecutor's Office was not admissible.

On 9 November 2010, ruling on the appeal lodged by the association, the *Cour de cassation* took a position in the latter's favour. It pointed out that the grounds set forth by the *Chambre de l'instruction* were in part inapplicable because of the broad definition of corruption, which, according to the civil-party applicant's charter, it sought to prevent and combat. In its view, assuming them to be established, the offences under investigation, in particular the handling and laundering in France of assets paid for out of misappropriated public funds, offences which were themselves facilitated by corrupt practices but which are distinct from the offence of corruption, would indeed be likely to cause direct and personal harm to Transparency International France, on account of the specific object and purpose of its mission.

It quashed the judgment of 29 October 2009 without referring it back (D. 30) and ordered the case to be returned to the investigating judge so that the investigation could be continued.

2. The investigation

On 27 January 2011, Daniel LEBÈGUE, the President of the association, was heard in his capacity as a civil-party applicant. He confirmed the terms of the complaint of 2 December 2008, specifying that his association had new information concerning, in particular, a building likely to belong to Teodoro NGUEMA OBIANG MANGUE, and demanding that provisional measures be taken to prevent the dissipation of the suspects' assets (D. 161).

On 1 February 2011, the association submitted further information, in particular concerning a building located at 42 avenue Foch in Paris (16th arrondissement) which belonged to the OBIANG family (D. 162-198).

On 4 July 2011, the Paris Public Prosecutor submitted an application for characterization. He recalled that the acts described by the association related to the acquisition and possession in France of movable and immovable assets which may have been paid for with monies derived from the "misappropriation" of foreign public funds, namely funds originating from the States of Gabon, the Congo and Equatorial Guinea. In his view, the characterization of misappropriation of public funds as provided for in Article 432-15 of the Penal Code was not applicable in so far as, assuming the facts to be established, they did not constitute misappropriation committed by persons in a position of public authority in France, but rather misappropriation of foreign public funds (Gabonese, Congolese and Guinean), committed by foreign authorities (Gabonese, Congolese and Guinean). He rejected that characterization and the characterizations of complicity in and concealment of that offence. He also asserted that the characterizations of breach of trust and complicity in breach of trust, which might be applied to the misappropriations complained of, could not be accepted, since the offences had been committed abroad, by foreign nationals, against foreign victims, acts to which French criminal law was not applicable, under the provisions of Articles 113-6 and 113-7 of the Penal Code, and that the offences of misuse of corporate assets and complicity in the misuse of corporate assets were not applicable because they concerned only commercial companies incorporated under French law.

He considered that the facts cited in the complaint could be characterized only as money laundering or handling offences, since even though the laundering or handling in France of an asset obtained through an offence committed abroad by a foreign national was not subject to French law, it was punishable in France, provided that the elements of the original offence were identified.

The Public Prosecutor's Office accordingly submitted that the investigation should concern only the facts that could be characterized as money laundering or handling offences (D. 319).

As the complaint with civil-party application and the application for characterization stood, the judicial investigation focused on the offences of complicity in the misappropriation of public funds, misuse of corporate assets and complicity in the misuse of corporate assets, breach of trust and complicity in breach of trust, money laundering and complicity in money laundering, handling of misappropriated public funds and of misused corporate assets, and concealing breach of trust.

The investigating judge requested the OCRGDF investigators to continue their investigations relating to the different chapters (Gabonese, Congolese and Equatorial Guinean) mentioned in the complaint with civil-party application.

Concerning the Equatorial Guinean chapter in particular, on 31 January 2012, following new evidence arising from the memorandums of 7 and 18 March 2011 from the TRACFIN intelligence unit, the memorandum of 7 March 2011 from the DNRED (the national directorate for intelligence and customs investigations) and the OCRGDF report of 4 October 2011, the scope of the investigation was extended to the new facts which could be characterized as the handling or laundering of the proceeds of an offence (D. 393).

In 2012, Teodoro NGUEMA OBIANG MANGUE, who was Minister for Agriculture and Forestry at the time the judicial investigation was opened and became Second Vice-President of Equatorial Guinea in charge of Defence and State Security during the proceedings, was summoned several times but never made an appearance.

On 13 July 2012, an arrest warrant was issued against him, and it was unsuccessfully challenged before the *Chambre de l'instruction*, which found that Teodoro NGUEMA OBIANG MANGUE could not claim any form of immunity from criminal process and noted that he had refused to appear and respond to the two summonses to a first appearance or for placement under judicial examination concerning acts committed in France in the context of his private life.

On 7 February 2014, owing to the nature of the offences and the great complexity of the facts at issue, the Paris Public Prosecutor relinquished the case to the Financial Prosecutor (D. 1859).

On 18 March 2014, in execution of an international letter rogatory, during a hearing held in Malabo (Equatorial Guinea) which the investigating judges attended via videoconference, Teodoro NGUEMA OBIANG MANGUE was placed under judicial examination for having in Paris and on national territory during 1997 and until October 2011, in any event for a period not covered by prescription, assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms EDUM, SOCAGE and SOMAGUI FORESTAL, acts characterized as laundering of the proceeds of the above-mentioned offences (D. 1860, 1866).

On 19 March 2014, a notice cancelling the warrant against him was issued by the investigating judge (D. 1864).

On 31 July 2014, in the context of these proceedings involving multiple appeals, Teodoro NGUEMA OBIANG MANGUE submitted an application to the *Chambre de l'instruction* seeking to have his placement under judicial examination annulled on the basis of his alleged immunity and to have the initial civil-party application declared inadmissible.

By a judgment of 11 August 2015, the application was rejected and the chapter of the investigation relating to Equatorial Guinea was closed and transferred for partial determination (D. 2838 and 2840).

On 10 November 2015, counsel for Teodoro NGUEMA OBIANG MANGUE filed a motion for the complaint with civil-party application filed on 2 December 2008 to be found partially inadmissible with respect to all facts unrelated to the misappropriation of public funds, the investigating judges' lack of jurisdiction over acts relating to the laundering of the proceeds of offences committed in the territory of a foreign State, and the personal immunity attached to Teodoro NGUEMA OBIANG MANGUE's functions.

On 7 December 2015, the investigating judge rejected all of those requests, taking the view 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 presented to the investigating judge at that stage of the investigation.

On 14 December 2015, Teodoro NGUEMA OBIANG MANGUE appealed the order (D. 3344).

The outcome of the proceedings hinged on the *Cour de cassation*'s decision on an appeal against the judgment of the Paris *Cour d'appel* of 11 August 2015, which had rejected the applications for annulment.

On 15 December 2015, the *Cour de cassation* confirmed the judgment of 11 August 2015, recognizing the regularity of the proceedings, including, in particular, the admissibility of the initial civil-party application and Teodoro NGUEMA OBIANG MANGUE's placement under judicial examination (document annexed hereto).

The judicial investigation identified the composition of the assets held in France by Teodoro NGUEMA OBIANG MANGUE, son of the President of the Republic of Equatorial Guinea, and determined that they had been financed out of the proceeds of offences committed in Equatorial Guinea (I). It also established that neither the individual concerned nor his assets were entitled to any form of immunity from criminal process (II).

2.1 Teodoro NGUEMA OBIANG MANGUE's assets in France — considerable assets financed out of the proceeds of offences committed in Equatorial Guinea

Nature and scope of the assets

The preliminary investigation and subsequent judicial investigation detected, identified, and enabled the seizure or attachment of at least some of the assets, which included movable assets and one immovable asset, of considerable value, financed out of the proceeds of corruption, misappropriation of public funds, misuse of corporate assets and breach of trust.

Whenever Teodoro NGUEMA OBIANG came to France — where he initially stayed at the finest luxury hotels before moving into a townhouse on avenue Foch in Paris, acquired through an equity investment in a number of Swiss companies — he spared no expense, accumulating high-end luxury movable assets (D. 242, 283, 350 to 362, 389).

Regarding the period from March 2000 to March 2011, the TRACFIN intelligence unit transmitted several memorandums relating to the unusual operation of his bank accounts (D. 242-285, 351-361).

At the sale of the Yves Saint-Laurent and Pierre Bergé collection, held by Christie's France on 23 to 25 February 2009, Teodoro NGUEMA OBIANG MANGUE acquired 109 lots for a total of €18,347,952.30. Contrary to standard practice, which requires payment within seven days of sale, which would have meant early March 2009, the first payments, which were partial, were not

made until a year later, in March 2010. They were made via two transfers of €1,665,638.67 each, sent to Christie's France on 30 and 31 March 2010.

It was particularly unusual that these transfers were sent from an account opened on the books of SOCIETE GENERALE de BANQUE de GUINEE EQUATORIALE (SGBGE) in the name of SOMAGUI FORESTAL, a logging company under the control of Teodoro NGUEMA OBIANG MANGUE, who was Minister for Agriculture and Forestry in his country at the time. Subsequently, several other identical transfers were sent: on 16 April 2010 (€1,665,638.67), 16 September 2010 (€1,665,638.67), 20 September 2010 (€1,665,638.67), 23 September 2010 (€1,665,638.67), 1 October 2010 (€4,251,847.10) and 28 October 2010 (€4,041,977.20) (D. 494).

Considering the buyer's public functions, and the peculiarity of having a company pay for works of art, the intelligence unit TRACFIN considered, in its memorandum of 18 March 2011, that stolen assets could be involved.

On 13 December 2010, the same company, SOMAGUI FORESTAL, through the intermediary of the same bank, SGBGE, transferred €599,965.05 to Didier Aaron et Cie Antiquités in connection with the sale of works of art. This transaction was the subject of a memorandum dated 18 March 2011 (D. 495).

Generally speaking, Teodoro NGUEMA OBIANG MANGUE made large purchases of audio equipment, furniture, jewellery and designer apparel (D. 500, 506).

Thus, he acquired audio-video equipment for €99,507.20 (Sony invoice), audio-video equipment primarily including a giant Panasonic screen for nearly €100,000 (Panasonic invoice), Dolce & Gabbana apparel for €69,740 (Dolce & Gabbana invoice sent to Mr. Teodoro NGUEMA), works of art for €600,000 (Didier Aaron invoice of 8 December 2010 sent to SOMAGUI FORESTAL, Avenida de la Indepedencia s/n Malabo, Equatorial Guinea, along with two photos of a pair of bronze sculptures), four luxury watches (Cartier, Piaget and Vacheron Constantin) for €710,000 (Dubail invoice of 23 October 2010 to SOMAGUI FORESTAL), several sets of cutlery for €1,469,280 tax inclusive, €157,328 tax inclusive and €247,296 tax inclusive, or a grand total of €1,873,904 tax inclusive (Christofle pro forma invoice of 2 February 2011), silverware including a caviar serving set and champagne bucket for €72,720 tax inclusive (Christofle pro forma invoice of 2 February 2011), silverware for €95,840 tax inclusive and €11,088 tax inclusive, or a grand total of €106,928 tax inclusive (Christofle pro forma invoice of 2 February 2011), porcelain items for €146,144 tax inclusive and €19,416 tax inclusive, or a grand total of €165,560 tax inclusive (Christofle pro forma invoice of 2 February 2011), and two brooches for €109,499.99 (Chaumet invoice of 30 June 2011).

Most of these invoices were made out to him at the address 42 avenue Foch in Paris.

During his stays in Paris, Teodoro NGUEMA OBIANG MANGUE frequented luxury hotels. From 2004 to 2009, for example, he paid €587,833 in cash to the Hôtel Crillon in Paris (€102,277 in 2004, €202,214 in 2005, €282,789 in 2006, €526 in 2007 and €26 in 2008) (D. 498).

He also invested in fine wines. In 2008, he purchased two cases of *premier cru classé* Bordeaux wine through Foch Service. In late 2008 or early 2009, another order totalling several hundred thousand euros was placed by his steward. In the first half of 2010, he purchased a lot of Romanée-Conti wine for €250,000, paid for by the aforementioned SOMAGUI FORESTAL (D. 499).

Between 2005 and 2011, he purchased jewellery for a total amount of €10,070,916, paid for either by himself (€3,699,837), by SOMAGUI FORESTAL (€2,320,833) or by SOCAGE/EDUM

(€1,189,972). In 2010, for example, he purchased €517,500 worth of jewellery from the Chaumet boutique at Place Vendôme in Paris (D. 504, 506, 508).

The total amount of his acquisitions of works of art, antiques and silverware between 2007 and 2009 has been estimated at €15,890,130 (€5.6 million for SARL Quere-Blaise, €2.9 million for Didier Aaron, €7.2 for Jean Lupu, €100,000 for Dominique Le Marquer and €20,130 for Marie-Pierre Boitard) (D. 505).

According to invoices obtained during a search, extravagant purchases totalling €5,545,927 were paid for either by Teodoro NGUEMA OBIANG MANGUE himself or by SOMAGUI FORESTAL or EDUM on his behalf (D. 500).

The investigations also confirmed the existence of an exceptional vehicle collection (D. 238, 239, 329, 407 to 433). On 7 March 2011, the DNRED transmitted to the investigating judges particularly valuable evidence in this regard (D. 239).

In November 2009, used cars and motorcycles valued at nearly US$12 million were transported to Vatry airport, sent from the United States via Schiphol airport in the Netherlands, to be re-exported to Equatorial Guinea. On the arrival of the different convoys, identification documents (registration certificates and transit documents) were discovered. The designated seller was Teodoro N. OBIANG, residing in the United States, and the recipient was declared to be Ruby HUGUENY, residing in Paris. The convoys comprised 26 luxury cars and eight luxury motorcycles, all registered in the United States (7 Ferrari cars, 4 Mercedes Benz cars, 5 Bentley cars, 4 Rolls Royce cars, 2 Bugatti cars, 1 Aston Martin car, 1 Porsche car, 1 Lamborghini car, 1 Maserati car, 5 Harley motorcycles, 2 Toiks motorcycles and 1 SPCNS motorcycle).

The majority of these vehicles were re-exported to Equatorial Guinea in December 2009. Two cars were sent to Germany for repair.

Teodoro NGUEMA OBIANG MANGUE had been in trouble with the customs authorities for importing vehicles from Switzerland without an import declaration, as discovered by the Paris Ney customs office in December 2006. At the time, an individual voluntarily came forward to clear a Ferrari Enzo vehicle imported from Switzerland on 24 December 2005 through customs in the name of Mr. NGUEMA OBIANG. The vehicle had been purchased on 17 October 2005 for 1,335,318 francs.

It was discovered that Vatry airport, where the re-exports to Equatorial Guinea took place, had been used regularly by the Office of the Guinean President for exports of material goods (furniture, plants, and vehicles intended for the police). In 2005 and 2006, these exports were ensured by the airline Equatorial Cargo, using an IL76 aircraft with a Russian crew. Since 2008, the Office of the Guinean President had exported goods via the airport 28 times through the intermediary of the declarant Euromulticourses 51, for an amount totalling €1,456,809. The majority of these operations concerned exports of luxury vehicles (D. 501, 502).

Searches conducted in the SIV (vehicle registration) database established that Teodoro NGUEMA OBIANG MANGUE was the owner of the following vehicles: a Lamborghini Diablo (registration number C/X 161 QFC 75), a Bentley vehicle of an unspecified model (registration number 734 TAC 75), a Bentley vehicle of an unspecified model (registration number 994 TAC 75), a Bentley Azure (registration number 143 QBK 75), an Aston Martin vehicle of an unspecified model (registration number 674 QAE 75), a Mercedes CL600FLA5 (registration number 707 WBE 75), a Maybach 62 (registration number 101 PXE 75), a Bentley Arnage (registration number 118 QGL 75), a Rolls-Royce Phantom (registration number 627 QDG 75), a Porsche Carrera (registration number 388 QQB 75), a Mercedes V 2.2 Long (registration number 565 QWP 75), a Bentley Brooklands (registration number 325 RKM), a Maserati MC12 (registration number 527 QGR 75), a Ferrari Enzo (registration

number 26 QXC 75), a Ferrari 599 GTO (registration number BB-600-SD), a Mercedes SL500 A5 (registration number F1 1033 WBE 78) and a Bugatti Veyron (registration number 616 QXC 75) (D. 407, 408).

Through investigations with car dealerships, other vehicles (Bugatti and Bentley vehicles, in particular) were added to this already long list.

Certain vehicles were financed in full or in part by SOMAGUI FORESTAL — such is the case, for example, of a Maserati MC 12, registration number 527 QGR 75 (€709,000), a Bentley Azure, registration number 855 RCJ 75 (€347,010), a Rolls-Royce Phantom, registration number 627 QDG 75 (€395,000), a Ferrari 599 GTO Fi, registration number BB-600-SD (€200,000), a Bugatti Veyron, registration number 616 QXC 75 (€1,196,000), a Bugatti Veyron, registration number W-718-AX (€1,959,048) and a Mercedes-Maybach, registration number 101 PXE 75 (€530,000).

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).

Continuing their operations, the investigators noted the presence of the following vehicles: a Peugeot 607 (217 QYY 75, 66,511 km), a Mercedes Viano CDI 2.2 (565 QWP 75, 56,851 km), a Ferrari Enzo (26 QXC 75, 1,435 km), a Bentley vehicle (325 RKM 75, 616 km), a Ferrari GTO (BB 600 SD, 596 km), another Bentley vehicle (855 RCJ 75, 616 km), a Maserati MC 12 (527 QGR 75, 2,327 km), a Bugatti vehicle (616 QXC 75, 2,782 km), another Bugatti vehicle (W 718 AX, 1,156 km, bearing the inscription "special edition 669 Made for Mr. Teodoro Nguema Obiang"), a Porsche Carrera GT (388 QQB 75, 969 km), and an Aston Martin vehicle (674 QAE 75, 3,946 km). These 11 vehicles were seized and removed from the premises (D. 416, 417, 418).

At a car park located at 181 avenue Victor Hugo in Paris (16th arrondissement), in the parking spaces leased by Teodoro NGUEMA OBIANG MANGUE, the presence of the following vehicles was discovered: a Rolls-Royce Phantom Coupé (registered in England under No. XB 59 AHP, with an insurance policy in the name of Theodore NGUEMA OBIANG), a Bentley Cabriolet (143 QBK 75, previously registered under 994 TAC 75, with a registration certificate in the name of Teodoro NGUEMA OBIANG), a Porsche Speedster (W 767 BS), a Bentley vehicle (118 QGL 75, with a copy of a registration certificate and a premium receipt in the name of NGUEMA OBIANG Theodore), and a Mercedes Maybach vehicle (101 PXE 75, 8,092 km, with a copy of the cheque in the amount of €376,822 provided as payment).

In the late afternoon, in possession of the keys, the investigators noted that the Porsche Speedster, which the car park security guard identified as belonging to Teodoro NGUEMA

OBIANG MANGUE, had been moved voluntarily. These five vehicles were seized and removed from the premises (D. 417, 419).

Noting that two vehicles were missing (a Porsche Cayenne Turbo, registration number 865 RKJ 75, and a Rolls-Royce Phantom, registration number 627 KDG 75), the investigators conducted additional investigations (D. 422). The vehicles were discovered in a car park located on avenue Marceau in Paris (16th arrondissement), were seized and removed from the premises (D. 423, 424).

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 the AGRASC (agency for the management and recovery of seized and confiscated assets) to be sold prior to judgment (D. 637, 708, 879).

The investigations also revealed the existence of an exceptional immovable asset in the form of a property located at 40-42 avenue Foch in Paris (16th arrondissement) — Teodoro NGUEMA OBIANG NGUEMA's place of residence in Paris — which address was listed on several invoices for the luxury items that he had purchased (D. 457, 458, 1480).

On verification with the *Direction générale des Finances Publiques* (the French tax authorities), it was established that the property was used for residential purposes, had been built in 1890, and comprised 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 middle-eastern style sitting room, 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 2,835m^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.

The acquisition of this property by Teodoro NGUEMA OBIANG MANGUE, through the intermediary of Swiss companies, has been clearly traced, in particular through the file transmitted by the tax authorities and the documents discovered during the searches of the premises of the trust companies in Switzerland which administered and managed the Swiss corporate co-owners (D. 434 to 493, sealed "Infinea"; D. 762, D. 765, wealth tax returns for years 2005 to 2011, sealed "ISF Nguema 1").

On 19 September 1991, the units of the building were first purchased by the Swiss companies:

— Ganesha Holding: units recorded in the land register as FA 60, units 401 to 410, 413 to 459, 501 to 543, 546 to 564, and 601 to 672, purchased on 19 September 1991 for 100,344,446 francs (that is, €15.3 million);

— GEP Gestion Entreprise Participation SA: units recorded in the land register as FA 60, units 502, 523, 524, 533 and 563, purchased on 19 September 1991 for 8 million francs (that is, €1.2 million);

— RE Entreprise SA: units recorded in the land register as FA 60, units 509, 510, 519, 534, 537 to 540, 549, 550, 553, and 601 to 605), purchased on 19 September 1991 for 9,900,000 francs (€1.5 million);

— Nordi Shipping and Trading Co. Ltd (land register reference FA 60, units 513, 514, 532, 541 and 562, purchased on 19 September 1991 for 16,500,000 francs (that is, €2.5 million);

— Raya Holding SA.

On 18 December 2004, Teodoro NGUEMA OBIANG MANGUE became the sole shareholder of these five Swiss companies, whose shares he acquired for €2,916,450. On 20 December 2004, he also acquired a claim against these companies in the amount of €22,098,595, a claim initially held by Opaline Estate Ltd, located in the British Virgin Islands. In 2004, in a personal capacity, he acquired the shares of the Swiss companies that owned the property for €25,015,000.

This acquisition is corroborated by a report prepared by the tax law firm CLC, which was seized during a search of the premises of FOCH SERVICE, an entity wholly owned (500 shares) by the Swiss company Ganesha Holding. According to that document, "Mr. X", a resident of Equatorial Guinea, has owned all of the shares of Ganesha Holding SA since 20 December 2004, and the owner of the building at 42 avenue Foch risks prosecution, namely for misuse of corporate assets, if it is demonstrated that Teodoro OBIANG NGUEMA is the *de facto* manager.

Heard on this point in the context of the Swiss authorities' execution of an international letter rogatory, the trustees of the Swiss companies (Guillaume de RHAM and Rodrigo LEAL) confirmed that the driving force behind the companies was indeed Teodoro NGUEMA OBIANG MANGUE.

According to Guillaume de RHAM, even though the shares were in bearer form, there is no doubt that the beneficial owner of these companies is actually Teodoro NGUEMA OBIANG MANGUE. He could not remember if he had been in physical possession of the shares from the beginning, but he handed them over to Mr. RAEBER upon termination of his final appointment. A Geneva-based lawyer — whose name Mr. de RHAM could no longer remember — who worked with a lawyer based in Paris, Mr. MEYER, briefly served as the depositary of the shares. Guillaume de RHAM specified that his actual assignment for the duration of his appointment, that is, from early 2005 to 16 December 2007, was to co-ordinate the different interior renovation works at the building at 42 avenue Foch (D. 762).

Rodrigo LEAL explained that, in January 2009, he was contacted by Miguel EDJANG, Teodoro NGUEMA OBIANG MANGUE's adviser, to manage the building at 42 avenue Foch in Paris through the intermediary of five companies governed by Swiss law, that is, Ganesha Holding, GEP Gestion Entreprise Participation SA, RE Entreprise SA, Nordi Shipping and Trading Co. Ltd, and Raya Holding SA. On 16 February 2009, at a meeting in Paris, they discussed a trust agreement for these companies. A month later, the agreement was signed. It covered management of the companies, the holding of the companies' shares in trust, bookkeeping and compliance with legal obligations, that is, registration with the *Registre du Commerce* (trade registry). According to him, Teodoro NGUEMA OBIANG MANGUE had indeed purchased the building in a personal

capacity, in order to host his guests, family, partners and friends. Teodoro NGUEMA OBIANG MANGUE himself called him if there were any problems relating to the building (D. 765).

On 10 May 2011, Jérôme DAUCHEZ — property manager and chief executive (*dirigeant*) of the property management firm DAUCHEZ, which had held management authorization to represent the owners of the units located at 42 avenue Foch — confirmed that the actual owner of the building, which had a total surface area of approximately 4,000-4,500m^2, was indeed Teodoro NGUEMA OBIANG MANGUE. From 2005 to the end of 2008, the DAUCHEZ firm held management authorization to represent the owners of the units located at 42 avenue Foch. The firm's contact person, who occupied the premises on a day-to-day basis, was Teodoro NGUEMA OBIANG MANGUE. Mr. DAUCHEZ remembered that major works had been carried out by the owner in 2005/2006, on two apartments on the ground floor, a triplex from the first to the third floors, and an apartment located on the four and fifth floors. The firm did not pay for the majority of the works directly, but did carry out the works on the two apartments located on the ground floor. The works on the triplex were carried out by the interior design firm PINTO. The works on the fourth and fifth floors were carried out by the interior designer Jacques GARCIA.

Jérôme DAUCHEZ explained that FOCH SERVICE was an entity created to pay the costs of staff (cleaners, driver, etc.) (D. 453).

The firm issued calls for advances to pay for certain expenses and fees. An analysis of the owner account statement confirmed that they were paid by bank transfers from the accounts of either the Swiss companies or, once again, SOMAGUI FORESTAL.

The service charges and management fees relating to the property were paid out of financial flows originating directly from Equatorial Guinea. From 2005 to 2007, these expenses were paid directly from Equatorial Guinea into bank accounts opened in the names of the Swiss companies through the DAUCHEZ property management firm.

From 2007 to 2011, FOCH SERVICE, whose purpose was to pay for the costs associated with managing the building and its staff, was financed by funds that also came from SOMAGUI FORESTAL.

Heard on 10 May 2011, Magali PASTOR, a property manager at DAUCHEZ who was responsible for managing the property located at 42 avenue Foch in Paris, confirmed Teodoro NGUEMA OBIANG MANGUE's capacity as the owner. Starting in 2005, and for more than a year, she first dealt with Guillaume de RHAM, the Swiss companies' trustee.

Ms PASTOR then dealt with Mr. RAEBER, followed by Rodriguo LEAL, the companies' new trustee. According to her, these individuals were mere intermediaries acting on behalf of Teodoro NGUEMA OBIANG MANGUE, who had purchased the apartments through the Swiss companies for approximately €30 million in 2005, with the sale taking place in Geneva. She remembered her first meeting with Teodoro NGUEMA OBIANG MANGUE in 2005, at the Hôtel Crillon. They discussed the nature of her work. He detailed the works that he planned to have carried out by Alberto PINTO. During this first meeting, they exchanged their contact details. She subsequently met with Teodoro NGUEMA OBIANG MANGUE several other times, at the Hôtel Crillon, Le Bristol or at 42 avenue Foch to monitor the works and manage the building. Teodoro NGUEMA OBIANG MANGUE paid Alberto PINTO for the renovation works either directly or through his companies. The contract was awarded for €12 million (D. 454).

Heard on 24 May 2011, Linda PINTO, co-manager of the interior design firm Alberto PINTO, confirmed that her firm had worked on the interior design of the building at 42 avenue Foch on behalf of Teodoro NGUEMA OBIANG MANGUE. In 2005, his house

manager had consulted them about having renovation works done. She situated this contact at the time Teodoro NGUEMA OBIANG MANGUE had purchased the property.

She could not remember the circumstances of their first meeting, but she later remembered that Teodoro NGUEMA OBIANG MANGUE had a specific idea of what he wanted. Among other things, he knew that they had carried out works for the previous owner and that they had the plans. Once the estimate had been drawn up, they worked in the building but only on the triplex. She met Teodoro NGUEMA OBIANG MANGUE about ten times while the works were being carried out (D. 456).

The documents seized from the premises of SARL Cabinet Alberto PINTO established that Teodoro NGUEMA OBIANG MANGUE made two €1 million down payments, on 3 May 2010 and 4 July 2011. The firm used these funds to purchase furniture and works of art on his behalf. By a decision of 16 April 2014, the investigating judge ordered that this furniture be seized without deprivation of title (D. 2045).

On 29 November 2011, Anne-Sophie METRAL, managing director (*directrice*) of the interior design firm Garcia, confirmed that she had been contacted, through DAUCHEZ, regarding renovation works to be carried out on an apartment located on the fifth floor of the building at 42 avenue Foch in Paris, on behalf of Teodoro NGUEMA OBIANG MANGUE. According to her, no further action was taken. In 2008, the firm was contacted again, this time by the chief executive (*gérante*) of FOCH SERVICE, which was owned by Teodoro NGUEMA OBIANG MANGUE. He wanted to meet Jacques GARCIA.

A project manager visited the fourth floor of the building and a business proposal was drawn up. Once again, no further action was taken (D. 490).

The investigation confirmed that FOCH SERVICE had been created to pay management and staff costs relating to the building. The banking investigations demonstrated that SOMAGUI FORESTAL had contributed €2.8 million. In that connection, Teodoro NGUEMA OBIANG MANGUE appeared to be the only link between these two companies — one which managed private property in Paris and the other, a Guinean company, which specialized in the production and marketing of timber (D. 483, 488). A search of the premises of FOCH SERVICE led to the discovery of documents revealing Teodoro NGUEMA OBIANG MANGUE's intention to make the financial ties between the different legal entities even more opaque by creating, in particular, a holding company in Singapore.

On 21 September 2011, Aurélie DELAURY, née DERAND, chief executive (*gérante*) of FOCH SERVICE, confirmed the company's purpose — to manage the apartment at 42 avenue Foch in Paris — and that the Swiss company Ganesha was its sole shareholder. She specified that Rodriguo LEAL was the former chief executive (*gérant*) of the company and that invoices for services were sent to SOMAGUI FORESTAL, adding that in 2011 two invoices had been sent to EDUM, which was also located in Equatorial Guinea.

She stated that she had crossed paths with Teodoro NGUEMA OBIANG MANGUE at 42 avenue Foch in Paris sometime in June or July 2011. According to her, the triplex apartment belonged to Ganesha (D. 468).

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.

The investigators were greeted by the housekeeper employed by FOCH SERVICE, Paula FURTADO TAVARES, who explained that Teodoro NGUEMA OBIANG MANGUE was in Equatorial Guinea. They noted the presence of two other domestic staff members.

A French lawyer, proclaiming to represent the interests of the State of Equatorial Guinea, came forward to contest the conduct of the inspection on account of the protection that he claimed the premises enjoyed.

Continuing their inspection, the investigators discovered that the townhouse comprised 101 rooms located on five levels, with a total surface area of approximately 4,000m^2. Numerous pieces of furniture and works of art were seized (D. 555, 556, 557, 560, 563, 564, 565, 567 and 568, photograph album D. 584). Findings made at the site confirmed that Teodoro NGUEMA OBIANG MANGUE enjoyed free disposal of the property (D. 532, D. 533, D. 555 *et seq*., D. 1400, D. 1408 and photograph album in D. 584).

However, no official documents were discovered concerning the State of Equatorial Guinea or indicating that the building might serve as a venue for official representation.

The findings also made it possible to take stock of the extravagant purchases made by Teodoro NGUEMA OBIANG MANGUE in a personal capacity over several years, and to confirm that he did indeed occupy the premises. Among other things, men's clothing were found, including size-30 trousers (5 Gucci, 40 Dolce & Gabbana, 4 Prada, 3 Yves Saint Laurent, 3 Louis Vuitton, 1 Burberry, 2 Nice Collections, 1 True Religion and 5 others), size-52 or -54 jackets (7 Gucci, 24 Dolce & Gabbana, 2 Dior, 1 Prada, 1 Galliano, 1 Watanabe, 20 Yves Saint Laurent, 4 Louis Vuitton, 3 Burberry, 1 Balenciaga and 3 others), size-1 jumpers (6 Gucci, 11 Dolce & Gabbana, 6 Yves Saint Laurent, 4 Louis Vuitton, 5 Burberry, 1 GAP and 1 other), size-M or -L polo shirts (1 Versace, 6 Dolce & Gabbana, 7 Yves Saint Laurent, 1 Balenciaga, 1 Armani and 1 other), size-52 or -54 suits (4 Gucci, 3 Dolce & Gabbana, 1 Yves Saint Laurent, 2 Burberry, 4 Armani and 24 others), and 64 pairs of men's shoes in American size 8.5, 9 or 9.5, most of which were Dolce & Gabbana. These personal effects were all in the same sizes (clothing size 54 and shoe size 43) and some were monogrammed with Teodoro NGUEMA OBIANG's name or the initials TNO.

The statements provided by the FOCH SERVICE employees who worked at the townhouse confirmed that the building was used in a personal capacity by Teodoro NGUEMA OBIANG MANGUE, who enjoyed free disposal thereof.

Heard on 26 October 2011, Joël CRAVELLO, who had been employed as a chef from November 2006 to September 2008, explained that he had worked for Teodoro NGUEMA OBIANG MANGUE after being recruited through the specialist agency DIGAME in Neuilly-sur-Seine.

At his first meeting in April 2006, he first went to the agency and then to Hôtel Crillon, where he met Teodoro NGUEMA OBIANG MANGUE in person. Teodoro NGUEMA OBIANG MANGUE hired him directly. He did not begin work until early 2007, owing to the works that were under way in the building. He stated that the employees would generally stay with Teodoro NGUEMA OBIANG MANGUE for three weeks each month: an average of 2-3 days in Paris, then 15 days in Los Angeles, and the individual concerned would generally spend the last week in Equatorial Guinea. His employment was terminated in May 2008 as a result of his poor relations with the housekeeper, but he did not leave until September 2008.

He added that he had observed the presence of suitcases full of euros and dollars used to pay for extravagant purchases, in particular at the top fashion houses on avenue Montaigne, such as

Dior, Saint Laurent and LVMH. He knew that the suitcases came from Equatorial Guinea and estimated the cash they contained at approximately US$10 million. Teodoro NGUEMA OBIANG MANGUE paid for nearly everything in cash and took the suitcases with him to the United States. According to Mr. CRAVELLO, the money came from the oil business, in the unofficial sense, since Teodoro NGUEMA OBIANG MANGUE collected unofficial commissions from oil companies from many different countries (D. 532).

Heard on 26 October 2011, Didier MALYSZKO, Teodoro NGUEMA OBIANG MANGUE's former house manager, stated that he had worked for him from November 2006 to July 2009, having been recruited through the specialist agency DIGAME in Neuilly-sur-Seine. He attended to his baggage, performed services and handled his meals. Owing to an overly taxing job and strict new rules put in place by Teodoro NGUEMA OBIANG MANGUE, he was dismissed in July 2009. Having accompanied his employer to Switzerland on several occasions to meet with lawyers at a hotel in Geneva to discuss practical considerations and arrangements for setting up his Swiss companies, Mr. MALYSZKO confirmed that Teodoro NGUEMA OBIANG MANGUE was in fact the companies' decision-maker. Didier MALYSZKO specified that Teodoro NGUEMA OBIANG MANGUE led the same life in France, the United States and Brazil, which could be summed up in three words: "*alcool, pute, coke*" (alcohol, whores and coke). He too had observed suitcases full of euros and dollars used to pay for extravagant purchases, in particular at the top fashion houses on avenue Montaigne. He explained that his employer would return from Equatorial Guinea with, in general, two suitcases filled with cash. He spent it first in Paris and then in the United States. Once the money was spent, he would return to Equatorial Guinea about three times a year to collect two more suitcases.

Didier MALYSZKO estimated the cash at approximately US$10 million, with Teodoro NGUEMA OBIANG MANGUE using it to pay for nearly everything. He added that he would travel with Teodoro NGUEMA OBIANG MANGUE for several months each year and that his function of minister in his country was only a title that enabled him to obtain a diplomatic passport. He stated that he was paid €5,000 net through transfers from SOMAGUI. He did not have a payslip, only a contract, since they were abroad for more than six months each year. He stated that he thought that all of the operating expenses relating to the property at 42 avenue Foch were paid by FOCH SERVICE (D. 533).

On 16 February 2012, Paula and Teodora FURTADO TAVARES, domestic staff at the property at 42 avenue Foch in Paris, were heard.

Paula FURTADO TAVARES stated that she had worked on-site since 1 August 2007, first as a housemaid and, since February 2010, as a housekeeper, recruited by the agency DIGAME in Neuilly-sur-Seine (Hauts-de-Seine), which had put her in contact with the previous housekeeper, Catherina DURAND. Following an interview with Ms DURAND, Paula FURTADO TAVARES was hired. Her employment contract was signed by the chief executive (*gérant*) of FOCH SERVICE. She started with a salary of €2,200, which was raised to €2,300, paid by that company. Her salary is currently €4,000 net, still paid by FOCH SERVICE. She stated that she did not know the name of the owner of the building, but the person who used it was Teodoro NGUEMA OBIANG MANGUE, who stayed there three or four times a year, rarely for longer than a week (D. 558, 561).

Teodora FURTADO TAVARES, who had been a housemaid since June 2010 after having been recruited following an interview with the chief executive (*gérant*) of FOCH SERVICE, confirmed that Teodoro NGUEMA OBIANG MANGUE resided at the townhouse on a regular basis (D. 559).

Since FOCH SERVICE had been created to manage the building located at 42 avenue Foch in Paris, which was owned by Teodoro NGUEMA OBIANG MANGUE, and the company was

financed by commercial companies in Equatorial Guinea which had ties to him, investigators questioned its chief executives (*gérants*).

Mourad BAAROUN, who was arrested at his home, was questioned in custody (D. 883 *et seq.*) on 18 December 2012.

A search of his residence led to the discovery of various documents relating to Teodoro NGUEMA OBIANG MANGUE and the Republic of Equatorial Guinea, a bank card in the name of FOCH SERVICE and €1,950 in cash, which had been given to him by Teodoro NGUEMA OBIANG MANGUE for the purpose of buying a camera.

He explained that he had been an employee of FOCH SERVICE until June 2012. Since October 2012, he had been employed by SERENISSIMA, which was in charge of managing the assets of the President of the Republic of Equatorial Guinea. As a driver, he first had the opportunity to work for Teodoro NGUEMA OBIANG MANGUE, and in early 2007 he was recruited by FOCH SERVICE to oversee the vehicle collection, which included 18 luxury vehicles. He acknowledged that he had stood in as the company's chief executive (*gérant*) for a few months in 2009-2010, and that he had handled the payment of invoices on Teodoro NGUEMA OBIANG MANGUE's instructions.

He confirmed that the purpose of FOCH SERVICE was to manage the costs associated with the building at 42 avenue Foch in Paris, admitting that it was an empty shell which had no resources of its own but was financed exclusively by Guinean funds that primarily came from SOMAGUI FORESTAL. He acknowledged that there was no economic link between FOCH SERVICE and SOMAGUI FORESTAL, such that the invoices prepared by FOCH SERVICE were done so only for use as accounting documents.

When questioned about Teodoro NGUEMA OBIANG MANGUE's assets, he acknowledged that, between the search relating to the vehicles and the search of the building at 42 avenue Foch, several valuables and masterpieces had been taken away to be stored at the residence of the Ambassador of Equatorial Guinea in Paris.

He stated that he had had occasion to run errands for Teodoro NGUEMA OBIANG MANGUE but he denied having managed the other employees of FOCH SERVICE. He objected to being characterized as Teodoro NGUEMA OBIANG MANGUE's right-hand man and gofer, specifying that Teodoro NGUEMA OBIANG MANGUE did not trust anyone. He acknowledged that his role at FOCH SERVICE had exceeded that of merely the person in charge of the vehicle collection, specifying that he could not refuse to do what was asked of him and that he did not have any decision-making power in his employer's absence.

On 19 December 2012, during his questioning at first appearance, Mourad BAAROUN stood by the explanations that he had given to the police (D. 895). He enjoyed the status of *témoin assisté* in respect of complicity in laundering misused corporate assets or the proceeds of breach of trust and handling offences.

On 26 February 2013, Aurélie DELAURY, née DERAND, was questioned in custody (D. 929 *et seq.*). She explained that she had been hired in late 2010 as an assistant to Pierre-André WENGER, the chief executive (*gérant*) of FOCH SERVICE at the time. Her employment contract was signed by Mourad BAAROUN in January 2011 and had been pre-dated to October 2010 because Mr. BAAROUN was the chief executive (*gérant*) of FOCH SERVICE at that time.

She confirmed that FOCH SERVICE was in charge of the administrative management of the building located at 42 avenue Foch in Paris. Pierre-André WENGER had asked her to invoice SOMAGUI FORESTAL, which she knew was linked to Teodoro NGUEMA OBIANG MANGUE,

for the purpose of paying invoices and salaries. She quickly understood that Teodoro NGUEMA OBIANG MANGUE was "*le patron*" (the boss) of the company. In that capacity, she copied him on all of her e-mails. In performing her duties, she noted the existence of accounting anomalies, which she attempted to rectify.

In November 2010, by chance, after the existing manager had been suspected of embezzlement, she took his place. She could not refuse, or she would have risked losing her job as an assistant.

From that period on, she sent him her reports and handled the company's accounting. In January 2011, she met Teodoro NGUEMA OBIANG MANGUE for the first time, at the building at 42 avenue Foch. She served as chief executive (*gérante*) until May 2012, at which time FOCH SERVICE discontinued its operations.

She confirmed that the company's resources came from transfers from SOMAGUI FORESTAL and EDUM, whose corporate purposes were unknown to her. She could not explain why these companies paid the costs relating to the building. She did not attempt to find out if there was a contract between FOCH SERVICE and these companies, and she never thought that the origin of the funds was fraudulent. She followed the instructions that were given to her and never imagined that it was abnormal to invoice SOMAGUI FORESTAL and EDUM.

She acknowledged that in September 2011, following the search of her residence, she had contacted Mourad BAAROUN to ask him to move FOCH SERVICE's documents, explaining that she had acted out of fear.

She now works for SERENISSIMA, which is responsible for managing the assets belonging to the President of the Republic of Equatorial Guinea.

She claimed that she had done only minor secretarial work, and not handled Teodoro NGUEMA OBIANG MANGUE's personal affairs, and denied that she had assisted with operations to conceal and facilitate the false justification of the source of the financial transactions initiated by foreign companies with no ties to FOCH SERVICE.

During her questioning at first appearance on 27 February 2013, she maintained that she had become the chief executive (*gérante*) of FOCH SERVICE by chance and that she had focused on regularizing the company's tax situation, explaining that she had learned many things about how the company actually operated while in police custody (D. 944).

She enjoyed the status of *témoin assisté* in respect of complicity in laundering misused corporate assets and the proceeds of breach of trust and complicity in laundering misappropriated public funds.

The capital gains declaration prepared on behalf of Teodoro NGUEMA OBIANG MANGUE for the year 2011, that is, after the present proceedings were initiated, discovered during a search at CLC, shows that on 15 September 2011 the individual concerned allegedly sold his shares in the co-owning Swiss companies to the State of Equatorial Guinea for €35 million, which amount includes the sale price of the shares plus the purchase of debt. This sale appears to be a form of legal window-dressing intended to prevent the property from being attached.

On 19 July 2012, the investigating judge ordered the attachment of the property, which was valued at €107 million, under the Code of Criminal Procedure because it was the object of a transaction involving the investment, concealment and conversion of funds derived from offences (D. 706).

On 24 April 2014, a list of all of Teodoro NGUEMA OBIANG MANGUE's purchases was compiled, demonstrating that he had purchased, in a personal capacity and through the intermediary of companies (primarily SOMAGUI FORESTAL) or nominees, the following assets:

Vehicles with a total value of €7,435,938; immovable property at 42 avenue Foch in Paris, purchased in early 2005 for €25 million, with an additional €11 million in works (PINTO firm) paid between 2005 and 2007; a villa in Malibu, California, purchased for €29 million in April 2006; €90,512,878 in furniture, works of art and paintings; €11,832,356 in jewellery and clothing; and more than €6 million in miscellaneous services (D. 2134).

It was established that, in connection with these purchases, €158,639,322 was paid directly by Teodoro NGUEMA OBIANG MANGUE, €14,769,983 was paid by SOMAGUI FORESTAL, €1,593,964 was paid by SOCAGE and EDUM, €350,037 was paid in cash, €210,325 was paid by FOCH SERVICE and €20,130 was paid by Ganesha Holding (D. 2134).

The majority of these purchases were made between 2005 and 2007 (D. 2134).

The illicit financing of assets

Considering the extent of Teodoro NGUEMA OBIANG MANGUE's assets, which are valued at more than a hundred million euros and were accumulated over just a few years, it is not possible for them to have been financed by his own official salary alone.

According to the evidence collected by the American authorities, the individual concerned received approximately US$80,000 per year in his capacity as minister, and he was prohibited, by the law of his own country, from carrying out a commercial activity. The investigations established that the above assets were financed by the proceeds of criminal offences, beginning with the offence of corruption (D. 1025, 1032, 1035 to 1047, 1048 to 1116).

On 15 June 2012, the investigating judges sent an international letter rogatory to the judicial authorities in Spain, a country which had maintained close economic ties with Equatorial Guinea. In that connection, witnesses who had run companies which worked with that State, and with SOMAGUI FORESTAL in particular, were questioned.

Pedro TOMO, the chief executive (*dirigeant*) of a logging company, explained that in 1996 a tax was imposed when Teodoro NGUEMA OBIANG MANGUE became an adviser to the Minister for Forestry, first through the intermediary of a firm corresponding to a unit within the Ministry which was based at the port and signed loading permits. Taxes owed to the Government were paid to the Treasury. The receipt from the Treasury then had to be brought somewhere to obtain a signature for the loading permit. Prior to Teodoro NGUEMA OBIANG MANGUE's arrival, loading permits were issued once payment was made to the Treasury.

Subsequently, in addition to the payment to the Treasury, Teodoro NGUEMA OBIANG MANGUE, who had become a minister, required all logging companies to pay him 10,000 francs per cubic metre in order to conduct loading, or more specifically in order to obtain a signature for the loading permit for exports. He first received the assessment and payment of the taxes and duties imposed by law. He then collected cheques made out to SOMAGUI FORESTAL at CCI, a bank in Equatorial Guinea. Lastly, Teodoro NGUEMA OBIANG MANGUE directly collected cash or cheques made out to SOMAGUI.

Depending on his preference, and in his presence or not, the regional forestry officer requested that cheques be submitted in the name of CCI bank for the benefit of SOMAGUI FORESTAL. When he was there, Teodoro NGUEMA OBIANG MANGUE directly collected cash, which he brought home with him.

Pedro TOMO specified that the money paid to Teodoro NGUEMA OBIANG MANGUE for the timber taxes was not all that he collected, given that he received large sums of money. The majority of the money handled by Teodoro NGUEMA OBIANG MANGUE was related to SOMAGUI FORESTAL, which did not exist in reality.

False certificates had been drawn up to show that the company was building roads, which were never actually built. Teodoro NGUEMA OBIANG MANGUE also freely sold the forests of the national reserve to the Malaysian company Shimmer. For open forests, Teodoro NGUEMA OBIANG MANGUE granted concessions to Shimmer on the condition that payment was made to him directly.

These statements were corroborated by those of other heads of companies who directly witnessed the same acts. The information transmitted by the United States authorities also demonstrates this point (D3.25/244, 2480).

On 4 September 2007, the United States Department of Justice sent the French investigation authorities a "Request for Assistance in the Investigation of Teodoro Nguema OBIANG and his associates", which shows that the United States judicial authorities had evidence demonstrating Teodoro NGUEMA OBIANG MANGUE's engagement in transactions consistent with foreign official corruption. As Minister for Agriculture and Forestry, he was paid an annual salary of US$60,000. However, from April 2005 to 2006, at least US$73 million was invested in the United States in his name. These funds were utilized to purchase a luxury home in Malibu, California, valued at approximately US$35 million, and a luxury jet for approximately US$33.8 million. The home in Malibu was purchased in the name of Sweetwater Management Inc., a shell corporation, which listed Teodoro NGUEMA OBIANG MANGUE as its president. To purchase the aircraft, he also used another shell corporation, Ebony Shine International Ltd, which was registered in the British Virgin Islands.

Additional information available to the investigation had revealed the illicit origin of the funds controlled by Teodoro NGUEMA OBIANG MANGUE. The investigators were informed that, in his official capacity, Teodoro NGUEMA OBIANG MANGUE had instituted a large "revolutionary tax" on timber, insisting that the payments be made directly to him, either in cash or through cheques made out to SOMAGUI FORESTAL, a logging company owned by him.

Moreover, in August 2006, Teodoro NGUEMA OBIANG MANGUE filed an affidavit with the High Court of South Africa in a civil matter regarding whether funds held by him belonged to the Equatorial Guinea Government, a contention that he vigorously contested. In his affidavit, he admitted that cabinet ministers in Equatorial Guinea form private companies which act in consortia with foreign companies when obtaining government contracts and, as a consequence, "a cabinet minister ends up with a sizeable part of the contract price in his bank account".

Although he claimed that this practice was legal, the assertion also suggested that he was receiving bribes or funds in the form of a percentage of contract revenue. Moreover, given Equatorial Guinea's reputation in the international community, the enormous natural resource wealth of the country, and the dominance of the OBIANG MBASOGO family over the government and economy, there was no doubt that a large portion of Teodoro NGUEMA OBIANG MANGUE's assets originated from extortion, misappropriation of public funds, or other corrupt conduct.

In addition, a United States Senate investigation was the subject of a report which revealed the relationships between Teodoro NGUEMA OBIANG MANGUE and his companies SOMAGUI FORESTAL and SOCAGE. Between 2003 and 2006, he received transfers to his bank account totalling US$4.6 million from SOMAGUI FORESTAL and US$2.4 million from SOCAGE (D. 534).

The United States investigation of the activities of Teodoro NGUEMA OBIANG MANGUE and his associates identified numerous suspicious transactions involving the French financial system.

In April 2005, he was the originator on at least five separate wire transfers — each in the amount of US$5,908,400 — from SGBGE to Banque de France, account No. 20001935.28235, then to a correspondent account at Wachovia Corporation Atlantic, and to account No. 2000055333 at First American Trust FSB in the name of First American Title. As a result of these transactions, he was able to transfer at least US$29,542,000 to the United States in a single month. Some of these funds are believed to have been used to purchase the home in Malibu, California.

In April 2006, he was the originator on three wire transfers from SGBGE to Banque de France, account Nos. 2000193528235 and 000061000012, then to a correspondent account at Wachovia Corporation Atlantic, and to account No. 071601562059 in the name of McAfee & Taft.

The investigation carried out by the United States judicial authorities on the basis of these alleged offences led to the signing of a settlement agreement between the United States Attorney and Teodoro NGUEMA OBIANG MANGUE.

According to this agreement, which was approved by the United States judicial authorities, the individual concerned received an official government salary of less than US$100,000 and he used his position and influence as a government minister to amass more than US$300 million worth of assets through corruption and money laundering, in violation of both Equatorial Guinean and United States law.

Through intermediaries and corporate entities, he acquired numerous assets in the United States that he agreed to relinquish in the form of forfeiture and divestment to a charity for the benefit of the people of Equatorial Guinea. Under the terms of the settlement, he had to sell his US$30 million mansion located in Malibu, California, a Ferrari and various items of Michael Jackson memorabilia purchased with the proceeds of corruption. Of those proceeds, US$20 million had to be given to a charitable organization to be used for the benefit of the people of Equatorial Guinea. Another US$10.3 million was to be forfeited to the United States and used for the benefit of the people of Equatorial Guinea to the extent permitted by law.

He also had to disclose and remove other assets he owned in the United States, make a US$1 million payment to the United States, representing the value of the Michael Jackson memorabilia already removed from the United States for disbursement to the charitable organization. The agreement also provided that if other assets, including the Gulfstream Jet, were brought into the United States, they would be subject to seizure and forfeiture.

The investigations demonstrated that in addition to the corrupt payments received in exchange for granting export permits, Teodoro NGUEMA OBIANG MANGUE's purchases in France were also financed by the proceeds of misappropriation of public funds through funds that originated from the Treasury of Equatorial Guinea and transited through SGBGE, a subsidiary of the bank SOCIÉTÉ GÉNÉRALE based in Equatorial Guinea (D. 2052 to 2075, sealed "SGBGE 4", D. 1340, D. 1512 and D. 1513, D. 2801).

A detailed analysis of the SGBGE bank statements for the 2004-2013 period, seized during a search of the premises of SOCIÉTÉ GÉNÉRALE, revealed transactions relevant to the analysis of his assets.

For the 2004-2005 period, which corresponds to the purchase of the shares of the Swiss companies that owned the building at 42 avenue Foch in Paris, the following information was brought to light:

— credit transaction, in August 2004: transaction in the amount of 7,879,095,180 CFA francs, that is, €12,011,603, with the description "DEVOL FONDOS TRF17576", corresponding to a transfer of funds originating from the Treasury of Equatorial Guinea;

— debit transactions, in January 2005: four debit transactions on the account for a total of €6,253,750 each. Three of these transactions transited through Banque des États d'Afrique Centrale (BEAC) and then Banque de France before appearing as a credit to Opaline Estate Ltd.'s account with Crédit Lyonnais in Geneva.

Throughout the period from 2004-2011, some 110 million euros were thus credited to the personal account of Teodoro NGUEMA OBIANG MANGUE from the Treasury of Equatorial Guinea, before being partially redirected to bank accounts opened in the name of the Swiss companies through DAUCHEZ, the firm managing the property at 42 avenue Foch.

Christian DELMAS, the manager of SGBGE between 2003 and 2007, described how the bank account of Teodoro NGUEMA OBIANG MANGUE functioned. He explained that the latter had a personal account funded solely by transfers issued by the Treasury approximately every six months, after the Payment Committee had made all payments due to foreign or local companies with government contracts via the BEAC. These funds were held by the BEAC. He maintained that since the funds came from the Treasury and were held by the BEAC, it was difficult for him to refuse them because the BEAC was his bank's supervisor and the origin of the funds was supposed to be verified by the bank receiving them. In his view, the money that came from the Treasury was public money that Teodoro NGUEMA OBIANG MANGUE had used to make transfers to France. In those instances, he debited the BEAC account which was used to credit the accounts of the beneficiaries in France via the correspondent account held by the BEAC at the Banque de France. He noted that three quarters of those transfers were made to the same beneficiary, the firm PINTO, mainly for the purchase of assets.

His statements have been corroborated by those of Jean-Marie NAVARRO, his successor at the head of SGBGE, who confirmed that public funds had been transferred from the BEAC and credited to the account of Teodoro NGUEMA OBIANG MANGUE. As if to justify the absence of any opposition to these highly dubious financial transactions, he wished to make it clear that, in Equatorial Guinea, a refusal to execute a financial transaction concerning a member of the NGUEMA OBIANG family was considered as a lack of respect synonymous with imprisonment.

Pierre NAHUM, who held the same post from 2009, confirmed the above. He attempted to justify the absence of any opposition to these financial transactions. According to him, given Teodoro NGUEMA OBIANG MANGUE's instability, it was better not to oppose his requests because at any moment he could become aggressive and dangerous. He had been in contact with him on three occasions, having been summoned when he had refused to make transfers. During a trip to Morocco, he had threatened him with expulsion, although the situation had been defused through the intervention of the French Ambassador.

On 9 December 2013, the investigators conducted an on-site visit to the headquarters of the Banque de France in order to recover documents relating to its role as an intermediary bank. It then became clear that the alert had first been raised in June 2011, with a transaction dated 1 June 2011 from Teodoro NGUEMA OBIANG MANGUE in the amount of €100,000 in favour of the firm PINTO.

A proposal was made to file a suspicious transaction report, but due to "an internal human error" it was never carried through. A file containing all the bank transaction documents relating to Teodoro NGUEMA OBIANG MANGUE for the period 2005-2011 was recovered by the investigators (D. 2114).

In the light of these elements, the investigations focused on the nature of the relationship between SOCIETE GENERALE and its subsidiary SGBGE with regard to the unusual manner in which Teodoro NGUEMA OBIANG MANGUE's bank accounts functioned.

On 10 January 2014, Emmanuel PIOT, a "supervisor" in the Banque Hors France Métropolitaine ("banking outside metropolitan France" — BHFM) department of SOCIETE GENERALE, explained that exchanges between the various managers of SGBGE and the management of BHFM took place mostly by e-mail or by telephone and that he had been informed of certain problems. He had thus been in regular telephone contact with Jean-Marie NAVARRO and subsequently with Pierre NAHUM, approximately two or three times a week. He confirmed that the BHFM department monitored the situation on a regular basis. Regarding the transactions observed on the accounts of Teodoro NGUEMA OBIANG MANGUE, he explained that the situation had been analysed internally and that it had been tacitly agreed to validate those transactions as ones of which the manager of the subsidiary bank and the management of BHFM had been made aware (D. 2055).

The general inspection unit of the bank had been informed of the problems posed by the functioning of SGBGE and had consequently conducted an on-site inspection. Thereafter, Nicolas PICHOU, the inspector in charge of the case, had drafted a note, dated 23 March 2010, addressed to his superiors.

It is apparent from the evidence that came to light during this inspection that SGBGE was the source of financial flows to France and to the United States, as identified by the British NGO Global Witness and by an investigative committee of the United States Senate in reports raising questions about the source of the funds, given that they were disproportionate to Teodoro NGUEMA OBIANG MANGUE's official income in his capacity as minister. These suspicious flows did indeed derive from transfer orders made by Teodoro NGUEMA OBIANG MANGUE. In the course of the on-site inspection, the inspector observed that some of the funds in the accounts of Teodoro NGUEMA OBIANG MANGUE came from the Treasury of Equatorial Guinea for no known reason. Rather, the explanations provided in the transfer orders were not credible. In his report, the inspector added that the media had previously reported on the criminal origin of funds deriving from acts of corruption or of misappropriation of public funds that had gone to the son of the President of the Republic. It was indeed apparent, from invoices that were submitted, that SGBGE had carried out transfers enabling the acquisition of various buildings, a yacht, a private jet and a number of luxury cars, as well as other extravagant expenditure, which, in the inspector's view, might justifiably shock the public at large, given the level of development in the country.

The inspector noted in particular the acquisition of a building in Brazil, a villa in Malibu, a plot of land in Morocco and the building at 42 avenue Foch in Paris. He was able to examine the invoices and SWIFT receipts, held in the safe of the manager of SGBGE, in respect of each of these purchases. He recalled that, first, US$47 million had been transferred to the United States in 2006 for the purchase of a plane, although the transaction had not been finalized. He also noted extravagant spending by Teodoro NGUEMA OBIANG MANGUE for the purchase of antiques at an auction for the sale of the Saint Laurent/Bergé collection, and pointed to the fact that the tools for anti-money laundering checks had not been operational at SGBGE.

Pedro TOMO concluded that if the complaint concerning the "ill-gotten gains" were to succeed, or if the United States were to mount pressure, the group would quickly have to define a line of defence in respect of the transactions made and adopt a firmer position with regard to the OBIANG family, in the face of the media pressure the group might come under.

From 11 February 2014, Gérard LACAZE, Patrick LE BUFFE and Bruno MASSEZ, employees of SOCIETE GENERALE, were questioned in custody (D. 2076 to 2110).

On 13 February 2014, the headquarters of SOCIETE GENERALE were searched (D. 2108). The investigators conducted a further on-site visit on 20 February 2014 in order to recover the documents, working notes and files of Nicolas PICHOU, who had been in charge of the inspection undertaken at SGBGE in late 2009 and during 2010 (D. 2061).

On 6 May 2014, Nicolas PICHOU, then sales manager at SOCIETE GENERALE Ghana, provided details of the inspection he had carried out at SGBGE, SOCIETE GENERALE's smallest subsidiary. He stated that at first his inspection had not been supposed to cover the NGUEMA OBIANG family, but that he had done research beforehand and was aware of the American report mentioning the SGBGE subsidiary. He had been advised to be cautious because of the local context, but had gained access to the bank accounts of Teodoro NGUEMA OBIANG MANGUE and those of the company SOMAGUI. He had conducted his on-site inspection from 22 to 26 February 2010. On his return, he had informed his superiors of the particular situation he had encountered. He had returned to Equatorial Guinea on 24 May 2010 and continued his inspection until 9 July 2010. He confirmed the contents of his note of 23 March 2010, according to which he had discovered misappropriated funds originating from bank accounts in the name of Teodoro NGUEMA OBIANG MANGUE and SOMAGUI, and, more specifically, the existence of funds used to credit the account of Teodoro NGUEMA OBIANG MANGUE originating either from the Treasury, with no credible supporting documentation and/or transfer orders, or from transfers from logging companies used to credit the account of SOMAGUI (D. 2074).

On 30 July 2015, SOCIETE GENERALE was summoned for questioning at first appearance for having in Paris, between January 2005 and December 2011, and in any event on national territory for a period not covered by prescription, assisted in investing, concealing or converting the direct or indirect proceeds of a felony or misdemeanour, in this instance by allowing its subsidiary SGBGE to execute transfer orders from the account opened in the books of that subsidiary in the name of Teodoro NGUEMA OBIANG MANGUE for amounts estimated at approximately €65 million to the United States, Switzerland or eurozone countries.

The bank was questioned regarding the fact its BHFM department, which supervised the activity of subsidiaries outside metropolitan France and was headed by Jean-François MATTEI, a member of the executive committee from January 2008, could not have been unaware that the account was funded through transfers originating from the Treasury of Equatorial Guinea and from commercial companies, in particular the company under Equatorial Guinean law SOMAGUI FORESTAL and the Malaysian company SHIMMER, without these credit transactions appearing to be justified by any legitimate economic, commercial or financial transaction allowing the transfer of funds from public monies or of funds derived from breach of trust and corruption (D. 2801).

The general counsel representing the SOCIETE GENERALE group contested the facts and expressed his surprise, pointing to several pieces of evidence presented as background but which were important to take into account.

He recalled that all the suspicious transactions had taken place in Equatorial Guinea, in a company in which SOCIETE GENERALE had a shareholding but which was not under its control. SOCIETE GENERALE had acquired its shareholding in 1997 or 1998 at the request of the French Government. It was a small organization with only four expatriate members of staff. SOCIETE GENERALE was not a majority shareholder on the board of directors, and the chairman of the board was also the Minister for the Budget of Equatorial Guinea. He added that the State of Equatorial Guinea was represented by two deputy directors and the managing director of the organization, in whose appointment SOCIETE GENERALE was involved, although it was trapped between the chairman of the board and the deputy managing directors. The organization's supervisory authority, COBAC (the Central African Banking Commission), was also headed by an Equatorial Guinean governor.

He noted that from an operational standpoint, SOCIETE GENERALE did not have access to the accounts held by SGBGE and did not have the means to oversee the transactions undertaken by that organization, which, in his view, operated in a very particular context, marked by very strong interference from the local authorities in how the shareholding functioned, in addition to which the same authorities exerted pressure on the governance bodies. These factors had moreover led SOCIETE GENERALE to believe that the local organization was in reality under the *de facto* control of the local authorities.

More generally, SOCIETE GENERALE considered that it had no means to act on the suspicious movements that had been observed. Its general counsel noted that it emerged from the statements of the agents of the local organization that the suspicious transactions had been brought to their attention *a posteriori* and that, therefore, SOCIETE GENERALE, as a mere shareholder, could not have known about them. While the BHFM department was able, sporadically and at the express request of the local organization, to give recommendations on managing the anti-money laundering mechanism, SOCIETE GENERALE, in his view, could not be held accountable, as a shareholder, for those recommendations not being followed at local level. Since the local organization was under the governance and supervision of COBAC and AMIF, responsible for the anti-money laundering mechanism in the geographical area in which the local organization was based, it was not for SOCIETE GENERALE to substitute itself for the anti-money laundering authorities supervising the local organization.

Following the first appearance questioning, the bank was given the status of *témoin assisté* (D. 2801).

The investigations revealed that the assets of Teodoro NGUEMA OBIANG MANGUE had also been paid for with the proceeds from the misuse of corporate assets (D. 462, sealed FOCH SERVICE/CL, D465 sealed FOCH SERVICES CL PIECES). In parallel to the financing channels described, the expenditure and lifestyle of Teodoro OBIANG were funded in particular by the company SOMAGUI FORESTAL. The bank statements of FOCH SERVICES for the period 2007-2011 showed transfers originating from that company in the amount of some €2.8 million.

Further personal expenditure by Teodoro NGUEMA OBIANG MANGUE was paid, in full or in part, by SOMAGUI, such as the acquisition of a number of cars (Maserati MC 12 with registration number 527 QGR 75 valued at €709,000, Bentley Azure with registration number 855 RCJ 75 valued at €347,010, Rolls Royce Phantom with registration number 627QDG 75 valued at €395,000, Ferrari 599 GTO Fi with registration number BB-600-SD valued at €200,000, Bugatti Veyron with registration number 616 QXC 75 valued at €1,196,000, Bugatti Veyron with registration number W-718-AX valued at €1,959,048 and Mercedes Maybach with registration number 101 PXE 75 valued at €530,000).

Based on the documents transmitted by the American authorities, it has also been established that, in 2004, Teodoro NGUEMA OBIANG MANGUE's lawyer had assured the lawyer of the City National Bank in Beverly Hills that the sum of US$999,950 million came from a legal source, namely his companies SOMAGUI FORESTAL and SOFONA, based in Equatorial Guinea (D. 2135).

Aware of the fact that it would be difficult for him to explain away the mounting evidence showing that he had acquired and paid for a large number of movable and immovable assets in France out of the proceeds of offences committed in his country, in particular breaches of probity, Teodoro NGUEMA OBIANG MANGUE focused his defence exclusively on a criminal immunity that he claimed to enjoy and on the diplomatic protection attaching to those assets.

The judicial investigation confirmed that neither he nor his assets could claim to enjoy any immunity enabling him to evade judicial action in France.

2.2 The status of Teodoro NGUEMA OBIANG MANGUE and of his assets in France: absence of immunity

Teodoro NGUEMA OBIANG MANGUE, who was the Minister for Agriculture and Forestry when the judicial investigation opened, was appointed Second Vice-President of Equatorial Guinea, in charge of Defence and State Security, on 21 May 2012 (Decree No. 64/2012 dated 21 May 2012), shortly after he received his first judicial summonses.

Throughout the investigation, he has devoted his energy, through his French counsel, to avoiding any explanation as to the substance of the case and claiming to enjoy criminal immunity linked to his status as minister then second vice-president of his country. Similarly, he claimed that the seizure or attachment of property, including the townhouse, was unlawful.

On 10 October 2011, the investigating judges made enquiries with the Protocol Department of the Ministry of Foreign Affairs as to his potential immunity and the status of the building located at 42 avenue Foch in Paris (16th arrondissement) (D. 400). On 11 October 2011, the department indicated that Teodoro NGUEMA OBIANG MANGUE was not a diplomatic agent active in France and that he was not registered with the Protocol Department. He was therefore to be considered as being subject to ordinary law (D. 401). Furthermore, the building had never been recognized as forming part of the diplomatic mission of the Republic of Equatorial Guinea. It was also, therefore, to be considered as being subject to ordinary law (D. 401).

Seised by Teodoro NGUEMA OBIANG MANGUE, the *Cour d'appel*, and subsequently the *Cour de cassation*, emphatically set aside the alleged immunity behind which he believed he could shelter (D. 551, 695-702, 705, 1866, 2171, 2270).

He was summoned by the investigating judges a number of times, either directly or through diplomatic channels, and on each occasion failed to attend.

He was summoned on 23 January 2012 to a first appearance to be held on 1 March 2012, and failed to appear (D. 551).

He was summoned again to appear on 11 July 2012, and also failed to appear (D. 695, 705).

Following his failures to appear, on 13 July 2012, the investigating judges issued a warrant for his arrest. Teodoro NGUEMA OBIANG MANGUE contested the arrest warrant by means of an application for annulment.

Ruling on this application, the *Chambre de l'instruction* stated that, while international custom, in the absence of international provisions to the contrary, bars the prosecution of States before the criminal courts of a foreign State, a custom extending to organs and entities which are an emanation of that State, and to their agents, in respect of acts falling within the sovereignty of the State concerned, this principle is limited to the exercise of State functions (*Ch. Crim.* 19 January 2010, 14 May 2002 and 23 November 2004).

In this case, the acts of money laundering and/or handling offences committed on French national territory in respect of the acquisition of movable and immovable assets for solely personal use were considered to be separable from the exercise of State functions protected by international custom under the principles of sovereignty and diplomatic immunity.

Consequently, in the view of the *Cour d'appel*, there is no merit in the Republic of Equatorial Guinea's claim that the procedure was irregular with regard to its Head of State and its Minister for Agriculture and Forestry, who became Second Vice-President of the Republic the day he found out that he had been issued with a summons to appear before the investigating judge to

respond to a possible judicial examination and that he was the subject of an international arrest warrant.

The *Cour d'appel* further took the view that, by a judgment of 8 April 2010, the *Chambre criminelle* of the *Cour de cassation* had found that, regarding the scope of the diplomatic immunity granted by the Vienna Convention of 18 April 1961 and in light of the Headquarters Agreement of 2 July 1954 between France and UNESCO, diplomatic agents who are nationals of the receiving State enjoy immunity from jurisdiction and inviolability only in respect of acts performed in the course of their duties. However, this is not the situation in the present case, since the acts attributed to Teodoro NGUEMA OBIANG MANGUE fall exclusively within the scope of his private life in France.

According to the *Chambre de l'instruction*, the same analysis must prevail with regard to the distinct capacities of Minister for Agriculture and Forestry and Second Vice-President of the Republic of Equatorial Guinea, and it should be noted that the latter capacity was conferred on Teodoro NGUEMA OBIANG MANGUE on 21 May 2012, on which date the procedural measures, such as the initial summons of 22 January 2012, led the individual concerned to expect that he might be placed under judicial examination, or that an arrest warrant might be issued against him.

In the view of the *Cour d'appel*, the investigating judges were therefore justified in issuing an arrest warrant against him, since he had refused to appear or respond to the two summonses to a first appearance or for placement under judicial examination concerning acts committed in France in the context of his private life.

On 14 November 2013, the investigating judges sent an international letter rogatory to the judicial authorities of Equatorial Guinea, seeking the judicial examination of Teodoro NGUEMA OBIANG MANGUE, on the basis of the United Nations Convention against Transnational Organized Crime of 15 November 2000. It was executed by the authorities of Equatorial Guinea.

On 18 March 2014, at a hearing held in Malabo (Equatorial Guinea) which the investigating judges attended by videoconference, Teodoro NGUEMA OBIANG MANGUE was formally placed under judicial examination for having in Paris and on national territory during 1997 and until October 2011, in any event for a period not covered by prescription, assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms EDUM, SOCAGE and SOMAGUI FORESTAL, acts characterized as laundering of the proceeds of the above-mentioned offences (D. 1860, 1866, 2171).

He refused to answer the questions put to him, simply stating that, in his capacity as Second Vice-President of the Republic of Equatorial Guinea in charge of defence and State security since 21 May 2012, he enjoyed full jurisdictional immunity during the time he exercised his functions. Since he had not waived that immunity and it had not been removed by his government, he considered that it was impossible for him to answer the questions put to him (D. 1860, 1866).

On 31 July 2014, Teodoro NGUEMA OBIANG MANGUE submitted an application for annulment to the *Chambre de l'instruction* seeking to have the judicial examination annulled, on the grounds of his alleged immunity, and the initial civil-party application declared inadmissible.

This application was rejected by the court, which, after recalling that it was established jurisprudence that the international custom barring the prosecution of States before the criminal courts of a foreign State extends to organs and entities which are an emanation of the State, and to

their agents, in respect of acts falling within the sovereignty of the State concerned, found that the limits of this principle lay in the very nature of the acts forming the subject of the proceedings, it being necessary for those acts to be related to State functions in order to enjoy any particular protection. It decided that since the acts committed on French national territory consisted, in particular, in the acquisition of movable and immovable assets for solely personal use between 1997 and 2011, they were separable from the exercise of such State functions.

The *Chambre de l'instruction* further considered that the condition regarding the relationship between the alleged acts and the exercise of sovereignty also applied to the diplomatic immunity provided for in the Vienna Convention of 18 April 1961, and described the appointment of the individual concerned to the post of Second Vice-President as an "appointment of convenience".

Ruling on the appeal submitted by Teodoro NGUEMA OBIANG MANGUE, the *Cour de cassation* upheld the decision of the *Chambre de l'instruction* in a judgment of 15 December 2015. The *Chambre criminelle* rejected the ground of appeal which, *inter alia*, complained that the contested judgment had not applied personal immunity in due consideration of the functions exercised by the individual under examination. It endorsed the refusal to afford immunity from criminal jurisdiction, stating first, in respect of personal immunity, that "the functions of the applicant are not those of a Head of State, Head of Government or Minister for Foreign Affairs", and, second, regarding substantive immunity, upholding the analysis of the *Cour d'appel* on the grounds that it was clear from the judgment and the pleadings that all the alleged offences, the proceeds thereof having been laundered in France, and should they be established, had been committed for personal gain before he had taken up his current functions, at a time when he was performing the functions of the Minister for Agriculture and Forestry.

Regarding the admissibility of the civil-party application, contested on the basis of an alleged violation of Article 85 of the Code of Criminal Procedure, the *Chambre criminelle* simply recalled the scope of the jurisdiction of the *Chambre de l'instruction* when it is seised of an application for the annulment of procedural measures. It reproached the latter court for ruling on the request of the individual under examination to annul the investigative measures in respect of the alleged inadmissibility of the civil-party application, but took the view that the judgment was not liable to censure "since that objection had to be submitted to the investigating judge so that he could issue a decision by means of an appealable order".

Nor were the arguments put forward by Teodoro NGUEMA OBIANG MANGUE in his attempt to protect his assets from judicial seizure successful.

The Protocol Department of the Ministry of Foreign Affairs issued an opinion on the status of the building located at 42 avenue Foch in Paris (D. 400, 401, 537-541, 543), stating clearly that the building is not included among those covered by the Vienna Convention of 18 April 1961 on Diplomatic Relations, and that it was 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.

By Note Verbale, the Embassy of the Republic of Equatorial Guinea informed the Protocol Department that "the Embassy ha[d] for a number of years had at its disposal a building located at 42 avenue Foch, Paris (16th arr.)" which it used for the performance of the functions of its diplomatic mission without having given official notification thereof. Referring to Article 22 of the Vienna Convention cited above, and stating that the building formed part of the premises of the diplomatic mission, it then officially requested the French authorities to ensure the protection of the said premises.

The Protocol Department replied, by Note Verbale, that the building did not form part of the premises of the Republic of Equatorial Guinea's diplomatic mission, that it fell within the private domain and was, as such, subject to ordinary law. It advised the authorities of Equatorial Guinea that it was unable to grant the Embassy's request.

It further recalled that a building with diplomatic status had to be declared as such to the Protocol Department, with a specific date of entry into the premises. Once it had been verified that the building was actually assigned to a diplomatic mission, the Protocol Department would inform the French Government that it had been officially recognized in accordance with the relevant provisions of the Vienna Convention of 18 April 1961 on Diplomatic Relations. In this instance, the building at 42 avenue Foch in Paris has never been recognized by the Protocol Department as forming part of the diplomatic mission of the Republic of Equatorial Guinea.

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 OBIANG MANGUE and is for his personal use, by claiming that it should enjoy diplomatic protection.

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.

DISCUSSION

All the appropriate steps having been undertaken to determine the truth with regard to the acts which took place on national territory relating to original offences committed in Equatorial Guinea, this chapter of the judicial investigation was rightly considered to have ended.

Regarding the facts relating to Teodoro NGUEMA OBIANG MANGUE

In this part of the investigation, Teodoro NGUEMA OBIANG MANGUE was placed under judicial examination for laundering the proceeds of the misuse of corporate assets, laundering the proceeds of the misappropriation of public funds, laundering the proceeds of breach of trust and

laundering the proceeds of corruption, by having in Paris and on national territory during 1997 and until October 2011, in any event for a period not covered by prescription, assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms EDUM, SOCAGE and SOMAGUI FORESTAL.

His placing under judicial examination for the offence of money laundering assumes that it has been established that he assisted in an investment, concealment or conversion transaction through acts of investing, concealing or converting the funds.

It must then be established that those funds derive from predicate or "initial" offences, in this instance from corruption, misappropriation of public funds, breach of trust and misuse of corporate assets, which offences it must be possible to characterize.

In accordance with the principle of autonomy of the offence of money laundering, it is recalled that the fact that the initial offences were committed abroad does not bar proceedings when the money laundering offence was committed on the territory of the [French] Republic. Since money laundering is a separate offence, the place where the initial offence was committed is irrelevant. It is sufficient simply to demonstrate that the acts of money laundering were committed on the territory of the [French] Republic in order to establish French legal and judicial jurisdiction.

Similarly, it is of little importance to verify the double criminality of the initial offences, since it is irrelevant, again because of the principle of autonomy of the offence of money laundering.

The criminal law texts defining the offence of money laundering thus require neither that the offences which were the source of the laundered sums occurred on national territory, nor that the French courts have jurisdiction to prosecute them. 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.

In these proceedings, the judicial investigation has established that, while he was Minister for Agriculture and Forestry of his country, Teodoro NGUEMA OBIANG MANGUE, son of Teodoro OBIANG NGUEMA, President of the Republic of Equatorial Guinea, acquired in France, between 2007 and 2011, either directly or through nominees or shell companies, movable and immovable assets valued at several tens of millions of euros. These assets have been identified, and some have been seized.

The methods whereby these assets were acquired have been clearly established.

— Teodoro NGUEMA OBIANG MANGUE invested in *a collection of high-end luxury vehicles*. Following the discovery in Paris of his collection of cars, a number of these vehicles were seized and even sold before judgment.

— He also invested in the purchase of furniture, works of art, paintings, jewellery and luxury clothing.

These purchases were paid for directly in his name but also through the Equatorial Guinean companies SOMAGUI FORESTAL, SOCAGE and EDUM.

— In January 2005, he also acquired for the sum of 25 million euros, through the purchase of shares in Swiss companies, the official owners, a *property located at 42 avenue Foch* in Paris, valued at 110 million euros.

Major work was carried out on the property between 2005 and 2007 for a sum estimated at 12 million euros, which for the most part came from a bank account in his name, but also from the bank account of SOMAGUI FORESTAL.

Even if the Swiss companies are the official owners of the property, Teodoro NGUEMA OBIANG MANGUE is the real owner, occupying it on a private basis and clearly conducting himself as the owner of the premises.

The purchase agreement of 18 December 2004 for the shares in the Swiss companies for an amount of €25,015,000 was found in Switzerland and shows that he is indeed the private buyer of the property.

The service charges and management fees for the property were paid out of financial flows from Equatorial Guinea, more specifically from SOMAGUI FORESTAL.

It is apparent from a capital gains declaration for 2011 that Teodoro NGUEMA OBIANG MANGUE transferred his shareholder's rights in the co-owning Swiss companies to the State of Equatorial Guinea. This transaction has all the marks of legal window-dressing intended as an attempt to protect the building from an attachment measure.

The investigations have thus established that the building is private property and is in no circumstances a diplomatic mission in French territory.

This building, the property of Teodoro NGUEMA OBIANG MANGUE and of which he enjoys free disposal, does not enjoy any legal protection since it is not part of the diplomatic mission of the Republic of Equatorial Guinea. It was attached, on reasonable grounds, as part of the present judicial investigation.

The investigations have also made it possible to determine the manner in which he was able to finance his assets. It has thus been established that the funds used to pay for them derived from offences committed in the Republic of Equatorial Guinea.

Teodoro NGUEMA OBIANG MANGUE, in his capacity as minister from 1996 to 2012, accumulated his wealth by investing in France the proceeds of the misappropriation of public funds, corruption and the misuse of corporate assets, offences committed in Equatorial Guinea, as demonstrated by analysis of the various financial flows and by the testimony of a number of witnesses which has made it possible to establish the manner in which he illegally captured funds in his own country that were subsequently invested in France.

Teodoro NGUEMA OBIANG MANGUE enriched himself by taking payments from private companies in return for administrative authorizations, by misappropriating public funds from the Treasury of Equatorial Guinea and by using funds belonging to a number of Equatorial Guinean companies for personal purposes.

These acts constitute offences of corruption, misappropriation of public funds, misuse of corporate assets and breach of trust.

He subsequently invested, concealed and converted those funds in France by accumulating wealth consisting of luxury movable and immovable assets, thus laundering in France the proceeds of those offences committed in Equatorial Guinea.

That he is the perpetrator of the predicate offence does not exclude him from being the perpetrator of the consecutive offence of money laundering. He enjoys no immunity that might bar prosecution.

In the light of all of the evidence gathered during the proceedings, Teodoro NGUEMA OBIANG MANGUE should be referred for trial for laundering the proceeds of a felony or misdemeanour, in this instance of the misuse of corporate assets, misappropriation of public funds, breach of trust and corruption.

Regarding the facts relating to SOCIETE GENERALE

SOCIETE GENERALE was given the status of *témoin assisté* for having in Paris, between January 2005 and December 2011, and in any event on national territory for a period not covered by prescription, assisted in investing, concealing or converting the direct or indirect proceeds of a felony or misdemeanour, in this instance by allowing its subsidiary SGBGE to execute transfer orders from the account opened in the latter's books in the name of Teodoro NGUEMA OBIANG, for amounts estimated at approximately €65 million, to the United States, Switzerland or eurozone countries.

It transpired that SGBGE, a subsidiary of SOCIETE GENERALE, had played a major role in the transfer of financial flows abroad from bank accounts used by Teodoro NGUEMA OBIANG MANGUE, either on a personal basis or in the names of the companies SOMAGUI FORESTAL, EDUM and ELOBA.

The investigations raised questions about the manner in which SOCIETE GENERALE had allowed its subsidiary SGBGE to execute transfer orders from the account opened in the latter's books in the name of Teodoro NGUEMA OBIANG, for amounts estimated at approximately *€65 million, to the United States, Switzerland or eurozone countries, whereas its Banque Hors France Métropolitaine ("banking outside metropolitan France" — BHFM) department, which supervised the activity of subsidiaries outside metropolitan France and was headed by Jean-François MATTEI, a member of the executive committee from January 2008, could not have been unaware that the account was funded through transfers originating from the Treasury of Equatorial Guinea, and in particular the company under Equatorial Guinean law SOMAGUI FORESTAL and the company SHIMMER, without these credit transactions appearing to be justified by any legitimate economic, commercial or financial transaction allowing the transfer of funds from public monies or of funds derived from breach of trust and corruption*.

The particular circumstances in which this subsidiary of SOCIETE GENERALE operated in Equatorial Guinea, more specifically with regard to the bank accounts of the son of the President of the Republic of that country, and the absence of any genuine means of action or oversight on the part of SOCIETE GENERALE, led the investigating judge to grant this legal person the status of *témoin assisté* in respect of the acts in question, which were characterized as laundering of the proceeds of the offences of corruption, misappropriation of public funds and breach of trust.

In the light of these elements, there is insufficient evidence that SOCIETE GENERALE itself willingly assisted or took part in money laundering activity involving the funds transferred by Teodoro NGUEMA OBIANG MANGUE and subsequently invested in movable and immovable assets in France.

Regarding the facts relating to Mourad BAAROUN and Aurélie DELAURY née DERAND, as chief executives (*gérants*) of FOCH SERVICE

Mourad BAAROUN and Aurélie DELAURY were questioned in their capacity as chief executives of FOCH SERVICE, an entity set up in France by Teodoro NGUEMA OBIANG MANGUE, financed by fraudulently derived funds originating from Equatorial Guinean commercial companies, to pay for the costs relating to the property located at 42 avenue Foch in Paris.

They both enjoyed the status of *témoin assisté* in respect of complicity in money laundering.

The investigation established that they effectively handled the administrative and financial management of FOCH SERVICE from 2010 to 2012.

Even though numerous signs should have alerted them to the manner in which the company operated, in particular the fact that invoices were sent to companies with no economic ties to the company they managed, it became apparent that they had been placed in the position of chief executive without necessarily having the skills or the means to have a detailed understanding of everything involved.

In any event, it has not been demonstrated that they were aware of the fraudulent origin of the funding of FOCH SERVICE's accounts and that, in their capacity as chief executives of that company, they therefore knowingly assisted Teodoro NGUEMA OBIANG MANGUE in a money laundering operation.

The judicial investigation has not established in respect of Mourad BAAROUN and Aurélie DELAURY acts of complicity in laundering misused corporate assets or the proceeds of breach of trust or complicity in laundering misappropriated public funds, which acts were notified to them at the time of their questioning at first appearance.

More generally, apart from Teodoro NGUEMA OBIANG MANGUE himself, the judicial investigation has not been able to establish, in respect of any person, acts of complicity in or concealment of misappropriation of public funds, complicity in money laundering, misuse of corporate assets, complicity in and concealment of the misuse of corporate assets, breach of trust, complicity in and concealment of breach of trust, which are liable to criminal proceedings in France and which are cited in the referral, pursuant to the complaint with civil-party application, the application to open an investigation and the application to extend the investigation, in respect of the chapter relating to Equatorial Guinea.

It will therefore be requested that these counts be dismissed.

The evidence gathered against Teodoro NGUEMA OBIANG MANGUE appears sufficient to order the partial referral of the proceedings against him, following separation of the complaints in the interest of the proper administration of justice concerning the chapter relating to Equatorial Guinea.

INFORMATION CONCERNING THE PERSON

Teodoro NGUEMA OBIANG MANGUE, an Equatorial Guinean national, was born on 25 June 1969 in Akoakam Esangui, Mongomo District, Wele Nzas Province, Equatorial Guinea, to Teodoro OBIANG NGUEMA MBASOGO and Constancia MANGUE NSUE OKOMO.

Son of the President of the Republic of Equatorial Guinea, he served as Minister for Agriculture and Forestry in his country before being appointed Second Vice-President of the Republic in charge of Defence and Security in 2012.

He lives in Malabo, Equatorial Guinea.

REQUEST FOR PARTIAL DISMISSAL

Whereas the investigation has produced insufficient evidence that any person has committed acts of complicity in and concealment of misappropriation of public funds, complicity in money laundering, misuse of corporate assets, complicity in and concealment of misuse of corporate assets, breach of trust, complicity in and concealment of breach of trust, which are liable to criminal proceedings in France and which are cited in the referral, pursuant to the complaint with civil-party application, the application to open an investigation and the application to extend the investigation, concerning the Republic of Equatorial Guinea.

Having regard to Articles 175 and 177 of the Code of Criminal Procedure, the senior judge in charge of the investigation is requested to find that there are no grounds to proceed against any person on these counts;

REQUEST FOR SEPARATION OF THE COMPLAINTS AND PARTIAL REFERRAL BEFORE THE *TRIBUNAL CORRECTIONNEL*

Whereas the investigation has produced sufficient evidence that Teodoro NGUEMA OBIANG MANGUE:

In Paris and on national territory, during 1997 and until October 2011, in any event for a period not covered by prescription, assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms EDUM, SOCAGE and SOMAGUI FORESTAL;

Having regard to Articles 175, 176, 179 and 182 of the Code of Criminal Procedure;

Consequently, the senior judges in charge of the investigation are requested to order the separation of the complaints and to refer Teodoro NGUEMA OBIANG MANGUE before the Paris *Tribunal correctionnel* to be tried in accordance with the law.

Done at the National Financial Prosecutor's Office, 23 May 2016

Financial Prosecutor

(Signed) Jean-Yves LOURGOUILLOUX,

Assistant Financial Prosecutor.

ANNEX 31

Financial Prosecutor at the Paris *Tribunal de grande instance*, Summons, 21 September 2016

Financial Prosecutor at the Paris *Tribunal de grande instance*, Summons, 21 September 2016

[Translation]

Association of Bailiffs
Boulevard du palais
75001 Paris

SUMMONS TO APPEAR

Having regard to Article 550 *et seq*. of the Code of Criminal Procedure,

I have the honour to request you to serve a summons to appear on the following person, and to return the duly completed confirmation of service to me within a maximum of ten days:

Mr. NGUEMA OBIANG MANGUE Teodoro

born on 25 June 1969 in AKOAKAN ESANGUI (EQUATORIAL GUINEA), with an address for service at the office of Mr. MARSIGNY Emmanuel, 203 bis Boulevard Saint Germain, 75007 Paris.

Accused of

having in Paris and on national territory during 1997 and until October 2011, in any event for a period not covered by prescription, assisted in making hidden investments or in converting the direct or indirect proceeds of a felony or misdemeanour, in this instance offences of misuse of corporate assets, misappropriation of public funds, breach of trust and corruption, by acquiring a number of movable and immovable assets and paying for a number of services out of the funds of the firms EDUM, SOCAGE and SOMAGUI FORESTAL;

acts set forth and characterized by the Court in its order for partial dismissal and partial referral of proceedings to the *Tribunal correctionnel*, dated 5 September 2016.

The hearing on the merits will take place before the 32nd *Chambre correctionnelle* (premises of the 14th *Chambre correctionnelle* — staircase D, first floor) of the Paris *Tribunal correctionnel*, entrance at 10 Boulevard du palais, 75001 Paris, on:

Monday 24 October 2016 at 1.30 p.m.

Done at the Office of the Financial Prosecutor
on 21 September 2016

On behalf of the Financial Prosecutor

Jean-Marc TOUBLANC,

Deputy Prosecutor.

LIST OF DOCUMENTS TO BE PRESENTED

You are to be tried by the *Tribunal correctionnel*.

You must attend the hearing in person.

You may be assisted by:

— a lawyer of your choice;

— a Court-appointed lawyer, who will be chosen by the Chairman of the Bar. Should you wish to make use of this option, you must make a request to that effect in your letter.

Alternatively, you may request, by letter to the President of the Tribunal, to be tried in absentia, being represented by:

— a lawyer of your choice;

— a Court-appointed lawyer, who will be chosen by the Chairman of the Bar. Should you wish to make use of this option, you must make a request to that effect in your letter.

You must pay the lawyer's fees, unless you have legal expenses insurance or meet the conditions for legal aid. The Legal Aid Office of your nearest *Tribunal de grande instance* will provide you with full details of those conditions.

You may obtain legal advice, free of charge if appropriate, from organizations offering legal assistance and support.

You (or your lawyer) may ask to receive copies of the materials in the case file.

You (or your lawyer) may request, in written submissions, that any action be carried out which you consider necessary for the establishment of the truth. These submissions may be sent before the opening of the hearing, by registered letter with advice of delivery or by hand-delivered letter to the Registry with acknowledgment of receipt.

If found guilty, you are required to pay a fixed procedural fee of €127, in addition to any fines ordered by the Court.

If you fail to appear in person or to be represented by a lawyer at the hearing and are found guilty, the fixed procedural fee will increase to €254 instead of €127.

As soon as the hearing has concluded, you must report to the:

SENTENCE FULFILMENT OFFICE

— to receive an explanation of the decision rendered **as it applies to you personally**, and

— to enable the **fulfilment of the decision to begin**.

You should bring the following documents with you, which will help to establish your identity and to enable the Tribunal's decision to begin to be applied:

— **proof of identity** (a valid identity card, passport or residence permit or a renewal request for such a document);

— **proof of address** (rent receipt, utility bill or, if you are a lodger, proof of lodging, a photocopy of the host's identity document and a rent receipt or utility bill from the host);

— **a means of payment** (cheque book or bank card);

— **your driving licence**;

— **your employment contract**, if applicable, together with a statement from your employer confirming your hours of work and your three most recent payslips;

— **your training contract**, if applicable, and a statement from the training centre you attend confirming your timetable;

— **benefits statements**, if you are unemployed or in receipt of RSA *(revenu de solidarité active)*;

— **your most recent tax assessment or notice of non-liability**;

— **other proof of income**.

_____

ANNEX 32

**Embassy of Equatorial Guinea, letter delivered in person to Mr. Alain Juppé,
Minister of State, Minister for Foreign Affairs,
28 September 2011**

Embassy of Equatorial Guinea, letter delivered in person to Mr. Alain Juppé, Minister of State, Minister for Foreign Affairs, 28 September 2011

[Translation]

The Republic of Equatorial Guinea wishes to register the strongest protest against the clear attacks on its sovereignty occurring at this time, under the guise of a judicial investigation, deliberately publicized via the media, by associations whose legitimacy remains to be demonstrated.

In particular, it condemns the searches and attachments targeting the person of its Minister for Agriculture, Minister of State, conducted within the framework of a judicial investigation whose very existence is contrary to both international law (I) and the principles of French criminal law (II).

Indeed, the most fundamental principles preclude the French criminal courts from entertaining a complaint from an association relating to alleged acts of money laundering and handling misappropriated foreign public funds.

I. On the violation of international law

1. First, the initiation of a judicial investigation into money laundering and handling misappropriated public funds in theory requires the characterization of the constituent elements of these three offences.

Money laundering and handling are what are known as derivative offences which require a determination that a prior, predicate offence was committed. This requirement has been laid down by the *Chambre criminelle* for both offences (for handling, see *Chambre criminelle*, 22 July 1959, *Bull. crim.*, No. 371; for money laundering, see *Chambre criminelle*, 25 June 2003, *Dr. pénal* 2003, *comm*. 142).

2. It follows that prosecution for handling offences and money laundering is necessarily dependent on the existence of a prior offence, which must be clearly characterized: in the instant case, the misappropriation of foreign public funds.

3. Within the context of this judicial investigation, this requirement means that the offences of handling and money laundering cited in the complaint can only be punished once a prior offence of misappropriation of Equatorial Guinean public funds has been characterized.

4. Characterizing that offence is the responsibility of the French investigating judge and, where applicable, the French criminal courts, which must find that the offence of misappropriation of Equatorial Guinean public funds has been committed.

In so doing, the French criminal courts must determine that the use of the public funds of Equatorial Guinea by political leaders of Equatorial Guinea is a criminal offence.

The French criminal courts would thus become the judge of how those public funds are used by the public authorities of Equatorial Guinea!

5. Yet a judgment of this kind by the French courts, which concerns the use of foreign public funds, is wholly contrary to international law and a serious violation of the principle of non-interference in the internal affairs of another State (A). It is also contrary to the principle of the equality of States (B).

A. Violation of the principle of non-interference in the internal affairs of another State

6. International law provides that States have exclusive jurisdiction over their organization and functioning. From this it follows that they alone are competent to determine them:

> "[The sovereign State] assumes all the functions necessary for the organization of the community of people on that territory: constitutional organization . . ., public administration, police powers, national defence, regulation of activities engaged in by private persons in national territory, etc." (P.-M. Dupuy, *Droit International Public*, 7th ed., Dalloz, 2004, No. 107).

This idea was clearly expressed by the arbitrator Max Huber in the well-known *Island of Palmas* case:

> "Sovereignty in the relations between States signifies independence; independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a State." (International Chamber of Commerce, Reports of Arbitral Awards, Vol. II, p. 281.)

7. **This has become the standard affirmation of a State's full and exclusive jurisdiction over State functions.**

That full and exclusive jurisdiction is recognized by the Charter of the United Nations, which prohibits States from intervening in matters falling within the jurisdiction reserved to States:

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter" (United Nations Charter, Art. 2 (7))

It follows that the United Nations is not competent to intervene in matters that fall within the exclusive domestic jurisdiction of States. This evidently includes their organization and functioning.

8. The prohibition against the United Nations interfering in matters falling within the domestic jurisdiction of a State applies *a fortiori* to other States. It takes the form of the principle of non-interference in the internal affairs of another State.

This principle was, for example, the basis for the United Nations General Assembly resolution entitled "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty."

> "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State . . .
>
> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the

exercise of its sovereign rights or to secure from it advantages of any kind." (United Nations, General Assembly, Resolution No. 2131 (XX) of 21 December 1965)

The principle of non-interference was again reaffirmed by the United Nations General Assembly in Resolution No. 2625 (XXV) of 24 October 1970, entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

That resolution laid down a "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State".

9. International law accordingly provides that:

— States have exclusive jurisdiction in matters of State functions,

— States do not have the right to intervene in the State functions of other States.

10. There is no doubt that a State's use of its public funds is a matter that falls within its functions as a State. It is quite clear that it has sole responsibility for determining such use.

In any event, it is clearly not for another State to interfere in such use, let alone judge it.

Yet this is what the opening of a judicial investigation in France into the handling and laundering of misappropriated foreign public funds has led to.

This judicial investigation constitutes an intervention by France in matters concerning the use of the Republic of Equatorial Guinea's own public funds, since it entails a ruling on the lawfulness of such use.

What is more, that determination can only be made by reference to French criminal law. This constitutes a second instance of interference in the internal affairs of the Republic of Equatorial Guinea.

11. It should be noted that it does not matter that the said interference is carried out by judges, rather than political authorities. Judges are connected to the States which appoint them. They therefore have the status of domestic judges and engage the responsibility of their States.

Moreover, the prohibition against a State intervening in the internal affairs of another State applies regardless of what form that intervention may take.

There is no doubt that intervention by a judge falls into the category of prohibited interventions, since it constitutes interference in the internal affairs of another State by making a judgment on the exercise of its State functions. This is clearly the case where the judgment concerns a foreign State's use of its public funds.

12. The initiation of a judicial investigation in France into the handling and laundering of allegedly misappropriated Equatorial Guinean public funds is thus indisputably contrary to international law, and constitutes a serious violation of the principle of non-interference in the internal affairs of the Republic of Equatorial Guinea.

The Republic of Equatorial Guinea would therefore be entitled to submit a complaint before the international courts, and it of course reserves the right to do so.

The opening of such a judicial investigation also runs counter to international custom, of which the principle of non-interference is a part, and which is directly applicable in domestic courts (see *infra*).

13. Furthermore, the opening of a judicial investigation in France into the handling and laundering of allegedly misappropriated Equatorial Guinean public funds is also contrary to the principle of the equality of States.

B. On the violation of the principle of the equality of States

14. The principle of the sovereignty of States implies that they are equal.

The United Nations Charter thus lays down the principle of the sovereign equality of States (Art. 2 (1)). This was strongly reaffirmed by Resolution No. 2625 (XXV) of 24 October 1970 (cited *supra*). In that resolution, the United Nations General Assembly recalled that: "States are judicially equal."

15. That sovereign equality of States precludes a State from arrogating the right to make itself the judge of the functioning of another State.

Such a situation would in fact be contrary to the principle of equality, since it would mean that the judging State is superior to the judged State.

16. However, this is what the opening of a judicial investigation in France into the laundering and handling of misappropriated foreign public funds has led to.

By investigating the use by the Republic of Equatorial Guinea of its public funds, the investigating judge places it in an unequal position with regard to France, since France would be arrogating the right to be the judge of the functioning of its public institutions.

This clearly constitutes a violation of the principle of the sovereign equality of States.

Here again, the Republic of Equatorial Guinea is entitled to complain of this violation before the international counts, which it reserves the right to do.

II. French criminal law does not apply

17. The existence of such a judicial investigation in France also runs counter to the principles of French criminal law, given that, first, the offence of misappropriation of public funds does not apply to foreign public funds (A).

Moreover, such proceedings would conflict with the principle of French law that prohibits a State from judging the sovereign acts of another State (B).

A. The offence of misappropriation of public funds cannot be applied to foreign public funds

18. The complaint lodged by Transparency International France concerns acts of laundering and handling in France the proceeds of the misappropriation of public funds committed abroad.

It thus assumes that acts committed prior to the acts of laundering and handling may be characterized as the misappropriation of public funds within the meaning of Article 432-15 of the Penal Code.

This is a prerequisite for characterizing the offences of laundering and handling since, as noted above, those two offences require the characterization of the constituent elements of the original offence.

19. Such a characterization of course assumes that there are prior acts that fall within the scope of the original offence.

Thus, the *Chambre criminelle* quite rightly set aside a conviction for concealing a breach of professional secrecy on the ground that it failed to identify the perpetrator of the breach (*Chambre criminelle*, 4 December 2007, *Dr. pénal* 2008, *comm*. 37). It was necessary to identify the perpetrator to ascertain that the prior acts did in fact fall within the scope of the offence of breach of professional secrecy, and that offence applies only to persons who are bound by professional secrecy by law. It follows that it can only be characterized if the perpetrator is bound by secrecy, failing which, the offence is not established, since the acts do not fall within its scope (see, e.g., *Chambre criminelle*, 9 October 1978, *Bull. crim.*, No. 263; *Chambre criminelle*, 19 November 1985, *Bull. crim.*, No. 364).

20. When applied to the handling and laundering offences cited in the complaint of Transparency International France, this approach amounts to requiring that the misappropriation of public funds is applicable to acts allegedly committed abroad.

That requirement, however, is not satisfied here, since the offence of misappropriating public funds only applies to French public funds.

21. The offence of misappropriation of public funds is thus defined as:

> "The destruction, misappropriation or purloining of a document or security, of private or public funds, papers, documents or securities representing such funds, or of any other object entrusted to him, by reason of his functions or his mission, committed by a person holding public authority or discharging a public service mission, a public accountant, a public depositary or any of his subordinates, is punishable by ten years imprisonment and a fine of €150,000."

22. The definition of its constituent elements leaves no doubt that this offence only applies to France.

The notion of "public funds" only concerns French public funds, as is evidenced by the inclusion of that offence under a section of the penal code entitled "infringements of the State's authority".

Obviously, the State in question can only be the French State, given that France is not responsible for punishing infringements vis-à-vis foreign States.

Moreover, for France, funds belonging to a foreign State are not in the nature of public funds. Nor can they be characterized as private funds, since they are the property of a State.

Accordingly, it is clear that the funds concerned by the offence of misappropriation of public funds cannot under any circumstances be the funds of a foreign State.

23. The restriction of the scope of the offence of misappropriation of public funds solely to French public funds is confirmed by the general lack of jurisprudence in which this offence is applied to foreign public funds.

Obviously, this is no accident. It merely reflects the fact that this offence only concerns French public funds.

Moreover, this analysis follows from the very nature of the offence, as Lombois clearly demonstrated in his classic treaty on international criminal law:

> "French offences whose purpose is to ensure the organization and functioning of public authorities do not apply to the protection of foreign public authorities. This concerns offences which relate to:
>
> — the creation of public authorities . . .
>
> — their proper functioning: interference with the exercise of their jurisdiction or the misuse of their functions, power, usurpation of titles or functions, encroachments, interference, …" (C. Lombois, *Droit pénal international*, 2nd ed., Dalloz, 1979, No. 393.)

24. It is thus beyond doubt that the offence of misappropriation of public funds does not apply to foreign public funds.

Under these circumstances, a handling or laundering offence cannot be characterized if the prior offence is misappropriation of foreign public funds, since these acts do not fall within the French criminal law definition of "misappropriation of public funds".

Accordingly, a constituent element of handling and laundering offences in issue here is lacking: the prior commission of an act that constitutes an offence under French criminal law.

25. In the instant case, the characterization of handling and laundering misappropriated foreign public funds also conflicts with the prohibition against a State judging the sovereign acts of another State.

B. The prohibition against judging the sovereign acts of another State

26. The existence in France of a judicial investigation into the handling and laundering of misappropriated foreign public funds runs counter to international custom, because such an investigation concerns the sovereign acts of foreign States.

There can be no doubt that the use of public funds is a sovereign act of States (see *supra*).

Such use is one of the functions of a State, which fall under a State's exclusive domestic jurisdiction. That exclusive domestic jurisdiction is binding on other States which are prohibited from intervening in such matters.

27. This principle of international law is applied by the *Chambre criminelle* of the *Cour de cassation*, which will not allow French proceedings to deal with the sovereign acts of other States. This was formally decided in a judgment of 24 November 2004, according to which:

> "the international custom which bars the prosecution of States before the criminal courts of a foreign State extends to organs and entities which are an emanation of that State, and to their agents, in respect of acts which, as in this case, fall within the sovereignty of the State concerned." (*Bull. crim.*, No. 292)

It follows from this judgment that no criminal prosecution can be brought in France against foreign agents who performed acts which are the sovereign acts of a foreign State.

This prohibition is of course general in nature, such that it includes all forms of criminal prosecution. Its generality is explained by the very purpose of the prohibition, which is international custom and respect for the sovereignty of other States.

It follows that no criminal prosecution may be conducted which in any way concerns a sovereign act of another State.

28. Applied to the instant case, this prohibition means that no prosecution for the handling and laundering of allegedly misappropriated public monies of Equatorial Guinea can lawfully be conducted in France.

Such a prosecution would entail a judgment of a criminal nature regarding the State of Equatorial Guinea's use of its public funds. This would therefore result in a judgment of a criminal nature of a sovereign act of that State. As such, it would be contrary to international custom. This is in strict application of the judgment handed down by the *Chambre criminelle* on 24 November 2004.

*

* *

It follows from the foregoing that the very existence of proceedings for the handling and laundering of allegedly misappropriated Equatorial Guinean public funds constitutes a serious violation of both the principles of international law and the principles of French criminal law.

This is particularly true of the attacks on personal freedoms represented by the searches and attachments conducted within the context of such a judicial investigation.

The Republic of Equatorial Guinea accordingly firmly condemns these acts, and reserves the right to bring the violation of these principles before the competent international courts.

It further notes that this situation is likely to harm relations between France and Equatorial Guinea and, more specifically, undermine the agreement on the mutual promotion and protection of investments, signed on 3 March 1982.

Equatorial Guinea has always sought to build the best relations with the French Republic.

That is why it cannot accept that certain associations attempt to disrupt that international co-operation, when, moreover, the president of one of those associations is a paid executive of an oil services company which has a major contract, and interests, in Equatorial Guinea.

*

* *

I request that you accept, Sir, the expression of my highest consideration.

(Signed) Federico EDJO OVONO,

Ambassador of the Republic of Equatorial Guinea
in France.

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ANNEX 33

**Embassy of Equatorial Guinea, Note Verbale No. 365/11,
4 October 2011**

Note Verbale No. 365/11 from the Embassy of Equatorial Guinea, dated 4 October 2011, to the French Ministry of Foreign and European Affairs

[Translation]

The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs, Protocol Department, Diplomatic Privileges and Immunities Division, 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.

Since the building forms part of the premises of the diplomatic mission, pursuant to Article 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Republic of Equatorial Guinea wishes to give you official notification so that the French State can ensure the protection of those premises, in accordance with Article 22 of the said Convention.

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ANNEX 34

French Ministry of Foreign and European Affairs, Note Verbale No. 5007/PRO/PID, 11 October 2011

Note Verbale No. 5007/PRO/PID from the French Ministry of Foreign and European Affairs, dated 11 October 2011, to the Embassy of Equatorial Guinea

[Translation]

The Ministry of Foreign and European Affairs, Protocol Department, presents its compliments to the Embassy of the Republic of Equatorial Guinea and, referring to the Embassy's Note Verbale No. 365/11 of 4 October 2011, has the honour to advise it of the following:

1. The Embassy has informed the Protocol Department that a building located at 42 avenue Foch, Paris (16th arr.), is used for the performance of the functions of its diplomatic mission, a fact which has hitherto not been formally notified to the Protocol Department.

   The Embassy, invoking Article 22 of the Vienna Convention on Diplomatic Relations of 18 April 1961, has officially requested that the French State ensure the protection of that building.

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.

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ANNEX 35

French Ministry of Foreign and European Affairs, Note Verbale No. 5009/PRO/PID, 11 October 2011

Note Verbale No. 5009/PRO/PID from the French Ministry of Foreign and European Affairs, dated 11 October 2011, to the Minister of Justice, for the attention of the senior investigating judges at the Paris *Tribunal de grande instance*

[Translation]

Re: Request for information/Republic of Equatorial Guinea

By a fax dated 10 October 2011, you asked the Ministry of Foreign and European Affairs, in the context of criminal proceedings, about the situation of a building located at 42 avenue Foch in Paris (16th arr.) and the situation with regard to the immunities of Mr. Teodoro NGUEMA OBIANG, born 25 June 1969 in Akoakam Esangui, Equatorial Guinea.

I have the honour to inform you of the following:

1. Status of the building located at 42 avenue Foch in Paris (16th arr.)

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 information, the Embassy of the Republic of Equatorial Guinea informed the Protocol Department, by Note Verbale No. 365/11 dated 4 October 2011, that "the Embassy ha[d] for a number of years had at its disposal a building located at 42 avenue Foch, Paris (16th arr.), which it use[d] for the performance of the functions of its diplomatic mission, a fact which it ha[d] hitherto not formally notified to [the] Department["].

Referring to Article 22 of the Vienna Convention cited above, and stating that the building formed part of the premises of the diplomatic mission, it then officially requested the French authorities to ensure the protection of the said premises.

The Protocol Department replied, by Note Verbale No. 5007/PRO/PID dated today, that the building does not form part of the premises of the Republic of Equatorial Guinea's diplomatic mission, that it falls within the private domain and is, as such, subject to ordinary law. It was therefore unable to grant the Embassy's request.

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.

You will find enclosed a copy of these two Notes Verbales.

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.

2. Status of Mr. Teodoro NGUEMA OBIANG

Mr. Teodoro NGUEMA OBIANG, born 25 June 1969 in Akoakam Esangui, Equatorial Guinea, 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 such a request being made, so that it may check whether Mr. NGUEMA OBIANG is in France as part of a special mission.

(Signed) Marie-Jeanne de COUQUEREAUMONT,
Deputy Director of the Protocol Department.

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ANNEX 36

**Embassy of Equatorial Guinea, Note Verbale No. 387/11,
17 October 2011**

Note Verbale No. 387/11 from the Embassy of Equatorial Guinea, dated 17 October 2011, to the French Ministry of Foreign and European Affairs

[Translation]

The Embassy of Equatorial Guinea in France presents its compliments to the Ministry of Foreign and European Affairs, Protocol Department, Diplomatic Privileges and Immunities Division, and has the honour to inform you that the Mission of His Excellency Mr. Federico EDJO OVONO, Ambassador Extraordinary and Plenipotentiary of the Republic of Equatorial Guinea, has come to an end.

The Embassy wishes to express its thanks to the Ministry of Foreign and European Affairs for the opportunity that it was afforded to maintain cordial and official relations reflecting those that exist between our two countries and Heads of State.

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

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ANNEX 37

**Embassy of Equatorial Guinea, Note Verbale No. 173/12,
14 February 2012**

Note Verbale No. 173/12 from the Embassy of Equatorial Guinea, dated 14 February 2012, to the French Ministry of Foreign and European Affairs

[Translation]

I am writing to you in my capacity as Chargée d'Affaires *ad interim* of the Embassy of Equatorial Guinea in France.

I am presently in the residence belonging to the Government of Equatorial Guinea purchased on 19 September 2001, at 42 avenue Foch, in Paris, which is the place of residence of the Permanent Delegation of the Republic of Equatorial Guinea to UNESCO.

However, contrary to the Vienna Convention and to all accepted practice, a search is presently underway at that address.

This is a particularly serious violation of the sovereignty of the State of Equatorial Guinea.

The Republic of France should promptly intervene to bring this breach of international public order to an end.

ANNEX 38

Equatorial Guinean Ministry of Foreign Affairs, International Co-operation and Francophone Affairs, Note Verbale No. 251/12, 14 February 2012

Note Verbale No. 251/12 from Equatorial Guinean Ministry of Foreign Affairs, International Co-operation and Francophone Affairs, dated 14 February 2012, to the French Ministry of Foreign Affairs

[Translation]

The Ministry of Foreign Affairs, International Co-operation and Francophone Affairs of the Republic of Equatorial Guinea presents its compliments to the honourable Minister for Foreign Affairs of the French Republic and has the honour of informing him that it is with the greatest regret that the Government of the Republic of Equatorial Guinea has learned 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.

Accordingly, we are calling upon the French Government to observe the 1961 Vienna Convention on Diplomatic Relations and the agreement signed by the two Governments on mutual protection, and to cease this practice immediately.

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ANNEX 39

Letter from the President of the Republic of Equatorial Guinea to His Excellency Nicolas Sarkozy, President of the French Republic, 14 February 2012

Letter from the President of the Republic of Equatorial Guinea to His Excellency Nicolas Sarkozy, President of the French Republic, 14 February 2012

[Translation]

The relations of friendship and co-operation maintained by the Republic of Equatorial Guinea and the French Republic may be considered historic and satisfactory by both parties inasmuch as, since the accession of Equatorial Guinea to international sovereignty in 1968, the French Republic has stood together with it, in addition to my country subsequently joining political, economic and socio-cultural institutions driven by France.

This was the spirit in which a frequent exchange of visits between the authorities of the two countries occurred, with the signing and ratification of major agreements, essentially, the Agreement on the Mutual Protection of Investments guaranteeing the activities and the physical and legal assets of both States, independently of the guarantees offered by international agreements in matters of diplomatic relations.

Nevertheless, we regret the fact that, despite this exemplary reminder of our relationship, in recent years we have observed a media cabal which resulted in the prosecution of my person, in my capacity as Head of State of Equatorial Guinea, by French legal institutions in connection with a supposedly unlawful acquisition of assets in France.

This situation, which is clearly unjust, has been challenged by our lawyers in the French courts, which issued a verdict of false accusations, inasmuch as there are no personal properties that could be characterized as an unlawful acquisition by the President of the Republic of Equatorial Guinea. The honour and reputation of my person have, however, been impugned.

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 legal and diplomatic protection under the Vienna Convention and the bilateral agreements signed by the two States.

Unfortunately, that building is the subject of legal proceedings, apparently as a result of the unfounded complaints of certain NGOs, without any legal justification.

The Government of the Republic of Equatorial Guinea has reliable information concerning several well-known foreign figures who own several properties in France, without having been the subject of criticism, or of any proceedings. The case of Equatorial Guinea could be viewed as discriminatory treatment, which the French Government should not allow.

In light of the excellent relations of friendship and co-operation enjoyed between our two countries, I have considered it necessary and urgent to send to Your Excellency His Excellency Mr. Eustaquio NZENG ESONO, Minister Delegate for Foreign Affairs, International Co-operation and Francophone Affairs, in order to personally express to you our deep concern about these acts, which violate the spirit of our relations, and at the same time request Your Excellency and the French Government to adopt such measures as you deem necessary to protect the interests of Equatorial Guinea.

Faithful to the traditional spirit of our relations of friendship and co-operation, I request, Mr. President and dear friend, that you accept the expression of my highest consideration.

OBIANG NGUEMA MBASOGO.

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ANNEX 40

French Ministry of Foreign and European Affairs, Note Verbale No. 5393/PRO/PID, 31 October 2011

Note Verbale No. 5393/PRO/PID from the French Ministry of Foreign and European Affairs, dated 31 October 2011, to the Embassy of Equatorial Guinea

[Translation]

The Ministry of Foreign and European Affairs — Protocol Department — presents its compliments to the Embassy of the Republic of Equatorial Guinea and, referring to the Embassy's Note Verbale No. 387/2011 dated 17 October 2011, has the honour to inform it of the following:

1. The Embassy has informed the Protocol Department of the departure, at the end of his mission, of His Excellency Mr. Federico EDJO OVONO, Ambassador of the Republic of Equatorial Guinea, and has indicated that pending the arrival of his successor, Mr. Agustin NSE NFUMU, approved on 24 August 2011, Ms Mariola BINDANG OBIANG, the Permanent Delegate of the Republic of Equatorial Guinea to UNESCO, has been appointed Chargé d'affaires *ad interim*.

Finally, it is specified that the residence of Ms BINDANG OBIANG is "on the premises of the diplomatic mission" located at 40-42 avenue Foch, Paris 16th.

2. The Protocol Department wishes first to draw the Embassy's attention to the fact that, in accordance with Article 19 of the Vienna Convention of 18 April 1961 on Diplomatic Relations, only a member of the mission's diplomatic staff may be designated Chargé d'affaires *ad interim* by the receiving State[1]. The appointment of Ms BINDANG OBIANG is thus contrary to the above-mentioned Vienna Convention.

3. Having regard to the status of the building located at 42 avenue Foch, Paris (16th arr.), the Protocol Department requests that the Embassy refer to the terms of its Note Verbale No. 5007/PRO/PID dated 11 October 2011. It states therein that it is not a part of the mission's premises, has never been recognized as such, and accordingly is subject to ordinary law.

4. Having regard to the residence of Ms BINDANG OBIANG, who is a member of the permanent delegation to UNESCO, the person in question took up her duties on 11 September 2011 and on 7 October the Protocol Department issued her a special CD/D-59305 residence permit.

In the notification form regarding her appointment and the assumption of her duties which it received with a view to issuing the special residence permit, the address of Ms BINDANG OBIANG was given as 46 rue des Belles Feuilles, Paris (16th arr.). Please note, for the record, that the seat of the permanent delegation is located at 1 rue Miollis, Paris (15th arr.)

If there was a change in the address of Ms BINDANG OBIANG's residence, the permanent delegation of the Republic of Equatorial Guinea to UNESCO must give official notification thereof to that organization's protocol department, which should, in turn, advise our Protocol Department in an official Note Verbale.

Indeed, the Embassy may not communicate on behalf of the permanent delegation.

———————

[1]On this point, in the event that no member of the mission's diplomatic staff is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the receiving State to handle the mission's day-to-day administrative affairs.

ANNEX 41

United Nations Educational, Scientific and Cultural Organization (UNESCO), Note Verbale No. ERI/PRO/12/L.45, 15 February 2012

Note Verbale No. ERI/PRO/12/L.45 from UNESCO, dated 15 February 2012, to the French Ministry of Foreign Affairs

[Translation]

The United Nations Educational, Scientific and Cultural Organization — Protocol, Visas and Residence Permits Unit — presents its compliments to the Ministry of Foreign and European Affairs, Diplomatic Privileges and Immunities Sub-division, and has the honour of transmitting to it a copy of a Note Verbale dated 14 February 2012 from the Permanent Delegation of Equatorial Guinea to UNESCO.

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Note Verbale from the Permanent Delegation of Equatorial Guinea dated 14 February 2012 to UNESCO

[Translation]

The Permanent Delegation of Equatorial Guinea presents its compliments to the United Nations Educational, Scientific and Cultural Organization, UNESCO (Protocol, Visa and Residence Permit Unit), and has the honour of informing them that the official residence of the Permanent Delegate of Equatorial Guinea to UNESCO is located at 42 avenue Foch 75016 Paris, property of the Republic of Equatorial Guinea.

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ANNEX 42

**Embassy of Equatorial Guinea, Note Verbale No. 218/12,
27 February 2012**

Note Verbale No. 218/12 from the Embassy of Equatorial Guinea, dated 27 February 2012, to the French Ministry of Foreign Affairs

[Translation]

The Embassy of the Republic of Equatorial Guinea in France presents its compliments to the Ministry of Foreign Affairs of the French Republic (Protocol Department) and, having reference to its Note Verbale No. 487/PRO/PID of 2 February 2012 on the summonsing of the Minister of the State for Agriculture and Forestry, Mr. Teodoro NGUEMA OBIANG MANGUE to appear before the *Tribunal de grande instance* in Paris on Thursday, 1 March 2012, has the honour of communicating the following:

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 *Tribunal de grande instance* of Paris on 1 March 2012 at 2.30 p.m.

ANNEX 43

**Embassy of Equatorial Guinea, Note Verbale No. 247/12,
12 March 2012**

Note Verbale No. 247/12 from the Embassy of Equatorial Guinea, dated 12 March 2012, to the French Minister of Justice, transmitting letter No. 153-090

[Translation]

Re: Transmission of letter No. 153-090

I have the honour of forwarding to you the attached letter No. 153-090 dated 9 March 2012 from the Ministry of Justice, Worship and Correctional Institutions of the Republic of Equatorial Guinea.

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Letter No. 153-090 from the Minister of Justice, Worship and Correctional Institutions of Equatorial Guinea, dated 9 March 2012, to the French Minister of Justice

[Translation]

Since 15 September 2011 the Republic of Equatorial Guinea has been the owner of a property located at 40/42 Avenue Foch in Paris, assigned to its diplomatic mission and declared as such to the Ministry of Foreign and European Affairs by Note Verbale No. 365/11 of 4 October 2011.

This acquisition was recorded with the French tax authorities (non-residents department) on 20 October 2011.

Despite this, on 14 February 2012, in violation of the Vienna Convention of 18 April 1961 on the protection of diplomatic premises and the Agreement between the Government of the French Republic and the Republic of Equatorial Guinea of 3 March 1982 on the mutual promotion and protection of investments, a search was conducted on those premises by two investigating judges of the Paris *Tribunal de grande instance*, with the assistance of several dozen police officers.

In addition to such an intrusion into diplomatic premises being illegal, all of the furniture located there, which, with a few exceptions, is the property of the State of Equatorial Guinea, was attached and removed over a number of days, despite official protests on the spot by the Embassy's representative, who, moreover, was treated harshly and threatened by the police and the judges.

In order to bring an end to these clearly unlawful acts, the Republic of Equatorial Guinea appealed to the urgent applications judge at the Paris *Tribunal de grande instance* to put a halt to this patently unlawful violation by the authorities.

In an order of 23 February 2012, the senior judge at the *Tribunal de grande instance* rejected the appeal on the ground that, the searches and attachments having been conducted by investigating judges, only the criminal courts could exercise jurisdiction over them.

Since it was not a party to that criminal proceeding, the Republic of Equatorial Guinea requests that you kindly ensure that this matter is referred to the *Chambre de l'instruction* of the Paris *Cour d'appel* at the earliest opportunity so that the lawfulness of these acts can be examined and this disruption brought to an end.

I would inform you that, at the same time, a claim for restitution will be sent to the investigating judges, since, besides being completely illegal, the attachment of assets belonging to the Republic of Equatorial Guinea is wholly unjustified and contrary to the above-mentioned Agreement between our two countries of 3 March 1982, Article 5 of which, it should be recalled, provides:

> "1. Investments made by nationals or companies of one Contracting Party shall be fully and completely protected and safeguarded in the territory and maritime zones of the other Contracting Party.
>
> 2. The Contracting Parties shall not take any expropriation or nationalization measures or any other measures which could cause nationals and companies of the other Party to be dispossessed, directly or indirectly, of the investments belonging to them in its territory and maritime zones, except for reasons of public necessity and on condition that these measures are not discriminatory or contrary to a specific undertaking."

These extremely serious acts of infringement of the sovereignty of the Republic of Equatorial Guinea and dispossession of those investments on French soil must be remedied at the earliest opportunity.

I am of course ready to provide you with any additional information that you may desire and heartily wish that the international agreements and conventions be observed so that the friendship which has bound our countries together for so many years is not marred by acts as serious as these.

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ANNEX 44

**Embassy of Equatorial Guinea, Note Verbale No. 249/12,
12 March 2012**

Note Verbale No. 249/12 from the Embassy of Equatorial Guinea, dated 12 March 2012, to the French Ministry of Foreign and European Affairs

[Translation]

The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs, Protocol Department, Diplomatic Privileges and Immunities Sub-division, and refers to its Note No. 5007/PRO/PID of 11 October 2011.

That Note was further to Note Verbale No. 365/11 from the Republic of Equatorial Guinea dated 4 October 2011, in which the latter advised the Ministry that it had a building located at 42 avenue Foch which was used for the performance of the functions of its diplomatic mission.

In its reply of 11 October 2011, the Ministry stated that:

> "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."

The Republic of Equatorial Guinea contests the position expressed by the Protocol Department, according to which the building in question "does not form part of the premises of Equatorial Guinea's diplomatic mission" and accordingly, that it cannot ensure the protection of that building.

First of all, contrary to what the Protocol Department states, these are not private premises, rather, they are premises used for the needs of the diplomatic mission of the Republic of Equatorial Guinea.

Second, 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 as is provided for by Article 22 of the Vienna Convention of 18 April 1961, which states that:

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

Under these provisions, the benefit of diplomatic protection is not subject to any conditions in respect of premises designated by a diplomatic mission in the receiving State, contrary to what the Convention provides in respect of:

— the establishment of "offices forming part of the mission in localities other than those in which the mission itself is established" (Article 12 of the Convention);

— or the accreditation of the head of the mission (Article 4 of the Convention).

In these latter two cases, the prior consent or *agrément* of the receiving State is required.

The fact that there are two separate régimes implies that the régime for the protection of diplomatic premises "used for the purposes of the mission" is a régime that is purely declaratory in nature.

The Republic of Equatorial Guinea accordingly reiterates its request to the Protocol Department to confirm that, in accordance with the above-mentioned Article 22 of the Convention, the French State will ensure the protection of those premises.

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ANNEX 45

French Ministry of Foreign and European Affairs, Note Verbale No. 1341/PRO/PID, 28 March 2012

Note Verbale No. 1341/PRO/PID from the French Ministry of Foreign and European Affairs, dated 28 March 2012, to the Embassy of the Republic of Equatorial Guinea

[Translation]

The Ministry of Foreign and European Affairs, Protocol Division, presents its compliments to the Embassy of the Republic of Equatorial Guinea and, referring to the Embassy's Note Verbale No. 249/12 dated 12 March 2012 and that of the Protocol Department No. 5007/PRO/PID dated 11 October 2011, has the honour to inform it of the following:

1. Having regard to the building located at 42 avenue Foch in Paris (16th arr.), the Embassy indicates that these are premises used for the requirements of the diplomatic mission of the Republic of Equatorial Guinea and states 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 as is provided for by Article 22 of the Vienna Convention of 18 April 1961".

2. The Protocol Department wishes to recall the following points:

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

   Official recognition of the status of "the premises of 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.

3. The building located at 42 avenue Foch in Paris (16th arr.) cannot be considered as part of the premises of the diplomatic mission, since it has not been recognized as such by the French authorities, given that it has not been assigned for the purposes of the mission or as the residence of the head of mission in accordance with the above-mentioned Article 1, paragraph *(i)*, of the Vienna Convention of 18 April 1961.

   The Protocol Department recalls in this regard that as from 4 October 2011, the building located at 42 avenue Foch has been the subject of a series of contradictory Notes Verbales from Equatorial Guinea:

   — "a building . . . [used] for the performance of the functions of its . . . mission a fact which it has hitherto not formally notified" (Note Verbale No. 365/11 of 4 October 2011) without any details about the departments established there as compared to the chancellery;

   "residence of Ms Mariola BINDANG OBIANG", Permanent Delegate of the Republic of Equatorial Guinea to UNESCO (Note Verbale No. 387/2011 of 17 October 2011) when her official residence, as officially notified by UNESCO and as attested to by the documents and notifications of appointment and

assumption of duties on 11 September 2011, is located at 46 rue des Belles Feuilles, Paris (16th arr.).

— moreover, that same address was again presented as the residence of Ms Mariola BINDANG OBIANG in the documents (Note No. 187/12 dated 16 February 2012) by which the French authorities were asked to approve the appointment of the person in question as the Ambassador of the Republic of Equatorial Guinea in France.

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ANNEX 46

French Ministry of Foreign and European Affairs, Note Verbale No. 1946/PRO/PID, 2 May 2012

Note Verbale No. 1946/PRO/PID from the French Ministry of Foreign and European Affairs, dated 2 May 2012, to the Embassy of Equatorial Guinea

[Translation]

The Ministry of Foreign and European Affairs, Protocol Department, presents its compliments to the Embassy of the Republic of Equatorial Guinea and, referring to the Embassy's Note Verbale No. 338/12 dated 25 April 2012 concerning the building located at 42 avenue Foch in Paris (16th arr.), has the honour to inform it of the following:

The Protocol Department kindly requests the Embassy to refer, in respect of the above-mentioned subject, to its Note Verbale No. 1341/PRO/PID dated 28 March 2012.

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ANNEX 47

Embassy of Equatorial Guinea, Note Verbale No. 501/12, 27 July 2012

Note Verbale No. 501/12 from the Embassy of Equatorial Guinea, dated 27 July 2012, to the French Ministry of Foreign and European Affairs

[Translation]

The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs, Protocol Department, Diplomatic Privileges and Immunities Sub-division 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.

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ANNEX 48

Embassy of Equatorial Guinea, Note Verbale No. 517/12, 2 August 2012

Note Verbale No. 517/12 from the Embassy of Equatorial Guinea, dated 2 August 2012, to the French Ministry of Foreign and European Affairs

[Translation]

The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign and European Affairs, Protocol Department, 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.

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ANNEX 49

**French Ministry of Foreign Affairs, Note Verbale No. 3503/PRO/PID,
6 August 2012**

Note Verbale No. 3503/PRO/PID from the French Ministry of Foreign Affairs, dated 6 August 2012, to the Embassy of Equatorial Guinea

[Translation]

The Ministry of Foreign Affairs, Protocol Department, presents its compliments to the Embassy of the Republic of Equatorial Guinea and, referring to the Embassy's Note Verbale No. 501/12 of 27 July 2012, has the honour to advise it of the following:

1. The Embassy has informed the Protocol Department that "*as from Friday 27 July 2012, the Embassy's offices are located at 42 avenue Foch, Paris (16th arr.), a building which it is henceforth using for the performance of the functions of its diplomatic mission in France*".

2. The Protocol Department draws the Embassy's attention to the fact that the building located at 42 avenue Foch, Paris (16th arr.), was the subject of an attachment order (*ordonnance de saisie pénale immobilière*), dated 19 July 2012. The attachment was recorded and entered in the mortgage registry on 31 July 2012.

3. The Protocol Department is thus unable officially to recognize the building located at 42 avenue Foch, Paris (16th arr.), as being the seat of the chancellery as from 27 July 2012.

   The seat of the chancellery thus remains at 29 boulevard de Courcelles, Paris (8th arr.), the only address recognized as such.

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ANNEX 50

**French Ministry of Foreign Affairs and International Development,
Note Verbale No. 2016-313721/PRO/PIDC, 27 April 2016**

Note Verbale No. 2016-313721/PRO/PIDC from the French Ministry of Foreign Affairs and International Development, dated 27 April 2016, to the Embassy of Equatorial Guinea

[Translation]

The Ministry of Foreign Affairs and International Development — Protocol Department — presents its compliments to the Embassy of Equatorial Guinea and 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.

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.

ANNEX 51

Embassy of Equatorial Guinea, Note Verbale No. 3168/2016, received 12 May 2016

Note Verbale No. 3168/2016 from the Embassy of Equatorial Guinea to the French Ministry of Foreign Affairs and International Development, received 12 May 2016

[Translation]

The Embassy of the Republic of Equatorial Guinea presents its compliments to the Ministry of Foreign Affairs and International Development and acknowledges receipt of Note Verbale No. 2016-313721/PRO/PIDC dated 27 April 2016, whereby the Ministry of Foreign Affairs and International Development recalls that it does not consider the building located at 42 avenue Foch (16th arr.) as part of the premises of the diplomatic mission of the Republic of Equatorial Guinea in France.

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 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.

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ANNEX 52

Paris *Cour d'appel, Chambre de l'instruction*, judgment of 13 June 2013 (Case No. 2012/07413)

Paris *Cour d'appel*, *Chambre de l'instruction*, judgment of 13 June 2013
(Case No. 2012/07413)

[Translation]

Prosecution No.: P083379601/7

Paris *Cour d'appel*

Division 7

Second *Chambre de l'instruction*

Application for annulment

Judgment

(No. 3, 21 pages)

Delivered in closed session on the thirteenth of June, two thousand and thirteen.

Proceedings initiated in respect of complicity in handling misappropriated public funds, complicity in the misappropriation of public funds, money laundering, complicity in money laundering, misuse of corporate assets, complicity in the misuse of corporate assets, breach of trust, complicity in breach of trust, and concealment of each of these offences, against:

Persons under judicial examination

Mourad BAAROUN: released under judicial supervision

Born 12 December 1967 in Tunis, Tunisia

27B rue Louis Rolland, 92120 Montrouge

Counsel: Mr. SPITZER, 9 rue d'Anjou, 75008 Paris

Franco CANTAFIO: released under judicial supervision

Born 27 September 1963 in Saint Maurice

Counsel: Mr. LAUNAY, 37 rue Jean-Baptiste Pigalle, 75009 Paris, whose offices he chooses as his address for service

Aurélie Sandrine C. DELAURY, née DERAND: released under judicial supervision

Born 4 January 1971 in L'Haÿ-les-Roses

Counsel: Ms TOUITOU, 25 rue du Louvre, 75001 Paris, whose offices she chooses as her address for service

Teodoro NGUEMA OBIANG MANGUE: arrest warrant

Born 25 June 1969 in Ako[a]kam-Esangui, Equatorial Guinea

c/o Mr. Emmanuel MARSIGNY, 100 rue de l'Université, 75007 Paris

Counsel:

— Mr. HERZOG, 3 place Saint Michel, 75005 Paris;

— Mr. MARSIGNY, 100 rue de l'Université, 75007 Paris;

— Mr. MAREMBERT, 260 boulevard Saint Germain, 75007 Paris;

— Mr. KLUGMAN, 132 rue de Courcelles, 75017 Paris.

Civil-party applicants

Transparency International France

Address for service: c/o Mr. William BOURDON, 156 rue de Rivoli, 75001 Paris

Counsel: Mr. BOURDON, 156 rue de Rivoli, 75001 Paris

Gabonese Republic (Minister for the Budget, Public Accounts and the Civil Service)

Address for service: Mr. Pierre HAIK, 27 boulevard St Michel, 75005 Paris

Counsel:

— Mr. HAIK, 27 boulevard Saint Michel, 75005 Paris;

— Mr. MAISONNEUVE, 232 boulevard Saint-Germain, 75007 Paris;

— Mr. DUPOND-MORETTI, 5 terrasse Sainte Catherine, 59800 Lille;

— Mr. ARAMA, 44 avenue des Champs Elysées, 75008 Paris.

Applicant

The Republic of Equatorial Guinea

Address for service: Me METZNER et ASSOCIES, 100 rue de l'Université, 75007 Paris

Counsel:

— Mr. Jean-Yves LE BORGNE, 116 bd Saint Germain, 75006 Paris

— METZNER et ASSOCIES, 100 rue de l'Université, 75007 Paris

— Mr. PARDO, 74 avenue de Wagram, 75017 Paris

Composition of the court

During the proceedings and the deliberations:

— Ms BOIZETTE, presiding judge;

— Ms DUPONT-VIET, judge appointed by order of the first president of the Paris *Cour d'appel* dated 13 March 2013;

— Mr. GUIGUESSON, judge.

All three of whom were appointed under the provisions of Article 191 of the Code of Criminal Procedure.

During the delivery of the judgment: Ms BOIZETTE, presiding judge, read the judgment in accordance with the provisions of the fourth paragraph of Article 199 of the Code of Criminal Procedure.

Clerk: during the deliberations and the delivery of the judgment, Ms MARCHAL

Public Prosecutor's Office: during the proceedings, Mr. WALLON, Advocate General, and during the delivery of the judgment, Mr. BARRAL, Advocate General

Proceedings

At the hearing in closed session on 4 April 2013, the following persons were heard:

— Ms BOIZETTE, presiding judge, on her report;

— Mr. WALLON, Advocate General, on his submissions;

— Mr. Antonin LEVY, counsel for the Republic of Equatorial Guinea, applicant, on his observations;

— Mr. BOURDON, counsel for Transparency International France, civil-party applicant;

— Ms TOUITOU, counsel for Aurélie DERAND, who is under judicial examination, on her observations;

— Mr. LAUNAY, taking the floor last as counsel for Franco CANTAFIO, who is under judicial examination;

Mr. MARSIGNY, Mr. MAREMBERT and Mr. KLUGMAN, Mr. CHAMPETIER DE RIBES, standing in for Mr. SPITZER, Mr. ARTUPHEL, standing in for Mr. HAIK, and Mr. LEBORGNE and Mr. HUC-MOREL, who are also counsel for the parties, were present at the hearing but did not take the floor during the proceedings.

At the end of the proceedings, the decision was reserved for 13 June 2013.

Procedural history

By a reasoned application filed with the registry of the *Chambre de l'instruction* on 24 September 2012, Mr. Fual Saison, standing in for Mr. Metzner, counsel for the Republic of

Equatorial Guinea, contested civil-party applicant, asked the court to rule on the possible nullity of procedural measures.

The presiding judge of the *Chambre de l'instruction* transmitted the application to the Public Prosecutor for referral to the *Chambre de l'instruction* on 7 November 2012.

The date on which the case was to be heard was notified to the persons under judicial examination, the civil-party applicants and counsel for the parties by registered letters dated 19 March 2013.

The file containing the Public Prosecutor's written submissions dated 23 November 2012 was filed with the registry of the *Chambre de l'instruction* and made available to counsel for the parties.

Written statements countersigned by the clerk, transmitted to the Public Prosecutor's Office and included in the case file were filed with the registry of the *Chambre de l'instruction* by:

— Mr. HUC MOREL, counsel for the Republic of Equatorial Guinea, the applicant, on 3 April 2013;

— Mr. MARSIGNY, counsel for Teodoro NGUEMA OBIANG MANGUE, person under judicial examination, on 3 April 2013;

— Mr. BOURDON, counsel for Transparency International France, civil-party applicant, on 3 April 2013.

Decision

Taken following deliberations in accordance with Article 200 of the Code of Criminal Procedure.

As to the procedure

The application, which falls within the scope of Article 170 *et seq*. of the Code of Criminal Procedure and was filed in the form and within the time-limits set out in Articles 173, 173-1 and 175 of the same Code, is admissible.

As to the merits

In May 2007 and July 2008, three associations — Sherpa, Survie and Fédération des Congolais de la Diaspora — which are not recognized as being in the public interest, filed a complaint with the Paris Public Prosecutor's Office concerning the conduct of five foreign Heads of State, accusing them primarily of misappropriation of public funds in their country of origin, the proceeds of which have allegedly been invested in France. One of the persons named was Teodoro NGUEMA OBIANG MANGUE, Minister of the Republic of Equatorial Guinea, Minister for Agriculture and Forestry, for acts characterized as handling misappropriated public funds (Articles 321-1 and 432-15 of the Penal Code). The Paris Public Prosecutor's Office opened a preliminary investigation but decided to take no further action, on the grounds that the offence was not sufficiently established.

Transparency International France took the same step; the Public Prosecutor's Office decided to take no further action with regard to the first complaint. On 2 December 2008, Transparency International France, an association governed by the Law of 1 July 1901, whose headquarters are located at 2*bis* rue de Villiers, 92230 Levallois-Perret, acting through its President, Daniel Lebègue, filed a complaint with civil-party application with the senior

investigating judge in Paris against the incumbent Presidents of Gabon, the Congo and Equatorial Guinea, and individuals in their entourage, for handling misappropriated public funds, and against persons unnamed for complicity in handling misappropriated public funds, complicity in the misappropriation of public funds, money laundering, complicity in money laundering, misuse of corporate assets, complicity in misuse of corporate assets, breach of trust, complicity in breach of trust and concealment of each of these offences.

Transparency International France claimed that the Heads of State in question, and members of their families and entourage, owned substantial assets in France, acquired over many years through monies derived from the misappropriation of funds in their countries of origin.

The complaint with civil-party application raised questions about the financial resources that the individuals concerned had used to finance such assets on a personal basis. In particular, it questioned the role played by Somagui Forestal, a logging company located in Equatorial Guinea and run by Teodoro NGUEMA OBIANG, the son of the Head of State. It speculated that the vehicles purchased by Edith and Pascaline BONGO had been paid for with cheques from the Treasury of Gabon. The complaint referred to information collected in 2007 by the OCRGDF (serious financial crime squad) and Tracfin (national anti-money laundering unit), as a result of a preliminary investigation launched by the Paris Public Prosecutor's Office.

The opening of the investigation based on this complaint was upheld by the *Chambre criminelle* of the *Cour de cassation* in a decision dated 9 November 2010, ruling on an appeal by Transparency International France, in which it recognized that it was possible for this type of private association, depending on its purpose, to report and pursue prosecution of the type of offences in question, of which it did not appear to be a direct victim.

On 1 December 2010, two investigating judges were appointed, the judicial investigation being considered open against a person or persons unknown, for handling misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and complicity in the misuse of corporate assets, and concealment of each of these offences.

The initial investigations launched at the request of the Paris Public Prosecutor's Office were the subject of a report that was filed on 9 November 2007 and included in the investigation file (D81).

Five countries were named in the complaint: Gabon, the Congo, Burkina Faso, Equatorial Guinea and Angola. The investigation file included all of the records of the investigations carried out in 2007 regarding:

— Gabon, its President, Omar Bongo, and his family (D81 to D114);

— Congo-Brazzaville and the family of Sassou Nguesso (D115 to D142);

— The Republic of Equatorial Guinea and the family of Teodoro Nguema Obiang (D149 to D153-D238).

The mission entrusted to the OCRGDF's criminal asset identification platform (PIAC) identified the natural persons concerned, their family members and some of their very considerable movable assets (a very large number of luxury vehicles) and immovable assets, particularly in Paris.

More specifically, the [PIAC] investigation revealed, in particular, that Wilfrid NGUESSO, nephew of the President of the Congo, and Teodoro NGUEMA, son of the President of Equatorial Guinea, were involved. Teodoro NGUEMA had, *inter alia*, purchased some fifteen vehicles in France for an amount estimated at more than €5,700,000. For example, he ordered three Bugatti

Veyron vehicles from the manufacturer in Alsace for a unit price of more than €1,000,000 (see record No. 132/2007/D/5 of 6 August 2007).

The financing of certain vehicles appeared unusual, to say the least: in 2006, Pascaline BONGO, who is believed to be the daughter of the President of Gabon, purchased a Mercedes vehicle paid for with three cheques drawn on the bank accounts of Ms Joannie ARTIGA, Mr. François MEYER and the Treasury Office of Gabon in France (see record No. 132/2007/A/4 of 20 July 2007). Similarly, some of the vehicles purchased by Teodoro NGUEMA were paid for through transfers from SOMAGUI FORESTAL (see records No. 132/2007/D/5 of 6 August 2007 and No. 132/2007/D/8 of 26 October 2007). Wilfrid NGUESSO paid the balance of an Aston Martin DB9 vehicle through a transfer made by MATSIP CONSULTING (see record No. 132/2007/B/28 of 5 November 2007).

Substantial immovable assets were also identified, in particular in the names of individuals who were likely to be members of the families of Omar BONGO and Denis SASSOU NGUESSO:

— Concerning the President of Gabon, a property in his name was discovered at 3 boulevard Frédéric Sterling in Nice (Alpes-Maritimes). The property is not mentioned in the letter of 10 July 2007 from Mr. François MEYER to the Paris Public Prosecutor, which provides a summary of Omar BONGO's assets. The property comprises two apartments (170 sq m and 100 sq m), three houses (67 sq m, 215 sq m and 176 sq m) and a swimming pool (see record No. 132/2007/A/8 of 17 September 2007).

— Concerning the members of the BONGO and SASSOU NGUESSO family, the tax authorities found a *société civile immobilière* (non-commercial property company), SCI De la Baume, whose shareholders include Edith SASSOU NGUESSO, who is the daughter of Denis SASSOU NGUESSO and wife of Omar BONGO. On 15 June 2007, the company purchased a townhouse located at 4 rue de la Baume in the 8th arrondissement of Paris for €18,875,000 (see record No. 132/2007/B/9 of 17 September 2007).

Lastly, it would appear that the majority of the immovable property owned by the individuals identified is located in high-end neighbourhoods: the 16th and 7th arrondissements of Paris for Omar BONGO and his wife, the 16th arrondissement of Paris and Neuilly-sur-Seine (Hauts-de-Seine) for Jeff BONGO, Le Vésinet (Yvelines) for Denis SASSOU NGUESSO's brother, Courbevoie (Hauts-de-Seine) for Wilfrid NGUESSO, and the 16th arrondissement of Paris for Chantal CAMPAORE.

Numerous active bank accounts were identified in the names of natural persons likely to be members of the families of the Heads of State concerned. A list for each person is set out in a record. It states the account number, the date on which the account was opened, the type of account, the exact address of the bank and branch office, and the address of the account holder.

With regard to the possible immunities enjoyed by the persons appearing in the file, the Protocol Department of the Ministry of Foreign Affairs sent a letter stating that only incumbent Heads of State enjoy inviolability and absolute immunity from criminal jurisdiction when abroad. Their family members may enjoy immunity if they accompany the Head of State on a visit that is official (see record No. 132/2007/7 of 24 October 2007) and duly authorized (see D147).

A copy of a letter rogatory sent by the United States of America, via the Department of Justice, to the French judicial authorities (D151) was included in the case file. This request for mutual assistance cites acts of money laundering by Teodoro NGUEMA OBIANG (Riggs Bank) on United States territory via banks and offshore companies, which purportedly resulted in prosecution and convictions. Teodoro NGUEMA OBIANG's annual salary is estimated at US$60,000. The document mentions that Teodoro NGUEMA OBIANG imposed a heavy tax on wood, which had to be paid in cash or by cheque to Somagui Forestal or directly to its chief

executive *(dirigeant)*. It also refers to certain financial transactions which passed through France before terminating in the United States (D151/43 and 24), hence the request for mutual assistance and international co-operation sent to France on 4 September 2007.

The mission entrusted to PIAC led, *inter alia*, to an investigation into the assets of Teodoro NGUEMA OBIANG MANGUE and Denis SASSOU NGUESSO, and to the observation that both individuals — but especially the former, who is the son of the President of the Republic of Equatorial Guinea — had, on national territory, substantial movable and immovable assets which were likely to have been paid for out of public funds from their countries. In particular, a property located at 40-42 avenue Foch in the 16th arrondissement of Paris, owned by Swiss and French companies whose sole shareholder was Teodoro NGUEMA OBIANG MANGUE, was reserved for his own personal and private use, and the sale of the Swiss companies' shares in the property to the Guinean State appeared to be an artifice intended to prevent the property from being attached. Provisional attachment measures were ordered in the course of the investigation.

On 7 March 2011, Tracfin transmitted to the Public Prosecutor's Office a memorandum which was included in the case file (D242). It listed Teodoro NGUEMA OBIANG MANGUE's six residences, including three in France, and his functions, including Minister for Agriculture and chief executive *(directeur)* of Somagui Forestal, which was used to finance the purchase of assets in France (purchases from the YSL collection totalling €18,347,952.30 — D273 to 280).

These revelations were corroborated by the investigations carried out by the OCRGDF, pursuant to a letter rogatory of 9 December 2010, in particular regarding the purchase of two vehicles — a Bugatti Grand Sport for €350,000 paid for by Somagui Forestal and a Ferrari GTO — [and] extravagant spending, such as the purchase of 300 bottles of Château Petrus for €2.1 million, paid for by the same company (D329). These facts led to the filing, on 31 January 2012, of an application to extend the investigation to acts of handling and money laundering (see 393).

The assets of the TEODORO OBIANG family are itemized and examined under reference numbers D143 to D153 (Vol. 2).

The assets of the SASSOUS NGUESSO family are listed under reference numbers D116 to D142 (Vol. 2).

At the request of the investigating judges on 20 October 2011, memorandums drafted by Tracfin and originally intended for the Paris Public Prosecutor's Office (D351) — including the memorandum of 25 May 2010 (D361), the memorandum concerning Mr. MEYER and his ties to Gabon (D359/3 and 4) and [that concerning] other purchases made in the name of Teodoro OBIANG NGUEMA (works of art — D358) — were included in the case file.

A memorandum dated 22 September 2008 (D357) was also included, in addition to those of October 2007 and April 2008 concerning transactions involving funds transferred by Somagui Forestal (D357/3 and 4) during the period from 10 February 2006 to 31 March 2008.

On 25 November 2011, Tracfin transmitted to the Paris Public Prosecutor a memorandum concerning Mr. NGUEMA OBIANG MANGUE (born in 1969), the President's son, and the financial transactions — primarily relating to expensive watches purchased between 2004 and 2007 — of EDUM SL, which was based in Equatorial Guinea and whose chief executive *(dirigeant)* was Mr. NGUEMA OBIANG MANGUE (D385).

In accordance with the letter rogatory issued on 9 December 2010, all of the investigative measures relating to spending in the name of Teodoro NGUEMA OBIANG in France between 2004 and 2007, including, among other things, purchases of expensive watches (D508/3 and 4) paid for by Somagui Forestal via Société Générale de Banques en Guinée, or made by the BONGO family (D494 to 515), were included in the case file.

An application for characterization was submitted on 4 July 2011 (D317-319) in the following terms:

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; 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; 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;

The Article 432-15 offence is therefore inapplicable, and likewise the characterizations of complicity in and concealment of that offence; that being so, the characterizations of breach of trust and complicity in breach of trust, which might be applied to the misappropriations complained of, cannot be accepted, since the alleged offences were committed abroad, by foreign nationals, against foreign victims, acts to which French criminal law is not applicable, under the provisions of Articles 113-6 and 113-7 of the Penal Code;

Moreover, the prosecution of offences committed outside the territory of the French Republic may be initiated only upon application by the Public Prosecutor's Office, pursuant to Article 113-8 of the Penal Code; and whereas in these proceedings the Public Prosecutor's Office submitted that the complaint with civil-party application was inadmissible.

The application notes that the offences of misuse of corporate assets and complicity in the misuse of corporate assets are applicable only to commercial companies incorporated under French law; and whereas the alternative characterizations of breach of trust and complicity in breach of trust cannot be applied for the reasons already set forth;

Consequently, in the view of the Paris Public Prosecutor, the facts under investigation, assuming them to be established, may be characterized only as money laundering or handling offences; and whereas the laundering or handling in France of an asset obtained through an offence committed abroad by a foreign national and not subject to French law is punishable in France, provided, however, that the elements of the original offence are identified;

The Public Prosecutor's Office requested the investigating judges to find that the facts under investigation may be characterized only as money laundering or handling offences, as provided for in Articles 324-1 and 321-1 of the Penal Code and punishable thereunder.

The customs and tax authorities provided numerous pieces of information, which were gradually added to the case file and gave rise to applications to extend the investigation, on account of facts that did not appear in the initial complaint with civil-party application, which new facts gave rise to an application to extend the investigation dated 31 January 2012 (D393), for handling offences and/or money laundering, in view of the memorandums transmitted by Tracfin on 7 March 2011 and 18 March 2011, the memorandum prepared by the DN[R]ED (the national directorate for intelligence and customs inquiries) on 7 March 2011 and a report from the OCRGDF dated 4 October 2011.

On 2 March 2012, a second application to extend the investigation was submitted for handling offences and/or money laundering in connection with renovation works performed until 31 July 2011 by SCI Les Batignolles on a property located at 109 boulevard du Général Koenig in Neuilly-sur-Seine — facts not cited in the original complaint with civil-party application — on the basis of a notification from Tracfin dated 26 May 2011 and two reports from the OCRGDF dated 7 and 29 February 2012.

On 14 December 2012, the Gabonese Republic, through its counsel (Messrs. MAISONNEUVE and ARAMA), filed a civil-party application (D37) which did not elicit any observations from the Public Prosecutor's Office.

On 1 February 2011, Mr. David DJAKA GONDI filed a civil-party application in his capacity as *Roi du Parord*. On 23 February 2011, this complaint was declared inadmissible; the individual concerned appealed the decision and the *Chambre de l'instruction* confirmed the inadmissibility of the complaint.

Mr. Gregory NGBWA MINSTA, a Gabonese national, filed a civil-party application in his capacity as a taxpayer.

On 8 May 2009, the senior investigating judge declared the application inadmissible, which decision is final (judgment of this court dated 19 October 2009).

On 2 February 2012, a Note Verbale from the Ambassador of Equatorial Guinea in France and a letter from the Public Prosecutor of that State were produced, with the letter certifying:

(1) that the existence of facts relating to those declared in Transparency International France's complaint, which could be characterized as the criminal offence of misappropriation of public funds, had not been established;

(2) that it had been verified that the logging company Somagui, which is composed entirely of private shareholders, focused on commercializing legitimate commercial products, which is the reason why the State of Equatorial Guinea had not claimed damages arising from the misappropriation of public funds. A copy of a letter dated 28 April 2011, sent to the Minister for Foreign Affairs, was also produced for the purpose of challenging the French courts' jurisdiction to entertain a case in violation of international law and the essential principles deriving therefrom (sovereignty and non-interference).

Olivier LA CHAPELLE, General Manager of the insurance brokerage ASCOMA, was heard on 3 May 2012 (D755). The company ASCOMA JUTHEAU insured Mr. Teodoro NGUEMA OBIANG's collection of vehicles, and, in this connection, had 18 contracts for his personal vehicles; the most recent payment was made by its client on 21 February 2011, with Foch Service handling these payments, although in November 2009 and June 2010, payments of €61,515.31 and €101,732,796 were made by SOMAGUI in that respect.

The OCRGDF's investigations showed that Mr. NGUEMA OBIANG (son) used the bank accounts of SOCAGE, SOMAGUI FORESTAL and EDUM SL to pay for his own personal expenses.

After the Spanish newspaper *El País* published, in June 2012, an article on corruption in Equatorial Guinea — in the logging industry in particular — several Spanish nationals identified as having founded SOMAGUI FORESTAL were heard in November 2012 pursuant to an international letter rogatory (D947/3). However, to date, the documents produced in response to the request for mutual assistance have not been returned for inclusion in the case file.

The testimony of Didier MALYSKO (D533), Teodoro NGUEMA OBIANG's house manager from November 2006 to July 2009, was revealing with regard to Mr. NGUEMA OBIANG's lifestyle, extravagant spending and assets. His employment contract shows that he was employed by the Ministry of Agriculture and Forestry of Equatorial Guinea. One of his bank statements shows that he received a transfer in the amount of €4,963.15 from SOMAGUI FORESTAL on 12 March 2009 (D533/11). Both he and the chef, Joël CRAVELLO (D532), state that they saw suitcases filled with cash that was spent in Paris or the United States, where the two domestic employees would accompany Mr. NGUEMA OBIANG.

In execution of the letter rogatory of 9 December 2010, the investigations into SARL Foch Service, located at 14 avenue d'Eylau in the 16th arrondissement of Paris, with its business address formerly at 42 avenue Foch in the 16th arrondissement of Paris, established that: Foch Service is a single member SARL (limited liability company) with a capital of €10,000, created in June 2007, whose purpose is to provide business and management consulting, and its chief executive *(gérante)* is [Aurélie] DERAND (D434/1). All 500 shares of the company are held by GANESHA HOLDING, which is governed by Swiss law (D437). The records of Foch Service were found at the premises of INFINEA, at 30 boulevard Pasteur in the 15th arrondissement of Paris (D470/2 to D470/6), in the presence of Ms DELAURY and Mr. BAAROUN.

The investigations relating to Mourad BAAROUN established that he was born in Tunisia in 1967, that he lives in Montrouge, that he owns a Peugeot 206, which was searched, and that he handled the insurance policies for the Porsche and Mercedes vehicles in the name of Teodoro NGUEMA OBIANG (D471).

Ms DELAURY was born in 1971, is married and has one child, who was born in 2010. She was appointed as SARL Foch Service's chief executive *(gérante)* and company secretary.

As an employee of the company, she earned €5,037 per month for these two functions, which salary was paid by a Swiss bank. She was unemployed and registered at the national employment agency when she was hired in 2010 by the actual chief executive *(gérant)* of Foch Service, Mr. WENGER, who would order transfers to be made and would instruct her by telephone to prepare quotes for works. She did not manage the domestic staff. She did not have powers of attorney on bank accounts. She succeeded Mr. WENGER following his removal from the company for embezzlement, after he left with a company chequebook and debit card. Her functions as chief executive *(gérante)* were actually those of an administrative secretary and they effectively made up for Mr. Wenger's shortcomings in managing the accounting and the administrative and tax matters relating to the property located at 42 avenue Foch, the company's sole shareholder being the Swiss company GANESHA, which paid the employees' salaries and handled the financing of the company, which was in liquidation.

With regard to SOMAGUI FORESTAL, Ms DERAND stated that it rented premises in the property's triplex to GANESHA. In sum, Ms DERAND received instructions for running and managing Foch Service from GANESHA, which was represented by the firm PYTHON & PETER, which was itself represented by Mr. HOFFMAN, it being further specified that her employment contract had been signed by Mr. BAAROUN, who served as chief executive *(gérant)* for two to three months (D468).

On 27 February 2013, by virtue of an application to open an investigation dated 1 December 2010 and an application to extend the investigation dated 19 February 2013, Ms Aurélie DELAURY, née DERAND, as the chief executive *(gérante)* of SARL Foch Service, was placed under judicial examination (D944) for complicity in laundering misused corporate assets or the proceeds of breach of trust or misappropriated public funds, in relation to acts committed by Teodoro NGUEMA OBIANG against the companies SOMAGUI FORESTAL and EDUM.

She stood by the statements she had made to the police and challenged the validity of her placement under judicial examination (D943-944).

On 1 December 2012, by virtue of an application dated 1 December 2010 and applications to extend the investigation dated 31 January and 2 March 2012, Mourad BAAROUN was placed under judicial examination for complicity in laundering misused corporate assets or the proceeds of breach of trust, and concealment of that offence (D895). He stood by the statements he had made while in police custody (D895).

He was placed under judicial supervision with bail set at €7,500, which he paid.

During his hearing, he confirmed that Teodoro NGUEMA OBIANG (son) led a luxurious lifestyle in Paris and abroad. He did not dispute the fact that SOMAGUI and EDUM paid for expenses incurred by Teodoro NGUEMA OBIANG in France and made payments in cash.

He was the chief executive *(gérant)* of FOCH SERVICE for a few months following the departure of Mr. WENGER, but did not give any orders or carry out any acts of management, FOCH SERVICE received several million euros from Guinean companies, in particular SOMAGUI, whose functioning he knew nothing about. He did not believe that he was in a position to question his boss, Teodoro NGUEMA OBIANG, about the source of the funds received or how his companies were managed.

FOCH SERVICE managed all of the expenses relating to the property at 42 avenue Foch, and paid Mr. BAAROUN wages of €3,500 per month. He ran errands, became a driver and was responsible for the collection of vehicles.

Mr. BAAROUN and ASCOMA had entered into a referral agreement providing for a 20 per cent referral fee (D755/5).

In its report of 30 January 2013, the OCRGDF noted that this same extravagant spending, arising from the presumed continuation of the fraudulent activities, continued in 2010 and 2011.

With regard to acts concerning the SASSOU NGUESSO family, a search conducted at FRANK EXPORT (carriage of goods from France to Africa) and the discovery of invoices and bank documents suggested that, from 2005 to the end of 2011, the company had acted as a bank by paying invoices that were inconsistent with its company purposes — for example, an invoice dated 17 September 2011 from an upholsterer, Mr. BELLET, relating to the restoration of the SCI Les Batignolles property, which was the residence of Mr. and Ms JOHNSON. Similar discoveries were made during investigations with a notary in Nice, through the interior decorating firm ATELIER 74, which, on behalf of the late Omar BONGO, had purchased townhouses for approximately €50 million and financed their restoration (D897).

These facts gave rise to the application to extend the investigation dated 19 February 2013.

The general terms of the application for annulment

<u>On the admissibility of the present application</u>

The Court should declare admissible the civil-party application of the President of the Republic of Equatorial Guinea, submitted by post on 20 August 2012, which aims to ensure respect for Equatorial Guinea's sovereignty and rights, which have been flouted.

In the view of the applicant — the Republic of Equatorial Guinea — the French investigating judges have no standing, authority or jurisdiction to investigate the original offences (misappropriation of public funds, misuse of corporate assets and breach of trust) allegedly committed in a foreign country, by foreign nationals, with foreign funds. The Equatorial Guinean courts alone have jurisdiction over these supposed offences.

The applicant refers to the order of 19 July 2012 issued by the investigating judges, who assumed and inferred that these offences were characterized on the basis of the following elements:

— the Swiss companies that owned the building located on avenue Foch were purportedly managed "with funds that c[a]me directly from Equatorial Guinea and, more specifically, from [the Equatorial Guinean company] Somagui Forestal" (page 2 of the order);

— the French company SARL Foch Service (in charge of managing the building) "has been supplied with funds that also come from Somagui Forestal";

— the works "[were] paid in part by [the Equatorial Guinean company] Somagui Forestal, whilst a very large portion was paid by debiting an account labelled, 'Teodoro Nguema Obiang, Presidency, Malabo'" (page 3 of the order);

— and concluded that the building was the "product of the investment, concealment or conversion of proceeds of the offences of misappropriation of public funds [and] misuse of corporate assets".

In the view of the Republic of Equatorial Guinea, the French judges are seeking to characterize original offences — misappropriation of public funds, misuse of corporate assets and breach of trust — even though they have no standing or jurisdiction to do so (see above) and are (are claimed to be) seised only of the derivative offences, which cannot be characterized in the absence of a characterization of the original offences, which, assuming them to be established and characterized under Equatorial Guinean criminal law, come under the full jurisdiction of Equatorial Guinea.

However, even though handling offences and money laundering are separate offences which may be prosecuted in France if they took place in France, this is on the condition that the original offences can be characterized by the courts of the foreign country.

1. Violation of the principle of non-interference in the internal affairs of another State

The Republic of Equatorial Guinea considers that it has suffered a violation of the principle proclaimed by resolution 2131 of 21 December 1965 and resolution 2625 of 24 October 1970 of the United Nations General Assembly, which principle provides that States may not intervene in matters which fall within the exclusive jurisdiction of another State, such as, in the present case, the opening of a criminal investigation. The Republic of Equatorial Guinea alone has jurisdiction to legislate and define the acts that it intends to punish. This sovereign jurisdiction is exclusive and prohibits all interference by third States.

The judicial investigation that has been opened has violated this principle. The only course open to the court is to declare the nullity of all of the prosecution and investigative measures relating to the Republic of Equatorial Guinea, its Head of State or its high-ranking representatives.

2. Violation of the principle of sovereign equality among all Members of the United Nations

Article 2, paragraph 1 of the United Nations Charter proclaims that no State may take it upon itself to judge the functioning of another State. This principle was reaffirmed by resolution 2625 (XXV) of 24 October 1970.

The violation of this principle must entail the annulment of all of the prosecution and investigative measures relating to the Republic of Equatorial Guinea, its Head of State or its high-ranking representatives.

3. Violation of the immunity of foreign Heads of States and high-ranking representatives of the State

The French Republic violated international law through the intervention of the different judicial authorities — from the Public Prosecutor's Office to the *Cour de cassation* — which were obliged to make a finding of (inadmissibility) and that they lacked jurisdiction under the principle of criminal immunity of Heads of States, which is established by the international custom recognized by the jurisprudence of the International Court of Justice and the *Cour de Cassation*, with the only permitted exception concerning serious violations of international humanitarian law (crimes against humanity and war crimes) (see the Judgment of 14 February 2002 of the International Court of Justice).

Unless a specific international convention provides otherwise, this principle of immunity is absolute. In the present case, the immunity of the President of the Republic of Equatorial Guinea, His Excellency Teodoro OBIANG NGUEMA MBASOGO, has been violated at the various stages of the proceedings, and, by the same token, the immunity of the Minister for Agriculture and Forestry and Second Vice-President of the Republic of Equatorial Guinea was also violated when an arrest warrant was issued against him following a summons to attend a first appearance which could have led to him being placed under judicial supervision or in pre-trial detention, even under and in accordance with the proceedings provided for by Article 656 of the Code of Criminal Procedure, proceedings to which the Government of Equatorial Guinea did not consent.

An arrest warrant is a prosecution and investigative measure which contravenes the principle of immunity of Heads of States, as does an ordinary summons that might include a measure of constraint pursuant to Article 109 of the Code of Criminal Procedure or Article 434-15-1 of the Penal Code.

Teodora NGUEMA OBIANG MANGUE has exercised various functions: those of Minister for Agriculture and Forestry since 1997, and, on 26 May 2012, he was appointed Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security; immunity of the Head of State thus extends to his person (CC, 14 February 2002 and 19 July 2010).

The Court is therefore requested to annul the arrest warrant issued against Teodoro NGUEMA OBIANG MANGUE and, more specifically, all of the prosecution and investigative measures against him and against other high-ranking representatives of the State in question.

4. Violation of the immunity attached to the property of a diplomatic mission

This immunity is enshrined in Article 22 of the Vienna Convention of 18 April 1961 and the international custom recognized by the jurisprudence of the Court. In the present case, this immunity was violated by the investigating judges.

On 16 September 2011, the Republic of Equatorial Guinea acquired a building located at 40/42 avenue Foch in Paris from Teodoro NGUEMA OBIANG MANGUE, by purchasing the shares of a number of companies. By a Note Verbale of 22 October 2011, the Embassy of the Republic of Equatorial Guinea, in view of Articles 21 and 22 of the above-mentioned Convention, informed the French Ministry of Foreign Affairs that it used the building for the performance of its diplomatic functions, but the French State declined to accept this notification. The building was subsequently searched several times on the initiative of the judicial authorities, in violation of Article 22(3) of the said Convention. These searches took place in violation of international law; the measures in question and the provisional attachments carried out in respect of the premises at that address must be annulled.

Given the seriousness of the violations of international law raised by the Republic of Equatorial Guinea, under Articles 187 and 173 of the Code of Criminal Procedure, the presiding judge of the chamber is requested to suspend the investigation until the pending decision is issued.

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By a written statement duly submitted on 3 April 2013, Mr. William BOURDON, counsel for Transparency International France, contends that the application for the annulment of proceedings filed by the Republic of Equatorial Guinea on 24 September 2012 is inadmissible. Mr. BOURDON asserts that the complaint was declared inadmissible by the investigating judges on 26 September 2012, that the Republic of Equatorial Guinea therefore is not a party to the investigation and that it consequently cannot invoke the nullity of the present proceedings under Article 173 of the Code of Criminal Procedure.

Moreover, the fact that the violations in the present case are not punished in the Republic of Equatorial Guinea does not prevent the investigation from continuing in France with regard to the handling and money laundering offences committed in France.

Regarding the nullity of the procedural measures according to the arguments presented by the Republic of Equatorial Guinea — that non-compliance with the principle of non-interference in the internal affairs of another State and the principle of sovereign equality among all Members of the United Nations violates the immunity of foreign Heads of State and high-ranking representatives of States and the immunity attached to the property of foreign diplomatic missions — counsel for Transparency International France responds that the application does not mention any violation of the rules of criminal procedure that might entail the nullity of the measures in question pursuant to Article 802 of the Code of Criminal Procedure.

Lastly, in support of the jurisdiction of the French courts, Transparency International France argues that two United Nations conventions are applicable: the Convention against [Transnational] Organized Crime, known as the Palermo Convention, signed on 15 November 2000, and the Convention against Corruption, known as the Merida Convention, signed on 31 October 2003, both of which have been ratified by Gabon, Congo-Brazzaville and Equatorial Guinea (D.322). Reference is made to Articles 5 to 9 of the first of these conventions and Articles 16 to 24 of the second. The civil-party applicant concludes with an overview of the original offences punished in each of the States concerned (D.323/11).

On behalf of the Republic of the Congo, Mr. Versini CAMPINCHI responds that Article 4 of the Merida Convention recalls the principles of non-interference and sovereignty and Article 42 of the same convention prohibits France from substituting for the Congolese State, which could refuse international mutual legal assistance.

In the view of the Public Prosecutor, in his written submissions of 23 November 2012, the application for annulment is admissible, as it was filed before a ruling was issued on the appeal concerning the admissibility of the civil-party application of the Republic of Equatorial Guinea. Nevertheless, because he considers that State's civil-party application inadmissible, he therefore also considers the present application inadmissible. In the alternative, he rejects the arguments put forward by the applicant: the violations of the principles invoked by the applicant do not involve any violation of rules of criminal procedure entailing nullity as prescribed by law within the meaning of Article 802 of the Code of Criminal Procedure. However, the points argued may lead

the *Chambre de l'instruction*, under its powers derived from Articles 174 and 206 of the Code of Criminal Procedure, to examine a question of absolute nullity *(nullité substantielle d'ordre public)* in respect of the French courts' jurisdiction to hear the case. Certain violations, such as handling offences and money laundering, have clearly been committed in France. There is no doubt about the French investigating judge's jurisdiction, even if the original offences are committed abroad and remain unpunished, owing in particular to diplomatic immunity.

In their duly filed written statement, the counsel for the Republic of Equatorial Guinea seek a finding that their application was and is admissible, since it was filed on 20 August 2012 and the investigating judges did not declare the civil-party application of the Republic of Equatorial Guinea, formalized on 20 August 2012, inadmissible until 26 September 2012, that is, over a month after the State expressed its intention to file a civil-party application. The civil-party application therefore was not contested at the time the application for annulment was filed, as the *Cour de cassation* has held that measures carried out during the first phase were not annulled retroactively (C.C. 16 February 1993), and the application's admissibility must be assessed as of the day on which it is filed.

Concerning the merits, as regards the nullity of the proceedings, the defence refers to its application: any procedural measure that violates State sovereignty or diplomatic immunity must be annulled, without it being necessary to demonstrate the existence of a grievance, and international custom bars the prosecution of States before the criminal courts of a foreign State, this immunity extending to organs and entities which are an emanation of that State, and to their agents, in respect of acts which, as in the present case, fall within the sovereignty of the State concerned. It should be noted that treaties and agreements take precedence over domestic laws. Under the Vienna Convention, the *Chambre d[e l]'instruction* has a duty to annul the arrest warrant, as the *Chambre criminelle* of the *Cour de cassation* has ruled on several occasions (5 March 1958, 13 March 2001 and 23 November 2004).

In the present case, the Republic of Equatorial Guinea is a victim of the violation of Article 2, paragraph 1, of the United Nations Charter, cited in the applications, resolution 2131 (XX) of 20 December 1965 and resolution 2625 (XXV) of 24 October 1970 of the United Nations General Assembly establishing the principle of non-interference in the internal affairs of other States — a violation arising from the opening of a judicial investigation in France to prosecute public acts of another sovereign State, with the result that any prosecution or investigative measures relating to the Head of State of Equatorial Guinea or its high ranking representatives must be annulled.

The immunity of the Head of State and high ranking State representatives was violated by the opening of the investigation. Those proceedings violate the rules of international custom established by the Judgment of [14] February 2002 of the International Court [of Justice]; the same applies for a Minister for Foreign Affairs. Unless an international convention provides otherwise, this immunity is absolute with regard to foreign Heads of State and holders of high ranking office in a State, regardless of the gravity of the crime alleged. Article 2 of the Merida Convention signed on 9 December 2003, which Equatorial Guinea has neither signed nor ratified, cannot be invoked against this principle. The principle of full immunity is also laid down in the resolution of 26 August 2001 adopted [by the Institut de droit international] at the Vancouver session.

The preliminary investigation and subsequent judicial investigation, which were opened following complaints in which Teodoro OBIANG NGUEMA MBASOGO was specifically named, violated the immunity from criminal process he enjoys as Head of State. Although the *Cour de cassation* reaffirmed the investigating judges' duty to investigate (C. Crim. 19 December 2012 and 19 March 2013) — regardless of whether the person is a foreign or French Head of State — they nonetheless cannot carry out investigative measures, the purpose or consequence of which is to undermine the immunity enjoyed by foreign Heads of State, as envisioned by legal scholars and the

French Constitution; and yet the President of Equatorial Guinea was investigated regarding, in particular, his property in Ville d'Avray.

This same immunity — as regards its principle and scope — must be enjoyed by Teodoro NGUEMA OBIANG MANGUE, the son of the Head of State and, more importantly, the Second Vice President of the Republic of Equatorial Guinea. However, he has been and is currently the subject of investigative measures, including the issuance of an arrest warrant against him. The *Cour de cassation* has upheld international custom and annulled two arrest warrants issued against high-ranking Senegalese representatives in pursuance of that immunity, which they continued to enjoy after leaving office (C. Crim. 19 January 2010). In the present case, Teodoro OBIANG NGUEMA MBASOGO, who has served as Minister for Agriculture and Forestry since 1997 and Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security since 21 May 2012, must enjoy the same immunity, in accordance with the same rules.

Nonetheless, the summons for judicial examination, which paves the way for placement under judicial supervision or even placement in pre-trial detention, and is already inconsistent with these rules, constituted a serious violation of the aforementioned principles, as did the issuance of an arrest warrant on 13 July 2012, in the absence of any response to a second summons to appear on 21 May, that is, the day after the person concerned was appointed to his new office, even though the *Cour de cassation* (sitting in plenary on 10 October 2001) ruled that an investigating judge could not summons the President of France as a witness, on account of the immunity attached to his office. The arrest warrant in question must therefore be annulled.

Lastly, the premises of a diplomatic mission and the property thereon also enjoyed immunity, which was also violated in the present case, in breach of the provisions of Article 22 of the Vienna Convention; these premises were searched, the movable property was seized and the immovable property was also attached, even though the building at 40-42 avenue Foch had become the property of the Republic of Equatorial Guinea on 15 September 2011 and that State's Embassy had, by Note Verbale of 4 October 2011, officially notified the French Ministry of Foreign Affairs that it was using the premises for the purposes of its diplomatic mission.

The refusal of the Ministry's Protocol Department is contrary to the Vienna Convention, since the designation of the premises is subject to a declaratory régime. Accordingly, the court must annul all of the search and attachment measures relating to the building or the movable property thereon, as well as the order of attachment under the Code of Criminal Procedure dated 19 July 2012.

Lastly, the defence contends that the investigating judges exceeded the scope of the case referred to them with regard to the characterizations set forth in their order of 26 September 2012, which were taken up by the Public Prosecutor in his submissions for that hearing. The investigating judges are considered to be investigating two sets of facts:

— the handling and laundering of public funds (misappropriation of public funds);

— the handling and laundering of private funds (misuse of corporate assets and breach of trust) originating from SOMAGUI FORESTAL.

Recalling the Public Prosecutor's submissions, the sole purpose of which was to note the inadmissibility of the civil-party application, the absence of submissions from the Public Prosecutor requesting or declining to open an investigation, and the judgment of 9 November 2010 of the *Chambre criminelle* defining the scope of the case in the following supporting reason: "assuming them to be established, the offences under investigation, in particular the handling and laundering in France of assets paid for out of misappropriated public funds, offences which were themselves facilitated by corrupt practices but which are distinct from

the offence of corruption, are likely to cause direct and personal harm to the association Transparency International France, on account of the specific object and purpose of its mission", the defence is of the view that the scope of the case is limited to the facts relating to the misappropriation of public funds or the use in France of misappropriated public funds. Transparency International France's civil-party application is said to be inadmissible with regard to the use of misappropriated private funds, and yet the investigating judges primarily focused and carried out their investigations in respect of facts relating to the use of misappropriated private funds, such as those originating from SOMAGUI FORESTAL, and they relied on those facts alone as grounds for the order of attachment under the Code of Criminal Procedure dated 19 July 2012, which order should be annulled.

By a written statement of 3 April 2013, Teodoro NGUEMA OBIANG MANGUE, through his counsel, recalls the course of the proceedings: his summons of 23 January 2012 for questioning at first appearance, even though he is the Permanent Representative of the Republic of Equatorial Guinea at UNESCO; the letter of 27 February 2012 from his Embassy stating that he will not respond to the summons; the search of the property on avenue Foch; his appointment on 21 May 2012 as Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and Security; the second summons of 22 May 2012, sent in violation of that status, for an appearance on 11 July 2013; and the letter from his counsel dated 10 July 2012, informing the investigating judges that Teodoro NGUEMA OBIANG MANGUE could not comply with the summons.

The defence refers to its application in arguing that the court has an imperative duty to consider the plea of immunity under customary international law, which has been violated in the present case, given that the *Cour de cassation* accepted an extended right of appeal in respect of pleas based on diplomatic immunity (5 March 1985), as did the *Conseil constitutionnel* (decision No. 2011/153, application for a priority preliminary ruling on an issue of constitutionality, 13 July 2011). According to the defence, by analogy, this legal rationale can be applied to Article 173 of the Code of Criminal Procedure.

The defence recalls that the *Chambre criminelle* of the *Cour de cassation* has established that, having regard to international public policy, the prosecution of officials is impossible (*Crim.* 13 March 2001 No. 00-87215, 13 November 2001 No. 01-82 440 and 19 January 2010 No. 09-84818). Under Article 206 of the Code of Criminal Procedure, the *Chambre d[e l]'instruction* has the right or duty to consider the regularity of proceedings. The issuance of the arrest warrant violated customary international law and Article 6 (1) of the ECHR (ICJ, 14 February 2002, *DRC* v. *Belgium*). Under Article 13 of the same Convention, immediate consideration of the present appeal is possible. This appeal seeking annulment is *a fortiori* possible from a legal standpoint, since Law No. 2004-204 of 5 March 2004 enables a *témoin assisté* (legally represented witness) to submit an application for annulment, in the same way as the *Chambre criminelle* of the *Cour de cassation* recognized that a person placed in detention in a foreign country pending extradition pursuant to an arrest warrant issued by a French investigating judge had the same right, pursuant to Article 5 (4) of the ECHR (*Crim*. 7 November 2000). The defence notes that the *Cour de cassation* took the opposite position in its judgment of 19 January 2010 (No. 09-84818), even though it deems an arrest warrant to be a prosecution measure.

Concerning the merits, as regards the nullity of the proceedings, the defence refers to its application: any procedural measure that violates State sovereignty or diplomatic immunity must be annulled, without it being necessary to demonstrate the existence of a grievance, and international custom bars the prosecution of States before the criminal courts of a foreign State, this immunity extending to organs and entities which are an emanation of that State, and to their agents, in respect of acts which, as in the present case, fall within the sovereignty of the State concerned. It should be noted that treaties and agreements take precedence over domestic laws. Under the Vienna Convention, the *Chambre d[e l]'instruction* has a duty to annul the arrest warrant, as the

Chambre criminelle of the *Cour de cassation* has ruled on several occasions (5 March 1958, 13 March 2001 and 23 November 2004).

In the present case, the Republic of Equatorial Guinea is a victim of the violation of Article 2, paragraph 1, of the United Nations Charter, cited in the applications, resolution 2131 (XX) of 20 December 1965 and resolution 2625 (XXV) of 24 October 1970 of the United Nations General Assembly establishing the principle of non-interference in the internal affairs of other States — a violation arising from the opening of a judicial investigation in France to prosecute public acts of another sovereign State, with the result that any prosecution or investigative measures relating to the Head of State of Equatorial Guinea or its high-ranking representatives must be annulled.

The immunity of the Head of State and high-ranking State representatives was violated by the opening of the investigation. Those proceedings violate the rules of international custom established by the Judgment of [14] February 2002 of the International Court [of Justice]; the same applies for a Minister for Foreign Affairs. Unless an international convention provides otherwise, this immunity is absolute with regard to foreign Heads of State and holders of high-ranking office in a State, regardless of the gravity of the crime alleged. Article 2 of the Merida Convention signed on 9 December 2003, which Equatorial Guinea has neither signed nor ratified, cannot be invoked against this principle. The principle of full immunity is also laid down in the resolution of 26 August 2001 adopted [by the Institut de droit international] at the Vancouver session.

The preliminary investigation and subsequent judicial investigation, which were opened following complaints in which Teodoro OBIANG NGUEMA MBASOGO was specifically named, violated the immunity from criminal process he enjoys as Head of State. Although the *Cour de cassation* reaffirmed the investigating judges' duty to investigate (*C. Crim*. 19 December 2012 and 19 March 2013) — regardless of whether the person is a foreign or French Head of State — they nonetheless cannot carry out investigative measures, the purpose or consequence of which is to undermine the immunity enjoyed by foreign Heads of State, as envisioned by legal scholars and the French Constitution; and yet the President of Equatorial Guinea was investigated regarding his property in Ville d'Avray.

This same immunity — as regards its principle and scope — must be enjoyed by Teodoro NGUEMA OBIANG MANGUE, the son of the Head of State and, more importantly, the Second Vice-President of the Republic of Equatorial Guinea. However, he has been and is currently the subject of investigative measures, including the issuance of an arrest warrant against him. The *Cour de cassation* has upheld international custom and annulled two arrest warrants issued against high-ranking Senegalese representatives in pursuance of that immunity, which they continued to enjoy after leaving office (*C. Crim*. 19 January 2010). In the present case, Teodoro OBIANG NGUEMA MBASOGO, who has served as Minister for Agriculture and Forestry since 1997 and Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security since 21 May 2012, must enjoy the same immunity, in accordance with the same rules.

Nonetheless, the summons for judicial examination, which paves the way for placement under judicial supervision or even placement in pre-trial detention, and is already inconsistent with these rules, constituted a serious violation of the aforementioned principles, and the same can be said of the issuance of an arrest warrant on 13 July 2012, in the absence of any response to a second summons to appear on 21 May, that is, the day after the person concerned was appointed to his new office, even though the *Cour de cassation* (sitting in plenary on 10 October 2001) ruled that an investigating judge could not summons the President of France as a witness, on account of the immunity attached to his office. The arrest warrant in question must therefore be annulled.

Lastly, the premises of a diplomatic mission and the property thereon also enjoyed immunity, which was also violated in the present case, in breach of the provisions of Article 22 of

the Vienna Convention; these premises were searched, the movable property was seized and the immovable property was also attached, even though the building at 40-42 avenue Foch had become the property of the Republic of Equatorial Guinea on 15 September 2011 and that State's Embassy had, by Note Verbale of 4 October 2011, officially notified the French Ministry of Foreign Affairs that it was using the premises for the purposes of its diplomatic mission.

The refusal of the Ministry's Protocol Department is contrary to the Vienna Convention, since the designation of the premises is subject to a declaratory régime. Accordingly, the court must annul all of the search and attachment measures relating to the building or the movable property thereon, as well as the order of attachment under the Code of Criminal Procedure dated 19 July 2012.

Lastly, the defence contends that the investigating judges exceeded the scope of the case referred to them with regard to the characterizations set forth in their order of 26 September 2012, which were taken up by the Public Prosecutor in his submissions for that hearing. The investigating judges are considered to be investigating two sets of facts:

— the handling and laundering of public funds (misappropriation of public funds);

— the handling and laundering of private funds (misuse of corporate assets and breach of trust) originating from SOMAGUI FORESTAL.

Recalling the Public Prosecutor's submissions, the sole purpose of which was to note the inadmissibility of the civil-party application, the absence of submissions from the Public Prosecutor requesting or declining to open an investigation, and the judgment of 9 November 2010 of the *Chambre criminelle* defining the scope of the case in the following supporting reason:

> "assuming them to be established, the offences under investigation, in particular the handling and laundering in France of assets paid for out of misappropriated public funds, offences which were themselves facilitated by corrupt practices but which are distinct from the offence of corruption, are likely to cause direct and personal harm to the association Transparency International France, on account of the specific object and purpose of its mission",

the defence is of the view that the scope of the case is limited to the facts relating to the misappropriation of public funds or the use in France of misappropriated public funds. Transparency International France's civil-party application is said to be inadmissible with regard to the use of misappropriated private funds, and yet the investigating judges primarily focused and carried out their investigations in respect of facts relating to the use of misappropriated private funds, such as those originating from SOMAGUI FORESTAL, and they relied on those facts alone as grounds for the order of attachment under the Code of Criminal Procedure dated 19 July 2012, which order should be annulled.

In the submissions, the court is requested:

— to find that the applicant enjoys absolute immunity from jurisdiction as Second Vice-President of the Republic of Equatorial Guinea;

— to find that the judicial investigation opened in France by the Paris *Tribunal de grande instance* violates the principle of non-interference in the internal affairs of another State and the principle of the sovereignty of that State, and violates the principle of sovereign equality of States;

— to declare the nullity of all of the prosecution and investigative measures relating to Teodoro NGUEMA OBIANG MANGUE and, consequently, the nullity of the arrest warrant issued against him.

Having regard to the foregoing

1. On the admissibility of the application for annulment submitted by the Republic of Equatorial Guinea

Whereas the Republic of Equatorial Guinea expressed its intention to file a civil-party application by letter of 20 August 2012 (D863), and the investigating judges refused to allow the said application by order of 26 September 2012 (D 868); whereas, therefore, between 20 August and 26 September 2012, the application for annulment filed by the Republic of Equatorial Guinea, which had expressed its intention to file a civil-party application, and which application was not contested as it stood, was procedurally admissible, as the Republic of Equatorial Guinea had standing during that period, and, having appealed the above-mentioned order, it retained that standing until the separate judgment of this chamber, dated this day (No. 2012/08462), ruling on the regularity of the civil-party application in question.

2. On the merits of an application for annulment to challenge the jurisdiction of the French courts and, more specifically, the investigating judges of the Paris courts

Whereas the French courts' jurisdiction to prosecute offences committed abroad, by foreigners, against foreign victims, is determined by the provisions of Articles 689, 689-1 and 693 of the Code of Criminal Procedure, and Articles 113-2, 113-5, 113-6, paragraphs 1 and 2, and 113-8 of the Penal Code, in particular;

Whereas if the jurisdiction of a French criminal court is challenged by a party to the proceedings, as in the present case, that party must seise the investigating judge concerned by means of an objection to jurisdiction, not an application for annulment under Article 802 of the Code of Criminal Procedure, since investigating judges have a duty to rule on their jurisdiction and that of the French criminal courts by means of an order, which, under the provisions of Article 186, paragraph 3, of the Code of Criminal Procedure, may be appealed by a party;

Whereas, consequently, the Republic of Equatorial Guinea's seisin of the court by means of an application for the annulment of procedural measures in order to obtain a ruling on the jurisdiction of the French courts, which application was filed on 24 September 2012 and registered under No. 2012/07413, must be declared ill-founded.

3. On the regularity of the procedural measures

Whereas the *Chambre d'instruction*, under the provisions of Article 206 of the Code of Criminal Procedure, subject to the provisions of Articles 173-1, 174 and 175 of the same code, has the power to consider and rule on pleas for nullity submitted to it by one or more parties to the proceedings;

A. <u>On the scope of the case referred to the investigating judges of the Paris *Tribunal de grande instance*</u>

Whereas, by judgment of 9 November 2010 (D 30), the *Chambre Criminelle* of the *Cour de cassation* found that an association such as Transparency International France could be allowed to file a complaint and a civil-party application against three foreign Heads of States and certain

individuals in their entourage, for misappropriation of public funds, misuse of corporate assets, money laundering and complicity in those offences, breach of trust and concealment; *whereas* the civil-party applicant Transparency International France claimed that assets derived from the alleged offences, which are themselves forms of corruption, are held by the persons concerned in national territory;

Whereas, by its application of 4 July 2011 (D.317-319) described above, the Paris Public Prosecutor characterized and defined the offences alleged by the civil-party applicant Transparency International France and referred them to the investigating judges, limiting them to acts of money laundering or handling offences, as provided for in Articles 324-1 and 321-1 of the Penal Code and punishable thereunder;

Whereas, in the light of the new facts revealed by the customs and tax authorities, which were not cited in Transparency International France's initial complaint with civil-party application, applications to extend the investigation were filed on 31 January 2012, 2 March 2012 and 19 February 2013 with regard to the same criminal characterizations;

Whereas, by judgment No. 2012/04175 dated 19 November 2012, this court confirmed the investigating judges' order of 24 April 2012 denying the request for the restitution of various vehicles that Teodoro NGUEMA OBIANG MANGUE declared he owned, on the following grounds:

— that it is clear from the pleadings that there is sufficient evidence to consider that all of the vehicles may have been acquired through the misappropriation of funds committed against the company Somagui Forestal and/or the Equatorial Guinean State; that, moreover, the counsel for Teodoro Nguema Obiang has not produced any supporting evidence concerning the origin of the funds used to acquire the vehicles in question;

— that the texts defining the offence of money laundering require neither that the original offence should take place in national territory nor that the French courts should have jurisdiction to prosecute it; that the characterization of the original offence must be determined with regard to the texts setting out the punishment of offences; that, moreover, the Republic of Equatorial Guinea is a member of the Organization for the Harmonization of Business Law in Africa, which, on 17 April 1997, adopted the Uniform Act on Commercial Companies and Economic Interest Groupings, whose Article 891 provides that any manager, chief executive officer, general director or deputy general director who uses company assets or credit in bad faith, knowing that this is contrary to the company's interests, for personal, material or moral purposes, or for the benefit of another legal entity in which they have a direct or indirect interest, shall incur a criminal sanction; that the judicial investigation aims to seek out the elements constituting money laundering in the original offence and to determine possible criminal responsibility;

— that the terms of this decision are final, as it has not been appealed; that it can be concluded that the characterizations of handling offences and money laundering concern both the offences of misappropriation of public funds and those of misuse of corporate assets and breach of trust, and that the scope of the case referred to the investigating judges is limited accordingly;

B. <u>As regards the money laundering and handling offences committed in France</u>

Whereas the Republic of Equatorial Guinea considers that in order to prosecute money laundering offences committed in France, the French judges, which have no standing or jurisdiction to characterize original offences (misappropriation of public funds, misuse of corporate assets and breach of trust) also have no element of fact or law allowing them to characterize the original offences under the legislation of a foreign State;

Whereas, in order to prosecute the offence of money laundering as defined in and punished under Articles 324-1 *et seq*. of the Penal Code, it must be possible objectively to characterize the initial criminal act as a felony or misdemeanour, but it is by no means necessary for the perpetrator of the original offence to have previously been prosecuted or convicted, or for prosecution of the offence to be impossible for procedural reasons (prescription, for example), as such procedural obstacles do not rid the original criminal offence of its objectively criminal nature;

Whereas, by judgment of 24 February 2010, the *Chambre Criminelle* of the *Cour de Cassation* found, after identifying the initial conduct of the suspect considered by the first judges with regard to the predicate offence, that 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 the jurisdiction to prosecute it, since the offence of money laundering is a general, separate, autonomous offence (*Ch. Crim.* 24 February 2010, 09-82-857);

Whereas, in the present case, the investigations carried out since 2007 by a number of services, including the OCRGDF and Tracfin, at the request of the Paris Public Prosecutor, the records of which are included in the investigation file, and the investigations carried out pursuant to a letter rogatory, revealed the existence of very substantial movable and immovable assets, as described above (pages 5, 6 and 7), benefitting in particular Teodoro NGUEMA, the son of the President of the Republic of Equatorial Guinea, Minister for Agriculture and Forestry, and chief executive *(dirigeant)* of the company SOMAGUI FORESTAL, who had a salary of approximately €60,000 to €80,000 per year; whereas the discrepancy between the official income of the person concerned and the magnitude of the total assets suggested that the financing of these assets located in French territory, using the means of payment also described above, pointed to the existence of offences, namely misappropriation of public funds, misuse of corporate assets or breach of trust, given the capacity and functions of the suspects, while this financing constituted assistance in investing, concealing or converting the direct or indirect proceeds of a felony or misdemeanour on the part of the persons who were named in Transparency International France's complaint and were identified as suspects in subsequent investigations;

Whereas, furthermore, on 7 February 2003 the Republic of Equatorial Guinea, like France, acceded to the convention adopted by resolution 55/25 of the United Nations General Assembly on 15 November 2000, known as the Palermo Convention, as did Gabon on 15 December 2004 and Congo-Brazzaville on 28 October 2005, the purpose of which is to criminalize and punish transnational organized crime, and whereas Article 6 of the Convention provides for the criminalization of the laundering of proceeds of crime;

Whereas, in taking such action, neither the Public Prosecutor's Office nor the investigating judges violated the principle of non-interference in the internal affairs of another State or that of sovereign equality among all Members of the United Nations, since the scope of the case referred to the French criminal court was limited to money laundering and handling offences committed in France, without intervening in the opening of a criminal investigation in Equatorial Guinea, the Congo or Gabon;

C. <u>As regards the violation of the principle of immunity of foreign Heads of State</u> and of high-ranking representatives of the same State, having regard to custom and international law, and more specifically in respect of Mr. Teodoro OBIANG NGUEMA MBANGO, President of the Republic of Equatorial Guinea, and his son Mr. Teodoro NGUEMA OBIANG MANGUE, Minister for Agriculture and Forestry from 1997 to 26 May 2012 and subsequently Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and Security as from 21 May 2012;

Whereas, while international custom, in the absence of international provisions to the contrary, bars the prosecution of States before the criminal courts of a foreign State, a custom extending to organs and entities which are an emanation of that State, and to their agents, in respect

of acts falling within the sovereignty of the State concerned, this principle is limited to the exercise of State functions (*Ch. Crim.* 19 January 2010, 14 May 2002 and 23 November 2004);

Whereas in the present case, the acts of money laundering and/or handling offences committed on French national territory in respect of the acquisition of movable and immovable assets for solely personal use are separable from the exercise of State functions protected by international custom under the principles of sovereignty and diplomatic immunity;

Whereas, consequently, there is no merit in the Republic of Equatorial Guinea's claim that the principle of immunity owed to foreign Heads of States and their entourage had been violated in respect of its Head of State and its Minister for Agriculture and Forestry, who became Second Vice-President of the Republic the day he found out that he had been summoned to appear before the investigating judge to respond to a possible judicial examination and that he was the subject of an international arrest warrant;

Whereas, knowing that he was the subject of two summons that might lead to his placement under judicial examination, Teodoro NGUEMA OBIANG MANGUE deemed it unnecessary to respond to them, and made this known to the judges, who, in accordance with the provisions of Article 131 of the Code of Criminal Procedure, were then entitled to issue an arrest warrant against him for the acts of which his is accused in France; whereas, consequently, the issuance of the said arrest warrant was regular, as set out and declared in decision No. 2012/08657;

D. <u>As regards the immunity attached to the property of a diplomatic mission</u>

Whereas, although Article 22 of the Vienna Convention of 18 April 1961, international jurisprudence and the French jurisprudence of the *Cour de Cassation* recognize the principle of such immunity, a question arises as to whether the property in question, that is, the building at 40/42 avenue Foch in Paris and the movable property therein, was intended and effectively used by the Republic of Equatorial Guinea for the purposes of a diplomatic mission;

Whereas the investigations conducted, in particular those carried out by OPIAC, revealed that, in addition to the list of expensive vehicles belonging to or having belonged to Teodoro NGUEMA OBIANG MANGUE (D 239), the list of transfers ordered by the company SOMAGUI FORESTAL (D 355) to pay for clothing, movable assets and decorative collectibles totalling several millions of euros (D 242, 280, 284), and all of the investigations relating to extravagant purchases (D 494 to 515), the investigations conducted by the OCRGDF in 2011 (D486) revealed that the building located at 42 avenue Foch in Paris, which originally included five apartments on five levels, belonged to five Swiss companies in 2004, that one person alone owned all of the shares of those companies (D 475/2), that the same person held a claim in the amount of €22,098,595 against those companies, that this person owned the furniture and fittings, that the building was placed, without charge, at the disposal of Mr. X, identified to be Teodoro NGUEMA, who was the actual owner, through SOMAGUI FORESTAL, of the shares forming the capital of the above-mentioned Swiss companies, that is, GANESHA, RE ENTREPRISE, GEP, NORDI AND SHIPPING and RAYA HOLDING, and the two French companies FOCH SERVICES and SCI Avenue du Bois;

Whereas these investigations established that the cost of the works carried out on the property totalled approximately €20 million (D.484), paid in large part by means of transfers from SOMAGUI FORESTAL, which also paid for the management and maintenance of the building, estimated at €40 million;

Whereas, on 5 October 2011 (D476/6 to 2) the judicial police officers noted the presence, on the front door of the premises and the upper floors, of two makeshift signs in sheet protectors, marked "Republic of Equatorial Guinea — Embassy premises", while the official address of the

Embassy appears as 29 boulevard de Courcelles in Paris (8th arr.), which signs, according to the caretaker, had been posted the previous day;

Whereas other investigations have shown that, between 1995 and 2005, Teodoro OBIANG NGUEMA MBASOGO, born on 5 June 1942 in Akaogam, Equatorial Guinea, owned three units in the building (D444/2);

Whereas ownership of the entire property is claimed to have been transferred to the Republic of Equatorial Guinea on 15 September 2011;

Whereas, on 27 October 2001, the investigators contacted the Protocol Department of the Ministry of Foreign Affairs, whereas it was confirmed to them that the premises at 42 avenue Foch were subject to ordinary law and that the address in question was in no circumstances an official address of the Republic of Equatorial Guinea (D 482), notwithstanding Note Verbale No. 185/12 of 15 February 2012 from the Embassy of Equatorial Guinea, in which that State informed the French Ministry of Foreign Affairs that it owned that property and wished to obtain police protection for it (D 543/2), which the Ministry of Foreign Affairs refused, with the Republic of Equatorial Guinea protesting against that refusal (D 630);

Whereas, from 14 to 22 February 2012, the premises of the building were searched (D 555 to D 568), whereas the records of the findings made on that occasion and the photograph album of the premises (D 585) show that all of the rooms were reserved exclusively for use as a private residence;

Whereas, consequently, there is no merit in the Republic of Equatorial Guinea's claim that the building at 42 avenue Foch in Paris housed its embassy, which enjoyed diplomatic immunity, whereas, on the contrary, it must be noted that the judicial measures carried out in respect of the property and the furniture thereon — the searches and attachments, in particular — did not violate diplomatic immunity of any kind, that they must be declared to be regular and that a ruling on the validity of the order of attachment (*ordonnance de saisie pénale*) will be made in decision No. 2012/09047;

Whereas all of the arguments set out in Teodoro NGUEMA OBIANG MANGUE's written statement have been given a response in judgment No. 2012/08657 rendered this day;

Whereas the entire proceedings are in order up to reference number D960, the court itself having identified no grounds for nullity.

For these reasons,

THE COURT,

Having regard to Articles 170, 171, 172, 173, 174, 194, 197, 199, 200, 206, 209, 216, 217, 801 and 802 of the Code of Criminal Procedure,

As to the procedure,

Declares the *application for annulment* admissible;

As to the merits,

Finds it ill-founded

And, after reviewing the proceedings, finds them to be regular and finds that there are no grounds for annulling any measure or any procedural document reviewed up to reference

number D960, with the exception of the partial annulments and cancellations ordered by judgment No. 2012/08657 dated this day;

Orders the file to be returned to the investigating judge to whom the case has been referred, for continuation of the investigation;

Orders this judgment to be enforced at the initiative of the Public Prosecutor.

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ANNEX 53

***Cour de cassation, Chambre criminelle*, judgment of 5 March 2014**

***Cour de cassation, Chambre criminelle,* judgment of 5 March 2014**

[Translation]

DISMISSAL

Mr. Louvel, presiding judge

The French Republic

in the name of the French people

The *Cour de cassation, Chambre criminelle*, at a public hearing at the *Palais de justice* in Paris, delivered the following judgment:

Ruling on the appeals lodged by:

Ganesha Holding
Nordi Shipping et Entreprise Participation
Re Entreprise
Raya Holding
Société du 42 avenue Foch
[SCI] Avenue du bois
GEP Entreprise Participation
The Republic of Equatorial Guinea

against judgment No. 6 of the *Chambre de l'instruction* of the Paris *Cour d'appel*, 2nd division, dated 13 June 2013, which, in the investigation of Mr. Mourad Baaroun, Mr. Franco Cantafio and Ms Aurélie Derand, among others, for money laundering, misuse of corporate assets, breach of trust, complicity in the misappropriation of public funds and handling offences, among others, upheld the investigating judge's order relating to an attachment (*saisie immobilière*) measure;

The court, ruling after a hearing in open court on 5 February 2014, where the following persons were present: Mr. Louvel, presiding judge, Ms Labrousse, reporting judge, Ms Nocquet, Ms Ract-Madoux, Mr. Soulard, Ms de la Lance, Ms Chaubon, Mr. Germain, Mr. Sadot, divisional judges, and Mr. Azema, auxiliary judge;

Advocate General: Mr. Bonnet;

Divisional clerk: Mr. Bétron;

On the basis of the report of [reporting judge] Ms LABROUSSE, the observations of the *société civile professionnelle* WAQUET, FARGE et HAZAN, the *société civile professionnelle* PIWNICA et MOLINIÉ, counsel before the court, and the submissions of Advocate General Mr. BONNET;

Having regard to the order of the presiding judge of the *Chambre criminelle*, dated 6 September 2013, ordering the joinder and immediate consideration of the appeals;

Having regard to the joint statement of appeal of the appellants, and the written statement submitted by the respondent;

Whereas the challenged judgment and the related procedural documents show that, on 2 December 2008, the association Transparency International France filed a complaint with civil-party application against, in particular, the acting President of the Republic of Equatorial

Guinea and his son, Mr. Teodoro Nguema Obiang Mangue, for misappropriation of public funds, misuse of corporate assets, breach of trust, money laundering, handling offences and complicity in these offences, stating that assets derived from the alleged offences are held by these persons in French territory; whereas, on 19 July 2012, the investigating judge, pursuant to Articles 706-141 to 706-147 and Articles 706-150 to 706-152 of the Code of Criminal Procedure, attached a property located in Paris, on a provisional basis, which he identified to be derived from the offence of money laundering and to be owned by Mr. Teodoro Nguema Obiang Mangue, through several Swiss and French companies of which he was the sole shareholder from December 2004; whereas the Republic of Equatorial Guinea and the above-mentioned companies appealed that decision;

In these circumstances,

On the first ground of appeal, based on the violation of Article 191 and Articles 591 to 593 of the Code of Criminal Procedure and Article R. 312-36 of the Code of Judicial Organization: failure to state reasons and lack of legal basis;

"in that, according to the particulars of the challenged judgment, the *Chambre de l'instruction* was composed as follows:

'Composition of the court:

During the proceedings and the deliberations:

Ms Boizette, presiding judge;

Ms Dupont-Viet, judge appointed by order of the first president of the Paris *Cour d'appel* dated 13 March 2013;

Mr. Guiguesson, judge;

All three of whom were appointed under the provisions of Article 191 of the Code of Criminal Procedure';

whereas, when a regular judge of the *Chambre de l'instruction* is unavailable and it is not possible to hold a meeting of the General Assembly, the first president of the *Cour d'appel* is authorised to appoint an alternate only on a temporary basis and for a fixed period; whereas, in failing to note that it was not possible to hold a meeting of the General Assembly and in failing to state the period for which Ms Dupont-Viet, judge appointed by order of the first president of the *Cour d'appel*, was allowed to sit on the bench of the *Chambre de l'instruction*, the challenged judgment did not enable the *Cour de cassation* to verify the regularity of the composition of the *Chambre de l'instruction*;

whereas the particulars of the challenged judgment, which state that the presiding judge and the two judges composing the *Chambre de l'instruction* were appointed in accordance with the provisions of Article 191 of the Code of Criminal Procedure, are sufficient, in the absence of any objection at the hearing concerning the terms of the judges' appointment, to establish the regularity of the court's composition;

this ground of appeal therefore cannot be accepted;

on the second ground of appeal, based on the violation of Articles 131-21 and 324-7, point 12, of the Penal Code and Articles 706-141 to 706-152 and Articles 591 to 593 of the Code of Criminal Procedure: failure to state reasons and lack of legal basis;

in that the challenged judgment upheld the order of attachment (*ordonnance de saisie pénale immobilière*) dated 19 July 2012;

on the grounds that the investigating judge cited Article 131-21 of the Penal Code without further detail, namely without citing paragraphs 5 or 6 thereof in the challenged order; the judge cited the provisions of Articles 706-141 to 706-147 and Articles 706-150 to 706-152 of the Code of Criminal Procedure; that he did not cite Article 706-148, which provides that, with regard to the attachment of assets, investigating judges issue orders at the request of the Public Prosecutor or of their own initiative after obtaining the opinion of the Public Prosecutor; that, in the present case, Article 131-21, paragraph 3, of the Penal Code applies; that the provisions of Article 131-21, paragraphs 5 and 6, do not apply, because the property that is the subject of the challenged order of attachment of 19 July 2012 is directly derived from the offence of money laundering, taking account of how the property was financed, and that it is not an extended attachment of assets; that, in the context of an attachment of immovable property, the investigating judge rightly proceeded with the attachment under Articles 706-150 to 709-152 of the Code of Criminal Procedure, which do not call for the prior opinion of the Public Prosecutor, but rather for the order to be notified to the Public Prosecutor's Office, which was done that same day, as mentioned in the clerk's annotation (D706/13); that the present order was therefore issued in accordance with the procedural requirements established by law;

whereas, under Article 706-148 of the Code of Criminal Procedure, the investigating judge may order an attachment of assets only after obtaining the prior opinion of the Public Prosecutor; whereas, in the present case, the investigating judge ordered the attachment (*saisie pénale*) of the property located at 40/42 avenue Foch on the basis of Article 324-7, point 12, of the Penal Code, which refers to the penalty of general confiscation provided for by Article 131-21, paragraph 6; whereas this attachment, within the meaning of Article 706-148 of the Code of Criminal Procedure, was therefore an attachment of assets requiring the prior opinion of the Public Prosecutor; whereas, in deciding otherwise, the *Chambre de l'instruction* violated the above-mentioned texts and principles";

On the third ground of appeal, based on the violation of Article 131-21 and Article 324-7, point 12, of the Penal Code and Articles 706-141 to 706-152 and Articles 591 to 593 of the Code of Criminal Procedure: failure to state reasons and lack of legal basis;

"in that the challenged judgment upheld the order of attachment (*saisie pénale immobilière*) dated 19 July 2012;

based on the court's own reasoning that, although Article 22 of the Vienna Convention of 18 April 1961, international jurisprudence and the French jurisprudence of the *Cour de cassation* recognize the principle of such immunity, a question arises as to whether the property in question, that is, the building at 40/42 avenue Foch in Paris and the movable property thereon, was intended and effectively used by the Republic of Equatorial Guinea for the purposes of a diplomatic mission; the investigations conducted, in particular those carried out by OPIAC, revealed that, in addition to the list of expensive vehicles belonging to or having belonged to Teodoro Nguema Obiang Mangue (D 239), the list of transfers ordered by the company Somagui Forestal (D 355) to pay for clothing, movable assets and decorative collectibles totalling several millions of euros (D 242, 280, 284), and all of the investigations relating to extravagant purchases (D 494 to 515), the investigations conducted by OCRGDF in 2011 (D 486) revealed that the building located at 42 avenue Foch in Paris, which originally included five apartments on five levels, belonged to five Swiss companies in 2004, that one person alone owned all of the shares of those

companies (D 475/2), that the same person held a claim in the amount of €22,098,595 against those companies, that this person owned the furniture and fittings, that the building was placed, without charge, at the disposal of Mr. X, identified to be Teodoro Nguema, who was the actual owner, through Somagui Forestal, of the shares forming the capital of the above-mentioned Swiss companies, that is, Ganesha, RE Entreprise, Gep, Nordi And Shipping and Raya Holding, and the two French companies Foch Services and SCI Avenue du Bois, which, with the exception of the latter two, were domiciled at Multifiduciaire in Fribourg (D640) and at Swiss companies to which Mr. Teodoro Nguema appears to have given power a of attorney (D665); these investigations established that the cost of the works carried out on the property totalled approximately €20 million (D 484), paid in large part by means of transfers from Somagui Forestal, which also paid for the management and maintenance of the building, estimated at €40 million; on 5 October 2011 (D 476/6 to 2), the judicial police officers noted the presence, on the front door and upper floors of the premises, of two makeshift signs in sheet protectors, marked 'Republic of Equatorial Guinea — Embassy premises', while the official address of the Embassy appears as 29 boulevard de Courcelles in Paris (8th arr.), which signs, according to the caretaker, had been posted the previous day; although ownership of the entire property is claimed to have been transferred to the Republic of Equatorial Guinea on 15 September 2011, subsequent on-site investigations did not establish that ownership had actually been transferred; the investigating judges aptly noted that when the vehicles belonging to Mr. Obiang Nguema Mangue were seized on 28 September 2011, in particular at the premises attached to the building (car parks), and two days after those operations, a sign board that said 'Annex of the Embassy of Equatorial Guinea' was placed on the entrance door to 42 avenue Foch, and they found it quite curious that the deed of sale of 15 September (thus, before those measures were taken) was not produced and used as a defence against the investigators at that time; on 27 October 2001, the investigators contacted the Protocol Department of the Ministry of Foreign Affairs and it was confirmed to them that the premises at 42 Avenue Foch were subject to ordinary law and that the address in question was in no circumstances an official address of the Republic of Equatorial Guinea (D 482), notwithstanding Note Verbale No. 185/12 of 15 February 2012 from the Embassy of Equatorial Guinea, in which that State informed the French Ministry of Foreign Affairs that it owned that property and wished to obtain police protection for it (D 543/2), which the Ministry of Foreign Affairs refused, with the Republic of Equatorial Guinea protesting against that refusal (D 630); from 14 to 22 February 2012, the premises of the building were searched (D 555 to D 568), and the records of the findings made on that occasion and the photograph album of the premises (D 585) show that all of the rooms were used solely as a private residence, as also noted by the investigating judges; accordingly, the appeals against the order of 19 July 2012 ordering the attachment of the property located at 40/42 avenue Foch are ill-founded and the order must be upheld;

based on the reasoning put forward by the court below, that the investigations show that the building located at 42 avenue Foch, Paris 16th, which is owned by six French and Swiss companies, was financed in whole or in part with the proceeds of the above-mentioned offences and thus constitutes the object of money laundering and the offences of misuse of corporate assets, breach of trust and misappropriation of public funds; that the above-mentioned Teodoro Nguema Obiang Mangue, son of the President of Equatorial Guinea, has the right to freely dispose of the said building; that, indeed, examination of the file submitted by the tax authorities and more specifically, the wealth tax returns for the years 2005 to 2011 (SEALED ITEM ISF NGUEMA ONE) has resulted in the discovery of documents handed over by the firm of CLC, 65 avenue Marceau 75116 Paris, which state that Mr. Nguema Obiang Mangue, a resident of Equatorial Guinea, has been the sole shareholder of five Swiss companies since late 2004: Ganesha Holding, Nordi Shipping &

Trading Co. Ltd., GEP Gestion Entreprise Participation, RE Entreprise and Raya Holding, the last of which holds the share capital of the following companies: Société 42 avenue Foch and SCI Avenue du Bois; that these six companies are recorded in the Mortgage Registry of Paris (8th Office) as the co-owners of the building located at 42 avenue Foch, Paris 16th; that, in addition, a report from the same law firm notes that a certain 'Mr. "X", a resident of Equatorial Guinea, has been the owner of all of the shares of Ganesha Holding SA since 20 December 2004.' That report also notes 'that the owner of the building at 42 avenue Foch is also exposed to a risk under the criminal law, i.e., the misuse of corporate assets, if it were shown that Mr. Teodoro Nguema Obiang was the *de facto* manager'. The CLC law firm further notes that the Swiss companies agreed to waive the rent in favour of Mr. 'X', who occupies the property that is registered under the company's assets free of charge, and that the amount of the rent which those companies normally should have charged should be incorporated into their results; that the various interviews, including but not limited to that of Ms Pastor of the Dauchez firm, the property manager at the time, Ms Linda Pinto from the Pinto company, a decorator's firm, as well as the interviews of former employees who worked for Mr. Teodoro Nguema Obiang Mangue also revealed that the person in question took all decisions concerning the building, supervised all of the works and had always conducted himself as the owner of the said building; that, based on documents seized during a search of the premises of Foch Service, which was in charge of managing the building at 42 avenue Foch, it was found that the manager, Ms Delaury, sent most of her memoranda and reports to Mr. Teodoro Nguema Obiang, who was the only person taking decisions; that recent investigations conducted as part of the execution of international letters rogatory sent to the Swiss judicial authorities, and in particular the searches of the premises of the trust companies that managed and administered the Swiss companies that owned 42 avenue Foch, resulted in the discovery of documents that unambiguously showed that Mr. Teodoro Nguema Obiang Mangue was the sole shareholder and the beneficial owner under Swiss law; that those companies have had no bank accounts since they were purchased in late 2004 by the new owner, Mr. Teodoro Nguema Obiang Mangue; that the search of the premises at 42 avenue Foch also revealed that the purpose of the works carried out at that address was to bring together all of the rooms and all of the floors so that it would henceforth constitute a single, vast property in which all of the rooms could be reached from inside, which meant that it was no longer possible to identify a unit by the company that owned it; thus, unit 512, belonging to SCI Avenue du Bois, represents a portion of an apartment located on the 4th floor, with an approximate surface area of 150 m^2, while the other part of that same apartment formed unit 511, which belonged to Société 42 avenue Foch; the management of the aforementioned companies is conducted with funds that come directly from Equatorial Guinea and, more specifically, from Somagui Forestal SA; that two time periods must be distinguished: the period from 2005 to 2007, in which transfers of funds were made directly from Equatorial Guinea to bank accounts opened in the names of Swiss companies with the Dauchez firm, the property management company for 42 avenue Foch; that, from 2007 until today, SARL Foch Service, a company organized under French law whose company object is payment of the charges intrinsic to the management of the building, as well as the costs of managing the staff assigned to the building's maintenance and to receiving guests, has been supplied with funds that also come from Somagui Forestal; that, thus, the analysis and the work done with the bank accounts of Foch Service show financial ties between Foch Services and Somagui Forestal, a Guinean company, in an amount of almost €2.8 million, coming from Somagui Forestal; that it should be noted that the company object of Somagui Forestal, which is specialized in growing and selling wood, is totally different to that of SARL Foch Services; that the cost of the works which made it possible to completely transform the property located at 42 avenue Foch by Mr. Teodoro Obiang Nguema was estimated at nearly €11 million, and was paid in part by Somagui Forestal whilst a very large portion was paid by debiting an account labelled 'Teodoro Nguema Obiang, Presidency, Malabo'; that this financing method, which is unusual to say the least since the building is for private use, is found once again in the purchases of costly art objects (€20 million worth) and luxury vehicles (€7 million or

€8 million worth), most of which, moreover, were attached in the interior courtyard and apartments at 42 avenue Foch; that the building located at that address is a private, immovable asset and is not in any way a diplomatic representative office on French territory, as has been pointed out by the Minister of Foreign Affairs; that this fact was verified during the search, since the search resulted in the discovery of objects, clothing and other personal effects that belonged exclusively to Mr. Teodoro Nguema Obiang; the agreement relating to the sale of the shares of the Swiss companies, dated 18 December 2004, which was discovered in Switzerland, for an amount of €25,015,000, specifies Teodoro Nguema Obiang Mangue, Malabo, Equatorial Guinea, as a private purchaser; at no time does that agreement mention any official post or title whatsoever; moreover, during a search of the premises of SARL Foch Services, documents that were seized reveal Mr. Teodoro Obiang Nguema Mangue's and his lawyer's desire to make the financial ties between the various legal persons even more opaque, in particular through the formation of a holding company in Singapore; that, in the course of the search of the CLC tax firm, the capital gains tax return for 2011, filed on behalf of Teodoro Nguema Obiang Mangue, was seized; that that return, dated 15 September 2011, followed the sale of his corporate interest in the Swiss company that co-owned 42 avenue Foch to the State of Equatorial Guinea; however, this event appears to be a legal ploy aimed at preventing any attachment or seizure; that the amount of that transaction is supposedly about €35 million (including the sale price of the shares and the purchase of receivables) which appears absurdly low and reflecting little or no thought, since France Domaine valued the building at €107 million in June 2012; that several inconsistencies show that the document was drafted urgently in an effort to block the measures taken by the court; that, indeed, the attachments of the vehicles belonging to Mr. Obiang Nguema Mangue were carried out on 28 September 2011; that, two days after those measures, a sign board that said 'Annex of the Embassy of Equatorial Guinea' was placed on the entrance door to 42 avenue Foch; that it seems quite curious that the deed of sale of 15 September (thus, before those measures were taken) was not produced at that time; moreover, the search conducted at 42 avenue Foch in February 2012, and hence after that event, revealed that Mr. Teodoro Nguema Obiang Mangue's personal effects, furniture and documents were still on the premises; the US investigation shows revenue for Mr. Teodoro Nguema Obiang Mangue, the Minister of Agriculture and Forestry, on the order of $80,000 per year and mentions articles of the Guinean Penal Code (article 399 of the Penal Code) which prohibit a Minister from carrying on a commercial activity; that the costs of purchasing the building at 42 avenue Foch, renovating it, maintaining it and decorating the interior, which are assessed at more than €100 million, are on an altogether different scale from his known income; that all of this information shows that Mr. Teodoro Nguema Obiang Mangue is the actual owner of the building at 42 avenue Foch and that he has the right to freely dispose of it within the meaning of article 131-21 of the Penal Code; that that building may therefore be confiscated as the product of the investment, concealment or conversion of proceeds of the offences of misappropriation of public funds, misuse of corporate assets and breach of trust; that, in addition, Teodoro Nguema Obiang Mangue is charged with acts of money laundering and subject to the confiscation of some or all of his movables or immovables, held separately or through undivided interests, in accordance with Article 324-7 (12) of the Penal Code; that the investigations that have been conducted show that it is Teodoro Nguema Obiang Mangue, a natural person, who has the right to freely dispose of the real estate complex fictitiously ascribed to legal persons; that, without criminal attachment, the effect of the dissipation of the value of that property would be to deny the adjudicating court any prospect of confiscation; accordingly, the criminal attachment of this immovable property should be conducted in order to provide security for the penalty of confiscation;

> "(1) whereas a provisional attachment cannot be carried out in respect of immovable property belonging to a third party in good faith; whereas, in the present case, in support of its written statement, the Republic of Equatorial Guinea produced all of the documents establishing that, since 15 September 2011, through the

companies of which it became the sole shareholder, it has been the sole and exclusive owner of the units composing the property covered by the attachment (*saisie pénale immobilière*) ordered on 19 July 2012; whereas, in deciding, nonetheless, that the attachment of that property was valid, noting that Mr. Teodoro Nguema Obiang Mangue appeared to be the real owner, the *Chambre de l'instruction* misinterpreted the said documents and thus deprived its decision of any legal basis under the texts and principles cited above;

"(2) whereas the *Chambre de l'instruction*, in order to justify upholding the attachment of the building belonging to the Republic of Equatorial Guinea, could not reason that the subsequent on-site investigations did not establish that ownership had actually been transferred or that Mr. Teodoro Nguema Obiang had retained free disposal of it; whereas such inapplicable grounds deprive the decision of any legal basis";

On the fourth ground of appeal, based on the violation of Article 22 of the Vienna Convention of 18 April 1961, Article 131-21 and Article 324-7, point 12, of the Penal Code, Articles 706-141 to 706-152 and Articles 591 to 593 of the Code of Criminal Procedure: failure to state reasons and lack of legal basis;

"in that the challenged judgment upheld the order of attachment (*saisie pénale immobilière*) dated 19 July 2012;

"on the grounds that, although Article 22 of the Vienna Convention of 18 April 1961, international jurisprudence and the French jurisprudence of the *Cour de cassation* recognize the principle of such immunity, a question arises as to whether the property in question, that is, the building at 40/42 avenue Foch in Paris and the movable property thereon, was intended and effectively used by the Republic of Equatorial Guinea for the purposes of a diplomatic mission; the investigations conducted, in particular those carried out by OPIAC, revealed that, in addition to the list of expensive vehicles belonging to or having belonged to Teodoro Nguema Obiang Mangue (D 239), the list of transfers ordered by the company Somagui Forestal (D 355) to pay for clothing, movable assets and decorative collectibles totalling several millions of euros (D 242, 280, 284), and all of the investigations relating to extravagant purchases (D 494 to 515), the investigations conducted by OCRGDF in 2011 (D486) revealed that the building located at 42 avenue Foch in Paris, which originally included five apartments on five levels, belonged to five Swiss companies in 2004, that one person alone owned all of the shares of those companies (D 475/2), that the same person held a claim in the amount of €22,098,595 against those companies, that this person owned the furniture and fittings, that the building was placed, without charge, at the disposal of Mr. X, identified to be Teodoro Nguema, who was the actual owner, through Somagui Forestal, of the shares forming the capital of the above-mentioned Swiss companies, that is, Ganesha, RE Entreprise, Gep, Nordi And Shipping and Raya Holding, and the two French companies Foch Services and SCI Avenue du Bois, which, with the exception of the latter two, were domiciled at Multifiduciaire in Fribourg (D 640) and at Swiss companies to which Mr. Teodoro Nguema appears to have given power a of attorney (D 665); these investigations established that the cost of the works carried out on the property totalled approximately €20 million (D 484), paid in large part by means of transfers from Somagui Forestal, which also paid for the management and maintenance of the building, estimated at €40 million; on 5 October 2011 (D 476/6 to 2), the judicial police officers noted the presence, on the front door and upper floors of the premises, of two makeshift signs in sheet protectors, marked 'Republic of Equatorial Guinea-Embassy premises', while the official address of the Embassy appears as 29 boulevard de Courcelles in Paris (8th arr.), which signs, according to the

caretaker, had been posted the previous day; even though ownership of the entire property is claimed to have been transferred to the Republic of Equatorial Guinea on 15 September 2011, subsequent on-site investigations did not establish that ownership had actually been transferred; the investigating judges aptly noted that when the vehicles belonging to Mr. Obiang Nguema Mangue were seized on 28 September 2011, in particular at the premises attached to the building (car parks), and two days after those operations, a sign board that said 'Annex of the Embassy of Equatorial Guinea' was placed on the entrance door to 42 avenue Foch, and they found it quite curious that the deed of sale of 15 September (thus, before those measures were taken) was not produced and used as a defence against the investigators at that time; on 27 October 2001, the investigators contacted the Protocol Department of the Ministry of Foreign Affairs [and] it was confirmed to them that the premises at 42 Avenue Foch were subject to ordinary law and that the address in question was in no circumstances an official address of the Republic of Equatorial Guinea (D 482), notwithstanding Note Verbale No. 185/12 of 15 February 2012 from the Embassy of Equatorial Guinea, in which that State informed the French Ministry of Foreign Affairs that it owned that property and wished to obtain police protection for it (D 543/2), which the Ministry of Foreign Affairs refused, with the Republic of Equatorial Guinea protesting against that refusal (D 630); from 14 to 22 February 2012, the premises of the building were searched (D 555 to D 568), [and] the records of the findings made on that occasion and the photograph album of the premises (D 585) show that all of the rooms were used solely as a private residence, as also noted by the investigating judges; accordingly, the appeals against the order of 19 July 2012 ordering the attachment of the property located at 40/42 avenue Foch are ill-founded and the order must be upheld;

"(1) whereas, in accordance with Article 22 of the Vienna Convention of 18 April 1961 on Diplomatic Relations, the premises of diplomatic missions are inviolable; whereas, in the present case, the Republic of Equatorial Guinea informed the Protocol Department of the Ministry of Foreign Affairs, by a Note Verbale from its Embassy dated 4 October 2011, that the building located at 40/42 avenue Foch in Paris was used "for the performance of the functions of its diplomatic mission" as "premises of the diplomatic mission", as defined by Article 1 of the Vienna Convention; whereas, in refusing to annul the attachment of the property on 1[9] July 2012, notwithstanding its assignment to the diplomatic mission of the Republic of Equatorial Guinea, the *Chambre de l'instruction* violated the texts and principles cited above;

"(2) whereas the diplomatic immunity defined in Article 22 of the Vienna Convention applies to all property assigned to the diplomatic mission, regardless of their professional or private use; whereas, in rejecting the inviolability of the building located at 40/42 avenue Foch, assigned to the diplomatic mission of the Republic of Equatorial Guinea, by merely noting that it was said to be reserved exclusively for use as a private residence, the *Chambre de l'instruction* violated the texts and principles cited above;

"(3) whereas the assignment of immovable property to the premises of a diplomatic mission is not subject to any prior authorization or accreditation process but rather only a declaratory régime; whereas in approving, nonetheless, the attachment of the property located at 40/42 avenue Foch in Paris on 1[9] July 2012, based on the refusal of the Protocol Department of the Ministry of Foreign Affairs, the *Chambre de l'instruction* once again violated the texts and principles cited above";

The grounds being joined;

Whereas, in upholding the order issued and rejecting the arguments of the Republic of Equatorial Guinea — which asserted, first, that the opinion of the Public Prosecutor was not obtained prior to the measure, second, that it had become the owner of the property attached after Mr. Teodoro Nguema Obiang Mangue transferred to it, on 15 September 2011, his shares in the capital of the companies that owned the building, and, third, that the building, assigned to its diplomatic mission, which it notified to the Ministry of Foreign Affairs by Note Verbale of 4 October 2011, enjoyed the immunity provided for in Article 22 of the Vienna Convention of 18 April 1961 on Diplomatic Relations — the judgment finds that the property, directly derived from the offence of money laundering, was rightly attached by the investigating judge under Articles 706-150 to 706-152 of the Code of Criminal Procedure, which do not require the prior opinion of the Public Prosecutor; whereas the judges add that the investigations carried out after the above-mentioned sale did not establish that ownership of the building had actually been transferred, as all of the building's rooms were reserved exclusively for use as a private residence; whereas, lastly, they note that, according to the Minister for Foreign Affairs, the attached premises were subject to ordinary law and were in no circumstances an official address of the Republic of Equatorial Guinea;

Whereas, in the light of these findings, it follows that, since the property is not the premises of the diplomatic mission of the Republic of Equatorial Guinea, it did not enjoy the immunity claimed and, in so far as the attachment of immovable property that may be confiscated under Article 131-21, paragraph 3 of the Penal Code — the only basis asserted in the present case — may, subject to the right of the owner in good faith, concern any property that is the object of or is directly or indirectly derived from the offence, the *Chambre de l'instruction*, which correctly applied Article 706-150 of the Code of Criminal Procedure, has justified its decision;

Therefore, the grounds cannot be accepted;

And whereas the judgment is in due form;

DISMISSES the appeals;

SETS at €3,000 the total amount that the appellants must pay Transparency International France, a civil-party applicant under Article 618-1 of the Code of Criminal Procedure;

So done and adjudicated by the *Cour de cassation*, *Chambre criminelle* and pronounced by the presiding judge this fifth day of March, two thousand fourteen;

In witness whereof, this judgment has been signed by the presiding judge, the reporting judge and the divisional clerk;

Accordingly, the French Republic hereby commands and orders all marshals so requested to enforce this judgment, the Public Prosecutors of the *Cours d'appel* and the *Tribunaux de grande instance* to provide support, and all law enforcement officers and personnel to give assistance when lawfully requested to do so.

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ANNEX 54

***Cour de cassation*, *Chambre criminelle*, judgment of 19 February 2014**

Cour de cassation, *Chambre criminelle*, judgment of 19 February 2014

Application for a priority preliminary ruling on issues of constitutionality — No grounds for referral to the *Conseil constitutionnel*

Mr. Louvel, presiding judge

Ms Labrousse, reporting judge

Mr. Gauthier, Advocate General

SCP Piwnica et Molinié and SCP Waquet, Farge et Hazan, counsel

Full text

The French Republic

In the name of the French people

The *Cour de cassation*, *Chambre criminelle*, at a public hearing held at the *Palais de Justice* in Paris, delivered the following judgment:

Ruling on the application for a priority preliminary ruling on issues of constitutionality set out in a special written statement received on 2 December 2013 and submitted by:

Mr. Teodoro X,

On the occasion of his appeal against judgment No. 5 of the *Chambre de l'instruction* of the Paris *Cour d'appel*, 2nd section, dated 13 June 2013, which, in the investigation relating to charges of misuse of corporate assets, breach of trust, money laundering, handling offences, complicity in these offences and complicity in the misappropriation of public funds, ruled on an application for the annulment of procedural measures;

The Court, ruling after a hearing in open court on 5 February 2014 at which, in accordance with the composition provided for under Article 567-1-1 of the Code of Criminal Procedure, the following persons were present: Mr. Louvel, presiding judge, Ms Labrousse, reporting judge, and Ms Nocquet, divisional judge;

Divisional clerk: Mr. Bétron;

On the basis of the report of Reporting Judge LABROUSSE, the observations of the *société civile professionnelle* (private law firm) WAQUET, FARGE et HAZAN and the *société civile professionnelle* PIWNICA et MOLINIÉ, counsel before the Court, and the submissions of Advocate General GAUTHIER;

Having regard to the order of the presiding judge of the *Chambre criminelle*, dated 3 October 2013, ordering immediate consideration of the appeal;

Having regard to the written statement of the respondent;

Whereas the first question regarding constitutionality reads:

> "Are Articles 122, 123, 124, 130, 130-1, 131, 133, 133-1, 134, 135-2, 135-3, 136, 567 and 568 of the Code of Criminal Procedure contrary to Articles 6 and 16 of the Declaration of the Rights of Man and of the Citizen, and to the principles of

equality before the law, and to the principles of the rights of the defence and access to justice, in that they do not allow a person who is the subject of an arrest warrant to lodge an appeal with the *Cour de cassation* against the judgments of the *Chambre de l'instruction* that has ruled on an application for annulment concerning, in particular, the regularity of the arrest warrant?";

Whereas the second question regarding constitutionality reads:

"Are the provisions of articles 122, 123, 124, 130, 130-1, 131, 133, 133-1, 134, 135-2, 135-3, 136, 173, 173-1 and 175 contrary to the Constitution in the light of Articles 6 and 16 of the Declaration of the Rights of Man and of the Citizen, and to the rights to a just and fair trial, and to the observance of the rights of the defence, and to the principles of equality before the law and the courts, in that persons who are the subject of an arrest warrant do not have the status of a party and are therefore precluded from filing an application for annulment, in particular for the purpose of requesting the annulment of their arrest warrant?";

Whereas, first, Articles 130 and 130-1 and the fourth paragraph of Article 133 of the Code of Criminal Procedure have already been declared to be in conformity with the Constitution by the *Conseil constitutionnel*'s decision No. 2011-133QPC of 24 June 2011, subject to the reservation set forth in ground 13 of the said decision;

Whereas, second, Article 136 of the Code of Criminal Procedure, in that it relates to the disciplinary proceedings that might be initiated against an investigating judge on account of a failure to observe the formalities prescribed for arrest warrants, does not apply to the proceedings;

Whereas the issues of constitutionality are therefore not relevant to those articles;

Whereas the other articles cited in the application for a priority preliminary ruling on issues of constitutionality, which have not previously been declared to be in conformity with the Constitution in the statement of grounds and operative provisions of a decision of the *Conseil constitutionnel*, do apply to the proceedings;

Whereas, however, the issues, which do not concern the interpretation of a provision of the Constitution that the *Conseil constitutionnel* has not previously had occasion to apply, are not new;

And whereas the issues raised are clearly not of a serious nature, given that a person who absconds and, knowing that he is wanted, willingly evades investigation proceedings, makes it impossible for himself, as a result of his own actions, to benefit from the provisions of Articles 173 and 567 of the Code of Criminal Procedure; whereas the benefit of these provisions, which give rise to the right to access proceedings, would in this case constitute an unjustified advantage with regard to a person who is placed under judicial examination (*personne mise en examen*) or a legally represented witness (*témoin assisté*) who has duly made an appearance with respect to procedural measures and would be contrary to the constitutional objective of the sound administration of justice; whereas the challenged provisions do not prevent a person who is the subject of an arrest warrant from challenging its validity, in accordance with the procedures provided for in the Code of Criminal Procedure, after having acquired the status of a party to the proceedings; whereas, therefore, they strike a balance between the right to an effective judicial remedy and the search for offenders that is necessary in order to safeguard constitutional rights and principles;

Accordingly, there are no grounds for referring the application for a priority preliminary ruling on issues of constitutionality to the *Conseil constitutionnel*;

For these reasons:

FINDS THAT THERE ARE NO GROUNDS FOR REFERRING the application for a priority preliminary ruling on issues of constitutionality to the *Conseil constitutionnel*;

So done and adjudicated by the *Cour de cassation*, *Chambre criminelle*, and pronounced by the presiding judge this nineteenth day of February, two thousand and fourteen;

In witness whereof, this judgment has been signed by the presiding judge, the reporting judge and the divisional clerk;

ECLI:FR:CCASS:2014:CR00905

Analysis

Publication: *Bulletin criminel* 2014, No. 47

D**ecision contested:** Paris *Cour d'appel*, *Chambre de l'instruction*, 13 June 2013

Headings **and summaries:** APPLICATION FOR A PRIORITY PRELIMINARY RULING ON AN ISSUE OF CONSTITUTIONALITY — Code of Criminal Procedure — Articles 122, 123, 124, 131, 133, paragraphs 1 to 3, 133-1, 134, 135-2, 135-3, 173, 173-1, 175, 567 and 568 — Articles 6 and 16 of the Declaration of the Rights of Man and of the Citizen — Equality before the law — Rights of the defence — Access to justice — Right to a just and fair trial — Equality before the courts — Serious nature — Insufficiency — No grounds for referral to the *Conseil constitutionnel*

APPLICATION FOR A PRIORITY PRELIMINARY RULING ON AN ISSUE OF CONSTITUTIONALITY — Code of Criminal Procedure — Articles 130, 130-1 and 133, paragraph 4 — Provisions already declared to be in conformity — Article 136 — Applicability to the proceedings — Insufficiency — Irrelevant issue

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ANNEX 55

Embassy of Equatorial Guinea, Note Verbale No. 012/16, 6 January 2016

Note Verbale No. 012/16 from the Embassy of Equatorial Guinea dated 6 January 2016 to the French Ministry of Foreign Affairs and International Development

[Translation]

The Embassy of the Republic of Equatorial Guinea in France presents its compliments to the Ministry of Foreign Affairs and International Development and has the honour to renew the firm commitment of the Government of Equatorial Guinea to finding, with the Government of the French Republic, a lasting diplomatic solution to the dispute between them arising from the so-called "ill-gotten gains" case currently pending before the Paris *Tribunal de grande instance*.

The Government of Equatorial Guinea accordingly reiterates its earlier offer of conciliation and arbitration, made to the French authorities on 26 October 2015 by means of a Memorandum by its counsel (attached), on the basis of Articles I and II of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, and Article 35 of the United Nations Convention against Transnational Organized Crime of 15 November 2000, ratified by both States.

The Embassy would be grateful if the Ministry of Foreign Affairs and International Development would kindly acknowledge receipt of the attached Memorandum.

The Embassy notes that the letter from the Minister for Justice of Equatorial Guinea to the French authorities, dated 31 December 2015 (attached), is part of the same renewed commitment to achieving a diplomatic solution.

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ANNEX 56

Embassy of Equatorial Guinea, Note Verbale No. 062/16, 2 February 2016

Note Verbale No. 062/16 from the Embassy of Equatorial Guinea dated 2 February 2016 to the French Ministry of Foreign Affairs and International Development

[Translation]

The Embassy of the Republic of Equatorial Guinea in France presents its compliments to the Ministry of Foreign Affairs and International Development and has the honour to transmit to it the attached Memorandum No. 2, concerning the offer to settle through diplomatic channels the dispute between the Republic of Equatorial Guinea and the French Republic with regard to certain criminal proceedings, in accordance with Articles I and II of the Optional Protocol to the Vienna Convention on Diplomatic Relations and Article 35 of the United Nations Convention against Transnational Organized Crime adopted in New York on 15 November 2000.

The Embassy would be grateful if the Ministry of Foreign Affairs and International Development would kindly acknowledge receipt of the attached Memorandum No. 2.

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Memorandum No. 2 from the Republic of Equatorial Guinea to the French Republic

[Translation]

THE CASE OF THE SO-CALLED "ILL-GOTTEN GAINS": THE EQUATORIAL GUINEAN CHAPTER

Subject: Renewal of notification of a dispute with regard to internationally wrongful acts, and reiteration of the offer of settlement through conciliation and arbitration

Background

1. On 2 December 2008, the association Transparency International France filed a complaint with civil-party application before the senior investigating judge of the Paris *Tribunal de grande instance* against the serving Heads of State of Gabon, Congo-Brazzaville and Equatorial Guinea, and individuals in their entourage, for misappropriation of public funds, misuse of corporate assets, money laundering, complicity in those offences, breach of trust and concealment.

2. A judicial investigation was therefore launched on the basis of the civil-party application, which was declared admissible by a judgment of 9 November 2010 of the *Cour de cassation*, *Chambre criminelle*, on the grounds that:

> "assuming them to be established, the offences under investigation, in particular the handling and laundering in France of assets paid for out of misappropriated public funds, offences which were themselves facilitated by corrupt practices but which are distinct from the offence of corruption, are likely to cause direct and personal harm to the association Transparency International France, on account of the specific object and purpose of its mission" (Annex 1). *[This and subsequent translations from this document are by the Registry.]*

Thus, the case of the so-called "ill-gotten gains" came before the French courts.

3. Commenting on that judgment, however, Professor Gabriel Roujou de Boubée was to observe that:

> "a strict interpretation of Article 2 of the Code of Criminal Procedure would probably have led to the dismissal of the action brought by Transparency International France, but such interpretations have today given way to ones that are much more favourable" (Recueil Dalloz 2009, p. 1520, Annex 2). *[This and subsequent translations from this document are by the Registry.]*

4. On 1 December 2010 two investigating judges were appointed, the judicial investigation having been opened against a person or persons unknown, for handling misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and concealment of each of these offences.

5. Throughout the investigation, which now appears to be completed, according to a communication from the investigating judges dated 11 August 2015, the Republic of Equatorial Guinea took the view that the French courts were violating its interests that are protected under

international law, by undertaking a number of actions and issuing a number of decisions that the Republic of Equatorial Guinea regards as internationally wrongful acts.

6. Consequently, the Republic of Equatorial Guinea is obliged to notify the French Republic officially of the existence of a dispute between the two States and to make an offer of settlement through conciliation and arbitration, as it has previously informed the Presidency of the French Republic and the French Ministry of Foreign Affairs on 26 October 2015 by way of a first Memorandum drafted by its duly instructed counsel, and by a Note Verbale from its Ambassador in Paris dated 6 January 2016 and received by the French Ministry of Foreign Affairs on 7 January (Annexes 3 and 4).

Subject-matter of the dispute

There are four aspects to the dispute between the Republic of Equatorial Guinea and the French Republic: the violation of the principles of the sovereign equality of States and non-interference in the domestic affairs of other States; the refusal to recognize the immunity from jurisdiction *ratione personae* of the Second Vice-President of Equatorial Guinea in charge of Defence and State Security; the violation of the principle of immunity from execution which protects foreign State property not used for private-law activities; and the attachment of a building assigned to the diplomatic mission of Equatorial Guinea in France.

1. Violation of the principles of the sovereign equality of States and non-interference in the domestic affairs of other States

7. Although in its judgment of [9] November 2010, cited above (see paragraph 2), the French *Cour de cassation* declared the civil-party application of the association Transparency International France to be admissible, it has never authorized the judges in charge of the investigation to disregard either the rules governing the territorial jurisdiction of French criminal courts or French criminal laws.

8. And yet this is undeniably what has occurred in this case, since it is plain to see that the investigating judges were only able to conduct their investigations by making numerous encroachments on the territorial jurisdiction of the State of Equatorial Guinea, notwithstanding the application for characterization *(réquisitoire aux fins de qualification)* addressed to them by the Paris Public Prosecutor on 4 July 2011 in the following terms:

> "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;

> Whereas, that being so, the characterizations of breach of trust and complicity in breach of trust, which might be applied to the misappropriations complained of, cannot be accepted, since the alleged offences were committed abroad, by foreign nationals, against foreign victims, acts to which French criminal law is not applicable, under the provisions of Articles 113-6 and 113-7 of the Penal Code; whereas, moreover, the prosecution of offences committed outside the territory of the French Republic may be initiated only upon application by the Public Prosecutor's Office, pursuant to Article 113-8 of the Penal Code; and whereas in these proceedings the Public Prosecutor's Office submitted that the complaint with civil-party application was inadmissible;
>
> Whereas the offences of misuse of corporate assets and complicity in the misuse of corporate assets are applicable only to companies incorporated under French law; and whereas the alternative characterizations of breach of trust and complicity in breach of trust cannot be applied for reasons already set forth;
>
> Whereas, consequently, the facts under investigation, assuming them to be established, may be characterized only as money laundering or handling offences; and whereas the laundering or handling in France of an asset obtained through an offence committed abroad by a foreign national and not subject to French law is punishable in France, provided, however, that the elements of the original offence are identified;
>
> Having regard to Article 2 of the Code of Criminal Procedure;
>
> Requests the senior investigating judges to find that the facts under investigation may be characterized only as money laundering or handling offences, as provided for in Articles 324-1 and 321-1 of the Penal Code and punishable thereunder" (Annex 5). *[Translation by the Registry.]*

9. The very least we can say is that the investigating judges chose to ignore the nonetheless legally relevant terms of this application by the Public Prosecutor, who, in French law, is regarded as the principal prosecuting authority for criminal cases.

10. Addressing the question of the jurisdiction of French courts in his commentary on the judgment of the *Cour de cassation* of [9] November 2010 (cited above in paragraph 2), Professor Gabriel Roujou de Boubée notes, moreover, that:

> "the jurisdiction of the French court would have been entirely questionable with regard to the actual misappropriation of public funds, since the offence was committed abroad and concerned funds belonging to foreign public bodies" (Recueil Dalloz, cited above in paragraph [3]).

11. It will be observed that, regarding the offence of misuse of corporate assets allegedly committed against companies incorporated under Equatorial Guinean law, the reasoning of the Paris Public Prosecutor is legally valid, since it is consistent with the jurisprudence of the *Cour de cassation*, which has had occasion to recall that:

> "the definition of the offence of misuse of corporate assets cannot be extended to companies in respect of which there is no provision in the law, such as a company incorporated under foreign law, which may only be charged with breach of trust" (judgment of 3 June 2004, Annex 6). *[Translation by the Registry.]*

12. Lastly, even having assumed jurisdiction — as they have insisted on doing — over alleged offences of laundering misused corporate assets, misappropriated public funds and the proceeds of breach of trust, the investigating judges were obliged to characterize the original offences (misuse of corporate assets, misappropriation of public funds, breach of trust).

13. Money laundering is what is known as a "derivative" offence, in that it presupposes that the original offence — from which, we repeat, it merely derives — has been established to exist.

14. For example:

— by a judgment dated 25 June 2003, the *Cour de cassation* found that for the trial court to justify a conviction for money laundering, it must "identify precisely the constituent elements of the predicate crime or offence that has profited the perpetrator directly or indirectly" (*Cour de cassation, Chambre criminelle,* 25 June 2003, Annex 7). *[Translation by the Registry.]*

— by another judgment dated 24 February 2010, ruling in a case concerning the laundering of the proceeds of corruption which had taken place abroad, the *Cour de cassation* found that "in France 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" (*Cour de cassation, Chambre criminelle,* 24 February 2010, Annex 8). *[Translation by the Registry.]* However, the *Cour de cassation* was only able to accept the characterization of money laundering in this case because, as it noted, the defendant, who was the former oil minister of his country, had admitted that he had received money from commissions.

15. In sum, according to the French *Cour de cassation*, criminal proceedings for acts of money laundering committed in France are legally possible, regardless of the place where the predicate offence was committed and regardless of whether the French courts have jurisdiction to prosecute it. However, the offence of money laundering legally and necessarily assumes the existence of a predicate offence, without which it cannot be said to exist.

16. In the present case, however, the French courts refuse to take account of the findings of the investigations carried out by the judicial authorities of the State of Equatorial Guinea, which found no indication of the predicate offences under investigation in France having taken place on Equatorial Guinean territory.

17. Indeed, according to the findings of an inquiry contained in an official report by the Public Prosecutor of the State of Equatorial Guinea, dated 22 November 2010 — which the investigating judges have received and which is included in their file under reference number D538 — the Equatorial Guinean judicial authority states that the 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 (Annex 9).

18. Ignoring this official report by Equatorial Guinea's judicial prosecuting authority, however, the French investigating judges continue to encroach on the territorial jurisdiction of the Equatorial Guinean courts, even though the alleged predicate offences do not concern any French

national, either as the perpetrator or as the victim, any more than the French State, in respect of the alleged misappropriation of public funds.

19. The Republic of Equatorial Guinea thus contends that the actions of the French courts, which, in this case, have felt obliged to extend their jurisdiction to Equatorial Guinea's territory, are in breach of the principle of the sovereign equality of States.

20. It should be recalled in this respect that Article 4 (the "Protection of sovereignty") of the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000, invoked by the investigating judges and to which Equatorial Guinea and France are parties, provides that:

> "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."

21. And the Legislative Guide for the Implementation of that Convention provides a useful clarification on the interpretation of Article 4 in these terms:

> "Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory." (Paragraph 33 of the Guide.)

22. Furthermore, by assuming jurisdiction to investigate alleged offences of misappropriation of public funds said to have been committed against the State of Equatorial Guinea, contrary to the official view of Equatorial Guinea and notwithstanding the fact that the State of Equatorial Guinea, which in no way sees itself as a victim of such offences, did not file a civil-party application, the French courts are in breach of the principle of the permanent sovereignty of the State of Equatorial Guinea over its economic resources, as enshrined by international law and, in particular, by the Charter of Economic Rights and Duties of States of 12 December 1974, contained in resolution 3281 of the United Nations General Assembly.

23. It is to be noted that Article 2, paragraph 1, (Chapter II) of the said Charter provides that "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities" (Annex 10).

24. It should be recalled that the International Court of Justice recognizes the customary nature of the principle of permanent sovereignty of a State over its economic resources.

> "The Court recalls that the principle of permanent sovereignty over natural resources is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974). While recognizing the importance of this principle, which is a principle of customary international law . . ." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment of 19 December 2005*, para. 244).

2. The refusal to recognize the immunity from jurisdiction *ratione personae* of the Second Vice-President of Equatorial Guinea in charge of Defence and State Security

25. In spite of the fact that, by Presidential Decree No. 64/2012 of 21 May 2012, Mr. **Teodoro Nguema Obiang Mangue** was appointed Second Vice-President in charge of Defence and State Security — at the same time as other officials were appointed, namely the Vice-President of the Republic, the Prime Minister, the First Vice-Minister and the Second Vice-Prime Minister — the French courts, through the French Ministry of Foreign Affairs, felt able to send him a summons on 22 May 2012 to attend a first appearance on 11 July 2012 for questioning on charges of laundering the proceeds of the offences of misuse of corporate assets, misappropriation of public funds, the unlawful taking of interest and breach of trust.

26. Despite being informed by Mr. **Teodoro Nguema Obiang Mangue's** counsel that it was not possible for him to appear before a foreign court because of his immunity from jurisdiction *ratione personae*, arising from his status as Second Vice-President of Equatorial Guinea in charge of Defence and State Security, the investigating judges saw fit to issue an international arrest warrant against him on 13 July 2012.

However, on 30 August 2013, having received a request from Mr. **Teodoro Nguema Obiang Mangue**, Interpol informed him that it had deleted from its files information about him "communicated by France" (Annex 11).

27. Thereafter, on 14 November 2013, the French investigating judges saw fit to send a letter rogatory to the authorities of Equatorial Guinea, not seeking permission to go to Equatorial Guinea for the purposes of the inquiry, as they should in principle have done, but requesting that the Second Vice-President of Equatorial Guinea in charge of Defence and State Security appear by videoconference; the letter rogatory stated that this request had been made on the basis of the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000.

28. Following his hearing held on 18 March 2014, during which Mr. **Teodoro Nguema Obiang Mangue** invoked his immunity from jurisdiction *ratione personae* before foreign civil and criminal courts, on account of his status as a high-ranking official of the State of Equatorial Guinea participating in his country's international activities, the investigating judges nevertheless notified him that he was under judicial examination for the acts described above.

29. Since then, the French courts have refused to recognize the immunity from jurisdiction of Mr. **Teodoro Nguema Obiang Mangue**, even though by virtue of his office as Second Vice-President of Equatorial Guinea in charge of Defence and State Security, in which capacity he

is called upon to represent his country internationally, he is entitled under international law to complete personal jurisdictional immunity before foreign courts in respect of acts carried out in a private or an official capacity before and during his term of office.

30. That is the substance of a judgment delivered by the *Cour de cassation* on 15 December 2015, which, without responding to Mr. **Teodoro Nguema Obiang Mangue's** very detailed arguments, supported by various pieces of evidence, declined to grant him the privilege of immunity on the grounds 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 . . . 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" (Annex [12]). *[This and subsequent translations from this document are by the Registry.]*

31. The Republic of Equatorial Guinea contends that by this judgment the French court, which in this case fails to draw a distinction between the legal régime of personal immunity — the only one applicable to Mr. **Teodoro Nguema Obiang Mangue** — and that of substantive immunity, adopted a stance that clearly runs counter to international law, as indicated by the International Court of Justice in its Judgment of 14 February 2002 (Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*).

32. According to the International Court of Justice,

> "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" (paragraph 51 of the Judgment).

33. All legal experts and a number of national courts agree that the Court's use of the words "such as" means that the list of officials cited is not restrictive but merely illustrative. In other words, immunity is not restricted to the three officials referred to — known as the "triad" or "troika" — but extends to other high-ranking officials of a State who, by virtue of their functions, are called upon to represent the State abroad.

34. The International Court of Justice further held that:

> "In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office" (*ibid.*, paragraph 55).

35. And it is precisely in order to be consistent with this Judgment of the International Court of Justice, and with international law, that a number of national courts, notably in Europe (i.e., in Great Britain and Switzerland), have granted personal immunity from jurisdiction to a Minister for Defence (Bow Street Magistrates' Court, case of *General Shaul Mofaz*, judgment of 12 February 2004), and even to a Minister for International Trade (Bow Street Magistrates' Court, case of *Bo Xi Lai*, judgment of 8 November 2005; case of *General Nezzar*, Swiss Federal Criminal Court, judgment of 25 July 2012, which stated that, in general, an incumbent Defence Minister enjoys immunity *ratione personae* with regard to foreign criminal courts, but did not grant this immunity because General Nezzar was no longer in office and the crimes were international in character).

36. In the present case, however, the immunity from jurisdiction of the Second Vice-President of Equatorial Guinea in charge of Defence and State Security is legally incontestable, given that, in addition, by an "Institutional Declaration" dated 21 October 2015 and submitted to the *Cour de cassation*, the President of the Republic of Equatorial Guinea stated:

> 37. "In accordance with the provisions of Article 33, paragraph 3, of the Basic Law of Equatorial Guinea and by virtue of Decree No. 64/2013 of 21 May 2013, His Excellency the Second Vice-President of the Republic, in charge of Defence and State Security, represents the State of Equatorial Guinea and has 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 is in charge" (Annex 12).

38. Numerous documents attest to the high-ranking status of the Second Vice-President in charge of Defence and State Security and to his function of representing the State before other foreign States, notably through his representation of the State of Equatorial Guinea as head of a delegation of 26 officials, in which the Equatorial Guinean Minister for Foreign Affairs ranked third in the order of protocol, at the last Heads of State summit on sustainable development in New York, during which he delivered two speeches on behalf of the Republic of Equatorial Guinea in the UN General Assembly and was received by a number of Heads of State, including the President of the United States of America, as well as the United Nations Secretary-General (Annexes 13, 14, 15).

39. The French court therefore had an obligation to take account of the "Institutional Declaration" by the President of the Republic of Equatorial Guinea regarding the function of the Second Vice-President, particularly since it was issued by the State of Equatorial Guinea, which alone has the prerogative to determine the extent to which the functions exercised by a high-ranking representative of this kind are reflected in terms of its sovereignty, but also because, in this case, the immunity in question directly concerns the international relations and interests of the State, and not those of Mr. **Teodoro Nguema Obiang Mangue**.

3. The third aspect of the dispute relating to the violation of the principle of immunity from execution which protects foreign State property not used for private-law activities

40. In the course of the judicial investigation, by an order of 19 July 2012, the investigating judges saw fit to seize a building located at 42 avenue Foch in the 16th arrondissement of Paris, on the grounds that it belonged to Mr. **Teodoro Nguema Obiang Mangue** and had been paid for out of the proceeds of the offences alleged against him.

41. However, this contention is clearly incorrect: on the date of its attachment, the building in question had been the property of the State of Equatorial Guinea for ten months, the latter having acquired it on 15 September 2011 following the transfer of the shares of Mr. **Teodoro Nguema Obiang Mangue**, the sole shareholder of the companies which had originally owned the building, to the State of Equatorial Guinea, its sole proprietor since that date.

42. It is apparent from documents which are manifestly not included in the case file that the deed of transfer for the said building was duly declared and registered with the non-residents department of the French tax authority at 10 rue de Centre, 93160 Noisy-le-Grand, and that the **€1,145,740** of capital gains tax sought by the French tax authorities in relation to this transfer was paid in full on 20 October 2011, further to a capital gains declaration dated the same day (Annex 16).

43. Furthermore, it is plainly established that since the date they were acquired, these premises, which belong to the State of Equatorial Guinea, have never been used for private-law activities or for acts *jure gestionis*.

44. Thus, by attaching this building which is not used for private-law activities, the French courts have violated the principle of immunity from execution which the State of Equatorial Guinea is entitled to claim under international law: a principle enshrined in the United Nations Convention on Jurisdictional Immunities of States and Their Property — which, although not yet in force, was ratified by France on 12 August 2011 — and invoked by the International Court of Justice.

45. In a Judgment of 12 February 2012, the International Court of Justice found that "the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni" (Annex 17, summary of the Judgment in the *Germany* v. *Italy* case, paragraph 2 of the operative clause).

46. The attachment of the property owned by the State of Equatorial Guinea is all the more contrary to international law, given that, in addition, it has been assigned to the diplomatic mission of the Republic of Equatorial Guinea in France since 2011.

4. The fourth aspect of the dispute concerning the attachment of a building assigned to the diplomatic mission of Equatorial Guinea in France

47. The judicial attachment of the property of the State of Equatorial Guinea was made possible only because the French Ministry of Foreign Affairs refused to recognize its diplomatic status and informed the investigating judges of its refusal, as recalled by the latter in their order of attachment.

48. By Note Verbale dated 4 October 2011, the Ambassador of Equatorial Guinea in France informed the Protocol Department, Diplomatic Privileges and Immunities Division, that the building located at 42 avenue Foch in the 16th arrondissement of Paris had been assigned to the diplomatic mission of Equatorial Guinea in France.

49. However, by Note Verbale of 11 October 2011, the Protocol Department notified the Embassy of its refusal to consider the building as part of the diplomatic mission, claiming that "[i]t

falls within the private domain and is, as such, subject to ordinary law". Since the Protocol Department maintained its refusal despite repeated notifications from the Embassy in a number of letters, the judges not only carried out the attachment, but also had the premises searched and movable property seized from inside the building by the police on the basis of letters rogatory issued by those judges.

50. And yet, for four years now — that is, since 2011 — the building located at 42 avenue Foch in the 16th arrondissement of Paris has indeed been occupied by the Ambassador and all the members of Equatorial Guinea's diplomatic mission; there is a sign on it indicating that it is the Embassy, and the flag of Equatorial Guinea is raised there.

51. Ultimately, because of the difference in positions between the two States regarding the legal status of the building in question, the diplomatic mission of Equatorial Guinea in France is being deprived of the protection to which it is entitled under Article 22 of the Vienna Convention on Diplomatic Relations and according to relevant practice.

52. With regard to this, as well as other aspects of the dispute, the Republic of Equatorial Guinea remains convinced that it can be resolved through conciliation between the two States, since it contends that it is free to establish its diplomatic mission at the address of its choosing, without requiring the express permission of the receiving State, as long as it does not move its mission outside Paris, the capital of the French Republic, in which case it would require permission as provided for in Article 12 of the Vienna Convention cited above.

53. Indeed, in their analysis of the Vienna Convention and the question of free choice of address for a diplomatic mission, specialists in diplomatic law maintain that:

> "Contrary to consular posts, the Convention does not require the express consent of the receiving State with regard to the seat of the mission. According to established practice, the seats of such missions are almost always located in the capital of the receiving State . . . The sending State's choice of the seat of its mission is thus not subject to the approval of the receiving State and does not even have to be notified to that State" (Annex 18, excerpt from *Droit international des relations diplomatiques et consulaires*, Anna Smolinska, Maria Boutros, Frédérique Lozanorios and Mariana Lunca, ed. Bruylant). *[Translation by the Registry.]*

54. Similarly, Professor Jean Salmon writes the following regarding the choice of premises for the mission:

> "Does the sending State have a choice as to where to establish the mission in the receiving State? Such freedom appears to be limited by the following obligations:
>
> — First, it is established practice for the diplomatic corps and members of the mission to be located in the same city as the government and sovereign of the receiving State. This is a traditional rule. And if the government of the receiving State were to change its seat, the diplomatic missions accredited to the Head of State must follow if so requested.
>
> — Secondly, the receiving State can group embassies together in the same area, which greatly facilitates the task of protecting them." *[Translation by the Registry.]*

55. Professor Salmon adds:

> "The Vienna Convention does not specify at which point the premises acquire the status of premises of the mission. There is no provision for a notification procedure for premises such as the one in Article 11 for people. However, as soon as the premises are assigned, their protection is ensured." (Annex 19, excerpt from *Manuel de droit diplomatique*, ed. Bruylant, pp. 188-192.) *[Translation by the Registry.]*

56. It thus follows from the above that the measures of constraint applied to the property of Equatorial Guinea and the judicial attachment thereof constitute a violation of the rights of Equatorial Guinea as recognized by international law, notably by the Vienna Convention on Diplomatic Relations.

57. Therefore, with a view to settling the dispute between the two States, arising from the internationally wrongful acts caused by the judicial proceedings pending at the Paris *Tribunal de grande instance* under the references Prosecution No. 0833796017, Investigation No. 2292/1012, which are likely to engage the international responsibility of the French Republic, the Republic of Equatorial Guinea officially notifies the French Republic of the existence of a dispute between the two States and of an offer of settlement through conciliation and 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.

58. The Republic bases its request for settlement on:

— Article 35 of the United Nations Convention against Transnational Organized Crime adopted in New York on 15 November 2000, ratified by France on 29 October 2002 and by Equatorial Guinea on 7 February 2003, which provides that:

> "1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.
>
> 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."

— Articles II and III of the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, ratified by France on 30 January 1971 and by Equatorial Guinea on 4 November 2014, which state that:

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

The Republic of Equatorial Guinea looks forward to receiving the position of the French Republic through the customary official channels.

For the Republic of Equatorial Guinea,

The Ambassador Extraordinary and Plenipotentiary,

Miguel OYONO NDONG MIFUMU.

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ANNEX 57

**French Ministry of Foreign Affairs and International Development,
Note Verbale No. 2016-208753/PRO/PIDC, 17 March 2016**

Note Verbale No. 2016-208753/PRO/PIDC from the French Ministry of Foreign Affairs and International Development dated 17 March 2016 to the Embassy of Equatorial Guinea

[Translation]

The Ministry of Foreign Affairs and International Development, Protocol Department, presents its compliments to the Embassy of the Republic of Equatorial Guinea and acknowledges receipt of the Embassy's Note Verbale No. 062/16, dated 2 February 2016, and of the document entitled Memorandum No. 2, appended thereto.

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.

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ANNEX 58

Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto **(United Nations, 2005)**
(excerpt)

United Nations Office on Drugs and Crime
Division for Treaty Affairs

Legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto

United Nations, New York
2004

(b) Serious crimes as defined above, if they are transnational in nature and involve an organized criminal group (art. 2, subparas. (a) and (b), and art. 3, para. 1 (b)). What crime is serious varies across time and place, but for the purposes of the Convention it is defined in article 2 to be any offence carrying a maximum penalty of four years deprivation of liberty or more;

(c) The offence is transnational (art. 3, para. 2) if:

(i) It is committed in more than one State;

(ii) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(iii) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(iv) It is committed in one State but has substantial effects in another State;

(d) Offences established under any of the Protocols to the Organized Crime Convention to which States have become parties (art. 1, paras. 2 and 3, of each Protocol).

31. However, it is critical for legislators and policy makers to be aware that, according to article 3, paragraph 1, these limitations in scope apply only except as otherwise stated in the Convention. As made clear in article 34, paragraph 2 (discussed earlier in the present chapter), the limiting factors of transnationality and involvement of an organized criminal group do not apply to all articles of the Convention. Moreover, the sections below on articles 16 (Extradition) and 18 (Mutual legal assistance) contain specific provisions that govern their scope of application (see chap. V, sects. A and B) and should be closely reviewed.

D. Protection of sovereignty

32. Lastly, the Convention respects and protects the sovereignty of States parties.

> *"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."

33. Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory.

34. There are also other provisions that protect national prerogatives and sovereignty set forth elsewhere in the Convention. For example, pursuant to article 11, paragraph 6 (see also chap. III, sect. A.3, Sanctions and deterrence), nothing in the Convention affects the principle that the domestic law of a State party governs:

(a) The description of offences established in accordance with the Convention;

(b) Applicable defences;

(c) Legal principles controlling the lawfulness of conduct;

(d) Prosecution and punishment.

35. Moreover, pursuant to article 11, paragraph 1, it is up to the State party concerned to determine the appropriate sanctions, while considering the gravity of the offence.

C. Prosecution, adjudication and sanctions

"Article 11
"Prosecution, adjudication and sanctions

"1. Each State Party shall make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions that take into account the gravity of that offence.

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

"3. In the case of offences established in accordance with articles 5, 6, 8 and 23 of this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

"4. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.

"5. Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.

"6. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law."

1. Introduction

261. Harmonizing legal provisions on transnational crimes committed by organized criminal groups, detecting the offences, identifying and arresting the culprits, enabling jurisdiction to be asserted and facilitating smooth coordination of national and international efforts 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 and with the benefits they have derived from their criminal activities.

262. The penalties provided for similar crimes in various jurisdictions diverge significantly, reflecting different national traditions, priorities and policies. It is essential, however, to ensure that at least a minimum level of deterrence is applied by the international community to avoid the perception that certain types of crimes "pay", even if the offenders are convicted. In other words, the sanctions must clearly outweigh the benefits of the crime. 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.

263. International initiatives have sought to do this with respect to particular offences, as, for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (General Assembly resolution 45/110, annex).

264. Article 11 addresses this important aspect of the fight against transnational organized crime with respect to the offences covered by the Convention and complements the provisions relative to the liability of legal persons (art. 10) and to the seizure and confiscation of proceeds of crime (see arts. 12-14). This article requires that States parties give serious consideration to the gravity of the offences covered by the Convention when they decide on the appropriate punishment and possibility of early release or parole. It 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, offences established in accordance with its Protocols, if they are or are considering becoming parties, and "serious offences" (art. 2, subpara. (b)).

265. Transnational offenders are frequently considered likely to flee the country where they face legal proceedings. For this reason, the Convention requires that States take measures to ensure that those charged with the four main offences covered by the Convention (under arts. 5, 6, 8 and 23) appear at forthcoming criminal proceedings consistently with their law and the rights of the defence. This relates to decisions on the defendants' release before trial or appeal.

266. Finally, this article addresses the question of statutes of limitation. Generally, such statutes set time limits on the institution of proceedings against a defendant. Many States do not have such statutes, while others apply them across the board or with limited exceptions. Where such statutes exist, the purpose is mainly to discourage delays on the part of the prosecuting authorities, or on the part of plaintiffs in civil cases, to take into account the rights of defendants and to preserve the public interest in closure and prompt justice. Long delays often entail loss of evidence, memory lapses and changes of law and social context, and therefore increase the possibilities of some injustice. However, a balance must be achieved between the various competing interests and the length of the period of limitation varies considerably from State to State. Nevertheless, serious offences must not go unpunished, even if it takes longer periods of time to bring offenders to justice. This is particularly important in cases of fugitives, as the delay of instituting proceedings is beyond the control of authorities.

267. For this reason, the Convention requires States with statutes of limitation to introduce long periods for all offences covered by the Convention, including

offences established in accordance with its Protocols and serious crimes, and longer ones for alleged offenders that have evaded the administration of justice.

268. In addition to the issues discussed immediately above, paragraph 6 of article 11 addresses the manner in which offences are to be denominated in the national laws of States parties. Further discussion regarding this issue, as well as other issues treated in this article, can be found in chapter II and chapter III, section A, of the present guide.

2. Summary of main requirements

269. The Organized Crime Convention requires that States:

(a) Ensure that offences covered by the Convention are subject to adequate sanctions taking the gravity of each offence into account (art. 11, para. 1);

(b) Ensure that any discretionary powers they may have are exercised to maximize the effectiveness of law enforcement and deterrence (art. 11, para. 2);

(c) Take appropriate measures to ensure the presence of defendants at criminal proceedings (art. 11, para. 3);

(d) Consider the grave nature of the four main offences covered by the Convention when considering early release or parole (art. 11, para. 4);

(e) Establish, where appropriate, long domestic statute of limitation periods for commencement of proceedings for offences covered by the Convention, especially when the alleged offender has evaded the administration of justice (art. 11, para. 5).

3. Mandatory requirements

270. The provisions of article 11 are outlined below under the headings of adequacy of sanctions, prosecution, adjudication and statutes of limitation.

(a) Adequacy of sanctions

271. Under article 11, paragraph 1, each State party is to make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of the Convention liable to sanctions that take into account the gravity of the offence.

272. This is a general requirement that penalties take into account the gravity of the offence. This paragraph applies to the four types of criminalization required by the Convention and to the offences established in accordance with the Protocols to which States are or are considering becoming parties (art. 1, para. 3, of each Protocol). Penalties for serious crimes under domestic law are left to the discretion of national drafters. It is reiterated that, should they wish to have the Convention applied to such offences, they need to provide for a maximum penalty of at least four years' deprivation of liberty.[14]

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[14] For example, see art. 3, para. 4 (a), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which reads: "such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation"; see also the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), General Assembly resolution 45/110, annex.

273. This requirement is general and applies to both natural persons and legal entities. As noted in chapter IX of the present guide, there are additional and more specific provisions regarding legal entities in article 10, paragraph 4, which requires that States ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

(b) Prosecution

274. The Convention requires that States endeavour to ensure that any discretionary legal powers under their 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 (art. 11, para. 2).

275. This provision 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, the offences established in accordance with the three Protocols (to the extent States are parties to the Protocols) and serious crimes.

(c) Adjudication

276. The Convention requires that, with respect to the offences established under articles 5, 6, 8 and 23, each State take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings (art. 11, para. 3).

277. The illegal operations in which many transnational criminal groups engage generate substantial profits. Consequently, large sums of money may be available to defendants, to the effect that they can post bail and avoid detention before their trial or their appeal. The dissuasive effect of bail is correspondingly diminished. The risk that law enforcement may be undermined is therefore higher. Thus, article 11, paragraph 3, points to this risk of imprudent use of pretrial and pre-appeal releases and requires that each State take appropriate measures consistent with its law and the rights of defendants to ensure that they do not abscond.

278. The Convention also encourages a stricter post-conviction regime by requiring each State to ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by the Convention when considering the eventuality of early release or parole of persons convicted of such offences (art. 11, para. 4).

279. Many jurisdictions allow for an early release or parole of incarcerated offenders, while others completely prohibit it. The Convention does not ask States to introduce such a programme, if their systems do not provide for it (A/55/383/Add.1, para. 20). It does, however, urge those States which provide for

ANNEX 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)

UNITED NATIONS
Office on Drugs and Crime

TRAVAUX PRÉPARATOIRES

of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto

"*The text of paragraph 4 could be included, as an explanatory note to paragraph 3, worded as follows:*

"4. For the purposes of this Convention, acts such as those noted in paragraph 3 of this article shall be understood as offences penalized under criminal law, even though they may be defined with different designations in the domestic law of a State Party.

"*New paragraph 5 reproduces option 2 of paragraph 5, amended to read as follows:*

"5. This Convention shall not apply where the offence is committed within a single State, all members of the criminal group are nationals of that State and the victims are nationals or entities of that State. However, in the case of organized crime within national confines, States may afford each other mutual judicial assistance and law enforcement cooperation taking this Convention as a framework.

"6. (*Former paragraph 6*)

"7. (*Former paragraph 7*)

"8. The annexed Protocols form an integral part of and have equal force with this Convention.

"9. States Parties may apply the mechanisms for judicial and law enforcement assistance and cooperation provided for in this Convention to other bilateral or multilateral conventions or treaties, whenever they so agree."

Rolling text (A/AC.254/4/Rev.2)

"Article 2
"Scope of application[19]

"1. The Convention shall, except as otherwise provided herein,[20] apply to the prevention,[21] investigation and prosecution of serious crime involving a [transnational] organized criminal group as defined in article 2 bis and the offences established in articles 3 and 4.[22]

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[19]At its second session, the Ad Hoc Committee decided to continue its work on the basis of the revised text of article 2 (see A/AC.254/4/Rev.1). The Ad Hoc Committee decided that a provision originally to be found in this article on criteria for deciding whether or not an offence was committed by an organized criminal group could be used as a point of reference in reviewing, for example, article 14 (Mutual legal assistance). The Ad Hoc Committee also accepted a compromise proposal by its Chairman that a list of offences, which could be either indicative or exhaustive, such as the list originally contained in this article (provided in the attachment in section D below), could be included either in an annex to the convention or in the *travaux préparatoires.* That list would, however, need to be supplemented with proposals from States (see the attachment in section D below and also the report of the Ad Hoc Committee on its second session (A/AC.254/11)).

[20]One delegation noted that, in certain cases, owing to the fact that an investigation was at a preliminary stage, it might not be possible for a requested State to establish with certainty that a particular offence was connected to organized crime. That should be taken into consideration in determining the scope of application of the various articles dealing with international cooperation, such as mutual legal assistance.

[21]Oman was of the view that the word "prevention" should be deleted, as this article should deal only with the scope of application of the convention. The same view was also expressed by Kuwait (see A/AC.254/L.12).

[22]The Philippines proposed the following rewording of paragraph 1 of this article: "Except as otherwise provided herein, the Convention shall apply to the prevention, investigation and prosecution of transnational organized crime. For this purpose, transnational organized crime refers to a serious crime that is committed by an organized criminal group and that has an international dimension, such as, but not limited to, the following: *(a)* if the offence is committed within two or more States; or *(b)* if the members of the criminal group are nationals of two or more States; or *(c)* if the offence is committed in one State but the victim is a national or entity of another State; or *(d)* if the offence is committed in one State but planned, directed or controlled in another State". The Philippines also proposed the deletion of paragraph 2 of this article as it would be superseded by the revised paragraph 1.

"[2. This Convention shall not apply where the offence is committed within a single State, all members of the criminal group are nationals of that State and the victims are nationals or entities of that State, except that the provisions of articles concerning judicial assistance may, as appropriate, apply where the offence is serious and of an organized nature.][23]

"3. 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.

"4. [Nothing in this Convention entitles a State Party to][24] [A State Party shall not][25] 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.

[*Paragraphs moved*]"[26]

Seventh session: 17-28 January 2000

Notes by the Secretariat

2. The version of article 2 contained in document A/AC.254/4/Rev.2 remained unchanged in the intermediate drafts of the convention (A/AC.254/4/Revs.3-6).

France (A/AC.254/L.132)

"Article 2
"Scope of application

"1. The Convention shall, except as otherwise provided herein, apply to the prevention and suppression:

"*(a)* Of serious crime, as defined in article 2 bis;

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[23]This paragraph was previously an option for paragraph 5 of this article. It was retained in brackets pending a decision on the retention of the bracketed word "transnational" in paragraph 1. Mexico proposed the following formulation: "The present Convention shall not apply if the offence is committed within a single State, if all members of the criminal group are nationals of or have substantial links with that State, if all victims are nationals or entities of that State and if the effects of the offence are produced only in that State [with the proviso that the provisions of the articles concerning judicial assistance may, as appropriate, apply where the offence is serious and of an organized nature]." Mexico specified that the inclusion of the part of the sentence in brackets would depend on the definition of serious crime. Oman suggested that the words "all members of the criminal group" should be replaced with the words "all or one of the members of the criminal group" to ensure that the presence of a foreign element in the offence would not constitute a transnational crime.

[24]This language is derived from article 18 of the International Convention for the Suppression of Terrorist Bombings (General Assembly resolution 52/164, annex). One delegation suggested that article 19, paragraph 1, of the same Convention might also be relevant in this regard.

[25]This language is derived from the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

[26]Pursuant to a decision of the Ad Hoc Committee at its second session, the provision on the relationship between the convention and the protocols thereto is dealt with in article 26 bis.

"*(b)* Of the offences established in articles 4, 4 ter and 17 bis, where involving an organized criminal group; and

"*(c)* Of the offence established in article 3."

Notes by the Secretariat

3. At its seventh session, the Ad Hoc Committee provisionally approved paragraphs 3 and 4 of article 2, as amended. However, the Ad Hoc Committee decided to keep paragraphs 1 and 2 of article 2 under review and to revert to the text in the light of the results of future negotiations on other articles of the draft convention that might have a bearing on the scope of the instrument. The Ad Hoc Committee also decided to use as a basis for further consideration of those paragraphs the text proposed by the representative of the Netherlands, in her capacity as the coordinator of an informal working group set up to discuss paragraphs 1 and 2 of article 2 at the request of the Chairman of the Ad Hoc Committee. That text was as follows:

Recommendations of the open-ended informal working group on article 2, paragraphs 1 and 2, submitted at the request of the Chairman (A/AC.254/L.140)

"Article 2
"Scope of application

"1. The Convention shall apply, except as otherwise stated therein, to the prevention, investigation and prosecution of:

"*(a)* The offences established in accordance with articles 3, 4, 4 ter and 17 bis;[27] and

"*(b)* Serious offences involving an organized criminal group as defined in article 2 bis.

"2. The Convention shall not apply, except as otherwise provided therein,[28] where such an offence is committed within a single State, all participants of the organized criminal group or, where no such group is involved, all alleged offenders are nationals of that State and are present in that State, and no State has a basis under article 9, paragraphs 1 and 2,[29] to exercise jurisdiction."

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[27]On the understanding that:

(a) In article 4 ter, paragraph 1, and in the chapeau of article 17 bis, the words "[and involving an organized criminal group]" will be deleted;

(b) In the articles on cooperation, in particular articles 10 (Extradition) and 14 (Mutual legal assistance), it will be stated that the obligation to apply the articles exists when the offences as referred to in article 2, paragraph 1, are committed involving an organized criminal group; and

(c) Furthermore, in the articles on cooperation, it will be stated that States may apply them even where there is no involvement of a criminal group.

[28]It could be advisable to try to have a more explicit text that specifies which of the provisions of the convention can apply to "domestic cases".

[29]Article 9, paragraph 1 *(a)* and *(b)*, on territorial jurisdiction; and paragraph 2 *(a)*, on the nationality or residency of the victim, *(b)*, on the nationality or residency of the offender and *(c)*, concerning an offence with a view to an offence within the territory.

Rolling text (A/AC.254/4/Rev.7)

"Article 2
"Scope of application[30,31]

"1. The Convention shall apply, except as otherwise provided herein, to the prevention, investigation and prosecution of:

"*(a)* The offences established in accordance with articles 3, 4, 4 ter and 17 bis; and

"*(b)* Serious offences involving an organized criminal group as defined in article 2 bis.

"2. This Convention shall not apply, except as otherwise provided herein, when such an offence is committed within a single State, all members of the organized criminal group or, where no such group is involved, all alleged offenders are nationals of that State and are present in that State, and no other State has a basis under article 9, paragraphs 1 and 2, to exercise jurisdiction.

"3. 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.[32]

"4. 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."

Eighth session: 21 February-3 March 2000

Rolling text (A/AC.254/4/Rev.8)

"Article 2
"Scope of application[33]

"1. The Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

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[30]As decided by the Ad Hoc Committee at its seventh session, the order of articles 2 and 2 bis would be reversed in the final text.

[31]Paragraphs 1 and 2 of article 2 remained under review (see the report of the Ad Hoc Committee on its seventh session (A/AC.254/25)). In a statement made prior to the adoption of the report of the Ad Hoc Committee on its seventh session, the Group of 77 and China expressed their preference for the draft text of paragraphs 1 and 2 of article 2 as contained in A/AC.254/4/Rev.6. That text was as follows:

"1. The Convention shall, except as otherwise provided herein, apply to the prevention, investigation and prosecution of serious crime involving a [transnational] organized criminal group as defined in article 2 bis and the offences established in articles 3 and 4.

"[2. This Convention shall not apply where the offence is committed within a single State, all members of the criminal group are nationals of that State and the victims are nationals or entities of that State, except that the provisions of articles concerning judicial assistance may, as appropriate, apply where the offence is serious and of an organized nature.]"

[32]At the seventh session, Poland proposed that paragraphs 3 and 4 should be placed in a separate article.

[33]Paragraphs 1 and 2 of article 2 remained under review. The present text of those paragraphs was submitted by Singapore at the eighth session of the Ad Hoc Committee (A/AC.254/L.152 and Corr.1) and was regarded as a basis for the further consideration of paragraphs 1 and 2 of article 2. The Netherlands proposed that the text of subparagraph *(b)* of paragraph 2 should be replaced with the following: "Its prevention, investigation or prosecution requires the cooperation of at least two States Parties". Some delegations were of the view that agreement on the establishment in article 2 of the convention of a link between the offences established by the convention and the involvement of an organized criminal group would imply, as a matter of consequence, the deletion of the phrase "and involving an organized criminal group" from the criminalization articles, especially articles 4 ter and 17 bis of the convention.

"*(a)* The offences established in accordance with articles 3, 4, 4 ter and 17 bis of this Convention; and

"*(b)* Serious offences as defined in article 2 bis of this Convention;

where the offence is transnational in nature and involves an organized criminal group.

"2. For the purpose of paragraph 1, an offence is transnational in nature if:

"*(a)* It is committed in more than one State; or

"*(b)* It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in a different State.

"3. 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.

"4. 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."

Tenth session: 17-28 July 2000

Notes by the Secretariat

4. Delegations based their comments on the text of article 2 of the revised draft convention contained in document A/AC.254/4/Rev.9 and Corr.1, which was the same as that contained in document A/AC.254/4/Rev.8. At its tenth session, the Ad Hoc Committee considered, finalized and approved article 2, as last amended. Paragraphs 3 and 4 were transferred to a new separate article (article 4). Furthermore, it was decided that two additional subparagraphs should be placed in paragraph 2 on the basis of a proposal submitted by the United States. The text of that proposal was as follows.

United States of America (A/AC.254/L.216)

"Article 2

"1. Amend paragraph 2 to read as follows:

'2. For the purpose of paragraph 1, an offence is transnational in nature if:

'*(a)* [...]

'*(b)* [...]

'*(c)* It is committed in one State, but involves an organized criminal group that operates or has members in more than one State;

'*(d)* It is committed in one State but with effects or intended effects in another State.'"

Article 4. Protection of sovereignty

Notes by the Secretariat

1. For the origin of the text of article 4, see article 3 of the convention and under article 1 of the convention, the proposal submitted by Germany in the context of the preparatory stage of the negotiations before the establishment of the Ad Hoc Committee (A/AC.254/5). At the seventh session of the Ad Hoc Committee, Poland proposed that paragraphs 3 and 4 of article 2 of the draft convention should be placed in a separate article (see article 3 of the convention, footnote 32). At the tenth session of the Ad Hoc Committee, there was agreement that these paragraphs should form new article 2 ter, which was subsequently renumbered and became article 4 of the convention (see the final text of the convention, as included in the report of the Ad Hoc Committee (A/55/383, sect. IV, draft resolution, annex I), that was submitted to the General Assembly for adoption pursuant to resolution 54/126 of 17 December 1999).

A. Approved text adopted by the General Assembly (see resolution 55/25, annex I)

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.

ANNEX 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)

UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/AC.254/5
19 December 1998

ORIGINAL: ENGLISH

Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
First session
Vienna, 19-29 January 1999

PROPOSALS AND CONTRIBUTIONS RECEIVED FROM GOVERNMENTS

CONTENTS

I. INTRODUCTION

The Secretary-General has the honour to bring to the attention of the Ad Hoc Committee proposals and contributions of States that relate to its mandated work. Most of the proposals and contributions contained in the present document were originally submitted prior to or during the Informal Preparatory Meeting of the Ad Hoc Committee, which took place in Buenos Aires from 31 August to 4 September 1998. Several of the proposals and contributions that were submitted by States during that meeting and are not contained in the present document have been incorporated into the new consolidated draft text of the Convention (see A/AC.254/4). Other contributions were

submitted to the Secretariat on the occasion of the third meeting of the informal group of Friends of the Chair, held in Vienna on 5 and 6 November 1998.

II. PROPOSALS AND CONTRIBUTIONS RECEIVED FROM GOVERNMENTS

Germany*

[Original: English]

1. The most difficult and time-consuming issue in the discussions on the drawing up of the proposed Convention against Transnational Organized Crime has been and probably will be in future meetings the scope of application of the Convention. The Open-ended Intergovernmental Ad Hoc Committee has up to now examined in principle three alternatives:

(a) Use of the "statement of objectives" to provide a frame of reference for the entire Convention;

(b) Use of a "seriousness test" combined with an "organized nature test";

(c) Use of either an exhaustive or illustrative list of offences.

2. One proposal (Finland) now suggests that the Convention should apply to serious crime when the circumstances provide reasonable grounds to believe that a criminal organization was involved in the commission of the crime and spells out some of the circumstances under which this may be assumed. In the field of transborder judicial cooperation (extradition, mutual assistance, freezing of assets and enforcement of foreign confiscation orders), this suggestion immediately raises the question as to whether only the requesting State has to have reasonable grounds to assume a link to "organized crime" or whether this is true for the requested State also. In the light of the principle of dual criminality, one would probably have to assert the second possibility. This would in practice lead to a very heavy burden of proof, especially in the field of mutual assistance when the offence has just been discovered and, by ordinary experience, it seems to be linked to organized crime but no such proof is available. Clearly, this would lead to serious lacuna in the international fight against organized crime. On the other hand, when a request for extradition or the execution of a confiscation order is made, such a link to organized crime will probably be easier to assess.

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*Issued previously as document CICP/CONV/WP.8.

3. Taking into account the Japanese non-paper (E/CN.15/1998/11, appendix IV), Germany would like to make the following tentative proposal.

"*Article X*

"*Scope of the Convention*

"1. The purpose of this Convention is to promote cooperation among the Parties so that they may address more effectively the various aspects of organized crime having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems. [art. 1, option 1, E/CN.15/1998/11, appendix 1]

"2. For that purpose, unless the context requires otherwise, organized crime shall be deemed to be any serious crime, committed within the jurisdiction of two or more States, that is punishable under the laws of the requesting Party and of the requested Party by imprisonment or other deprivation of liberty for a maximum period of at least two years or by a more severe penalty.[1]

"3. 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 the principle of non-intervention in the domestic affairs of other States.

"4. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other Party by its domestic law. [United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, art. 2, paras. 2 and 3]

"*Extradition*

"1. This Article shall apply to serious offences as defined in article X, paragraph 2, under the condition that:

"(a) The offence was committed by a member of a criminal organization as defined in article Y; or

"(b) The offence is a predicate offence of money-laundering under the law of the requesting Party.

"2. [Art. 6, paras. 2-12, of the 1988 Convention as appropriate].

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[1]This does not however exclude the possibility of foreseeing a ground for refusal in the field of mutual assistance in criminal matters, for example, if the offence to which the request relates would not be considered to be linked to organized crime if committed under the jurisdiction of the requested State Party.

"*Money-laundering*

[Art. 4 and 4bis, appendix 1, E/CN.15/1998/11]

"'Predicate offence'" means any criminal offence that under the law of a Party is punishable by deprivation of liberty or imprisonment for a period of at least four years or was committed by a member of a criminal organization as defined by article Y as a result of which proceeds were generated that may become the subject of an offence as defined in article 4 of this Convention."

ANNEX 61

Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 **(United Nations, 2000)**
(excerpt)

COMMENTARY ON THE UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES 1988

Done at Vienna on 20 December 1988

UNITED NATIONS
New York, 1998

paragraph 1, on close international cooperation "consistent with [the Parties'] respective domestic legal and administrative systems". These formulas should be distinguished from the safeguard clauses,[100] which limit the obligations of parties in case of conflicting constitutional or legislative domestic rules by stipulating that the parties shall adopt certain measures "subject to", "to the extent permitted by", or "without prejudice to" the basic principles of their domestic legal systems. In some cases, both types of clauses are combined when a measure is required "if [the Party's] law so permits and in conformity with the requirements of such law".[101]

2.11 The second sentence of paragraph 1 would suggest that no provision in the Convention is considered self-executing. In order to carry out their obligations under the Convention, Parties must incorporate in their domestic law, through appropriate legislative and administrative action, the relevant substantive elements of its provisions.

Paragraph 2

> **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.**

Commentary

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 (Article 2, paragraphs 1 and 7), have been reaffirmed and elaborated upon in subsequent authoritative documents, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV).

2.13 The rationale for restating these principles in article 2 lies in the fact that the Convention, as already noted above, goes much further than previous drug control treaties in matters of law enforcement and mutual legal assistance.

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[100] See footnote 93 above.

[101] See article 6, paragraph 10, and article 5, paragraphs 4 and 9.

2.14 As will be shown in greater detail in the comments on the respective articles, 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. Formal requests have to be made, and authorizations granted, for putting in motion certain procedures or operations requiring the express prior consent of parties.

2.15 Special attention has been paid to this problem in a number of articles. Article 9 (Other forms of co-operation and training) requires that parties exercise caution in applying the forms of cooperation that are envisaged. It provides, for instance, for the establishment of joint teams "in appropriate cases and if not contrary to domestic law". It stresses that officials of any party taking part in such teams "shall act as authorized by the appropriate authorities of the Party in whose territory the action is to take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected". In all cases, cooperation shall be initiated and conducted "on the basis of bilateral or multilateral agreements or arrangements". The use of controlled delivery at the international level contemplated in article 11 is also subject to prior agreement or arrangement between the parties.

2.16 The conclusion of formal or informal agreements or arrangements between parties, recommended in several articles as a means of giving practical effect to certain provisions of the Convention and enhancing cooperation, should contribute to fostering respect for the principles of sovereign equality and territorial integrity referred to in paragraph 2.

2.17 Generally speaking, a party has no right to undertake law enforcement action in the territory of another party without the prior consent of that party. The principle of non-intervention excludes all kinds of territorial encroachment, including temporary or limited operations (so-called "in-and-out operations"). 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".[102] Thus, for instance, the unauthorized undertaking by a party, within the territory of another party, of surveys to detect areas of illicit cultivation of narcotic plants, or the spraying of such areas for purpose of eradication, would not be in order.

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[102]Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex), " Principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter", para. 2.

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, taking into account the particular circumstances of each incident.[103]

2.19 It was emphasized by the sponsors of the proposed text that the reference to the "territorial integrity of States" could in no way be interpreted by parties as a springboard to assert particular claims of rights to lands and waters.[104]

Paragraph 3

> **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.**

Commentary

2.20 Paragraph 3 is conceptually linked to the preceding paragraph and is complementary to it insofar as practical implications are concerned. Whereas paragraph 2 lays down, in affirmative language, a code of conduct to which parties should conform in fulfilling their obligations under the Convention, paragraph 3 sets out, in negative language, what parties should not do if they are to comply with the accepted customary norms of international law. Exclusive exercise of territorial jurisdiction is a corollary of sovereignty and has the same function as the prohibition of intervention in the domestic affairs of other States and due respect for territorial integrity. Compliance with these principles constitutes in fact a guarantee of the independent exercise of jurisdiction and performance of functions that a State considers to be within its own *domaine réservé*.

2.21 Nevertheless, by agreeing to be bound by the obligations imposed by the Convention in matters that otherwise might be considered to pertain to its *domaine réservé*, a party is precluded, in the absence of a specific safeguard

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[103] See article 32 and the comments thereon below.

[104] *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 24th meeting, para. 89.

ANNEX 62

***Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (United Nations, 2012)**
(excerpt)

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

TRAVAUX PRÉPARATOIRES

of the negotiations for the elaboration of the United Nations Convention against Corruption

UNITED NATIONS
New York, 2010

Article 4. Protection of sovereignty

A. Negotiation texts

First session: Vienna, 21 January-1 February 2002

Rolling text (A/AC.261/3 (Part I))

"Article 4[1]
"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 shall entitle 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."

Notes by the Secretariat

1. At the first session of the Ad Hoc Committee, the Philippines proposed the inclusion of a third paragraph to this article as follows (A/AC.261/L.14):

"3. While the full implementation of all provisions in this Convention in the respective jurisdictions of all the States Parties concerned is ideal, it shall not serve as a precondition for returning, to their country of origin, funds derived from or obtained through acts of corruption."

[1] Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4), Colombia (A/AC.261/IPM/14), Mexico (A/AC.261/IPM/13) and Turkey (A/AC.261/IPM/22) at the Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption (Buenos Aires, 4-7 December 2001) and based on article 4 of the Organized Crime Convention.

Third session: Vienna, 30 September-11 October 2002

Rolling text (A/AC.261/3/Rev.2)

"Article 4
"Protection of sovereignty[2]

"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 [and non-interference][3] in the domestic affairs of other States.

"2. Nothing in this Convention shall entitle 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.

"[3. The provision of this article is a fundamental provision and any provision of any article contrary to it shall be disregarded.]"[4]

Notes by the Secretariat

2. Article 4 was not discussed at the fourth session of the Ad Hoc Committee (Vienna, 13-24 January 2003). It was decided that thorough consideration of this article would be undertaken at the third reading of the draft convention during the sixth session of the Ad Hoc Committee.

Sixth session: Vienna, 21 July-8 August 2003

Rolling text (A/AC.261/3/Rev.5)

"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[5] in the domestic affairs of other States.

"2. Nothing in this Convention shall entitle 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.[6]

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[2] The text of this article was amended by the Vice-Chairman with responsibility for this chapter of the draft convention, in an effort to reflect proposals submitted by Governments during the third session of the Ad Hoc Committee and thus facilitate consideration by the Ad Hoc Committee at its fourth session.

[3] Proposed by Algeria at the third session of the Ad Hoc Committee (A/AC.261/L.96).

[4] Proposed by Yemen at the third session of the Ad Hoc Committee (A/AC.261/L.105).

[5] It was agreed that the *travaux préparatoires* would indicate that the principle of non-intervention is to be understood in the light of Article 2 of the Charter of the United Nations.

[6] Paragraph 2 was still under consideration.

"[*Paragraph 3 was deleted*.]"

Notes by the Secretariat

3. At its sixth session, the Ad Hoc Committee provisionally approved article 4 of the draft convention (see A/AC.261/22, para. 22).

4. At its seventh session (Vienna, 29 September-1 October 2003), the Ad Hoc Committee considered, finalized and approved the article (see the final text of the convention, as included in the report of the Ad Hoc Committee (A/58/422, para. 103, draft resolution, annex), that was submitted to the General Assembly for adoption at its fifty-eighth session in accordance with Assembly resolution 56/260).

B. Approved text adopted by the General Assembly (see resolution 58/4, annex)

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 shall entitle 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.

C. Interpretative notes

The interpretative note on article 4 of the convention approved by the Ad Hoc Committee and contained in its report on the work of its first to seventh sessions (A/58/422/Add.1, para. 10) is as follows:

Paragraph 1

The principle of non-intervention is to be understood in the light of Article 2 of the Charter of the United Nations.

ANNEX 63

***Legislative Guide for the Implementation of the United Nations Convention against Corruption* (United Nations, 2012)**
(excerpt)

DIVISION FOR TREATY AFFAIRS
UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Legislative guide for the implementation of the United Nations Convention against Corruption

Second Revised Edition 2012

UNITED NATIONS
New York, 2012

against transnational organized crime and terrorism), States parties are encouraged to take these also into account and to ensure that their national legislation is compatible with them (for more details, see chapters II-V of the present guide, on preventive measures, criminalization, international cooperation and asset recovery).

C. Protection of sovereignty

> *"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 shall entitle 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."

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. For example, pursuant to article 30, paragraph 9, nothing in the Convention affects the principle that the domestic law of a State party governs:

(a) The description of offences established in accordance with the Convention;

(b) Applicable defences;

(c) Legal principles controlling the lawfulness of conduct;

(d) Prosecution and punishment.

34. Moreover, pursuant to article 30, paragraph 1, it is up to the State party concerned to determine the appropriate sanctions, while considering the gravity of the offence.

35. Finally, article 31, which covers issues of freezing, seizure and confiscation of assets, states: "Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party" (para. 10).

ANNEX 64

***Mechanism for the Review of Implementation of the United Nations Convention against Corruption —Basic Documents* (United Nations, 2011)**
(excerpt)

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Mechanism for the Review of Implementation of the United Nations Convention against Corruption—Basic Documents

UNITED NATIONS
New York, 2011

Preamble

1. Pursuant to article 4, paragraph 1, of the United Nations Convention against Corruption,[3] which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and non-intervention in the domestic affairs of other States, the Conference of the States Parties to the United Nations Convention against Corruption establishes the following mechanism to review implementation of the Convention.

I. Introduction

2. The Mechanism for the Review of Implementation of the United Nations Convention against Corruption (hereinafter "the Mechanism") includes a review process that shall be guided by the principles contained in sections II and III and be carried out in accordance with the provisions contained in section IV. The Mechanism shall be supported by a secretariat as set out in sections V and VI and be financed in accordance with section VII.

II. Guiding principles and characteristics of the Mechanism

3. The Mechanism shall:

(a) Be transparent, efficient, non-intrusive, inclusive and impartial;

(b) Not produce any form of ranking;

(c) Provide opportunities to share good practices and challenges;

[3] United Nations, *Treaty Series*, vol. 2349, No. 42146.

(d) Assist States parties in the effective implementation of the Convention;

(e) Take into account a balanced geographical approach;

(f) Be non-adversarial and non-punitive and shall promote universal adherence to the Convention;

(g) Base its work on clear, established guidelines for the compilation, production and dissemination of information, including addressing issues of confidentiality and the submission of the outcome to the Conference, which is the competent body to take action on such an outcome;

(h) Identify, at the earliest stage possible, difficulties encountered by States parties in the fulfilment of their obligations under the Convention and good practices adopted in efforts by States parties to implement the Convention;

(i) Be of a technical nature and promote constructive collaboration, inter alia, in preventive measures, asset recovery and international cooperation;

(j) Complement existing international and regional review mechanisms in order that the Conference may, as appropriate, cooperate with those mechanisms and avoid duplication of effort.

4. The Mechanism shall be an intergovernmental process.

5. In 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 the review process shall be conducted in a non-political and non-selective manner.

6. The Mechanism shall promote the implementation of the Convention by States parties, as well as cooperation among States parties.

7. The Mechanism shall provide opportunities to exchange views, ideas and good practices, thus contributing to strengthening cooperation among States parties in preventing and fighting corruption.

8. The Mechanism shall take into account the levels of development of States parties, as well as the diversity of judicial, legal, political, economic and social systems and differences in legal traditions.

9. The review of implementation of the Convention is an ongoing and gradual process. Consequently, the Mechanism shall endeavour to adopt a progressive and comprehensive approach.

Guidelines for governmental experts and the secretariat in the conduct of country reviews

I. General guidance

1. Throughout the review process, governmental experts and the secretariat shall be guided by the relevant provisions of the United Nations Convention against Corruption[6] and the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption.[7]

2. In particular, governmental experts shall bear in mind article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.

3. Furthermore, governmental experts shall carry out the reviews in full recognition of the purpose of the review process as specified in paragraph 11 of the terms of reference.

4. During all interactions within the review process, governmental experts shall respect the collective approach. Governmental experts are expected to act with courtesy and diplomacy, and shall remain objective and impartial. Governmental experts need to be flexible in their approach and ready to adapt to changes in schedules.

5. Governmental experts and the secretariat shall maintain the confidentiality of all information obtained in the course of, or used in, the country review process, as well as the country review report, as stipulated

[6]United Nations, *Treaty Series*, vol. 2349, No. 42146.

[7]CAC/COSP/2009/15, chap. I, sect. A, resolution 3/1, annex.

ANNEX 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)

United Nations CTOC/COP/2016/L.5

Conference of the Parties to the United Nations Convention against Transnational Organized Crime

Distr.: Limited
3 October 2016

Original: English

Eighth session
Vienna, 17-21 October 2016
Item 2 (a) of the provisional agenda*
Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: United Nations Convention against Transnational Organized Crime

Bulgaria, Finland, France and Italy

Mechanism for the review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto

The Conference of the Parties to the United Nations Convention against Transnational Organized Crime,

Recalling that the United Nations Convention against Transnational Organized Crime and the Protocols thereto[1] represent the principal worldwide legal instruments to combat the scourge of transnational organized crime, which affects individuals and societies in all countries, and reaffirming their importance as the main tools available to the international community for this purpose,

Reaffirming that the purpose of the Convention and the Protocols thereto is, inter alia, to promote cooperation to prevent and combat transnational organized crime more effectively, and stressing the need to take additional concerted action to reinforce the implementation of the Convention and the Protocols thereto by States parties and to identify related technical assistance needs,

Recalling article 32 of the Convention, pursuant to which the Conference of the Parties to the United Nations Convention against Transnational Organized Crime was established to improve the capacity of States parties to combat transnational organized crime and promote and review the implementation of the Convention,

Reaffirming its decision 1/2 of 8 July 2004, in which the Conference decided to carry out its functions assigned to it in article 32 of the Convention,

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* CTOC/COP/2016/1.

[1] United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

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Recalling also that in article 32 of the Convention it is stated that the Conference of the Parties shall agree upon mechanisms for achieving, inter alia, the objective of periodically reviewing the implementation of the Convention,

Noting the continuing obligation of each State party, under article 32 of the Convention, to provide the Conference with information on its programmes, plans and practices, as well as legislative and administrative measures, related to implementation of the Convention,

Recalling its resolution 5/1 of 22 October 2010, which began a process to consider and explore options with regard to the establishment of a mechanism to assist the Conference in reviewing the implementation of the Convention and the Protocols thereto, as well as its resolution 6/1 of 19 October 2012 and General Assembly resolution 68/193 of 18 December 2013, entitled "Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity", in which the Assembly, inter alia, reiterated the need for the establishment of a mechanism for the review of the implementation of the Convention and the Protocols thereto,

Recalling also its decision 4/1 of 17 October 2008 and its resolution 5/5 of 22 October 2010, entitled "Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto",

Recalling further its resolution 7/1 of 10 October 2014, entitled "Strengthening the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto", in which, inter alia, the usefulness of the existing working groups to advise and assist the Conference of the Parties in the implementation of its mandate was emphasized,

Welcoming the call of the Doha declaration, adopted by the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, to continue to explore all options regarding an appropriate and effective mechanism or mechanisms to assist the Conference of the Parties to the United Nations Convention against Transnational Organized Crime in the review of the implementation of the Convention and the Protocols thereto in an effective and efficient manner,

Recalling article 28 of the Convention, which encourages States Parties to collect, exchange and analyse, in consultation with the scientific and academic communities, trends in organized crime in their territory, as well as to monitor their policies and actual measures to combat transnational organized crime and making assessments of their effectiveness and efficiency,

Recalling also articles 2 and 37 of the Convention concerning respectively the use of terms and the relation between the Convention and the Protocols thereto, as well as the common article 1 of each Protocol thereto,

Recalling articles 29 and 30 of the Convention, and stressing the connections between the review of the implementation of the Convention and the Protocols thereto and the technical assistance programmes provided to requesting States parties and international cooperation, with a view to combating transnational organized crime,

1. *Takes note with appreciation* of the report on the intergovernmental 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, held in Vienna on 6 and 7 June 2016;[2]

2. *Decides* to continue the process of establishing the mechanism for the review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto based on the recommendations contained in the report of the working group to explore all options to explore all options for a review mechanism held in Vienna on 6 and 7 June 2016;[3]

3. *Decides* to elaborate specific Procedures and rules for the functioning of the review mechanism for consideration and adoption by the Conference at its ninth session, which shall be guided by the following principles and characteristics set out in Conference resolution 5/5:

(a) Be transparent, efficient, non-intrusive, inclusive and impartial;

(b) Not produce any form of ranking;

(c) Provide opportunities to share good practices and challenges;

(d) Assist States parties in the effective implementation of the Convention and, where applicable, the Protocols thereto;

(e) Take into account a balanced geographical approach;

(f) Be non-adversarial and non-punitive and shall promote universal adherence to the Convention and its Protocols;

(g) Base its work on clear, established guidelines for the compilation, production and dissemination of information, including addressing issues of confidentiality and the submission of the outcome to the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, which is the competent body to take action on that outcome;

(h) Identify, at the earliest possible stage, difficulties encountered by States parties in the fulfilment of their obligations under the Convention and its Protocols, as applicable, and good practices adopted in efforts by States parties to implement the Convention and, where applicable, the Protocols thereto;

(i) Be of a technical nature and promote constructive collaboration, inter alia, on issues concerning international cooperation, prevention, protection of witnesses and assistance and protection for victims;

(j) Complement existing relevant international and regional review mechanisms so that the Conference may, as appropriate, cooperate with those mechanisms and avoid duplication of efforts;

(k) Be an intergovernmental process;

(l) IBe conducted in conformity with article 4 of the Convention, not serve as an instrument for interfering in the domestic affairs of States parties and the review process shall be conducted in a non-political and non-selective manner;

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[2] CTOC/COP/WG.8/2016/2.

[3] United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

ANNEX 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)

United Nations CTOC/COP/WG.8/2016/2

Conference of the Parties to the United Nations Convention against Transnational Organized Crime

Distr.: General
10 June 2016

Original: English

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
Vienna, 6-7 June 2016

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, held in Vienna on 6 and 7 June 2016

I. Introduction

1. In its resolution 7/1, entitled "Strengthening the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto", the Conference of the Parties to the United Nations Convention against Transnational Organized Crime underlined that the review of the implementation of the Convention and the Protocols thereto was an ongoing and gradual process and that it was necessary to explore all options regarding an appropriate and effective mechanism to assist the Conference in that review.

2. In the same resolution, the Conference requested the United Nations Office on Drugs and Crime to convene, within existing resources from the regular budget and without prejudice to other mandated activities, at least one open-ended intergovernmental meeting, with interpretation, to include government officials with practical expertise related to the implementation of the Convention and its Protocols, with a view to analysing the above-mentioned options and submissions by States parties, and to submit to the Conference at its eighth session a report containing concrete recommendations for reviewing, through a possible mechanism or mechanisms, the implementation of the Convention and the Protocols thereto, and recommendations for cooperating with relevant international and regional organizations and non-governmental organizations, in line with article 32 of the Convention and as guided by the principles and characteristics contained in its resolution 5/5.

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3. In its resolution 7/1, the Conference requested States parties, and invited other interested Member States, on a voluntary basis, to submit to the Secretariat their comments and views for the purpose of deliberations at the above-mentioned meetings.

4. At the meeting of the extended Bureau of the Conference held on 27 March 2015, the President of the Conference welcomed Hussam Abdullah Hasan Ghodayeh Al Husseini (Jordan) to the meeting of the extended Bureau in his role as Chair of the open-ended intergovernmental meeting.

5. The first open-ended intergovernmental meeting to explore all options regarding an appropriate and effective review mechanism for the Convention and the Protocols thereto was held from 28 to 30 September 2015.

6. The extended Bureau of the Conference agreed, by tacit consensus, on 1 March 2016, that the second open-ended intergovernmental meeting to explore all options regarding an appropriate and effective review mechanism for the Convention and the Protocols thereto would take place on 6 and 7 June 2016.

II. Recommendations

7. Pursuant to article 32 of the Organized Crime Convention and guided by the principles and characteristics set out by the Conference of the Parties in its resolution 5/5 and by resolution 7/1, as well as by the developments within the Conference with regard to exploring all options regarding an appropriate and effective mechanism to assist the Conference with promoting and reviewing the implementation of the Convention and the Protocols thereto, the open-ended intergovernmental meeting made the following recommendations to the Conference.

8. The Conference may wish to decide that a review mechanism for the Convention and its Protocols should be guided by the following principles and characteristics set out in Conference resolution 5/5:

(a) Be transparent, efficient, non-intrusive, inclusive and impartial;

(b) Not produce any form of ranking;

(c) Provide opportunities to share good practices and challenges;

(d) Assist States parties in the effective implementation of the Convention and, where applicable, the Protocols thereto;

(e) Take into account a balanced geographical approach;

(f) Be non-adversarial and non-punitive and shall promote universal adherence to the Convention and its Protocols;

(g) Base its work on clear, established guidelines for the compilation, production and dissemination of information, including addressing issues of confidentiality and the submission of the outcome to the Conference, which is the competent body to take action on that outcome;

(h) Identify, at the earliest possible stage, difficulties encountered by States parties in the fulfilment of their obligations under the Convention and its Protocols,

as applicable, and good practices adopted in efforts by States parties to implement the Convention and, where applicable, the Protocols thereto;

(i) Be of a technical nature and promote constructive collaboration, inter alia, on issues concerning international cooperation, prevention, protection of witnesses and assistance and protection for victims;

(j) Complement existing relevant international and regional review mechanisms so that the Conference may, as appropriate, cooperate with those mechanisms and avoid duplication of efforts;

(k) Be an intergovernmental process;

(l) In conformity with article 4 of the Convention, 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 the review process shall be conducted in a non-political and non-selective manner;

(m) Promote the implementation of the Convention and its Protocols by States parties, as applicable, as well as cooperation among States parties;

(n) Provide opportunities to exchange views, ideas and good practices, thus contributing to strengthening cooperation among States parties in preventing and fighting transnational organized crime;

(o) Take into account the levels of development of States parties, as well as the diversity of judicial, legal, political, economic and social systems and differences in legal traditions;

(p) Endeavour to adopt a progressive and comprehensive approach, given that the review of implementation of the Convention is an ongoing and gradual process.

9. The Conference may wish to consider that such a review mechanism should also be cost-effective, complete and user-friendly. It should make optimal and efficient use of existing information, tools and technology so that the administrative burden it entails for States parties, their central authorities and experts involved in the review process is acceptable. It should also provide a clear benefit to those authorities and experts.

10. The Conference may wish to consider all options regarding the funding model of such a review mechanism, including that the core activities of that mechanism should be funded through the existing regular budget resources, to be complemented if necessary by voluntary contributions for other activities, once clear options and their associated costs have been identified. The Conference may also wish to consider whether additional resources would be appropriate, bearing in mind the principle of cost-efficiency.

11. The review mechanism as envisaged in article 32 of the Convention should be a gradual process, comprehensively addressing all the articles of the Convention and the Protocols thereto, and start with a review of a set of agreed articles, including, potentially, through thematic clusters to be created in accordance with the normative content of the provisions, and through the adoption of multi-year workplans. In that regard, the Conference may wish to take into account, where appropriate, the previous efforts of the Conference with regard to information-gathering and review

ANNEX 67

Resolution 5/5 of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 18-22 October 2010 (excerpt)

Resolution 5/5

Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto

The Conference of the Parties to the United Nations Convention against Transnational Organized Crime,

Reaffirming that the purpose of the United Nations Convention against Transnational Organized Crime and the Protocols thereto[1] is to promote cooperation to prevent and combat transnational organized crime effectively, and stressing the need to take additional concerted action in order to reinforce the implementation of the Convention and identify related technical assistance needs,

Recalling article 32 of the Convention, which established the Conference of the Parties to the United Nations Convention against Transnational Organized Crime to improve the capacity of States parties to combat transnational organized crime and to promote and review the implementation of the Convention,

Stressing the urgent need to finalize a user-friendly software-based comprehensive self-assessment checklist ("omnibus tool"), including its availability in the six official languages of the United Nations, in order to facilitate the gathering of information on the implementation of the Convention and the Protocols thereto,

1. *Takes note with appreciation* of the work undertaken at the open-ended intergovernmental meeting of experts on possible mechanisms to review the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, held in Vienna on 25 and 26 January 2010, and the recommendations of the experts contained in the report on that meeting;[2]

2. *Notes* the progress report on the voluntary pilot programme to review implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto;[3]

3. *Decides* to establish an open-ended intergovernmental working group:

(a) To consider and explore options and make proposals for the establishment of a mechanism or mechanisms to assist the Conference in the review of the implementation of the Convention and the Protocols thereto;

(b) To prepare terms of reference for such proposed review mechanism or mechanisms, guidelines for governmental experts and a blueprint for the country review reports, for consideration and possible adoption by the Conference at its sixth session;

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[1] Ibid., vols. 2225, 2237, 2241 and 2326, No. 39574.
[2] CTOC/COP/EG.1/2010/3.
[3] United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

4. *Agrees* that the open-ended intergovernmental working group may consider, as a basis of its work, proposals and initiatives as may be submitted by States parties and signatories in that regard in advance of the meetings of the working group, including the proposal contained in annexes I and II to the present resolution;

5. *Decides* that any mechanism or mechanisms for assisting the Conference to review the implementation of the Convention and the Protocols thereto deriving from such proposals shall:

(a) Be transparent, efficient, non-intrusive, inclusive and impartial;

(b) Not produce any form of ranking;

(c) Provide opportunities to share good practices and challenges;

(d) Assist States parties in the effective implementation of the Convention and, where applicable, the Protocols thereto;

(e) Take into account a balanced geographical approach;

(f) Be non-adversarial and non-punitive and shall promote universal adherence to the Convention and its Protocols;

(g) Base its work on clear, established guidelines for the compilation, production and dissemination of information, including addressing issues of confidentiality and the submission of the outcome to the Conference, which is the competent body to take action on that outcome;

(h) Identify, at the earliest possible stage, difficulties encountered by States parties in the fulfilment of their obligations under the Convention and its Protocols, as applicable, and good practices adopted in efforts by States parties to implement the Convention and, where applicable, the Protocols thereto;

(i) Be of a technical nature and promote constructive collaboration, inter alia, on issues concerning international cooperation, prevention, protection of witnesses and assistance and protection for victims;

(j) Complement existing relevant international and regional review mechanisms so that the Conference may, as appropriate, cooperate with those mechanisms and avoid duplication of efforts;

(k) Be an intergovernmental process;

(l) In conformity with article 4 of the Convention, 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 the review process shall be conducted in a non-political and non-selective manner;

(m) Promote the implementation of the Convention and its Protocols by States parties, as applicable, as well as cooperation among States parties;

ANNEX 68

Report of the Working Group on Measures to Eliminate International Terrorism
(A/C.6/52/L.3), 10 October 1997
(excerpt)

UNITED NATIONS

A

General Assembly

Distr.
LIMITED

A/C.6/52/L.3
10 October 1997

ORIGINAL: ENGLISH

Fifty-second session
SIXTH COMMITTEE
Agenda item 152

MEASURES TO ELIMINATE INTERNATIONAL TERRORISM

Report of the Working Group

Chairman: Mr. Philippe KIRSCH (Canada)

I. INTRODUCTION

1. The General Assembly, by its resolution 51/210 of 17 December 1996, decided to establish an Ad Hoc Committee, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to elaborate, inter alia, an international convention for the suppression of terrorist bombings. The Assembly recommended that the work of the Ad Hoc Committee, which held its first session from 24 February to 7 March 1997, continue during the fifty-second session of the Assembly from 22 September to 3 October 1997 in the framework of a working group of the Sixth Committee.

2. In accordance with that recommendation, the Sixth Committee, at its 2nd meeting, on 22 September 1997, established such a Working Group and elected Mr. Philippe Kirsch (Canada) as its Chairman.

3. Pursuant to the decision taken by the Sixth Committee at its 2nd meeting, the Working Group was open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency.

4. The Working Group held 17 meetings, from 22 September to 3 October 1997.

5. The Working Group had before it the report of the Ad Hoc Committee on the work of its first session,[1] which included revised texts of articles 1 to 12 ter of the draft convention proposed by the Bureau on the basis of the discussions in the informal consultations within the Ad Hoc Committee. Those texts were

13. PROPOSAL SUBMITTED BY AUSTRALIA (A/C.6/52/WG.1/CRP.13)

New article 2 bis

"This Convention shall not apply where the offense is committed within a single State, the alleged offender and the victims are nationals of that State, and the alleged offender is found in the territory of that State, except that the provisions of article 9, 10 and 11 shall apply in those cases."

14. PROPOSALS SUBMITTED BY THE REPUBLIC OF KOREA (A/C.6/52/WG.1/CRP.14)

Articles 2, 5, 6, 7, 8, 10, 10 bis, 11, 12, 12 bis (document A/52/37, annex I.A)

Article 2

1. Delete "intentionally" in the second line of the chapeau of paragraph 1.

2. Add "the person knew or should have known that" after "in which" in paragraph 1 (c).

Article 5

1. Insert "owned and" before "operated" in paragraph 1 (b).

2. Insert "abroad" after "that State," in paragraph 2 (a) bis.

Article 6

1. Replace "prosecution or extradition" by "investigation, criminal or extradition proceedings" in the fourth line of paragraph 1.

2. Insert "Parties" after both "the States" in the third line and "any other interested States" in the fifth line of paragraph 4.

Article 7

1. Change "option" to "optional condition" in the sixth line of paragraph 2.

Article 8

1. Add "Without prejudice to article 7, paragraph 1," at the beginning of paragraph 6.

Article 10

1. Add "or when the purpose of the transfer has been fulfilled." in paragraph 2 (b).

Article 10 bis

1. Delete "applicable provisions of" in the fifth line.

Article 11

1. Substitute "detecting and detering the use of" for "detection of" in the second line of subparagraph (c).

Article 12

1. Delete the second sentence in whole.

Article 12 bis

1. Replace "the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." with "the purposes and principles of the Charter of the United Nations."

15. PROPOSAL SUBMITTED BY THE NETHERLANDS (A/C.6/52/WG.1/CRP.15)

Article 3 (document A/52/37, annex I.A)

Amend article 3 as follows:

"This Convention shall not apply to the delivery, placement, discharge or detonation of an explosive or other lethal device in accordance with national and international law."

16. PROPOSAL SUBMITTED BY THE SUDAN (A/C.6/52/WG.1/CRP.16)

Preamble (document A/52/37, annex I.A)

Add the following paragraph immediately after the seventh preambular paragraph:

"Further stressing that efficient implementation of relevant legal instruments could be enhanced by exchanging information voluntarily and in good faith."

17. PROPOSAL SUBMITTED BY SOUTH AFRICA (A/C.6/52/WG.1/CRP.17)

Article 8.6 bis (document A/52/37, annex I.A)

Insert a new article 8.6 bis:

"Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel,

ANNEX 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)

[Relevant excerpts only]

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)

[Translation]

III. The Convention, French legislation, and European law

A. French legislation in light of the Convention

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 **participation in an organized criminal group** (Art. 5), it corresponds to the charge of **criminal conspiracy** provided for by Article 450-1 of the Penal Code.

Since enactment of the Act of 15 May 2001 on New Economic Regulations, criminal conspiracy in domestic law has applied to the preparation of a crime or offence punishable by at least five years' imprisonment (Art. 450-1 of the Penal Code).

It should be recalled that under the Convention, the criminalization of participation in an organized criminal group assumes that the objective is to commit a "serious crime", defined as an offence punishable by a maximum deprivation of liberty of at least four years, or a more serious penalty.

Our criminal law accordingly complies with the Convention's requirements.

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.

In matters of **corruption** (Art. 8), the constituent elements of the offences of active corruption and passive corruption of national officials defined by the Palermo Convention correspond to the offences provided for by Articles 433-1(1), 432-11(1) and 434-9 of the Penal Code and do not require any adjustment to domestic law.

The Penal Code does not provide for the offences of active and passive corruption of foreign public officials and international civil servants provided for in paragraph 2, except with regard to the active corruption of foreign public officials in the context of commercial transactions and the corruption of EU civil servants or civil servants of other Member States of the European Union.

However, **paragraph 2 of the Convention is not binding.** The Government indicated to your rapporteur that it considered it premature to undertake an amendment of the substantive law when negotiations of a general convention against corruption had just begun under the aegis of the United Nations.

Finally, the constituent elements of the offence of **obstruction of justice** (Art. 23) already correspond to charges provided for by domestic law, essentially **subornation of witnesses** (Art. 434-15 of the Penal Code) **or experts** (Art. 434-21 of the Penal Code) and threats to and acts of intimidation of public officials (Art. 433-3(2) of the Penal Code). They do not require an adjustment of domestic law.

Other provisions of the Convention, although drafted in very general or non-binding terms, could warrant the amendment of our domestic law, primarily with regard to the protection of

witnesses and collaborators of justice. On that point, it must, moreover, be pointed out that the Law on every day security of 15 November 2001 provides for a witness protection mechanism (Arts. 706-58 to 706-62 of the Code of Criminal Procedure) which satisfies the requirements of European jurisprudence relating to the observance of Article 6 of the European Convention on Human Rights, the key features of which are:

— a legal status of "anonymity" defined by specific rules of criminal procedure, specifying a certain level of seriousness (offences punishable by at least five years' imprisonment);

— a protection criterion relating to the "danger to the life or bodily integrity of the person, his or her family members or close friends";

— examining a witness protected by anonymity is authorized by the judge of freedoms and detention, upon a reasoned application by the public prosecutor or investigating judge;

— the possibility for the person placed under judicial examination or sent before the trial court to confront the witness by means of a technical process allowing remote examination which preserves the anonymity and safety of the witness or the victim (masked video);

— the requirement that anonymous testimony not be relied upon as a determinative element of the declaration of guilt;

— the creation of the offence (Art. 706-59 of the Penal Code) of disclosing the identity or address of a witness who had had the benefit of the provisions on the anonymity of testimony.

B. The Convention and European law

The instruments adopted by or being prepared within the European Union are fully compatible with the international undertakings assumed within the context of the United Nations, and in fact merely represent an extension of them. Accordingly, not only do they make it possible to satisfy the requirements of the Convention, but, most of all, they make it possible to go even further.

In matters of combating organized crime, the European Union adopted a detailed plan of action on 28 April 1997. It concerns, firstly, the elaboration and improvement of existing instruments under the Convention, and secondly, the strengthening of operational co-operation between Member States, notably by the implementation of co-ordination and centralization mechanisms within each Member State.

The work of the European Union has grown considerably since then.

Several instruments have been adopted in connection with the **harmonization of charges and criminal penalties** (Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro; Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings; Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment; Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime — instruments to which can be added the Joint Action of 21 December 1998 on making it a criminal offence to participate in a criminal organization, adopted previously).

Others are being negotiated (Draft Directive and Framework Decision strengthening the penal framework to prevent the facilitation of unauthorized entry and residence; Draft Framework Decision on combating trafficking in human beings; Draft Framework Decision on combating the

sexual exploitation of children and child pornography; Draft Framework Decision on the protection of the environment through criminal law; Draft Framework Decision on offences in matters of narcotics).

In matters of **co-operation between criminal courts**, the instruments adopted by the European Union go much farther than the provisions contained in the instruments of the United Nations. Thus, this is true of the Convention relating to extradition between the Member States of the European Union of 27 September 1996 and the Convention on simplified extradition procedure between the Member States of the European Union of 10 March 1995, and the Convention of 29 May 2000 on mutual judicial assistance in criminal matters, and its Protocol of 16 October 2001. An additional level will be reached with the instruments adopted or in negotiation, concerning the implementation of the **principle of mutual recognition,** which aims to replace traditional co-operation mechanisms with **the direct enforcement of court decisions pronounced in another Member State** (Draft Framework Decision on the **European arrest warrant** and the surrender procedures between Member States, which aims to replace the complex, cumbersome mechanism of extradition; Draft Framework Decision on the mutual recognition of orders imposing a fine; Draft Framework Decision on the mutual recognition of orders freezing assets).

Finally, several instruments or draft instruments make it possible to strengthen **operational co-operation between the Member States** (Draft Framework Decision on joint investigation teams — which is the subject of a political agreement; the gradual development of Europol's competencies; the putting in place of a Police Chiefs "Task Force").

The same is true of judicial co-operation, with the implementation of the European Judicial Network, and then the provisional Pro-Eurojust unit (Council Decision of 14 December 2000). The final Eurojust unit should be put in place soon by the adoption of a Draft Council Decision on which political agreement has already been reached. That judicial co-operation unit will be responsible for contributing to successful co-ordination between the national authorities responsible for prosecution, providing support to organized crime investigations and contributing to the simplification of the execution of letters rogatory.

The signature of these instruments will respond to the wish expressed by the Palermo Convention, to encourage the development of more advanced methods of judicial co-operation, notably by means of multilateral agreements.

CONCLUSION

The Palermo Convention has been signed by 140 States, but ratified by only seven, whereas its entry into force is subject to at least 40 ratifications.

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. The approach recommended by the Convention is also fully consistent with efforts made within the European Union. The interest of the Palermo Convention thus lies above all in getting other States, beyond the European Union, to harmonize their criminal legislation and strengthen their judicial co-operation with third States.

In stressing the need for this Convention to enter rapidly into force, the Foreign Affairs and Defence Committee asks that you adopt the bill authorizing its ratification.

ANNEX 70

Resolution 67/1 of the United Nations General Assembly, 24 September 2012

United Nations A/RES/67/1*

General Assembly

Distr.: General
30 November 2012

Sixty-seventh session
Agenda item 83

Resolution adopted by the General Assembly on 24 September 2012

[*without reference to a Main Committee (A/67/L.1)*]

67/1. Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels

The General Assembly

Adopts the following declaration:

Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels

We, Heads of State and Government, and heads of delegation have gathered at United Nations Headquarters in New York on 24 September 2012 to reaffirm our commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development. We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.

I

1. We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.

2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also

* Reissued for technical reasons on 15 July 2013.

12-47866*

recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.

3. We are determined to establish a just and lasting peace all over the world, in accordance with the purposes and principles of the Charter of the United Nations. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, to respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, and to uphold the resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and the fulfilment in good faith of the obligations assumed in accordance with the Charter.

4. We reaffirm the duty of all States to settle their international disputes by peaceful means, inter alia through negotiation, enquiry, good offices, mediation, conciliation, arbitration and judicial settlement, or other peaceful means of their own choice.

5. We reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.

6. We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, all human rights and fundamental freedoms for all. The universal nature of these rights and freedoms is beyond question. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect human rights and fundamental freedoms for all, without distinction of any kind.

7. We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.

8. We recognize the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship, and in this regard we commend the work of the United Nations Commission on International Trade Law in modernizing and harmonizing international trade law.

9. States are strongly urged to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries.

10. We recognize the progress made by countries in advancing the rule of law as an integral part of their national strategies. We also recognize that there are common

features founded on international norms and standards which are reflected in a broad diversity of national experiences in the area of the rule of law. In this regard, we stress the importance of promoting the sharing of national practices and of inclusive dialogue.

11. We recognize the importance of national ownership in rule of law activities, strengthening justice and security institutions that are accessible and responsive to the needs and rights of all individuals and which build trust and promote social cohesion and economic prosperity.

12. We reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.

13. We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.

14. We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.

15. We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms.

16. We recognize the importance of ensuring that women, on the basis of the equality of men and women, fully enjoy the benefits of the rule of law, and commit to using law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judicial system, and recommit to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice.

17. We recognize the importance of the rule of law for the protection of the rights of the child, including legal protection from discrimination, violence, abuse and exploitation, ensuring the best interests of the child in all actions, and recommit to the full implementation of the rights of the child.

18. We emphasize the importance of the rule of law as one of the key elements of conflict prevention, peacekeeping, conflict resolution and peacebuilding, stress that justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations, and stress the need for the international community, including the United Nations, to assist and support such countries, upon their request, as they may face special challenges during their transition.

19. We stress the importance of supporting national civilian capacity development and institution-building in the aftermath of conflict, including through peacekeeping operations in accordance with their mandates, with a view to delivering more effective civilian capacities, as well as enhanced, international, regional, North-South, South-South and triangular cooperation, including in the field of the rule of law.

20. We stress that greater compliance with international humanitarian law is an indispensable prerequisite for improving the situation of victims of armed conflict, and we reaffirm the obligation of all States and all parties to armed conflict to respect and ensure respect for international humanitarian law in all circumstances, and also stress the need for wide dissemination and full implementation of international humanitarian law at the national level.

21. We stress the importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law. In this respect, we underline that truth-seeking processes, including those that investigate patterns of past violations of international human rights law and international humanitarian law and their causes and consequences, are important tools that can complement judicial processes.

22. We commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose we encourage States to strengthen national judicial systems and institutions.

23. We recognize the role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law, and in this respect we welcome the States that have become parties to the Rome Statute of the International Criminal Court,[1] and call upon all States that are not yet parties to the Statute to consider ratifying or acceding to it, and emphasize the importance of cooperation with the Court.

24. We stress the importance of strengthened international cooperation, based on the principles of shared responsibility and in accordance with international law, in order to dismantle illicit networks and counter the world drug problem and transnational organized crime, including money-laundering, trafficking in persons, trafficking in arms and other forms of organized crime, all of which threaten national security and undermine sustainable development and the rule of law.

25. We are convinced of the negative impact of corruption, which obstructs economic growth and development, erodes public confidence, legitimacy and transparency and hinders the making of fair and effective laws, as well as their administration, enforcement and adjudication, and therefore stress the importance of the rule of law as an essential element in addressing and preventing corruption, including by strengthening cooperation among States concerning criminal matters.

26. We reiterate our strong and unequivocal condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security; we reaffirm that all measures used in the fight against terrorism must be in compliance with the obligations of States under international law, including the Charter of the United Nations, in particular the purposes and principles thereof, and

[1] United Nations, *Treaty Series*, vol. 2187, No. 38544.

relevant conventions and protocols, in particular human rights law, refugee law and humanitarian law.

II

27. We recognize the positive contribution of the General Assembly, as the chief deliberative and representative organ of the United Nations, to the rule of law in all its aspects through policymaking and standard setting, and through the progressive development of international law and its codification.

28. We recognize the positive contribution of the Security Council to the rule of law while discharging its primary responsibility for the maintenance of international peace and security.

29. Recognizing the role under the Charter of the United Nations of effective collective measures in maintaining and restoring international peace and security, we encourage the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are maintained and further developed.

30. We recognize the positive contribution of the Economic and Social Council to strengthening the rule of law, pursuing the eradication of poverty and furthering the economic, social and environmental dimensions of sustainable development.

31. We recognize the positive contribution of the International Court of Justice, the principal judicial organ of the United Nations, including in adjudicating disputes among States, and the value of its work for the promotion of the rule of law; we reaffirm the obligation of all States to comply with the decisions of the International Court of Justice in cases to which they are parties; and we call upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute. We also recall the ability of the relevant organs of the United Nations to request advisory opinions from the International Court of Justice.

32. We recognize the contributions of the International Tribunal for the Law of the Sea, as well as other international courts and tribunals, in advancing the rule of law at the international and national levels.

33. We commend the work of the International Law Commission in advancing the rule of law at the international level through the progressive development of international law and its codification.

34. We recognize the essential role of parliaments in the rule of law at the national level, and welcome the interaction among the United Nations, national parliaments and the Inter-Parliamentary Union.

35. We are convinced that good governance at the international level is fundamental for strengthening the rule of law, and stress the importance of continuing efforts to revitalize the General Assembly, to reform the Security Council and to strengthen the Economic and Social Council, in accordance with relevant resolutions and decisions.

36. We take note of the important decisions on reform of the governance structures, quotas and voting rights of the Bretton Woods institutions, better reflecting current realities and enhancing the voice and participation of developing countries, and we reiterate the importance of the reform of the governance of those

institutions in order to deliver more effective, credible, accountable and legitimate institutions.

III

37. We reaffirm that States shall abide by all their obligations under international law, and stress the need to strengthen support to States, upon their request, in the national implementation of their respective international obligations through enhanced technical assistance and capacity-building.

38. We stress the importance of international cooperation and invite donors, regional, subregional and other intergovernmental organizations, as well as relevant civil society actors, including non-governmental organizations, to provide, at the request of States, technical assistance and capacity-building, including education and training on rule of law-related issues, as well as to share practices and lessons learned on the rule of law at the international and national levels.

39. We take note of the report of the Secretary-General entitled "Delivering justice: programme of action to strengthen the rule of law at the national and international levels".[2]

40. We request the Secretary-General to ensure greater coordination and coherence among the United Nations entities and with donors and recipients to improve the effectiveness of rule of law capacity-building activities.

41. We emphasize the importance of continuing our consideration and promotion of the rule of law in all its aspects, and to that end we decide to pursue our work in the General Assembly to develop further the linkages between the rule of law and the three main pillars of the United Nations: peace and security, human rights and development. To that end, we request the Secretary-General to propose ways and means of developing, with wide stakeholder participation, further such linkages, and to include this in his report to the Assembly at its sixty-eighth session.

42. We acknowledge the efforts to strengthen the rule of law through voluntary pledges in the context of the high-level meeting, and encourage States that have not done so to consider making pledges individually or jointly, based on their national priorities, including pledges aimed at sharing knowledge, best practices and enhancing international cooperation, including regional and South-South cooperation.

3rd plenary meeting
24 September 2012

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[2] A/66/749.

ANNEX 71

Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1975 (excerpt)

CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE FINAL ACT

HELSINKI 1975

The Conference on Security and Co-operation in Europe, which opened at Helsinki on 3 July 1973 and continued at Geneva from 18 September 1973 to 21 July 1975, was concluded at Helsinki on 1 August 1975 by the High Representatives of Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia.

During the opening and closing stages of the Conference the participants were addressed by the Secretary-General of the United Nations as their guest of honour. The Director-General of UNESCO and the Executive Secretary of the United Nations Economic Commission for Europe addressed the Conference during its second stage.

During the meetings of the second stage of the Conference, contributions were received, and statements heard, from the following non-participating Mediterranean States on various agenda items: the Democratic and Popular Republic of Algeria, the Arab Republic of Egypt, Israel, the Kingdom of Morocco, the Syrian Arab Republic, Tunisia.

Motivated by the political will, in the interest of peoples, to improve and intensify their relations and to contribute in Europe to peace, security, justice and cooperation as well as to rapprochement among themselves and with the other States of the world,

Determined, in consequence, to give full effect to the results of the Conference and to assure, among their States and throughout Europe, the benefits deriving from those results and thus to broaden, deepen and make continuing and lasting the process of détente,

The High Representatives of the participating States have solemnly adopted the following:

Questions relating to Security in Europe

The States participating in the Conference on Security and Co-operation in Europe,

Reaffirming their objective of promoting better relations among themselves and ensuring conditions in which their people can live in true and lasting peace free from any threat to or attempt against their security;

Convinced of the need to exert efforts to make détente both a continuing and an increasingly viable and comprehensive process, universal in scope, and that the implementation of the results of the Conference on Security and Cooperation in Europe will be a major contribution to this process;

Considering that solidarity among peoples, as well as the common purpose of the participating States in achieving the aims as set forth by the Conference on Security and Cooperation in Europe, should lead to the development of better and closer relations among them in all fields and thus to overcoming the confrontation stemming from the character of their past relations, and to better mutual understanding;

Mindful of their common history and recognizing that the existence of elements common to their traditions and values can assist them in developing their relations, and desiring to search, fully taking into account the individuality and diversity of their positions and views, for possibilities of joining their efforts with a view to overcoming distrust and increasing confidence, solving the problems that separate them and cooperating in the interest of mankind;

Recognizing the indivisibility of security in Europe as well as their common interest in the development of cooperation throughout Europe and among selves and expressing their intention to pursue efforts accordingly;

Recognizing the close link between peace and security in Europe and in the world as a whole and conscious of the need for each of them to make its contribution to the strengthening of world peace and security and to the promotion of fundamental rights, economic and social progress and well-being for all peoples;

Have adopted the following:

1

(a) **Declaration on Principles Guiding Relations between Participating States**

The participating States,

Reaffirming their commitment to peace, security and justice and the continuing development of friendly relations and co-operation;

Recognizing that this commitment, which reflects the interest and aspirations of peoples, constitutes for each participating State a present and future responsibility, heightened by experience of the past;

Reaffirming, in conformity with their membership in the United Nations and in accordance with the purposes and principles of the United Nations, their full and active support for the United Nations and for the enhancement of its role and effectiveness in strengthening international peace, security and justice, and in promoting the solution of international problems, as well as the development of friendly relations and cooperation among States;

Expressing their common adherence to the principles which are set forth below and are in conformity with the Charter of the United Nations, as well as their common will to act, in the application of these principles, in conformity with the purposes and principles of the Charter of the United Nations;

Declare their determination to respect and put into practice, each of them in its relations with all other participating States, irrespective of their political, economic or social systems as well as of their size, geographical location or level of economic development, the following principles, which all are of primary significance, guiding their mutual relations:

I. Sovereign equality, respect for the rights inherent in sovereignty

The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations.

Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's right to define and conduct as it wishes its relations with other States in accordance with international law and in the spirit of the present Declaration. They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement. They also have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality.

II. Refraining from the threat or use of force

The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle.

Accordingly, the participating States will refrain from any acts constituting a threat of force or direct or indirect use of force against another participating State.

Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights. Likewise they will also refrain in their mutual relations from any act of reprisal by force.

No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them.

III. Inviolability of frontiers

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

IV. Territorial integrity of States

The participating States will respect the territorial integrity of each of the participating States.

Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.

The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.

V. Peaceful settlement of disputes

The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.

They will endeavour in good faith and a spirit of cooperation to reach a rapid and equitable solution on the basis of international law.

For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.

In the event of failure to reach a solution by any of the above peaceful means, the parties to a dispute will continue to seek a mutually agreed way to settle the dispute peacefully.

Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult.

VI. Non-intervention in internal affairs

The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.

They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.

They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.

VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

ANNEX 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

NAM 2011/Doc.7/Rev.1
Original: English

XVI Ministerial Conference and Commemorative Meeting of the Non-Aligned Movement
Bali – Indonesia
23 – 27 May 2011

BALI COMMEMORATIVE DECLARATION ON THE 50TH ANNIVERSARY OF THE ESTABLISHMENT OF THE NON-ALIGNED MOVEMENT

We, the Ministers of Foreign Affairs of the Non-Aligned Movement (NAM), while solemnly paying tribute to the founders of the Movement and former leaders of its Member States, for their vision, leadership and dedication to strengthen the Movement and promote a more peaceful and equitable world order, have gathered in Bali, Indonesia, on the 25th of May 2011, at the Main Commemorative Event of the 50th Anniversary of the establishment of the Non-Aligned Movement, to reiterate our deepest commitment to the Bandung Principles as well as the Purposes and Principles and the Role of the Non-Aligned Movement in the Present International Juncture adopted by the XIV NAM Summit in Havana.

We reiterate our strong commitment to the purposes and principles of the United Nations Charter, international law, international humanitarian law and human rights law, and reaffirm the implementation of the Sharm El Sheikh Declaration adopted by the XV NAM Summit held in Sharm El Sheikh, Egypt, which reflects the institutional positions of the Movement vis- à -vis various international issues as well as the documents adopted by the previous NAM Summits and Ministerial Conferences.

We express appreciation to the Government of the Republic of Indonesia, the birth place of the historic Bandung Principles, for hosting the Main Commemorative Event of the 50th Anniversary of the establishment of the Non-Aligned Movement.

We recognize, as our Movement celebrates this historic landmark event that our role and objectives remain as enduring and essential as ever and that, in our complex and interwoven world, our responsibilities to the world and to our individual Member States are even more monumental today.

We deeply value the prominent and dynamic role of the Movement over the past 50 years on vital issues of common concern to its Members, assured that the Movement has evolved from a forum garnering solidarity and uniting the

visions of its Members to a forum resolutely advancing the causes of justice, peace and prosperity**,** while staying true to its founding principle of serving as an independent and objective voice amid the tides of international politics.

We recall the valiant struggle of the Non-Aligned Movement against colonization and apartheid which denied many Member States of their independence as well as economic and political rights thus hindering their development in conditions of peace and security.

We emphasize that interlinkages between development peace and security are mutually reinforcing. We commit to poverty eradication and a balanced integration of economic growth, social development and environmental protection, these three being indispensable pillars of sustainable development.

We reiterate our commitment to strengthen the collective actions of the Non-Aligned Movement and enhance its leading role in defending and promoting the interests of the developing countries**.** We also stress that the Non-Aligned Movement, the Membership of which has soared to 120, by utilizing its diverse strengths and unity, should continue to inspire and influence global issues with the aim of improving the lives of peoples everywhere, and contribute significantly at the United Nations and other international forums in developing adequate and sustainable responses to issues pertaining to peace and security, development, human rights, democracy, disarmament, terrorism, and gender equality and empowerment.

We agree to continue to explore ways and means to enhance the role of the Movement, through strengthening its existing mechanisms, including the primary mechanism of the NAM Coordinating Bureau in New York and its Working Groups and Caucuses, as well as the Former Chairs, the Troika, and different Chapters where the Movement is represented, in order to realize a more coordinated and efficient Movement capable of responding in an effective and timely manner to a rapidly changing international environment.

We emphasize that the remarkable accomplishments of the Non-Aligned Movement achieved so far should be used as a basis for promoting its objectives and principles in the next 50 years and beyond, and resolve to:

- Achieve a safer and more secure world through our commitment to promote disarmament, international security and stability, bearing in mind that total and complete nuclear disarmament remains the only route to a world free from nuclear weapons, while the inalienable right of all States to peaceful uses of nuclear energy should be assured.

- Actively work towards creating a multi-polar world by strengthening multilateralism through the United Nations and other multilateral processes, and participating actively in the process of the reform of the United Nations and its principal organs.

- Reject unilateral sanctions imposed on any NAM Country which adversely affect the economy and people, in contravention of international law and in breach of the purposes and principles of the United Nations Charter.

- Take effective measures for the suppression of acts of aggression or other breaches of peace, to defend, promote and encourage the settlement of international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

- Strengthen the promotion of democracy as a universal value as the freely expressed will of the people to determine their own political, economic, social and cultural systems, with the understanding that there is neither one model of democracy nor it is defined by any particular civilization, region or country.

- Reject any action aimed at the unconstitutional change of Governments or the attempt at regime change.

- Uphold the principles of sovereignty and the sovereign equality of States, territorial integrity and non-intervention in the internal affairs of any State.

- Uphold also the fundamental and inalienable rights of all peoples, including all non-self-governing territories, as well as those territories under foreign occupation and colonial or alien domination, to self determination, in accordance with the UN Charter and international law.

- Achieve just and comprehensive peace in the Middle East based on relevant United Nations resolutions, the Madrid Terms of Reference, land-for-peace, and the Arab Peace Initiative in its entirety.

- Remain at the forefront of support for the historic march of the Palestinian people to realize freedom, peace and justice, in line with the long-standing international consensus recognizing the Palestinian people as a nation and recognizing their inalienable right to self-determination, with the achievement of the independence of the State of Palestine on the basis of the 4th of June 1967 borders, with East Jerusalem as its capital, and a just solution to all other aspects of the question of Palestine in accordance with international law and United Nations resolutions.

- Address the adverse impacts of the interrelated and mutually exacerbating crises, particularly the global financial and economic crisis, the food and energy crises, together with climate change, on the

developing countries, and enhance efforts to ensure the attainment of the Internationally Agreed Development Goals, including the Millennium Development Goals by 2015, taking into account, *inter alia*, the special needs of Africa, LDCs, LLDCs and SIDS, in line with the related declarations of various United Nations conferences, and emphasize in this regard the need for scaling up the global partnership and finance for development.

- Promote sustained, inclusive and equitable economic growth at all levels to enhance the productive capacity of the Member States of the Movement and induce the generation of productive employment and decent work in their economies in order to accelerate progress towards eradicating poverty.

- Expand and deepen South-South cooperation, and strengthen coordination and cooperation with the Group of 77 and China (G-77), through the Joint Coordinating Committee (JCC), including in the formulation of common positions and strategies on economic development and issues of social progress, and at the same time strengthen North-South cooperation and partnership.

- Combat terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes in accordance with the principles of the United Nations Charter, international law and the relevant international conventions while stressing that terrorism should not be associated with any religion, nationality, civilization or ethnic group.

- Combat transnational organized crime, in particular terrorism, trafficking in human-beings, illicit small arms and light weapons, piracy and illicit drugs, including through enhanced international and regional cooperation and partnerships.

- Reinforce and build momentum to respect, protect and promote all human rights and fundamental freedoms, including the right to development, based on a cooperative, balanced, non-selective, impartial, objective, and transparent approach focused on constructive dialogue and capacity building, with a view to energizing universal commitment to both civil and political rights and economic, social and cultural rights and the right to development.

- Enhance dialogue among Civilizations and Religions, and promote tolerance and understanding among peoples of different cultures, religions and beliefs.

- Reaffirm the Movement's commitment to gender equality and empowerment of women and to take the necessary action towards the full advancement and empowerment of women in the Non-Aligned Movement countries, including by strengthening the role of the NAM Institute for the Empowerment of Women and its regional centres in this regard, and enhancing its cooperation with the UN Women.

- Intensify efforts aiming at developing effective youth policies and programs at all levels in order to build their capacities, address their problems and fulfill their aspirations.

- Strengthen solidarity and cooperation to confront and combat the global threats posed by health epidemics such as HIV&AIDS, malaria, tuberculosis and other communicable diseases, as well as those posed by non-communicable diseases, and improve humanitarian response to natural disasters and emergencies by building appropriate capacities at all levels.

- Strengthen contribution to United Nations conflict prevention, peacekeeping operations and integrated peace-building, and ensure that countries undergoing and emerging from conflicts are assisted to foster sustainable peace and development, including through a vigorous United Nations architecture that utilises a more integrated and coherent approach**,** without prejudice to the sovereignty and territorial integrity of the respective countries.

We stress the need to enhance the role of the Non-Aligned Movement as a key driving force in addressing international issues of common concern to its Members. The Movement should therefore focus on issues that further unite rather than divide, and deal with global issues by further consolidating the common denominator among its membership.

We underscore that based on its founding principles, the Non-Aligned Movement should continue being open to dialogue with other interested Groupings and partners, and generate synergies to work for a peaceful and prosperous world for all, including among parliaments and civil societies in the States Members of the Movement.

ANNEX 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)

Summit Declarations
of
Non-Aligned Movement (1961-2009)

Institute of Foreign Affairs, IFA
Tripureshwor, Kathmandu
2011

HARARE DECLARATION

The Declaration of the 8th Summit of the Heads of State or Government of the Member Countries of the Non-Aligned Movement Issued on 1-6 September 1986.

1. The Eighth Summit Conference of Heads of State or Government of Non-Aligned Countries was held in Harare, Zimbabwe, from 1 to 6 September 1986.

2. The Conference was preceded by a Conference of Foreign Ministers of Non-Aligned Countries from 28 to 29 August 1986.

3. The representatives of the following countries and organizations which are members of the Movement participated in the Eighth Conference: Afghanistan, Algeria, Angola, Argentina, Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Bolivia, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Colombia, Comoros, Congo, Cote D'Ivoire, Cuba, Cyprus, Democratic People's Republic of Korea, Democratic Yemen, Djibouti, Ecuador, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Guyana, India, Indonesia, Iran (Islamic Republic of), Iraq, Jamaica, Jordan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Morocco, Mozambique, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Palestine Liberation Organization, Panama, Peru, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Somalia, South West Africa People's Organization, Sri Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Togo, Trinidbd and Tobago, Tunisia, Uganda, United Arab Emirates, United Republic of Tanzania, Vanuatu, Viet Nam, Yemen Arab Republic, Yugoslavia, Zaire, Zambia and Zimbabwe.

4. The representatives of the following countries and organizations, as well as national liberation movements, attended the Conference as Observers Brazil, Mexico, Papua New Guinea, Philippines, Uruguay, Venezuela, African National Congress, Afro-Asian People's Solidarity Organization, Front de Liberation Nationale Kanak et Socialists, League of Arab States, Organization of the Islamic Conference, Organization of African Unity, Pan Africanist Congress of Azania, Socialist Party of Puerto Rico, United Nations.

Security Council and General Assembly and fully utilize the procedures for the amicable settlement of disputes envisaged in the Charter of the United Nations, including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

285. In this context, they recalled the request made by the Seventh summit Conference of Heads of State or Government of Non-Aligned Countries, in paragraph 170 of its Political Declaration, to the Non-Aligned Co-ordinating Bureau in New York to finalize the composition of the Working Group set up at the Ministerial Meeting in Havana to study proposals and working papers submitted on the subject of peaceful settlement of disputes, as well as any others to be submitted in future, with a view to the preparation of an appropriate comprehensive report and recommendations on the subject for consideration at the Ministerial Conference in 1988. The Working Group would be open-ended.

XXXIII. NON-INTERVENTION AND NON-INTERFERENCE

286. The Heads of State or Government reaffirmed their support for the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States contained in United Nations General Assembly resolution 360103 and for the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, as embodied in General

Assembly resolution 2625 (XXV). They reiterated that violation of the principles if non-intervention and non-interference in the internal and extern affairs of States is unjustifiable and unacceptable under any circumstances. They noted with grave concern that policies of intervention and interference, pressure and the threat or use of force continue to be pursued against many non-aligned and developing countries, with dangerous consequences for peace and security. They asserted the right of all States to pursue their own economic or political development without intimidation, hindrance or pressure and called upon all States to adhere to the Declaration on non-intervention and non-interference and to observe its principles in their dealings with other States.

XXXIV. UNESCO

287. The Heads of State or Government emphatically reaffirmed the full support of the Movement of Non-Aligned Countries for the goals and objectives of UNESCO and its role as the predominant and most

ANNEX 74

Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016

25 June 2016

№ 1202-25-06-2016

The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law

1. The Russian Federation and the People's Republic of China reiterate their full commitment to the principles of international law as they are reflected in the United Nations Charter, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. They are also guided by the principles enshrined in the Five Principles of Peaceful Coexistence. The principles of international law are the cornerstone for just and equitable international relations featuring win-win cooperation, creating a community of shared future for mankind, and establishing common space of equal and indivisible security and economic cooperation.

2. The Russian Federation and the People's Republic of China share the view that the principle of sovereign equality is crucial for the stability of international relations. States enjoy their rights on the basis of independence and on an equal footing, and assume their obligations and responsibilities on the basis of mutual respect. States have the right to participate in the making of, interpreting and applying international law on an equal footing, and have the obligation to comply with international law in good faith and in a coherent and consistent manner.

3. The Russian Federation and the People's Republic of China reaffirm the principle that States shall refrain from the threat or use of force in violation of the United Nations Charter and therefore condemn unilateral military interventions.

4. The Russian Federation and the People's Republic of China fully support the principle of non-intervention in the internal or external affairs of States, and condemn as a violation of this principle any interference by States in the internal affairs of other States with the aim of forging change of legitimate governments. 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.

5. The Russian Federation and the People's Republic of China reaffirm the principle of peaceful settlement of disputes and express their firm conviction that States shall resolve their disputes through dispute settlement means and mechanisms that they have agreed upon, and all means of settlement of disputes should serve the goal of resolving disputes in a peaceful manner in accordance with applicable international law, thus leading to de-escalation of tensions and promotion of peaceful cooperation among disputing parties. This applies equally to all types and stages of dispute settlement, including political and diplomatic means when they serve a pre-requisite to the use of other mechanisms of dispute settlement. It is crucial for the maintenance of international legal order that all dispute settlement means and mechanisms are based on consent and used in good faith and in the spirit of cooperation, and their purposes shall not be undermined by abusive practices.

6. The Russian Federation and the People's Republic of China share the view that good faith implementation of generally recognized principles and rules of international law excludes the practice of double standards or imposition by some States of their will on other States, and consider that imposition of unilateral coercive measures not based on international law, also known as «unilateral sanctions», is an example of such practice. The adoption of unilateral coercive measures by States in addition to measures adopted by the United Nations Security Council can defeat the objects and purposes of measures imposed by the Security Council, and undermine their integrity and effectiveness.

7. The Russian Federation and the People's Republic of China condemn terrorism in all its forms and manifestations as a global threat that undermines the international order based on international law. To counter this threat requires collective action in full accordance with international law, including the United Nations Charter.

8. The Russian Federation and the People's Republic of China assert that international obligations regarding immunity of States, their property and officials must be honored by States at all times. Violations of these obligations are not in conformity with the principle of sovereign equality of States and may contribute to the escalation of tensions.

9. The Russian Federation and the People's Republic of China emphasize the important role of the 1982 United Nations Convention on the Law of the Sea in maintaining the rule of law relating to activities in the Oceans. It is of utmost importance that the provisions of this universal treaty are applied consistently, in such a manner that does not

impair rights and legitimate interests of States Parties and does not compromise the integrity of the legal regime established by
the Convention.

10. In line with their relationship of strategic partnership, the Russian Federation and the People's Republic of China are resolved to further enhance their cooperation in upholding and promoting international law and in establishing of a just and equitable international order based on international law.

Done at Beijing, on 25th of June, 2016.

On Behalf of the Ministry of Foreign Affairs of the Russian Federation	**On Behalf of the Ministry of Foreign Affairs of the People's Republic of China**

ANNEX 75

Statement by France before the Sixth Committee, [26] October 2011

[Annex not translated (any extracts cited in the text of the Memorial are translated there); the relevant paragraphs of the summary record of the 20th meeting of the Sixth Committee held on 26 October 2011, doc. A/C.6/66/SR.20, are reproduced below.]

Summary record of the 20th meeting of the Sixth Committee of the United Nations General Assembly, 26 October 2011, doc. A/C.6/66/SR.20

[Excerpt]

42. **Ms Belliard** (France) expressed concern that the addition of five new topics to the Commission's long-term programme of work might cause a delay in completing the work already under way, which should remain the primary focus of attention.

43. On the topic of the immunity of State officials from foreign criminal jurisdiction, the most prudent approach to such a complex and sensitive subject would be to identify the *lex lata* rules before determining the extent to which the Commission should develop the law further. Since the immunity of State officials was based on State sovereignty, the interests of the State were more fully engaged than those of the individual. She agreed that none of the grounds invoked for exceptions to immunity could be considered established norms of international law. Moreover, in considering whether exceptions were founded in customary international law, the Commission should not lose sight of the distinction between jurisdiction — whether territorial, personal or universal — and immunity: the absence of one did not imply that the other came into play.

44. The fundamental distinction between immunity *ratione personae* and immunity *ratione materiae* must be maintained when considering the substantive and procedural aspects of immunity. In the case of immunity *ratione materiae*, the Commission should examine the criteria for determining whether a State official had acted in an official capacity and consider to what extent an "act of an official as such" was different from an "act falling within official functions". 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, might enjoy such immunity *de lege lata*.

45. The Special Rapporteur's conclusions as to the effect of immunity at the pretrial phase merited further development. Analysis of the procedural aspects of immunity was all the more essential in that the aim was to strike a balance between the interests of the State and the need to prevent impunity, on one hand, and the strengthening of cooperation between the State exercising jurisdiction and the State of the official, on the other. Lastly, the issue of the inviolability of State officials should be included in the study of immunity, given the close links between the two notions.

46. Her delegation had serious doubts that the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) should remain on the Commission's agenda, since, although it had been under consideration since 2005, no draft articles had been referred to the Drafting Committee as yet.

47. With respect to the five new topics proposed by the Commission, her delegation was of the view that the topic on the formation and evidence of customary international law was most in line with the Commission's mandate to promote the codification and progressive development of international law. The codification of rules in the working paper on the topic, contained in annex A to the Commission's report, would be particularly useful to national courts.

48. Her Government was opposed to the Commission taking up the highly technical topic of protection of the atmosphere, many aspects of which lay outside its areas of expertise. The topic of the provisional application of treaties was narrow and largely based on the constitutional law of

States; her Government urged the Commission not to undertake a study that would necessarily be confined to observations on State practice. Given the number of existing rules and mechanisms governing the fair and equitable treatment standard in international investment law, a study of that topic by the Commission would also be inopportune.

49. Protection of the environment in relation to armed conflicts was an interesting but extremely technical subject. The existing rules in that area could, however, be interpreted in good faith so as to make them applicable to any situation. Her delegation therefore supported the ICRC and United Nations Environment Programme (UNEP) proposal that interpretative guidelines should be developed.

50. On the topic of reservations to treaties, she would confine her comments at present to the Commission's conclusions on the reservations dialogue and recommendation on the establishment of a reservations assistance mechanism. Since a reservation was a unilateral act that lay within the competence of a State, the periodic review of reservations, while desirable, was not compulsory for the reserving State. A reservations dialogue should be encouraged but not institutionalized; an informal dialogue would yield better results.

51. Her Government, which appreciated the work of the observatory established within CAHDI, supported the establishment of a similar tool in other regional or subregional organizations. She had doubts, however, about the need for a reservations assistance mechanism whose mandate would go beyond the letter and spirit of the reservations regime enshrined in the Vienna Convention. While it might be useful for States to be able to receive technical assistance if they so desired, a mechanism empowered to make binding proposals for the settlement of disputes between States would be difficult to accept.

52. Welcoming the draft articles on the responsibility of international organizations for internationally wrongful acts, she said that while the Commission's consideration of the topic should be based on the articles on State responsibility, some of those provisions required reformulation and others were entirely inapplicable to international organizations. For example, some of the provisions on circumstances precluding wrongfulness had required adaptation or rewording. The introduction and the commentary thereto partially responded to some of her delegation's concerns by specifying that the draft articles might not apply to certain international organizations owing to the latter's powers and functions.

53. In draft article 7 (Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization), the criterion of "effective control" was logical but caution was required in assessing such control; a case-by-case analysis was the best approach. Furthermore, although that criterion had been applied to peacekeeping operations, further study was required in order to determine whether it was applicable to all acts of international organizations.

54. In draft article 8 (Excess of authority or countervention of instructions), the last sentence should be reworded to clarify that it was not the conduct itself, but the organ or agent that, through its conduct, exceeded its authority or contravened instructions. Furthermore, as stated in the commentary, the authority exceeded was not only that of the organ or agent, but also that of the international organization represented.

55. There was some overlap in the provisions of chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization); draft article 17 (Circumvention of international obligations through decisions and authorizations addressed to members) appeared redundant.

56. In chapter V (Circumstances precluding wrongfulness), the transposition of the articles on State responsibility with regard to self-defence (draft article 21), countermeasures (draft article 22) and necessity (draft article 25) was unwise given the lack of practice of international organizations in those areas. Draft article 21, in particular, would lead to controversy: as a well-known concept in international relations, enshrined in Article 51 of the Charter of the United Nations, self-defence was an attribute of the State that could not apply to international organizations owing to their fundamentally different nature in international law. Draft article 25 would have limited practical application as necessity had been rarely and only indirectly invoked, for example, where the United Nations had admitted responsibility in the context of peacekeeping operations but had limited it to damage resulting from violations not justified by military imperatives. In any event, necessity could never be invoked to justify the violation of obligations applicable during armed conflicts.

57. The wording of draft article 32 (Relevance of the rules of the organization) could cause difficulties since an international organization that acted in violation of international law but in compliance with its statute would be held responsible even though it was unable to amend the relevant provision of that instrument.

58. As legal persons, international organizations should be obligated to compensate for any damage that they caused, as set out in draft article 36 (Compensation). That article should, however, be read in parallel with draft article 40 (Ensuring the fulfilment of the obligation to make reparation); the obligation in question was solely that of the organization and member States should not be required to indemnify the injured party directly. Instead, as suggested by the new wording of paragraph 1, international organizations must make provision in their budgets to ensure that they could make reparation for any damages they caused and cover the costs of related disputes.

59. Concerning the provisions on countermeasures set out in draft articles 22 and 51 to 57, the lack of practice suggested that a prudent approach should be adopted in order to limit recourse to such measures to exceptional cases. She reiterated her Government’s doubts as to whether a State or international organization could take countermeasures against an organization of which it was a member and whether an organization could take countermeasures against one or more of its members.

60. Part Five of the draft articles (Responsibility of a State in connection with the conduct of an international organization), was useful in that the subject was not covered by the articles on the responsibility of States. It also appeared to be in line with the jurisprudence of the International Court of Justice. Each draft article should take into account the organization’s operations and the rules defining its relationship with its members. She welcomed the emphasis, in the second paragraphs of draft articles 58 and 59, on the fact that a State’s participation in an organization’s decision-making and implementation of the organization’s binding decisions did not, in principle, engage its responsibility.

61. The wording of draft article 61 (Circumvention of international obligations of a State member of an international organization) was acceptable insofar as its scope was severely

restricted. The new wording was less satisfactory than that of 2009 (A/64/10, former draft article 60) which had emphasized that the State must be seeking to avoid complying with one of its international obligations. The argument that the verb "circumvent" implied intention, in paragraph 2 of the commentary, was insufficient; it would be preferable to state the principle explicitly in the draft article.

62. The amendment to draft article 62 did not allay her delegation's concern as to its lack of clarity. Although the new wording of paragraph 1 *(b)* was clearer than that of the previous version, the provision was not needed since paragraph 1 *(a)* already provided for a State's tacit acceptance of responsibility. It was difficult to imagine a case in which a State could be held responsible when it had not explicitly or implicitly accepted such responsibility. In the case envisaged by paragraph 1 *(b)*, the fact that the State had led an injured party to rely on its responsibility seemed to imply that it had incurred responsibility.

ANNEX 76

Statement by France before the Sixth Committee, 29 October 2008

[Annex not translated; the relevant paragraphs of the summary record of the 19th meeting of the Sixth Committee held on 29 October 2008, doc. A/C.6/63/SR.19, are reproduced below]

Summary record of the 20th meeting of the Sixth Committee of the United Nations General Assembly, 29 October 2008, doc. A/C.6/63/SR.19

[Excerpt]

10. **Ms Belliard** (France) said that the Commission should continue to focus on the substance of customary international law and the codification of that law rather than on relative normativity or the exclusively theoretical study of matters that were not ripe for codification. She welcomed the productive discussions that had taken place as part of the commemoration of the Commission's sixtieth anniversary and hoped that further such exchanges would be held in the future.

11. She also welcomed the Commission's adoption on second reading of the draft articles on the law of transboundary aquifers and endorsed the two-step approach for follow-up recommended by the Commission. Given the highly technical nature of the topic and the underlying scientific issues, the draft articles should be reviewed in depth by Member States so that the General Assembly could assess at a later stage whether the elaboration of a general convention would be appropriate. She paid tribute to the Commission for its adoption on first reading of the draft articles on the effects of armed conflicts on treaties, on which her delegation would be providing detailed written observations.

12. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, codification efforts were useful because of the existence of a large body of customary law and the need for legal certainty. Her delegation endorsed the Special Rapporteur's view of the scope of the topic, as set out in his preliminary report (A/CN.4/601). All State officials should be included, although the most senior State officials should be dealt with separately. The Commission's work would be much less relevant if it were restricted to Heads of State and Government and ministers for foreign affairs. Furthermore, the immunities of diplomatic agents, consular officials, members of special missions and representatives of States in and to international organizations fell outside the scope of the topic. The question of family members of State officials should not be addressed either, since family members did not have immunities under customary international law.

13. The topic should be limited to the immunity of State officials from foreign criminal jurisdiction. The question of immunity from the jurisdiction of the State of nationality of the official in question was a matter solely for that State. Immunity before international criminal tribunals should also be excluded from the scope of the topic, since such tribunals had their own rules regarding immunities. Lastly, the Commission should review the immunities enjoyed not only by incumbent officials but also by former officials.

14. Recent developments regarding universal or quasi-universal jurisdiction were one reason for the relevance of the issue of immunity of State officials. However, they were not the only reason. In the case of offences committed abroad, a State might be recognized as having criminal jurisdiction on other grounds, in particular the victim's nationality. However, it was crucial that there should be no confusion between universal jurisdiction and immunity. As the International Court of Justice had noted in the *Arrest Warrant* case, rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction did not imply absence of immunity, while absence of immunity did not imply jurisdiction. The Commission should keep that distinction in mind when reviewing the question of possible exceptions to immunity in customary international law.

15. The distinction between immunity *ratione personae* and immunity *ratione materiae* was key, not only with regard to the basis of immunity, which was mainly functional, but also with regard to the scope of immunities that an official might claim depending on his or her rank in the State. That distinction must be upheld and refined. The Commission should examine the criteria for determining which officials could receive immunity *ratione personae*, especially in the light of the judgments of the International Court of Justice.

16. Lastly, her delegation expressed interest in any review by the Commission of the effect of immunity in the pre-trial phase and considered that the question of the inviolability of State officials should be included in the scope of the study, given the close links between the concepts of inviolability and immunity.

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ANNEX 77

Statement by France before the Sixth Committee, 28 October 2013

Liberté • Égalité • Fraternité
RÉPUBLIQUE FRANÇAISE

68th Session of the United Nations General Assembly
Sixth Committee

Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (Agenda item 81)

- Part I -

Speech by Mrs Edwige Belliard
Director of Legal Affairs
Ministry of Foreign Affairs

New York, 28 October 2013
(Check against delivery)

Mr. Chairman,

Adverse weather conditions upset the agenda last year and unfortunately limited our discussions. I should like to thank the International Law Commission which, once again this year, has produced a very high-quality report, presenting work which is sure to provoke thought. On this point, I should like to thank all the experts for the work submitted for our consideration and the Secretariat for the richness of the various studies prepared. Today, I will make some general observations, followed by more specific remarks on the various subjects included in the Commission's programme.

General observations

I will start with some observations on subjects on which work is least advanced. I recall on this point that France is concerned for the Commission's workload, and call for the utmost vigilance to ensure that its long-term programme of work is not increased to little purpose.

On the subject of the "**Most-favoured-nation clause**", my delegation takes note of the new working documents produced and shares the concerns raised over the risk of an excessively prescriptive outcome. Although identifying and analysing examples of clauses is a long and useful business, it is not certain that an excessively prescriptive document or a document proposing model clauses is desirable.

The "**Obligation to extradite or prosecute**" was the subject of a presentation in the Working Group's report. I should like merely to recall that the concept of a *peremptory* norm should be treated with great caution; that in our opinion the obligation to extradite or prosecute is distinct from that of universal jurisdiction, the latter being widely debated and disputed among the States; and that the link between such an obligation and the mechanisms put in place by international jurisdictions does indeed deserve particular attention.

Concerning "**Protection of the environment in relation to armed conflict**", I congratulate Mrs Jacobsson on her appointment as Special Rapporteur. Nevertheless, I confirm the doubts already expressed by my delegation on the feasibility of work on such an issue. Leaving aside the time segmentation of the field of study, determining its objective seems less than self-evident. In all events, it seems neither desirable nor achievable to draw up guidelines or reach conclusions on the subject at this stage.

Concerning the Commission's inclusion of **new projects in its programme of work**, we can only repeat the concerns already expressed that the Commission should not overburden its programme of work. We query the inclusion of "**Crimes against humanity**" in the long-term programme of work. It is not clear that all the Commission's criteria on the choice of subjects are met. In this regard, France wonders whether the States really need to draw up a convention on the subject. At this point it seems preferable to encourage universalisation of the Rome Statute and the effectiveness of existing norms, which might well not favour the drafting of new sectoral norms. Furthermore, the call on a universal jurisdiction to try the perpetrators of crimes against humanity is far from being shared by a majority of States and merits further consideration. Lastly, the question could well arise of the compatibility of the obligations that would derive from any such convention with those imposed by existing conventions, which is why the urgency of work on the subject may be queried. As for the new subject concerning "**Protection of the atmosphere**", the limits imposed on the scope of the Commission's work, especially with regard

to existing work on climate change and the definition of outer space, seem to be wise precautions.

Mr. Chairman,

I should now like to make some more substantive remarks, starting with **"Identification of customary international law"**. On this point, I should like to thank Sir Michael Wood for his first report, which augurs well for the richness of subsequent work. My delegation shares the options outlined in his report, such as the change of title, which is now more explicit. I share the Rapporteur's reservations as to the place that could be allowed to the study of *jus cogens*. Giving too much consideration to this concept would risk leading the work down very long and complex pathways. The concept is difficult to identify, and its relations with the customary rule are another question which it does not seem necessary to consider at this stage. We also share the Rapporteur's conclusions concerning an essentially practical approach to the subject, helpfully enhanced by occasional theoretical studies, and concerning the need to establish a terminology.

Contributions from the States seem decisive in the identification of practice and we shall endeavour to contribute. In our opinion, however, the importance to be given to the case law of national courts in the matter should take account of the fact that constitutional requirements place the customary norm more or less high up in the hierarchy of norms imposed on domestic judges. Caution is also needed with regard to the consideration given to the acts of international organisations or non-governmental organisations. Their acts or studies are a mine of very useful information, but the fact remains that it is above all the acts of States which can attest to a customary rule binding them, if the subject of study remains strictly limited to the state customary norm. That leads me to say a few words about a tendency observed during discussions, which on occasion seeks to criticise a "conservative" view of how custom is formed. While it is necessary for concepts to evolve in order to adapt them to the needs of society and its regulation, it should be done only after ensuring that the conditions which justified them no longer prevail. I am thinking in particular about the recognition, still shared today, of the need to combine both constituent elements of a customary rule, namely practice and *opinio juris*. The combination of both elements must be maintained because it is a State's *opinio juris* which gives weight to the practice, and vice versa. A State can act in a certain way while clearly indicating that its conduct is not imposed on it by a norm but results solely from its will in that particular circumstance. We should not lose sight of these elements. It will encourage caution when we come to consider so-called "modern" theories or the scope allowed to soft law in the matter.

Concerning the relationship of the customary norm with other sources of law, it does indeed seem helpful to focus on the general principles of law, given the extent to which that source can remain indeterminate. In contrast, the relations between custom and treaty sources seem to me to be more clearly identified. I shall end on that point, reiterating my thanks to the Special Rapporteur.

On the **Protection of persons in the event of disasters**, France takes due note of the draft articles provisionally adopted.

First, I note that the new wording takes into account several comments made by the delegations. We support the amendments made to the wording, which improve both the clarity of the text and the correspondence between the different language versions. A good example of this is the replacement of the French term "*touché*" by "*affecté*" ("affected") to describe a State that is faced with a disaster. An improvement could also be made to **draft articles 7 and 10**: while it is certainly desirable to distinguish between international organisations and non-governmental organisations, the adjective "*appropriées*" ("appropriate") applied to the latter might be more fitting than "*pertinentes*" ("relevant").

Concerning the scope of the topic *ratione temporis*, the question of disaster prevention must not distract the Commission from the core issue, namely post-disaster assistance. Bearing in mind how useful it would be to identify the main measures which would facilitate the protection of persons, in particular by establishing an appropriate internal normative framework, I can only welcome the draft articles submitted on this matter. However, I feel that it will be difficult to go much further. There are indeed many bilateral and multilateral conventions, but these are very often the result of a specific commitment by States to deal with a particular risk, or of a strengthened collaboration, and cannot necessarily provide a basis for the establishment of obligations which States might not recognize as such. On this point, the title of **draft article 16** does not correspond precisely to the state of the law. It seems difficult to conclude that there is a general "*duty*" to reduce the risk of disasters, as the wording of the title suggests. Even though, as the Special Rapporteur noted, some case law suggests that States are under a positive obligation in this regard, it is an obligation of means not of result, which remains closely linked to the circumstances of each case.

Consequently, while the wording of **draft articles 5 *ter* and 16 § 1 and 2** seems appropriate, the title of **draft article 16** could be amended to avoid generalising too broadly with respect to existing law and undermining the principle of States' sovereignty. We therefore

propose simply "*Prévention des catastrophes*" (Disaster prevention). Lastly, I reaffirm the stance adopted by the French delegation on the articles examined in previous years, particularly concerning respect for the sovereignty of the affected State and the State offering assistance, and our reserves concerning the extent of their obligations. We hope that this will be taken into account during the second full reading of the draft articles

On the subject of "**Immunity of State officials from foreign criminal jurisdiction**", I should like to thank Mrs Concepción Escobar Hernandez for the quality of her second report. I also note with pleasure the Commission's provisional adoption of three draft articles relating to, respectively, the scope of the subject, the beneficiaries of immunity *ratione personae* and the extent of such immunity.

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 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".

Mr. Chairman, I should now like to share some remarks on subjects relating to the law of treaties.

On the subject of "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", I should like to thank Mr. Georg Nolte for having produced a very rich first report. To begin with, I should simply like to recall that, although practice is

precious in determining how States interpret or apply a treaty, we should not lose sight of the fact that it is the text itself which makes it possible to identify the parties' intention in the first place. The whole interest of a study on this subject lies in the fact that, in international law, the State is both the author and the subject of the norm. That may be stating the obvious, but the special status of the State in the international order makes analysis of the attitude it adopts all the more relevant. And it is of course on the practice of the States parties to a treaty that the study should focus, as the report emphasises.

I turn now to the provisionally adopted draft conclusions. **Draft conclusion 1** suggests that the rules set out at articles 31 and 32 of the Vienna Convention on the Law of Treaties have customary value, whereas such an assertion is perhaps not quite so self-evident, at least as far as article 31, paragraph 3 is concerned. In addition, the wording of paragraph 4 of the draft conclusion differs from that of article 32 of the Vienna Convention, since that article does not expressly refer to subsequent practice.

Concerning **draft conclusion 2**, I do not think that subsequent agreements and subsequent practice can be considered "objective evidence" of the parties' understanding as to the meaning of a treaty. I do not consider this term to be either necessary or helpful. States' interpretation of a treaty may evolve and vary according to need and circumstance. I believe it would be preferable not to describe the evidence as "objective", though this does not in the least detract from the relevance of giving consideration to subsequent agreements and subsequent practice in order to interpret a treaty. In contrast, I believe it would be helpful if future work were to draw a distinction among subsequent agreements between those that are binding and those that the parties do not acknowledge as such. The consequences in terms of the interpretation of a treaty cannot be similar.

An essentially semantic amendment should be made to **draft conclusion 3**, since the idea of the "presumed intention" of the parties does not seem to reflect the commentaries, whose purpose my delegation shares, namely to raise the question of the choice between a contemporaneous approach to the treaty and an evolutive approach in order to interpret a treaty.

I believe that a slight correction could also be made to **draft conclusion 4**. There is no difficulty with the definition of a "subsequent agreement". However, the definition of "subsequent practice" is more questionable. It cannot be defined as "conduct". A State's "conduct" is not necessarily consistent and continuous. It may be variable and contradictory. A State may apply a treaty in a particular way without considering it to be the only possible way. The definition should therefore be amended in order to dispel any doubt on the subject, and

should clearly state that it is only concordant and consistent conduct which establishes the parties' interpretation. That idea is contained in the commentaries, and even more so in those relating to draft conclusion 5 than to draft conclusion 4. It should be stipulated as soon as what constitutes "subsequent practice" is defined.

Concerning **draft conclusion 5**, I would simply recall that, although non-State actors have a useful part to play in identifying practices, it would be wrong to draw hasty conclusions from that, insofar as their presentation may be influenced by the purpose of the organisation or institution which prepares it. That is emphasised in the report, especially with regard to international humanitarian law, States having often reaffirmed that they are primarily responsible for the development of such law.

I shall finish on this point by expressing my support for the avenues for thought already announced, such as the question of the frequency of subsequent practice or of omission as an attitude which reveals an interpretation.

I shall end with a few words on the subject of "**Provisional application of treaties**". I thank the Special Rapporteur for his first report, which identifies the avenues to be explored. Study of the legal regime should indeed focus on the form of consent given to provisional application; in my opinion, the hypothesis of implicit intention should be approached with care. I believe that the primary aim of this work should be to examine the legal effects of provisional application, given the extent to which that question remains unclear. While I agree that there is not much to be gained from examining States' responsibility, the question of the legal consequences arising from a State's failure to comply with the provisions of a treaty which it has agreed to provisionally apply deserves further consideration. The situation appears to be different *a priori* in the case of failure to comply with an obligation in force. The question that arises is whether such acceptance entails only duties or also rights. Another question concerns the provisional establishment of bodies created by a treaty. I further believe that the subject could be usefully extended to include provisional accession. It also does not seem possible to utterly rule out any consideration of domestic law obligations, mainly of a constitutional nature. Although these requirements do not allow a State to escape its international obligations, the situation is perhaps not quite so clear-cut when it comes to the scope of a provisional undertaking, in particular because its performance could be rendered impossible in domestic law. Lastly, I would underline that the richness of work on this subject will inevitably depend on the material provided by the States concerning their practice in the matter.

I will end by stating that France will submit its observations on the subject of **"Expulsion of aliens"** to the Commission within the given time limit and will endeavour to produce the observations requested by the Commission on the subjects relating to **"Identification of customary international law"**. The **Guide to Practice on Reservations to Treaties** will be the subject of a separate address at the end of the week.

Thank you, Mr. Chairman.

ANNEX 78

Letter from the Public Prosecutor concerning the *Rumsfeld* case, 16 November 2007

[Annex not translated (any extracts cited in the text of the Memorial are translated there)]

ANNEX 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

284/ PMEG-NY/NV/015/IAS

The Permanent Mission of the Republic of Equatorial Guinea to the United Nations in New York, presents its compliment to the Office of Protocol and Liaison Services to the United Nations/ the General Assembly Affairs and has the honor to herewith communicate that **H.E. Mr. TEODORO NGUEMA OBIANG MANGUE**, Second-Vice President for Defense and State Security will be the Head of Delegation of the Republic of Equatorial Guinea to participate in the United Nations Summit for the adoption of the post 2015 development agenda and the General Debate of the Seventieth Session of the General Assembly, as well as the plenary meeting to hear an address by His Holiness Pope Francis, from 25 September to 06 October 2015.

Attached is the complete list of the delegation that will accompany him, in order to be sent to the proper channel of the United Nations.

The Permanent Mission of the Republic of Equatorial Guinea to take this opportunity to renew to the Permanent Mission of the Office of Protocol and Liaison Services to the United Nations and the General Assembly Affairs , the assurances of its highest consideration.

New York, September 7th, 2015

The Office of Protocol and Liaison Services
to the United Nations
and General Assembly Affairs
New York

ANNEX 80

Request for information from the senior investigating judges to the Ministry of Foreign Affairs, 10 October 2011

Request for information from the senior investigating judges to the Ministry of Foreign Affairs, 10 October 2011

[Translation]

In the context of the judicial investigation opened in our chambers and referenced above, we have the honour to ask you to inform us:

— 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;

— whether Mr. Teodoro NGUEMA OBIANG, born on 25 June 1969 in Akoakam Esangui (Equatorial Guinea) enjoys diplomatic immunity.

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ANNEX 81

Record of the hearing at the Paris *Tribunal correctionnel*
held on 24 October 201[6]

Record of the hearing at the Paris *Tribunal correctionnel* held on 24 October 201[6]

[Translation]

Paris *Tribunal de grande instance*

Paris *Tribunal correctionnel*
32nd *Chambre correctionnelle*

RECORD OF THE HEARING

Hearing of 24 October 2016 — 1 p.m. — 32nd *Tribunal correctionnel*

President:	Bénédicte DE PERTHUIS
Judges:	Laurence MOUSSEAU
	Elise MELLIER
Public Prosecutor's Office:	Jean-Yves LOURGOUILLOUX,
	National Financial Prosecutor's Office
Registrar:	Sandrine LAVAUD

Prosecution No.: 08337096017

Public access to hearing: Public hearing

Type of hearing: Hearing

DEFENDANT: Teodoro NGUEMA OBIANG MANGUE

Method of proceeding: Order of referral to the *Tribunal correctionnel* of 5 September 2016

Date of birth: 25 June 1969 in Malabo (Equatorial Guinea)

Parents: Teodoro OBIANG NGUEMA and Constance MANGUE NSU OKOMO

Address: c/o Mr. MARSIGNY, 203 bis boulevard Saint Germain, 75007 Paris

Profession: Minister of Equatorial Guinea

Nationality: Guinean

Criminal record: No convictions

Characterization:

MONEY LAUNDERING: ASSISTING IN THE INVESTMENT, CONCEALMENT OR CONVERSION OF THE PROCEEDS OF AN OFFENCE PUNISHABLE BY IMPRISONMENT NOT EXCEEDING FIVE YEARS in Paris and on national territory, during 1997 and until October 2011

Custodial status: At liberty

Security measure(s): Arrest warrant dated 11 July 2012 — Lifted on 19 March 2014

Method of summons: At bailiff's office on 28 September 2016 — Registered letter with acknowledgment of receipt — Letter refused by addressee

Method of appearance: Not entering an appearance

Assisted by: —

Represented by: —

Nature of trial: Adversarial hearing subject to notification

Decision of the *Tribunal*: NOTES that the Order for partial dismissal, partial referral and continuation of the investigation, issued on 5 September 2016, does not meet the provisions of Article 184 of the Code of Criminal Procedure, insofar as it does not cite the relevant criminal law and procedural texts.

REFERS the procedure to the Public Prosecutor's Office for resubmission to the investigating judge with a view to regularizing the Order for partial referral.

POSTPONES the hearings to

2 January 2017 at 1 p.m.; 4 January 2017 at 9 a.m.; 5 January 2017 at 1 p.m.; 9 January 2017 at 1.30 p.m.; 11 January 2017 at 9 a.m.; 12 January 2017 at 1.30 p.m.

RESUMMON Mr. Obiang after the new order has been issued, to inform him of the referral dates.

CIVIL PARTY

The association TRANSPARENCY INTERNATIONAL FRANCE

Address: c/o Mr. William BOURDON, 156 rue de Rivoli, 75001 Paris

Legal representative:

Mr. Daniel LEBEGUE

Address:

Method of summons: Sent to counsel who, having received a copy, stamped the original on 26 September 2016

Method of appearance:

Assisted by:

Represented by: Mr. William BOURDON

Nature of trial: Adversarial

Seals: YES

Conduct of proceedings: The President called the civil parties.

The President noted that the defendant and his counsel were absent.

We heard the Public Prosecutor's Office, after the filing of the written submissions

Seeking: referral to the Public Prosecutor's Office and determination of dates.

We heard Mr. BOURDON, counsel for Transparency International France, civil party, present his argument.

We are not bound by the ICJ.

The Public Prosecutor's Office on the referral dates: we are not bound by the ICJ.

Mr. BOURDON's comments.

The court rose at 1.50 p.m.

Hearing resumed at 2.05 p.m.