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INTERNATIONAL COURT OF JUSTICE

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

REPLY OF THE REPUBLIC OF EQUATORIAL GUINEA

8 May 2019

[Translation by the Registry]

Table of Contents

1

INTRODUCTION

0.1. The dispute between the Republic of Equatorial Guinea (Equatorial Guinea) and the French Republic (France) arose from the ongoing criminal proceedings in France against the Vice-President of Equatorial Guinea. Those proceedings were initiated, and are still underway today, in flagrant violation of a number of France's obligations under international law, in particular those relating to the principles of sovereign equality and non-intervention, the immunity of States, of their property and their high-ranking representatives, and the inviolability of the premises of diplomatic missions, notwithstanding Equatorial Guinea's constant efforts to settle the dispute amicably. The Court having determined that it lacks jurisdiction on the basis of the United Nations Convention against Transnational Organized Crime, the case now concerns the unlawful actions of the French courts and other French authorities in respect of the premises of Equatorial Guinea's diplomatic mission in France, located at 42 avenue Foch in Paris.

0.2. Equatorial Guinea is dismayed at the tone of the Counter-Memorial, in which France continues to show contempt for Equatorial Guinea's authorities, its counsel and their legal position. It is inappropriate, to say the least, to make accusations of bad faith in proceedings before this Court when a party is simply setting out its position in international law, as envisaged by the principle of the peaceful settlement of disputes enshrined in Article 2, paragraph 3, of the United Nations Charter. It is unworthy of France to say that Equatorial Guinea has committed an abuse of rights by instituting proceedings on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations (VCDR) in order to protect its sovereign rights. Equatorial Guinea is simply seeking to bring a peaceful end to a dispute, as required by the United Nations Charter, after France refused (and continues to refuse) to engage in dialogue.

0.3. This introduction begins by recalling the current status of the proceedings before the Court (**I**). It then describes the latest developments in the criminal proceedings in France (**II**) and outlines France's arguments on the subject-matter of the dispute (**III**). The next section gives a general overview of Equatorial Guinea's position (**IV**). Finally, the last section sets out the
2 structure of this Reply, briefly stating the points that will be discussed in each chapter (**V**).

I. The current status of the proceedings before the Court

0.4. The present proceedings were instituted by Equatorial Guinea against France by way of an Application filed in the Registry on 13 June 2016.

0.5. A few weeks later, developments in the criminal proceedings in France against the Vice-President of Equatorial Guinea compelled Equatorial Guinea to submit a request for the indication of provisional measures. The measures requested by Equatorial Guinea were partially indicated by the Court in its Order of 7 December 2016.

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

0.7. On 31 March 2017, France raised certain preliminary objections to the jurisdiction of the Court, which were the subject of the Court's Judgment of 6 June 2018. France then filed its Counter-Memorial within the time-limit fixed by the Court.

0.8. Following a meeting held by the President of the Court with the Agents of the Parties on 17 January 2019, the Court, by an Order dated 24 January 2019, fixed 24 April 2019 as the time-limit for the filing of Equatorial Guinea's Reply.

0.9. By an Order dated 17 April 2019, the Court, at Equatorial Guinea's request, extended to 8 May 2019 the time-limit for the filing of Equatorial Guinea's Reply. The present Reply has been filed in accordance with that Order.

II. Latest developments in the criminal proceedings in France

0.10. As Equatorial Guinea mentioned during the oral proceedings on the preliminary objections, the Vice-President of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangue, has appealed against the judgment rendered on 27 October 2017 by the 32nd *Chambre correctionnelle* of the Paris *Tribunal de grande instance*, which found him guilty of money laundering offences
3 and sentenced him to a three-year suspended prison term and a suspended fine of €3[0] million, in addition to ordering the confiscation of the building at 42 avenue Foch in Paris[1].

0.11. Without the suspensive effect of that appeal, the judgment would have become final and the measure of confiscation would have resulted in the sale at public auction of the premises of the diplomatic mission.

0.12. In any event, at a procedural hearing on 26 February 2019, the Paris *Cour d'appel* fixed 9, 10, 11, 16, 17 and 18 December 2019 as the dates for the examination of the case on the merits, after a further procedural hearing to be held on 9 September 2019[2].

0.13. It should be noted that because a principal appeal has also been filed by the French Public Prosecutor's Office, the Vice-President of Equatorial Guinea might incur a heavier penalty than that imposed on him at first instance. If a further appeal *(pourvoi en cassation)* is made against any future decision of the *Cour d'appel,* that appeal will have suspensive effect.

0.14. Certain inaccuracies regarding the Vice-President of Equatorial Guinea advanced by France in its Counter-Memorial should be put right, despite the fact that the Court has found that it lacks jurisdiction to rule on the aspect of the dispute relating to his immunity as a high-ranking representative of the Equatorial Guinean State.

0.15. First, the Vice-President is not currently under criminal investigation in the United States, which he is widely known to have visited on several occasions recently, notably in September 2015 to represent his country at the United Nations General Assembly and to meet with the President of the United States, and again in May 2018, when he delivered a speech on behalf of his country before the Security Council, to which Equatorial Guinea was elected as a non-permanent member for the 2018-2019 period.

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[1] CR 2018/3, p. 27, para. 47 (Tchikaya); Paris *Tribunal de grande instance*, 32nd *Chambre correctionnelle*, judgment of 27 Oct. 2017, pp. 105-106 (**Ann. 1**). [Translator's note: in other pleadings and Court documents this judgment is also referred to as the judgment of the 32nd *Chambre correctionnelle* of the Paris *Tribunal correctionnel*.]

[2] Paris *Cour d'appel*, Notice of hearing, 26 Feb. 2019 (**Ann. 2**).

0.16. As regards Switzerland, on 31 October 2016, the Geneva Public Prosecutor's Office — in all likelihood influenced by the criminal proceedings in France — considered it necessary to launch a criminal investigation into Mr. Teodoro Nguema Obiang Mangue, a Swiss lawyer, and a
4 Swiss citizen for "suspected money laundering and misconduct in public office". A number of cars and boats were seized during this investigation on the assumption that they belonged to Mr. Teodoro Nguema Obiang Mangue and constituted the proceeds of an offence. It should be noted, however, that after more than two years of investigation, the Geneva Public Prosecutor's Office reached the conclusion that Mr. Teodoro Nguema Obiang Mangue could not be charged with any offence, and that the boats, which belonged to companies of which the Equatorial Guinean State was the sole shareholder, were indeed State property.

0.17. On 7 February 2019, having obtained the agreement of all the parties, the Geneva Public Prosecutor's Office had to issue a ruling abandoning proceedings based on reasons of law[3]. It should be noted that in contrast with the approach taken by France, the Swiss authorities heard Equatorial Guinea throughout the investigation.

0.18. Finally, contrary to the assertions made by France, whose sole aim is to justify at all costs the criminal proceedings on its territory, Mr. Teodoro Nguema Obiang Mangue is not the subject of any criminal proceedings in Brazil.

III. Subject-matter of the dispute

0.19. France devotes Chapter 2 of its Counter-Memorial to analysing the subject-matter of the dispute in light of the Court's Judgment on the preliminary objections of 6 June 2018. Equatorial Guinea does not contest that the only dispute now before the Court is that concerning the interpretation and application of the VCDR[4].

0.20. Yet France relies on paragraph 70 of the Judgment to limit the subject-matter of the dispute to the interpretation and application of Article 1 *(i)* and Article 22 of the VCDR, thereby excluding any claims that Equatorial Guinea might have on the basis of other provisions of the
5 Convention[5]. This is too restrictive a reading of one paragraph of the Judgment, which disregards the general nature of the Judgment's operative part, in which the Court:

> "(2) . . . *Rejects* the second preliminary objection raised by the French Republic that the Court lacks jurisdiction on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes;
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> . . . . . .
>
> (4) . . . *Declares* that it has jurisdiction, on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, to entertain the Application filed by the Republic of Equatorial Guinea on 13 June 2016, in so far as it concerns the status of the building located at 42 Avenue

[3] It is to be noted that, according to Article 320 of the Swiss Criminal Procedure Code, a ruling abandoning proceedings is equivalent to a final verdict of acquittal.

[4] Counter-Memorial of France (CMF), paras. 2.1-2.21.

[5] *Ibid*., paras. 2.11-2.12.

Foch in Paris as premises of the mission, and that this part of the Application is admissible"[6].

0.21. France further contends that rules other than those arising from the VCDR are irrelevant in the present case[7]. First of all, that is self-evident. Second, a treaty's terms must be interpreted in their context and in the light of the treaty's object and purpose. In addition, together with the context, account must be taken of any relevant rule of international law applicable in the relations between the parties[8]. And, of course, the facts must also be taken into consideration in interpreting the VCDR. Consequently, while, as we shall see below, the question of who owns the building at 42 avenue Foch is relevant to the application of the Convention, the Court's Judgment of 6 June 2018 does not prevent it from being addressed, contrary to what France appears to suggest[9]. France's arguments on the relevance of the building's ownership[10] are in fact closely linked to the violations of the VCDR, and France itself addresses this question in order to justify its conduct.

6 0.22. Lastly, Equatorial Guinea does not share France's position that only paragraphs 1 and 3 of Article 22 of the VCDR are relevant in this instance[11]. The dispute before the Court also concerns France's obligation to take all steps to prevent, *inter alia*, any disturbance of the peace of the mission or impairment of its dignity. Equatorial Guinea has always invoked Article 22 of the Convention in its entirety[12], and the Court did the same in its Judgment of 6 June 2018[13]. Equatorial Guinea will return to this question in **Chapter 2**.

IV. General overview of Equatorial Guinea's position

0.23. Equatorial Guinea maintains in this Reply all the arguments set out in its Memorial. At this stage of the proceedings, it is necessary only to respond to the arguments that France has put forward in its Counter-Memorial and to clarify for the Court certain aspects of Equatorial Guinea's position.

0.24. This case raises several fundamental legal questions concerning diplomatic relations, which calls for caution. In particular, it involves determining the circumstances in which a building may be considered "premises of the mission" within the meaning of Article 1 *(i)* of the VCDR, and the acts of a receiving State which may constitute violations of Article 22.

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[6] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 337-338, para. 154.

[7] CMF, para. 2.10.

[8] Art. 31, paras. 1 and 3 *(c)*, of the Vienna Convention on the Law of Treaties.

[9] CMF, paras. 2.13-2.20.

[10] *Ibid*., para. 2.19.

[11] *Ibid*., para. 3.50.

[12] See Memorial of Equatorial Guinea (MEG), paras. 8.4-8.8. See also Application instituting proceedings of Equatorial Guinea (AEG), para. 38; Request for the indication of provisional measures of Equatorial Guinea (RPMEG), paras. 13, 17; Written Statement of Equatorial Guinea on the Preliminary Objections of France (WSEG), paras. 3.4, 3.7, 3.8, 3.26 *et seq*.

[13] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 331-334, paras. 129-138. See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, pp. 1161, 1165, 1167, 1171-1172, paras. 51, 68, 79, 99.

0.25. As regards the acquisition of the status of "premises of the mission", France advances a theory of "two cumulative conditions". As will be demonstrated below, that theory has no basis in law. France itself has not adopted it in practice. It is an unreasonable theory which, according to France's own analysis, could not be applied in State practice without posing serious threats to the successful conduct of diplomatic relations. For these reasons, Equatorial Guinea remains convinced that its interpretation of the VCDR is correct and that a building acquires diplomatic status when
7 the sending State notifies the receiving State of the building's assignment for the purposes of its diplomatic mission. The building at 42 avenue Foch in Paris, for its part, acquired this status on 4 October 2011. Consequently, any measures contrary to Article 22 of the VCDR which were taken against the building by the French authorities after that date engage France's international responsibility.

0.26. Unable to respond to Equatorial Guinea's arguments concerning its right of ownership over the building, France invites the Court not to address this question, taking the view that a measure which affects the ownership of a building housing the premises of a diplomatic mission cannot be in breach of Article 22 of the VCDR. This argument is untenable, especially since, as Equatorial Guinea has already noted, France refused to recognize the diplomatic status of the building at 42 avenue Foch, considering it wrongly to fall within "the private domain" in October 2011.

0.27. In the alternative, Equatorial Guinea further contends that, even if France's "two cumulative conditions" argument were correct *(quod non)*, France has nonetheless breached its obligations under the VCDR. As will be seen below, France's conduct in refusing to recognize the diplomatic status of the building at 42 avenue Foch is clearly arbitrary and discriminatory and must, as such, be condemned. Moreover, as the Court's jurisprudence clearly indicates, if France believed that Equatorial Guinea had acted inappropriately, it should have availed itself of the means provided by the VCDR for dealing with possible violations or abuse. Instead, it adopted coercive measures that are unacceptable under the Convention, thereby breaching its obligations under that instrument. Equatorial Guinea addressed these aspects of the dispute in its Memorial, but France simply ignored them.

0.28. Lastly, Equatorial Guinea once again firmly rejects France's accusations that it has committed an abuse of rights. Abuse by a sovereign State should never be lightly presumed, and doing so risks undermining the system of peaceful settlement of disputes. As Equatorial Guinea will explain in this Reply, France has provided no evidence of the existence of such an abuse in these proceedings. These accusations must be dismissed.

8 **V. Structure of the Reply**

0.29. After this introduction, the Reply comprises four chapters.

0.30. **Chapter 1** deals with the facts. It responds to Chapters 1 and 4 of the Counter-Memorial and addresses, in particular, the use of the building at 42 avenue Foch for the purposes of Equatorial Guinea's diplomatic mission in France. It will also be demonstrated that any "inconsistencies" on Equatorial Guinea's part, if there were any, have been greatly exaggerated by France.

0.31. **Chapter 2** responds to Chapter 3 of the Counter-Memorial and shows that, contrary to what is claimed by France, the building at 42 avenue Foch acquired diplomatic status on 4 October 2011, and that its inviolability as premises of Equatorial Guinea's diplomatic mission has not been

respected. In the alternative, it will be demonstrated that, even if France's position on the "two cumulative conditions" were to be upheld, France has in any event acted in a manner inconsistent with its obligations under the VCDR.

0.32. **Chapter 3** deals with France's accusations that Equatorial Guinea has committed an abuse of rights. It will be demonstrated that France has misrepresented the strict requirements for a finding of abuse of rights in international law and has failed to establish the facts required for such a finding in this case.

0.33. **Chapter 4** responds to Chapter 5 of the Counter-Memorial and explains the content of France's responsibility for its violations of international law.

0.34. The Reply concludes with Equatorial Guinea's **submissions**.

9

CHAPTER 1

THE FACTS RELATING TO THE DIPLOMATIC STATUS OF THE BUILDING AT 42 AVENUE FOCH

1.1. France admits, and Equatorial Guinea agrees, that the facts relating to this case "are particularly important . . . in view of the questions of law raised before the Court"[14]. However, in its Counter-Memorial, the other Party gives an incomplete and inaccurate account of those facts, particularly as regards its own conduct. Equatorial Guinea has already given a detailed statement of the facts in its written pleadings[15], but is obliged to respond in this Reply to some of France's regrettable allegations.

1.2. Equatorial Guinea's position with respect to the facts, as will be set out in detail below, can be summarized as follows:

— Equatorial Guinea had already decided to acquire new premises for its diplomatic mission in France in the years before 2011. That decision was based on the fact that the previous premises, located at 29 boulevard de Courcelles, consisted of too small an apartment which was ill-suited for the representational purposes of one of Equatorial Guinea's largest diplomatic missions.

— In the years preceding Equatorial Guinea's acquisition of the building at 42 avenue Foch, Mr. Teodoro Nguema Obiang Mangue, who held a high-ranking office in the Equatorial Guinean State, allowed that building to be used for diplomatic and official purposes. Equatorial Guinea did indeed make such use of the building.

10 — On 15 September 2011, Equatorial Guinea completed its acquisition of the five Swiss companies which co-owned the building at 42 avenue Foch and, in so doing, became the building's owner. The acquisition was lawfully concluded at market price (€32 million). The transaction was recorded by both the Swiss and the French authorities, the latter having also collected the related taxes in accordance with the normal procedure.

— Equatorial Guinea's acquisition of the building at 42 avenue Foch was completed well before the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue were initiated and well before any measure of constraint was taken against the building. Equatorial Guinea's right of ownership was never disputed by France before the institution of the present proceedings before the Court. On the contrary, the conduct of the French authorities themselves is evidence of the recognition of that right.

— On 4 October 2011, Equatorial Guinea notified the French Ministry of Foreign Affairs that it was assigning the building for the purposes of its diplomatic mission in France. That notification was made in line with a well-established bilateral and reciprocal practice between Equatorial Guinea and France relating to the establishment of premises of diplomatic missions.

— On 11 October 2011, without providing any legal or factual grounds, and without consulting Equatorial Guinea, the French Ministry of Foreign Affairs replied to Equatorial Guinea, stating that the building "f[ell] within the private domain and [was], as such, subject to ordinary law". It should be observed that before this notification was sent to Equatorial Guinea, the Ministry addressed a similarly worded letter to the investigating judges in charge of the judicial

[14] CMF, para. 1.2.

[15] MEG, Chaps. 2-4; WSEG, paras. 1.2-1.43; Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016.

investigation into several African Heads of State and members of their families, stating that the building did not form part of the premises of Equatorial Guinea's diplomatic mission. This prompted the French judicial and police authorities to take measures of constraint against the building in February and July 2012.

— Following the first measures of constraint against the building in February 2012, Equatorial Guinea protested in the strongest terms and rejected France's position regarding the
11 building's status. It also set out its legal position concerning the establishment of diplomatic premises.

— Between September 2011 and July 2012, Equatorial Guinea gradually relocated the Embassy's offices and stopped using the premises at 29 boulevard de Courcelles as premises of its diplomatic mission.

— Finally, on 19 July 2012, the French courts, which had still not been informed by the French Ministry of Foreign Affairs of the actual status of the building at 42 avenue Foch, ordered the building's attachment with a view to its confiscation.

1.3. This chapter is divided into two sections. **Section I** contains a number of general observations relating to the statement of the facts in France's Counter-Memorial. **Section II** responds to specific factual issues by addressing in more detail the facts set out above.

I. General observations

1.4. Before addressing the facts relating to the building at 42 avenue Foch, two general observations should be made.

1.5. First, France has alleged throughout the proceedings before the Court that Equatorial Guinea acted in bad faith in acquiring the building at 42 avenue Foch in order to assign it for the purposes of its diplomatic mission. France has even adopted the supposition of certain French courts that the acquisition was "legal window-dressing". It claims, in essence, that Equatorial Guinea's intention was to shield the building from certain criminal proceedings.

1.6. Equatorial Guinea rejects these allegations in the strongest terms: not only is it established, for example, that France has never sought to annul this supposedly fraudulent transaction, but, as this Reply will show, it was in fact France which acted in an arbitrary and discriminatory manner when, on 11 October 2011, it sought to refuse the designation of the new premises of Equatorial Guinea's Embassy. Indeed, France had no grounds, legal or factual, for that refusal, which was made worse by its failure to consult Equatorial Guinea. France's conduct is
12 completely contrary to the rules governing diplomatic relations, including those concerning non-discrimination between equal and sovereign States.

1.7. Second, the facts set out in France's Counter-Memorial are based to a very large extent on the information produced by the French judicial and police authorities during the criminal proceedings against the Vice-President of Equatorial Guinea, initiated at the request of certain NGOs. However, Equatorial Guinea is of the view that the Court should not simply take that information and those descriptions at face value, especially when they are contested by Equatorial Guinea, but must, in the exercise of its judicial function, form its own opinion. This applies, for example, to the insinuations that Equatorial Guinea's acquisition of the building at 42 avenue Foch was "legal window-dressing", that Mr. Teodoro Nguema Obiang Mangue's

appointment to high-ranking office was an "appointment of convenience", and that predicate offences were committed on Equatorial Guinean territory.

1.8. The information produced by the French judicial and police authorities is not definitive, even in France, because the criminal proceedings are still ongoing. Moreover, Equatorial Guinea would recall that it has not been permitted to participate in those proceedings, its civil-party application having been systematically dismissed[16]. Its version of the facts has never been taken into account. It is therefore wrong, and even unfair, to use in argument against it the one-sided assessment of the facts by the French courts.

1.9. It is all the more necessary to treat with caution the information produced by the French courts, since they have demonstrated a clear and unacceptable bias against Equatorial Guinea. Indeed, without ever having heard Equatorial Guinea in the context of the judicial investigation, the French courts have repeatedly expressed value judgments on its conduct, and even disregarded any information that Equatorial Guinea has attempted to provide[17]. The bias of the French courts against Equatorial Guinea is clear from the attitude reflected in the following — completely unacceptable — passage from the 27 October 2017 judgment:

13

> "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"[18].

1.10. This attitude of the French courts is contrary to every principle governing relations between equal and sovereign States. It should not be reinforced by this Court.

II. The facts

1.11. This section first addresses certain facts concerning the premises of Equatorial Guinea's diplomatic mission in France since the establishment of diplomatic relations between the two countries (**A**). It then clarifies certain facts about Equatorial Guinea's acquisition of the building at 42 avenue Foch in Paris (**B**). A third part is devoted to the use of that building for the purposes of Equatorial Guinea's diplomatic mission, focusing in particular on the year 2011 and France's initial refusal to recognize that use (**C**).

A. The premises of Equatorial Guinea's diplomatic mission in France

1.12. Equatorial Guinea considers it useful to begin by setting out certain facts concerning the various premises which have housed its diplomatic mission in France.

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[16] As Equatorial Guinea noted in its Memorial, in a judgment dated 13 June 2013, the Paris *Cour d'appel* declared Equatorial Guinea's civil-party application inadmissible. See MEG, paras. 3.62-3.63; Paris *Tribunal de grande instance*, 32nd *Chambre correctionnelle*, judgment of 27 Oct. 2017, pp. 18-19 (**Ann. 1**).

[17] MEG, para. 6.20; Paris *Tribunal de grande instance*, 32nd *Chambre correctionnelle*, judgment of 27 Oct. 2017, p. 36 (**Ann. 1**).

[18] Paris *Tribunal de grande instance*, 32nd *Chambre correctionnelle*, judgment of 27 Oct. 2017, p. 39 (**Ann. 1**).

1.13. Equatorial Guinea and France have maintained diplomatic relations since Equatorial Guinea's independence on 12 October 1968. In addition to the building at 42 avenue Foch, a further four premises have housed its diplomatic mission in Paris:

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— The first diplomatic mission was set up in the suite of a Paris hotel (Hôtel de Crillon), where the Ambassador was staying.

— In June 1980, the diplomatic mission moved to a rented building at 6 rue Alfred de Vigny[19]. Equatorial Guinea had intended to buy that building, but ultimately was unable to do so[20]. For that reason, it had to terminate the rental contract and seek new premises.

— The diplomatic mission was then temporarily housed at 16 avenue de Baudelaire, pending the acquisition of new premises.

— Finally, Equatorial Guinea purchased an apartment at 29 boulevard de Courcelles. The Embassy moved there in 2001 and operated out of those premises for ten years.

1.14. On each occasion, the French Ministry of Foreign Affairs was informed of the Embassy's change of address, without any objection on its part. Nor was any "verification" procedure carried out by the Ministry.

1.15. Lastly, it is worth emphasizing that France has used a series of premises to house its diplomatic mission in Malabo. Each of those premises was also established by simple notification to the Ministry of Foreign Affairs of Equatorial Guinea by France.

B. Ownership of the building at 42 avenue Foch

1.16. France asserts that the ownership of the building at 42 avenue Foch is irrelevant to the settlement of the dispute before the Court[21]. Equatorial Guinea, on the other hand, considers that its
15 right of ownership (already amply demonstrated in its written pleadings[22]) is entirely relevant, since that title is the sole basis permitting Equatorial Guinea to use the building for the purposes of its diplomatic mission[23], and since, as stated above, the building's ownership is the reason given by France for refusing to recognize its diplomatic status in October 2011.

1.17. First, Equatorial Guinea would point out to the Court that it has what it considers a normal policy of acquiring ownership of the buildings it intends to use for diplomatic purposes. As mentioned above, it was Equatorial Guinea's inability to buy the building at 6 rue Alfred Vigny which led to its decision to vacate those premises[24]. It then purchased the building at 29 boulevard de Courcelles. Equatorial Guinea has also always sought to become the owner of the buildings that serve as residences for its diplomatic officials in France.

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[19] Professional lease, 5 June 1980 (**Ann. 3**).

[20] Letter from the Embassy of Equatorial Guinea to Mr. de Pesquidoux, 12 Aug. 1999; letter from the Embassy of Equatorial Guinea to CDR Créances, 7 Oct. 1999 (**Ann. 4**).

[21] CMF, paras. 2.13-2.20.

[22] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, pp. 1-4; MEG, paras. 2.12-2.28; WSEG, paras. 1.37, 1.39.

[23] See paras. 2.53-2.56 below.

[24] Letter from the Embassy of Equatorial Guinea to Mr. de Pesquidoux, 12 Aug. 1999; letter from the Embassy of Equatorial Guinea to CDR Créances, 7 Oct. 1999 (**Ann. 4**).

1.18. Equatorial Guinea decided to acquire new premises for its diplomatic mission in 2010, as demonstrated by, for example, a number of exchanges between Equatorial Guinea and real estate agents[25]. That decision was driven by the fact that the premises at 29 boulevard de Courcelles were much too small for the effective performance of the Embassy's functions and were ill-suited, in Equatorial Guinea's view, for the representational purposes of one of its largest diplomatic missions.

1.19. An opportunity arose to purchase the building at 42 avenue Foch, which has what Equatorial Guinea considers the appropriate characteristics to house its diplomatic mission in France and is in a better geographical location (in an area with a number of embassies and consular posts, and closer to the Quai d'Orsay). Equatorial Guinea became the owner of that building following a transfer of the shareholder rights on 15 September 2011 and the arrangements to acquire the building were, of course, set in motion long before then. The transfer occurred well
16 before the criminal proceedings were initiated against the Vice-President of Equatorial Guinea and before any measure of constraint was taken against the building.

1.20. France contends, somewhat oddly, that it has never contested Equatorial Guinea's right of ownership, but that it has not recognized it either[26]. France's conduct in this regard is in fact very erratic. In some judgments, without ever having shown any interest in hearing Equatorial Guinea's views on the matter, the French courts seem to be of the opinion that Equatorial Guinea is not the owner of the building, because the transfer of ownership was purported to be "legal window-dressing"[27]. Yet, as noted above, the French courts have never sought to annul that supposedly fraudulent transaction. Moreover, this position is in direct contradiction with the conduct of the French tax authorities, which accepted the payment of dues and taxes from Equatorial Guinea for the acquisition of the building[28].

1.21. What is more, even the French courts have recognized Equatorial Guinea's ownership of the building. In an interim order *(ordonnance de référé)* of 22 October 2013 concerning a complaint by the association of co-owners of 40-42 avenue Foch, the Paris *Tribunal de grande instance* noted that "the Republic of Equatorial Guinea, . . . through intermediary companies, is the owner of premises in building B". Equatorial Guinea's Embassy transmitted that order to the French Ministry of Foreign Affairs on 25 October 2013. The Ministry made no protest in this regard[29].

1.22. As far as Equatorial Guinea is concerned, there can therefore be no doubt that it is indeed the owner of the building at 42 avenue Foch. This matter will be discussed further in **Chapter 2**.

1.23. Lastly, Equatorial Guinea is of the view that, although the Court has decided that it does not have jurisdiction to settle the question of whether the immunity from execution of the
17 building at 42 avenue Foch, as State property used for government non-commercial purposes, has

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[25] Letter from Haussmania agency to the Ambassador of Equatorial Guinea, 1 Apr. 2010 (**Ann. 5**).

[26] CMF, para. 4.31. Cf. para. 4.14 below.

[27] Paris *Tribunal de grande instance*, 32nd *Chambre correctionnelle*, judgment of 27 Oct. 2017, p. 36 (**Ann. 1**); MEG, para. 6.20.

[28] MEG, paras. 2.21-2.25.

[29] Embassy of Equatorial Guinea, Note Verbale No. 863/13, 25 Oct. 2013, transmitting the interim order of the Paris *Tribunal de grande instance* of 22 Oct. 2013, p. 2 (**Ann. 6**).

been violated in this case, it would be appropriate for the Court to remind France that it remains bound by that obligation under international law[30].

C. The use of the building for the purposes of Equatorial Guinea's diplomatic mission

1.24. France claims in its Counter-Memorial that the building at 42 avenue Foch is a "private residence"[31]. That assertion is incorrect. The building was indeed owned by Mr. Teodoro Nguema Obiang Mangue between 18 December 2004 and 15 September 2011. However, as noted above, it was lawfully acquired by Equatorial Guinea on 15 September 2011 and assigned exclusively for the purposes of its diplomatic mission in France. On 4 October 2011, Equatorial Guinea notified France of that assignment.

1.25. As Equatorial Guinea explained in its Memorial, assignment consists in giving a purpose or a function to a property[32], i.e. designating it for a specific use[33]. This is a sovereign decision. Equatorial Guinea had decided to assign the building located at 42 avenue Foch for the purposes of its diplomatic mission even before it was acquired on 15 September 2011.

1.26. On 28 September 2011, Equatorial Guinea twice protested against the first measures of constraint taken by the French authorities during the criminal proceedings (then at the preparatory investigation stage), namely the seizure of vehicles belonging to Mr. Teodoro Nguema Obiang Mangue which were still in the courtyard of the building at 42 avenue Foch, an outdoor area
18 adjoining the building. Equatorial Guinea's Ambassador first contested the measure on the spot[34]. The Ambassador then sent a letter to the French Ministry of Foreign Affairs[35].

1.27. As pointed out by France, Equatorial Guinea did not mention in its letter of 28 September 2011 that the building at 42 avenue Foch had been assigned for the purposes of its diplomatic mission[36]. In fact, Equatorial Guinea did not mention the building at all. Equatorial Guinea was more interested in focusing on what it considered to be the most serious issue at that time: the unlawfulness of the judicial investigation, in so far as it was contrary to the principles of non-intervention and sovereign equality, and to French criminal law[37]. In its Counter-Memorial, France disregards that letter, which it simply ignored in 2011. However, it is in fact the first occasion on which Equatorial Guinea set out its position with respect to the criminal proceedings.

1.28. Furthermore, Equatorial Guinea did not mention the building's assignment, because it was not aware that the French courts were concerned with or had any real interest in the building. The search of 28 September 2011 offered no such indication, since it was directed only at the vehicles belonging to Mr. Teodoro Nguema Obiang Mangue, which were parked in the building's outer courtyard.

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[30] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 328, para. 128.

[31] CMF, p. 11.

[32] MEG, para. 8.46.

[33] WSEG, para. 1.41.

[34] Paris *Tribunal de grande instance*, 32nd *Chambre correctionnelle*, judgment of 27 Oct. 2017, p. 18 (**Ann. 1**).

[35] MEG, Ann. 32.

[36] CMF, paras. 1.16, 3.57.

[37] MEG, Chap. 6.

1.29. It was in fact on 14 February 2012, i.e. the day on which the French authorities first entered the building at 42 avenue Foch despite the express opposition of the Embassy's Chargée d'affaires a.i., that Equatorial Guinea became aware of the fact that the building might be subject to measures of constraint.

1.30. This is reinforced by the fact that although the 2008 complaint with civil-party application of Transparency International France and Mr. Gregory Ngbwa Mintsa mentioned the building[38], the complainants themselves admitted at the time that "they ha[d] not been able to
19 assemble sufficient factual elements to have the property . . . included in the scope of the forthcoming investigations"[39].

1.31. Moreover, as Equatorial Guinea explained in its Memorial, in November 2010 its Public Prosecutor transmitted a report to the French investigating judges, which stated that none of the predicate offences mentioned in the complaint with civil-party application had been committed in Equatorial Guinea[40]. Expecting that the decisions of its national courts regarding offences committed on Equatorial Guinean territory would be taken seriously by France, Equatorial Guinea had no reason to believe that criminal proceedings would be launched. It was only later that Equatorial Guinea learned that France had no interest in Equatorial Guinea's position on offences that are, or are not, being committed on its own territory[41].

1.32. Thus, contrary to what France maintains, Equatorial Guinea did not "dra[w] the attention of the French authorities to the criminal proceedings involving the building at 42 avenue Foch"[42] in September 2011. It merely drew France's attention to the ongoing judicial investigation which it regarded as unlawful.

1.33. On 4 October 2011, Equatorial Guinea informed France by Note Verbale that the building at 42 avenue Foch was assigned for the purposes of its diplomatic mission. In this regard, France asserts that the phrase "has for a number of years", which appears in the Note Verbale, equates to a claim by Equatorial Guinea that the premises "had for a long time been assigned for diplomatic use"[43]. As Equatorial Guinea explained in its written reply to the question put by Judge Donoghue at the provisional measures stage, that is not the case. In the past, for convenience, the building had been used to accommodate Equatorial Guinea's diplomatic staff or other officials on
20 special missions[44]. However, Equatorial Guinea has never claimed that the building benefited from diplomatic status before 4 October 2011.

1.34. One week later, on 11 October 2011, the French Ministry of Foreign Affairs replied to Equatorial Guinea, stating that the building at 42 avenue Foch was not part of the premises of Equatorial Guinea's diplomatic mission, since it "f[ell] within the private domain and [was], as

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[38] Preliminary objections of France (POF), Ann. 1, p. 8.

[39] *Ibid.*

[40] MEG, paras. 3.32-3.35.

[41] *Ibid.* See also paras. 3.62-3.63.

[42] *Ibid.*, para. 1.19.

[43] *Ibid.*

[44] Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 22.

such, subject to ordinary law"[45]. That same day, and before replying to Equatorial Guinea, the Ministry also sent a similarly worded letter to the investigating judges[46], further to a request for information dated 10 October 2011[47]. Equatorial Guinea was not informed of that letter to the investigating judges or of the request for information.

1.35. The question arises as to the basis on which the French Ministry of Foreign Affairs decided, on 11 October 2011, that the building fell within the private domain, notwithstanding Equatorial Guinea's Note Verbale of 4 October 2011 and without consulting that State.

1.36. It now seems clear that the Ministry's refusal was not based on any objective evidence. Indeed, the investigating judges' request for information asked only:

> "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"[48].

1.37. That question should have been answered in the affirmative, in view of the Note Verbale of 4 October 2011. However, in its reply to the investigating judges of 11 October 2011, the Ministry of Foreign Affairs expressed the view that the building fell within the private domain. That answer was incorrect. The Ministry also referred to a supposed procedure for recognizing the diplomatic status of buildings, despite never having shown any interest in following that procedure
21 in the case of Equatorial Guinea and the building at 42 avenue Foch.

1.38. Equatorial Guinea is surprised by this situation. It informed the French Ministry of Foreign Affairs of the building's assignment on 4 October 2011. Yet, with no explanation, the Ministry completely ignored the Note Verbale which had been sent to it. A few days later, the Ministry received the investigating judges' request for information and learned of the French courts' possible interest in the building. However, at that time, the proceedings were at the judicial investigation stage and no decision had been taken against Mr. Teodoro Nguema Obiang Mangue with respect to the offence of money laundering. At most there may have been suspicions (not communicated to the Ministry in the investigating judges' request), even though the Equatorial Guinean authorities had found that no predicate offence had been committed[49].

1.39. In fact, according to France's Counter-Memorial, it was only at the time of the attachment *(saisie pénale immobilière)*, i.e. on 19 July 2012, that the French courts concluded that there might be a link between the building and the commission of an offence[50].

1.40. It is clear, therefore, that in October 2011, the French Ministry of Foreign Affairs arbitrarily determined that the building at 42 avenue Foch fell within the private domain, thus

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[45] MEG, Ann. 34.

[46] *Ibid*., Ann. 35.

[47] *Ibid*., Ann. 80.

[48] *Ibid*.

[49] *Ibid*., Ann. 9.

[50] CMF, para. 1.36.

demonstrating contempt for and a bias against Equatorial Guinea. Equatorial Guinea will return to this unacceptable conduct below.

1.41. Lastly, Equatorial Guinea would recall that, contrary to France's assertions, its "claims regarding the date from which the building at 42 avenue Foch should be considered as diplomatic premises" have not "varied considerably"[51]. As far as Equatorial Guinea is concerned, the date on which the building acquired diplomatic status has always been 4 October 2011[52], which was, moreover, recognized by the Paris *Tribunal de grande instance* in its interim order of 22 October 2013[53]. Equatorial Guinea has never considered that the building had diplomatic status before 4 October 2011, although, as shown above, it had intended to use the building for the purposes of its diplomatic mission long before then and, from 15 September 2011 onwards, was also of the view that the building was protected by the customary rule affording State property immunity from execution. The Notes Verbales of 27 July and 2 August 2012 simply informed France that the Embassy's relocation had been completed[54].

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1.42. As soon as the building was assigned for the purposes of Equatorial Guinea's diplomatic mission, it was used by that State for the purposes of its diplomatic mission. The following facts attest to that use:

— On 4 October 2011, having notified France of the building's assignment for the purposes of its diplomatic mission, Equatorial Guinea put up signs marked "République de Guinée Équatoriale — locaux de l'ambassade" (Republic of Equatorial Guinea — Embassy premises). France has objected that those signs were made of paper, but Equatorial Guinea sees nothing extraordinary in that. It takes time to order and obtain suitable signs for a diplomatic mission.

— In October 2011, Equatorial Guinea housed its Permanent Delegate to UNESCO and Chargée d'affaires a.i. in the building.

— The relocation of the Embassy's offices was gradual. Several sections, such as the consulate and the accounting and administration offices, began operating out of the building immediately upon being relocated.

— Since 27 July 2012, all of the Embassy's offices have been housed in the building.

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1.43. Contrary to France's claims, there is nothing exceptional in Equatorial Guinea's conduct in this case[55]. It has acted reasonably and in good faith, always with the aim of ensuring the proper conduct of its diplomacy. If the other Party had made the effort to enter into dialogue with the Equatorial Guinean authorities at the appropriate time in order to shed light on the facts, the dispute currently before the Court could have been avoided. Unfortunately, that is not the case.

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[51] CMF, para. 3.54.

[52] MEG, paras. 2.30, 8.38, 8.46; Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, paras. 21, 24.

[53] Embassy of Equatorial Guinea, Note Verbale No. 863/13, 25 Oct. 2013, transmitting the interim order of the Paris *Tribunal de grande instance* of 22 Oct. 2013, p. 3 (**Ann. 6**).

[54] MEG, para. 8.48; Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, paras. 29-30.

[55] CMF, para. 3.48.

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CHAPTER 2

THE FAILURE TO RESPECT THE INVIOLABILITY OF THE BUILDING AT 42 AVENUE FOCH AS PREMISES OF THE DIPLOMATIC MISSION

2.1. In its Counter-Memorial, France contends that it has not committed any breach of the VCDR, because, in its view, the building at 42 avenue Foch in Paris never acquired the status of premises of the diplomatic mission within the meaning of Article 1 *(i)* of the Convention. In Equatorial Guinea's opinion, this position is wholly erroneous.

2.2. This chapter is divided into three parts. **Section I** responds to the "two cumulative conditions" argument put forward by France. It will be shown that, contrary to France's assertions, whether a building acquires the status of premises of the diplomatic mission does not depend on the "non-objection" or "implicit consent" of the receiving State, and that the concept of premises "used for the purposes of the mission", as set out in Article 1 *(i)* of the Convention, includes buildings assigned for diplomatic purposes. **Section II** reaffirms that the building at 42 avenue Foch has acquired diplomatic status, and responds to France's arguments regarding its specific violations of Article 22 of the VCDR in this case. **Section III** explains that even if France's contention were correct *(quod non)*, the Respondent has nevertheless violated its obligations under the VCDR by subjecting Equatorial Guinea to arbitrary and discriminatory treatment and by adopting coercive measures that are unacceptable under the Convention.

I. Acquisition of the status of premises of the diplomatic mission is not dependent on the "two cumulative conditions" advanced by France

2.3. In its written pleadings, Equatorial Guinea has shown that, for a building to acquire diplomatic status and to benefit from the protections afforded by the VCDR, it is generally sufficient for the sending State to assign the building for the purposes of its diplomatic mission and to notify the receiving State accordingly, especially when the receiving State has no regulations in this area[56]. This position is based, in particular, on the ordinary meaning of the terms of the VCDR, its *travaux préparatoires*, the widespread practice of States, and the bilateral and reciprocal practice between Equatorial Guinea and France[57]. As Eileen Denza has explained:

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> "Article 1 *(i)* of the Convention does not require a sending State to seek the approval of the receiving State before acquiring property for use as premises of its mission. Nor does Article 10 require notification of premises to be used or already in use as mission premises."[58]

2.4. Similarly, according to Joanne Foakes and Eileen Denza:

> "if the sending State has notified the receiving State of its acquisition of premises for use as an ambassador's residence or embassy offices, and has secured any consents which may be needed under local law (for the character of the building as embassy premises does not exempt it from local building or planning laws), then those premises

[56] MEG, paras 8.35-8.50; Written replies of Equatorial Guinea to the questions put by Judge Bennouna and Judge Donoghue, 26 Oct. 2016, para. 24.

[57] See paras. 1.14-1.15 above.

[58] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed., OUP, 2016, p. 16.

> are generally regarded as premises of the mission while they are being prepared for occupation and use"[59].

2.5. In keeping with this interpretation of the VCDR, most States do not impose special conditions for the establishment of premises of diplomatic missions. Some States expressly recognize the sending State's right to designate the premises it considers most suitable for its diplomatic mission. For example, according to New Zealand's *Guidelines for the Diplomatic and Consular Corps*, "[s]ubject to the normal regulations governing property ownership/rental in New Zealand, missions are free to locate and acquire property of their choice. It is up to missions to identify suitable premises for a chancery, official residence and other staff accommodation"[60]. Similarly, the handbook *Diplomatic privileges and immunities in Finland* provides that "[m]issions and members of missions do not need a consent from the Ministry for Foreign Affairs for acquisition or sale of real property in Finland"[61].

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2.6. To refute Equatorial Guinea's argument, France contends that a building's diplomatic status depends on "two cumulative conditions". In this regard, it asserts that the

> "identification of a building as mission premises — and entitlement to the resulting régime of protection — presupposes, first, that the receiving State does not expressly object to granting it diplomatic status . . . and, second, that the building is actually assigned for the purposes of the diplomatic mission"[62].

As will be seen below, this contention is legally and practically unrealistic.

2.7. This section will address two points. First, Equatorial Guinea will show that there is nothing in the VCDR subjecting the acquisition of diplomatic status by a building to the "non-objection" or "implicit consent" of the receiving State (**A**). Second, it will be demonstrated that the notion of premises "used for the purposes of the diplomatic mission", as set out in Article 1 *(i)* of the Convention, includes both the buildings in which the diplomatic mission is fully established and those assigned for the purposes of the mission (**B**).

A. Whether a building acquires diplomatic status is not dependent on the "non-objection" or "implicit consent" of the receiving State

2.8. France searches the object and purpose of the VCDR, the text of the Convention and State practice for evidence to support its claim that the "non-objection" or "implicit consent" of the

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[59] J. Foakes and E. Denza, "Privileges and Immunities of Diplomatic Missions", in I. Roberts (ed.), *Satow's Diplomatic Practice*, 7th ed., OUP, 2017, p. 232, para. 13.20.

[60] *Guidelines for the Diplomatic and Consular Corps Resident in and Accredited to New Zealand*, 2018, para. 1.2.4.

[61] *Diplomatic privileges and immunities in Finland*, 2018, para. 9.1. See also *Guia prático para as missões diplomáticas acreditadas em Portugal*, 2017, p. 22 ("Chancelleries and the official residences of heads of mission must be located within the city limits of Lisbon") *[translation by the Registry of the French translation provided by Equatorial Guinea]*; *Protocol Guide* of Bulgaria, 2017, p. 33 ("In the event of change of address . . . the diplomatic mission should promptly notify the State Protocol Directorate at the Ministry of Foreign Affairs with a *Note Verbale*"); *Manuale sul trattamento riservato al corpo diplomatico accreditato presso la Repubblica Italiana*, 2013, para. 6.3.3 ("the conditions for the acquisition of immovable property by diplomatic missions or international organizations are limited to those set out in the relevant provisions of the [VCDR]") *[translation by the Registry of the French translation provided by Equatorial Guinea]*.

[62] CMF, para. 3.5.

receiving State is required for a building to acquire the status of premises of the diplomatic mission.

28 2.9. As a preliminary point, it should be noted that France does not deny in its written pleadings that, in principle, a sending State has the right to designate the premises that will house its diplomatic mission in the receiving State (although its conduct towards Equatorial Guinea in these proceedings might suggest otherwise). This is why France speaks of "non-objection" to the *choice* of the sending State[63]. Indeed, the Respondent appears to agree fully with Equatorial Guinea's position when it states that:

> "prior official notification by a sending State of its intention to assign premises to the offices of its mission is generally sufficient for the Ministry to recognize that those premises benefit from the régime of the VCDR"[64].

2.10. It is also revealing that France has been compelled to rely on the doctrine of abuse of rights: for a State to abuse a right, it must, of course, have a right to begin with. In this case, it is the right of the sending State to designate the premises it considers to be the most suitable and dignified to house its diplomatic mission in the receiving State. This in itself suggests that "prior official notification by a sending State of its intention to assign premises" is sufficient, and that "non-objection" or "implicit consent", as described by France in its Counter-Memorial, is not required under international law.

2.11. France first asserts that "[t]he ordinary meaning to be given to the terms of Article 1 *(i)*, interpreted in light of the object and purpose of the Convention, runs counter to" Equatorial Guinea's arguments[65]. It thus considers that,

> "in accordance with the essentially consensual letter and spirit of the VCDR, the premises that the sending State wishes to use for its diplomatic mission can be used as such only when the receiving State gives its consent and, above all, does not expressly object to that choice, after notification has been given by the sending State"[66].

29 2.12. France bases this argument on what it regards as the *"ratio legis"* of the VCDR. In its view, this *ratio legis* can be seen in the paragraph of the preamble which states that the purpose of the privileges and immunities conferred by the Convention "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"[67]. France claims that the "non-objection" or "implicit consent" of the receiving State is thus needed for a building to acquire diplomatic status, in order to prevent possible abuse by the sending State.

2.13. Equatorial Guinea disagrees with France's manifestly flawed reading of the object and purpose of the VCDR. The spirit of the Convention is rooted not in mistrust or the possible abuse of the rights afforded by that instrument, but in the need to create conditions that promote friendly relations between equal sovereign States. The preamble in its entirety reads as follows:

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[63] CMF, para. 3.13.

[64] *Ibid.*, para. 3.44.

[65] *Ibid.*, para. 3.9.

[66] *Ibid.*

[67] *Ibid.*, paras. 3.10-3.11.

"*Recalling* that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention."

2.14. Rather than conferring on the receiving State the right to object to a sending State's claims regarding the diplomatic status of property each time it considers there to be an abuse, the Convention's object and purpose give rise to a presumption that such claims are valid, which is fundamental to the successful conduct of diplomatic relations based on the principle of reciprocity. Friendly and reciprocal relations between States would be seriously affected if a receiving State, through its Ministry of Foreign Affairs, police or national courts, could at any time challenge a sending State's decisions about the conduct of its diplomacy, without restriction and without at least consulting the sending State.

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2.15. This presumption of validity is corroborated by the fact that the VCDR provides specific means for dealing with possible abuse or violations. As the Court has found,

"[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and *specifies the means at the disposal of the receiving State to counter any such abuse*"[68].

These means exist precisely because the VCDR presupposes that, as a general rule, diplomatic immunity will be respected and not verified, evaluated or approved by the receiving State. Article 41 of the Convention is also relevant in this regard, since it establishes that the duty of members of the mission to respect the laws and regulations of the receiving State is "[w]ithout prejudice to their privileges and immunities"[69].

2.16. State practice further attests to the existence of this presumption. For example, in a case concerning the question whether a building presented by Kenya as forming part of its diplomatic premises enjoyed inviolability, the German Federal Supreme Court found that:

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[68] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 40, para. 86 (emphasis added). See, in particular, Art. 9, Art. 31, para. 4, and Art. 32 of the Convention. See also paras. 2.72-2.74 and 3.11 below.

[69] See also J. Craig Barker, "In Praise of a Self-Contained Regime", in P. Behrens (ed.), *Diplomatic Law in a New Millennium*, OUP, 2017, p. 25 (the principle of diplomatic inviolability is "intended to have overriding force").

> "[t]he debtor [Kenya] has sufficiently established its submissions, in view of the fact that its embassy declared, in a Note Verbale of 17 August 2001 to the Ministry of Foreign Affairs, that the premises were being used for diplomatic purposes at the time of the order and continue to be used as the diplomatic residence of the embassy and in order to accommodate staff of the diplomatic mission during their stay in Bonn. Moreover, as the Ministry has informed the Court by letter of 7 November 2001, the debtor's ambassador declared personally at a meeting in the Ministry of Foreign Affairs that the premises continue to be used by him in person and his colleagues for diplomatic purposes on official visits to Bonn and in the case of visits by delegations from Kenya. These statements prove that, even when the creditor's submissions are taken into account, there is an overwhelming probability that the facts asserted by the debtor are true."[70]

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2.17. Finally, it should be noted that, in the *Cumaraswamy* case, the Court expressly upheld the existence of a strong presumption of validity:

> "When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a *presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts*."[71]

2.18. Although that case concerned the immunity from legal process of a United Nations agent, Equatorial Guinea considers, for the reasons set out above, that the Court's reasoning is all the more justified in respect of diplomatic claims made by a sending State. The absence of practice running counter to such a presumption confirms this.

2.19. France then turns to Articles 2 and 12 of the VCDR. In its view, because Article 2 provides that "[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent", "it would seem strange that either of the two States could impose on the other the choice of premises for its mission"[72]. With regard to Article 12 of the Convention, France considers that, "[i]n the specific circumstances of establishing diplomatic premises outside the capital of the territorial State, it is perfectly understandable that that State's express agreement is required"[73], and that "[t]his does not mean that in ordinary circumstances, when the mission must be established in the capital, such consent is not necessary; it is still necessary but can be given implicitly"[74]. These arguments are unfounded.

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2.20. With regard to Article 2, the fact that diplomatic relations are established by mutual consent does not mean that every aspect of those relations, once established, depends on such consent. The VCDR provides several examples in this regard. For instance, the right of the receiving State to designate *persona non grata* the head of mission or any other member of the mission's diplomatic staff is not subject to the sending State's consent (Article 9). Similarly, no

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[70] CMF, fn. 136.

[71] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 87, para. 61 (emphasis added).

[72] CMF, para. 3.13.

[73] *Ibid.*, para. 3.15.

[74] *Ibid.*

special consent is required for a sending State to use its flag and emblem on the premises of the mission (Article 20) or to bring to an end the function of a diplomatic agent (Article 43 *(a)*).

2.21. Contrary to what is claimed by France, the VCDR expressly sets out the instances in which the receiving State's consent is required[75]. The question of the designation of premises of diplomatic missions is answered in full by Article 12. The "express consent" of the receiving State is only required when a sending State wants to "establish offices forming part of the mission in localities other than those in which the mission itself is established". This is the express exception to the general rule. The drafters of the Convention were clearly mindful of the question of the designation of premises, and they decided to limit the circumstances requiring the receiving State's consent to those set out in Article 12.

2.22. France believes it can infer from the words "express consent" in Article 12 that the receiving State's "implicit consent" is required when the sending State decides to move the premises of its mission within the same locality in which they are already established[76]. However, this interpretation cannot be upheld, since, generally speaking, the VCDR does not allow the position of a receiving or sending State to be deduced[77]. Such an interpretation would also present insurmountable problems in practice and leave the sending State in a situation of complete uncertainty, especially when, as in France's case, the receiving State has no relevant regulations. At what point would the sending State know that the premises it had designated to house its diplomatic
33 mission enjoyed diplomatic status and inviolability? From the date of notification? If so, should the building at 42 avenue Foch be considered to have acquired diplomatic status on 4 October 2011 for one week, until France expressed its opinion on the subject? If not from the date of notification, how much time must pass before the receiving State's silence may be construed as consent to the designation of the new premises? A week? A month? A year?

2.23. If France's "implicit consent" argument is combined with the second condition which it claims must be met for a building to acquire diplomatic status[78], it is not hard to see that the sending State would find itself in a vulnerable position. Indeed, by France's logic, a sending State must notify the receiving State that it has assigned new premises for the purposes of its diplomatic mission, and the receiving State need not respond. Having received no response, the sending State must carry out all the refurbishment work required to enable the new premises to house its diplomatic mission, then move the mission's offices. After all this, the receiving State may still decide that the new premises should not form part of the sending State's diplomatic mission. As a result, the sending State would no longer have any premises and would have forfeited the cost of acquiring and preparing the new premises. These problems demonstrate that France's position is not only unfounded in law, it is also unreasonable in practice. Such uncertainty is, moreover, incompatible with the régime of diplomatic law, in which promoting and developing stable, friendly relations between States is fundamental[79].

2.24. Finally, to underpin its "non-objection" or "implicit consent" argument, France relies on the national practices of 13 States which "make the establishment of premises of foreign

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[75] See, for example, Arts. 2, 8, 12, 19 and 46 of the Convention.

[76] CMF, para. 3.15.

[77] See, for example, Art. 32, para. 2, of the Convention, pursuant to which a waiver of immunity "must always be express".

[78] See paras. 2.33-2.47 below.

[79] See the second and third paras. of the preamble of the VCDR.

diplomatic missions on their territory explicitly subject to some form of consent"[80], or corroborate "the existence of a régime based on agreement between the parties"[81]. France refers to this practice without explaining whether it is a subsequent practice in the application of the Convention which establishes the agreement of the parties regarding its interpretation[82], a supplementary means of interpretation[83], or a practice which is said to have created a new rule of customary international law.

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2.25. As Equatorial Guinea explained in its Memorial[84], the limited practice of certain States seeking to exercise some degree of control over the establishment of premises of diplomatic missions confirms Equatorial Guinea's interpretation of the Convention. Moreover, it is clear that any control measure in domestic law must be in keeping with the letter and spirit of the VCDR[85].

2.26. It should also be noted that the States which seek to exercise a measure of control through their national legislation or internal guidelines have at least explained their position clearly and transparently to the sending States on their territory. They have also ensured that, in introducing such measures, they are not acting in breach of international law; further, there is nothing to suggest that these States would apply their legislation or guidelines in an arbitrary or discriminatory manner. What is more, these practices have been put in place to safeguard specific national interests of the receiving State, in particular national security, public safety, tax exemption rules and urban planning[86].

2.27. In this regard, one may look to the practice of the United Kingdom, which, under the Diplomatic and Consular Premises Act of 1987, requires diplomatic missions to obtain the consent of the Secretary of State before acquiring new premises, in order for those premises to enjoy the status of premises of the mission[87]. When presenting this new legislation in the House of Lords, the Minister of State admitted that "[a]t present, there are no legislative powers to prevent diplomatic missions from establishing their premises in any part of the capital"[88]. In other words, the VCDR, the relevant provisions of which have statutory force in the United Kingdom under the Diplomatic Privileges Act of 1964, was not itself regarded as requiring notification to be given to the receiving State in order for premises to acquire the status of premises of the diplomatic mission.

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2.28. It should be noted that the Diplomatic and Consular Premises Act provides that consent may be given or withdrawn if the Secretary of State "is satisfied that to do so is permissible under international law"[89]. Moreover, the UK Foreign Office brought the new legislation to the attention

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[80] CMF, para. 3.16.

[81] *Ibid.*, para. 3.18.

[82] Vienna Convention on the Law of Treaties, Art. 31, para. 3 *(b)*.

[83] *Ibid.*, Art. 32.

[84] MEG, paras. 8.42-8.43.

[85] E. Denza, *op. cit.*, p. 147.

[86] See also MEG, fn. 320.

[87] E. Denza, *op. cit.*, p. 17.

[88] *British Yearbook of International Law* (*BYIL*), Vol. 58, 1987, p. 540.

[89] Diplomatic and Consular Premises Act 1987, Part 1, Sec. 1 (4).

of diplomatic missions in London through a circular note long before it entered force[90]; all missions were aware of the legislation in advance and could object to it if they so wished.

2.29. In the United States, national regulations were introduced through the District of Columbia Code and, in 1982, the Foreign Missions Act[91]. Under section 4305 of that Act, all diplomatic missions must notify the State Department of their intention to acquire, use, sell or dispose of real property located in the United States. Several Notes Verbales were sent by the Secretary of State to the heads of mission to inform them of the regulations in question, the aim of which was "to facilitate the secure and efficient operation in the United States of foreign missions . . ., and to assist in obtaining appropriate benefits, privileges, and immunities for those missions and organizations and to require their observance of corresponding obligations in accordance with international law"[92].

2.30. The legislation and guidelines of other States, including those mentioned by France in its Counter-Memorial, are clearly very varied. Some refer only to the acquisition of real property, which must be facilitated under Article 21, paragraph 1, of the VCDR. In any event, what is clear is that any control measure in the receiving State's domestic law concerning the designation of
36 premises of diplomatic missions by sending States must be notified in advance to all diplomatic missions, must serve an objective that is appropriate and consistent with the object and purpose of the VCDR and must be exercised in a reasonable and non-discriminatory manner.

2.31. Nothing of the sort exists in the present case, because France has no legislation or guidelines on the subject, and its position has been unknown, unclear and inconsistent. France's refusal to recognize the diplomatic status of the building at 42 avenue Foch has absolutely nothing to do with the specific national interests whose protection is sought by the few State practices which do exist; rather, its refusal was based on the legally and factually erroneous argument that the building "f[ell] within the private domain". What is more, France now speaks of a "French practice" that is said to apply generally to all diplomatic missions on its territory, yet it is unable to provide any examples in this regard. Equatorial Guinea will return to these points in **Section III** below.

2.32. In the circumstances, the practice which appears most relevant in this case is that between Equatorial Guinea and France; further, there is nothing to prevent Equatorial Guinea from relying on it. As mentioned in **Chapter 1**, the two countries have a long-standing bilateral and reciprocal practice, whereby the sending State's notification of the assignment of a building for the purposes of the diplomatic mission is sufficient for the building to acquire diplomatic status[93]. No other formalities are required, and neither State has ever objected to the other's choice. Equatorial Guinea thus had a legitimate expectation that France would comply with this practice, and with international law, when it notified it of the assignment of the building at 42 avenue Foch in October 2011.

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[90] *BYIL*, Vol. 58, 1987, pp. 541-542.

[91] United States Code (USC), Title 22, Sec. 4301-4316.

[92] See the explanatory note prepared by the United States Department of State (available at: https://www.state.gov/documents/organization/17842.pdf).

[93] Attestation of the Minister for Foreign Affairs of the Republic of Equatorial Guinea, 30 Apr. 2019 (**Ann. 7**).

B. The notion of premises "used for the purposes of the mission" includes buildings assigned for the purposes of the diplomatic mission

2.33. The second condition which France claims must be met for a building to acquire the status of premises of the diplomatic mission is its "actual" or "effective" assignment[94].

37 2.34. Equatorial Guinea would first note that it is unclear whether France's position truly differs from its own. France contends that there is "actual assignment" if a building is "effectively used for the purposes of the mission"[95], if the sending State puts the building "to use" or makes it "serve a precise purpose"[96], or if the building is "actually assigned for the purposes and functions of the mission"[97]. In Equatorial Guinea's view, a building purchased (or rented) by a State, which is designated by it as serving the purposes of its diplomatic mission and which undergoes the necessary planning and refurbishment works to enable it to house the mission naturally meets these criteria[98]. Moreover, as explained above, a sending State's claim that a building has diplomatic status and is used for official purposes enjoys a presumption of validity under the VCDR.

2.35. Equatorial Guinea's position is also in keeping with the rules on the immunity from execution of State property, which are consistent with the VCDR's régime of protection. Article 21 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property is particularly informative, in so far as it provides that:

> "1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph *(c)*:
>
> *(a)* property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences".

[94] CMF, paras. 3.24 *et seq*.

[95] *Ibid*., p. 48.

[96] *Ibid*., para. 3.28.

[97] *Ibid*.

[98] See also P. Cahier, *Le droit diplomatique contemporain*, 2nd ed., Librairie Droz, 1964, p. 198 ("works being carried out on the building may already be sufficient to establish the inviolability of the headquarters" *[translation by the Registry]* (cited by France in CMF, para. 3.29).

38 2.36. It should be noted that France has adopted laws which give effect to this well-established rule of international law[99]. Therefore, it cannot disregard it here.

2.37. If the position taken by France in its Counter-Memorial is that there is "actual assignment" only after a diplomatic mission has completely moved in, it must be rejected. First of all, such a position would directly contradict what France recognizes as its own practice, since, in its own words, "*prior* official notification by a sending State of its *intention* to assign premises to the offices of its mission is generally sufficient for the Ministry to recognize that those premises benefit from the régime of the VCDR"[100].

2.38. It would, moreover, be an extremely restrictive interpretation of the expression "used for the purposes of the mission" in Article 1 *(i)* of the VCDR, which would deprive the Convention of its *effet utile* with regard to the rule of inviolability. Indeed, if inviolability were to apply from the moment that all diplomatic functions were first performed in the building, it would mean that the receiving State could enter the building up until the point at which the move was completed. This interpretation is clearly unreasonable and could compromise the security and dignity of the mission. The risk of impeding the successful conduct of diplomatic relations is even greater, since, by France's logic, even if the sending State had completed its move to the new premises, the receiving State could still refuse to recognize them as premises of the diplomatic mission.

39 2.39. Like the first condition put forward by France, the "actual assignment" argument raises several questions which remain unanswered. It is unclear, for example, whether the assignment should be verified by the receiving State's Ministry of Foreign Affairs, or whether this verification could also be performed by other authorities, such as its courts or police. Moreover, France fails to clarify whether the verification process requires the receiving State to enter the mission, and whether this may be done without the head of mission's consent[101]. It is also unclear whether France is claiming that the "actual assignment" must be verified on a regular basis. or whether a single verification is sufficient.

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[99] See, in particular, Art. L 111-1-2, introduced into the Code of Civil Enforcement Procedures by Act No. 2016-1691 of 9 Dec. 2016:

> ("The court cannot authorize provisional measures or compulsory enforcement measures against property belonging to a foreign State unless one of the following conditions is met: . . . (3) Where a judgment or arbitral award has been rendered against the State concerned and the property in question is specifically in use or intended for use by that State for other than government non-commercial purposes and it maintains a link with the entity against which the proceedings have been brought. In the application of (3), the following property, in particular, is considered as specifically in use or intended for use by the State for government non-commercial purposes: *(a)* property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences." *[Translation by the Registry.]*)

For a recent application of this law, see *Cour de cassation*, judgment No. 3 of 10 Jan. 2018 (16-22.494).

[100] CMF, para. 3.44 (emphasis added).

[101] J. d'Aspremont, "Premises of Diplomatic Missions", *Max Planck Encyclopedia of Public International Law*, 2009, para. 8 ("The receiving State cannot verify the actual use of the building without bearing a risk of infringing . . . inviolability").

2.40. France also makes fleeting reference to the *travaux préparatoires* of the VCDR, but these do not support its contention. As France acknowledges, the question of the exact point at which the premises become inviolable was raised, but not dealt with explicitly[102].

2.41. Finally, to counter Equatorial Guinea's position, France also relies on the practice of certain States which it believes substantiates its "actual assignment" argument. On examination, however, this practice is often irrelevant, misinterpreted or in need of some clarification.

2.42. France first cites its 28 March 2012 response to Equatorial Guinea's Note Verbale of 12 March 2012[103]. As will be seen in **Section III**, the practice to which the French Ministry of Foreign Affairs refers in this response is by no means "constant" and is very different from France's conduct towards Equatorial Guinea in the present case.

2.43. The Note Verbale from the French Ministry of Foreign Affairs of 6 July 2005, for its part, confirms Equatorial Guinea's position in this case. It clearly states that the Ministry for the Economy, Finance and Industry granted a tax exemption for the new residence of the Ambassador of Equatorial Guinea on the basis of a deed which stated that "the buyer . . . declares and agrees that the property . . . is to be used exclusively as the official residence of the Ambassador of the Republic of Equatorial Guinea". The Ministry also explains that the Embassy must "[give] notif[ication] . . . in due course . . . of the Ambassador's date of arrival at the new premises"[104]. It is clear from these passages that the tax exemption was granted long before the Ambassador of Equatorial Guinea took up residence in the new premises, and that Equatorial Guinea's intended use of the building was sufficient for the French authorities.

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2.44. The reference to an obsolete decision of the *Tribunal civil de la Seine* in *State of Sweden* v. *Petrococchino* (1929) is no more convincing. First, Sweden had waived its immunity from jurisdiction in that case. Second, the *Tribunal* refers to the concept of "extraterritoriality", which differs from the now universally recognized concept of inviolability. Lastly, the meaning of the term *affectation* ("assignment") in this decision is not entirely clear, and the term *installation* ("establishment") is also used, presumably not as a synonym[105].

2.45. France cites only one recent decision of the *Cour de cassation*, dated 25 January 2005, in a case involving the Democratic Republic of the Congo. In that case, the court had to determine whether certain immovable property acquired by the Democratic Republic of the Congo enjoyed immunity from execution as property of the State. It decided that the property was not entitled to such immunity, because, in its view, its acquisition constituted a "routine business transaction governed by private law", and because it had "found that the property in question was not assigned to the offices of the Embassy or its annexes, and was not the residence of the Ambassador"[106]. The thinking behind the second part of this reasoning is unclear, and France has made no effort to clarify it. It could very well be that the sending State simply failed to notify the receiving State of the building's assignment.

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[102] CMF, para. 3.27.

[103] *Ibid*., para. 3.33.

[104] CMF, Ann. 9.

[105] *State of Sweden* v. *Petrococchino*, *Journal du droit international*, Vol. 59, 1932, pp. 945-946.

[106] *Cour de cassation*, 1st *Chambre civile*, judgment of 25 Jan. 2005, No. 03-18.176 *[translation by the Registry]*.

2.46. France then refers to a number of cases in Germany, Canada, the United States and the United Kingdom[107]. Yet these practices, which France often cites out of context, are neither consistent nor conclusive, for the following reasons in particular:

41 — The judgment of the Supreme Restitution Court for Berlin in *Tietz* v. *Bulgaria* concerns a situation in which a mission's premises were damaged and rendered uninhabitable as a result of war, and "the use and the function of the premises had ceased — and ceased for a reason not truly and merely temporary"[108]. It is thus irrelevant to the question of determining when inviolability begins. It should also be noted that Bulgaria had waived its immunity from jurisdiction[109], and that the court based its decision on the obsolete notion that "the status of extraterritoriality is derived from the person of the ambassador [and] it follows by clear implication that when the ambassador ceased to use real property its special extraterritorial status also ceases"[110]. As for the *Cassirer* v. *Japan* case, a complete reading of the judgment of the Supreme Restitution Court for Berlin shows that it too was rendered in exceptional circumstances and on various legal grounds, including the peace treaty between Japan and the Allies. The reasoning of the Supreme Restitution Court cannot therefore be generalized for the purpose of interpreting the VCDR[111]. The same applies to the 1969 judgment of the German Federal Supreme Court mentioned by France[112].

— The only recent case in Germany that is relied on by France is the *Kenyan Diplomatic Residence Case*[113]. As stated above, this case is relevant because it corroborates the presumption of validity of diplomatic claims made by a sending State[114]. Moreover, the judgment in this case appears to reverse all earlier jurisprudence in Germany where the courts believed they could challenge such claims.

— In principle, the judgment of the Ontario Court of Justice supports Equatorial Guinea's position when it states that the notion of diplomatic premises "does not include lands and buildings
42 never used in the past or present or *in all likelihood ever to be used in the future* as the premises of the mission"[115]. The Ontario Court thus contradicts itself when it subsequently refuses to recognize that Croatia's Note Verbale establishes such an intention of future use[116].

— France next cites the 1982 *United States* v. *County of Arlington* case to reinforce the idea that the views of the receiving State's Ministry of Foreign Affairs regarding the actual assignment of premises to a diplomatic mission are conclusive[117]. It could not have escaped France's attention that the US court notes that the State Department's views are "not conclusive", precisely because they could be "manifestly unreasonable"[118]. Moreover, it bears noting that

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[107] CMF, pp. 53-56.

[108] *Tietz* v. *Bulgaria*, *American Journal of International Law (AJIL)*, Vol. 54, 1960, p. 177.

[109] *Ibid*., p. 165.

[110] *Ibid*., p. 167.

[111] *Cassirer* v. *Japan*, *AJIL*, Vol. 54, 1960, pp. 178-188.

[112] *Hungarian Embassy Case, International Law Reports (ILR)*, Vol. 65, pp. 110-114.

[113] *Kenyan Diplomatic Residence Case*, *ILR*, Vol. 128, pp. 632-639.

[114] See para. 2.16 above.

[115] CMF, p. 54 (emphasis added).

[116] *Ibid*., p. 55.

[117] *Ibid*.

[118] United States Court of Appeals, 4th Circuit, 1 Feb. 1982, *United States* v. *County of Arlington*, 669 F. 2d 925, para. 54.

the State Department decided to act in this case after the German Democratic Republic protested against the measures taken against it[119].

— Lastly, France cites two British examples, but makes no attempt to qualify them. The example involving Nigeria, to which the Foreign Office allegedly failed to issue a certificate[120], is consistent with the fact that the United Kingdom is one of the countries whose domestic legislation lays down the procedures for recognizing diplomatic premises, which is not the case in France. The second example, concerning Iran, pertains to a building which France rightly notes had been "abandoned several years earlier"[121], thus making it easy for the High Court to conclude that "[i]t seems . . . clear beyond argument that the premises have ceased to be used for the purposes of the mission"[122].

2.47. In conclusion, the notion of premises "used for the purposes of the mission" in Article 1 *(i)* of the VCDR must be interpreted as comprising not only premises where the diplomatic mission is fully installed, but also premises assigned for diplomatic purposes. The second condition put forward by France in its Counter-Memorial must therefore also be rejected.

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II. France has breached its obligations under the VCDR

2.48. In light of the foregoing, it must be concluded that the building at 42 avenue Foch in Paris acquired the status of premises of Equatorial Guinea's diplomatic mission in France on 4 October 2011, i.e. the day on which Equatorial Guinea notified the French Ministry of Foreign Affairs that it was assigning the building for the purposes of its diplomatic mission.

2.49. As Equatorial Guinea explained in its Memorial, the measures taken by the French authorities against the building after that date constitute violations of Article 22 of the VCDR which engage France's international responsibility. It is necessary briefly to revisit the specific breaches committed by France in order to respond to the arguments put forward by it in its Counter-Memorial.

2.50. First, Equatorial Guinea notes that France's main argument as to why the measures taken against the building at 42 avenue Foch do not constitute violations of the VCDR is that the building did not acquire diplomatic status on 4 October 2011. It therefore does not deny that, should it be established that the building did acquire such status, the measures in question would engage its international responsibility. Moreover, it bears repeating that the rule of inviolability laid down in Article 22 is absolute and, as the Court has explained, "[e]ven in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State"[123]. In the present case, France has violated its obligations in peacetime and in far less extreme circumstances.

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[119] United States Court of Appeals, 4th Circuit, 1 Feb. 1982, *United States* v. *County of Arlington*, 669 F. 2d 925, para. 4.

[120] CMF, p. 55, fn. 141.

[121] *Ibid*., pp. 55-56.

[122] *Ibid*., p. 56.

[123] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 40, para. 86. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 270, para. 309, and p. 277, para. 337.

2.51. The first violation of the VCDR occurred when the French authorities entered and searched the building during the period from 14 to 23 February 2012, removing several objects and
44 furnishings. On 19 July 2012, France then proceeded to attach the building *(saisie pénale immobilière)*, leaving it subject to confiscation. These measures are clearly contrary to Article 22, paragraphs 1 and 3, of the Convention.

2.52. The measures taken by France are also in breach of Article 22, paragraph 2, of the VCDR. More specifically, the peace of the mission was disturbed as a result of the searches and attachment in 2012. Furthermore, these measures impaired the dignity of the mission, especially since they were widely covered in the media, painting a false and degrading picture of Equatorial Guinea both in France and elsewhere.

2.53. France considers that "the attachment . . . affects only the right of ownership of the building and therefore cannot entail a breach of [its] inviolability"[124]. This extremely restrictive interpretation of Article 22 of the VCDR must be rejected. While it is true that, pursuant to Article 1 *(i)* of the Convention, the "premises of the mission" are those used for the purposes of the mission "irrespective of ownership", this does not mean that measures taken by the receiving State against a sending State's ownership can never constitute a breach of Article 22. Such measures can indeed violate this provision, especially when ownership is the only title enabling the sending State to use a building for the purposes of its diplomatic mission.

2.54. Attachment and confiscation, for example, seriously disturb the peace of the mission in a manner contrary to Article 22, paragraph 2, of the Convention, because they carry an ever-present risk of expulsion. This risk creates a situation of uncertainty which interferes with the proper functioning of the mission. In the present case, the effect of the unlawful criminal proceedings is that the premises of Equatorial Guinea's diplomatic mission may be sold by France at any time without the consent of the owner (Equatorial Guinea). Once sold, the premises clearly cannot be used for the purposes of the diplomatic mission. In the interim, the reality is that the building cannot be used to its fullest extent owing to the uncertainty surrounding its ongoing availability. As a result, it is not practical to continue furnishing the building or installing all the systems needed for it to function effectively and efficiently as a diplomatic mission.

45 2.55. Moreover, Article 22, paragraph 3, of the Convention prohibits the adoption of any measure of execution, expressly including attachment. Indeed, widespread State practice shows that States do not adopt measures of execution or expropriation which affect a sending State's ownership of the premises of its diplomatic mission[125]. Expropriation and other measures of confiscation are classic examples of unlawful interference in the functioning of a diplomatic mission.

2.56. Finally, the *Hirschhorn* v. *Romania* case cited by France is irrelevant to the proceedings at hand[126]. Not only were the facts in that case very specific, it is also extraordinary to claim that the régime of absolute inviolability laid down by Article 22 of the VCDR in no way bars the transfer of property owned by the sending State, because it would not entail the immediate eviction of that State from its premises. This assertion is based on the assumption that the sending State should present its defence arguments at the point of eviction, and presupposes that those

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[124] CMF, para. 3.52.

[125] E. Denza, *op. cit.*, pp. 119-120.

[126] CMF, para. 2.19.

arguments will always prevail. Subjecting a sending State to such situations is quite simply incompatible with diplomatic law.

2.57. In conclusion, Equatorial Guinea reiterates that, by entering the building at 42 avenue Foch in Paris, which has formed part of the premises of Equatorial Guinea's diplomatic mission since 4 October 2011, and by searching, attaching and confiscating it, France has violated its obligations under the VCDR.

III. In the alternative, whatever the correct interpretation of the VCDR, France has violated its obligations

2.58. As Equatorial Guinea submitted in its Memorial, even if France enjoys the discretion it claims to have over the choice of premises of diplomatic missions in general *(quod non)*, such discretion should be exercised in a manner that is reasonable, non-discriminatory and consistent with the requirements of good faith[127]. This is a far cry from how France has acted in the present
46 case, however. A careful examination of the Respondent's conduct shows that Equatorial Guinea has been subjected to treatment which is arbitrary and discriminatory, and thus contrary to the VCDR. The arbitrary and discriminatory nature of France's conduct is evidenced by at least four factors:

— the manifest errors of fact and law underlying France's initial refusal to recognize the diplomatic status of the building at 42 avenue Foch;

— France's failure to follow what it considered at the time to be the applicable procedure for recognizing the premises of diplomatic missions;

— the extraordinary shifts in France's position, since 2011, regarding the conditions and procedures to be satisfied for the building at 42 avenue Foch to acquire diplomatic status;

— France's failure to make any effort to engage in dialogue with Equatorial Guinea.

2.59. First, France's initial refusal to recognize the diplomatic status of the building at 42 avenue Foch was expressly based not on an assessment of the "two cumulative conditions" it now relies on before the Court, but on a conclusion it reached regarding the building's ownership. Indeed, in its Note Verbale of 11 October 2011, the French Ministry of Foreign Affairs refused to recognize the diplomatic status of the building, because it "f[ell] within the private domain and [was], as such, subject to ordinary law"[128].

2.60. However, as Equatorial Guinea has already amply demonstrated, the building was owned by the Equatorial Guinean State on the date in question[129]. The assessment of the French Ministry of Foreign Affairs, made without the slightest effort to consult Equatorial Guinea, was thus based on an error of fact.

2.61. Even more importantly, it is well established that ownership of a building is not conclusive when determining whether the building constitutes the premises of a diplomatic
47 mission. The VCDR does not require the sending State to own the premises: Article 1 *(i)* of the

[127] MEG, paras. 8.37-8.41.

[128] MEG, Ann. 34.

[129] See paras. 1.16-1.23 above.

Convention provides that the "premises of the mission" are those buildings used for the purposes of the mission, "irrespective of ownership". Article 21, paragraph 1, further establishes that the receiving State must either facilitate the sending State's acquisition of the premises necessary for its mission, "or assist the latter in obtaining accommodation in some other way". As Judge Gaja has observed, "[o]wnership of the premises does not necessarily belong to the sending State. Missions are often located on rented or leased property"[130]. Eileen Denza further explains that "[t]he definition in Article 1 *(i)* [of the VCDR] makes clear that the sending State need not hold title to its premises — and indeed under the laws of some States this is not permitted to a foreign State"[131].

2.62. France's initial refusal to recognize the diplomatic status of the building at 42 avenue Foch, allegedly because it was not owned by Equatorial Guinea, was thus also founded on an error of law contrary to the VCDR.

2.63. Second, when, on 11 October 2011, France refused to recognize the building at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission, it failed to comply with the procedures which France itself deemed applicable for such recognition at the time.

2.64. As has already been seen, in October 2011, France was of the view that

> "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."[132]

However, no such verification was ever carried out between the date on which the Embassy of Equatorial Guinea informed the French Ministry of Foreign Affairs of the building's assignment (4 October 2011) and the date on which the Ministry notified the Embassy of its refusal (11 October 2011).

48 2.65. Needless to say, the searches of 28 September and 3 October 2011 cannot be regarded as verification, especially since the French judicial and police authorities did not enter the building's interior. The same applies to the searches in February 2012, which took place several months after France had refused to recognize the building's diplomatic status.

2.66. Consequently, not only did France assess Equatorial Guinea's notification of assignment in a manifestly incorrect way, it also failed to comply with the recognition procedure which it considered to be applicable at the time. In the circumstances, it is clear that France's refusal to recognize the diplomatic status of the building at 42 avenue Foch was arbitrary and contrary to the VCDR.

2.67. Third, there have been some extraordinary shifts in France's position on the conditions and procedures to be satisfied for a building to acquire diplomatic status, at least as far as Equatorial Guinea is concerned. As explained above, notification that a building has been assigned for the purposes of a diplomatic mission has always been sufficient in the two countries' bilateral

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[130] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, declaration of Judge Gaja.

[131] E. Denza, *op. cit.*, p. 16.

[132] MEG, Ann. 35.

and reciprocal practice, and Equatorial Guinea had a legitimate expectation that France would adhere to that practice. Since October 2011, however, France has advanced the following contradictory views:

— On 11 October 2011, France wrote to the investigating judges (and not to Equatorial Guinea!) that "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"[133]. This means that Equatorial Guinea had to (1) acquire new premises, (2) move its Embassy offices and (3) notify France of the specific date of entry into those new premises. Thereafter, France was required to "verify" the actual assignment of the premises, then officially recognize them.

— On 28 March 2012, France wrote to Equatorial Guinea that "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 . . . Official recognition . . . is determined on the date of completion of the assignment of the said premises to the services of the diplomatic mission, i.e. at the time that they are effectively moved into"[134]. In other words, Equatorial Guinea had to (1) inform France of its intention to acquire new premises, (2) undertake to assign them for the purposes of its diplomatic mission, (3) acquire the new premises and (4) effectively move into them. Thereafter, France had to officially recognize the premises' diplomatic status, apparently without any "verification" of their actual assignment.

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— In its Counter-Memorial, France asserts that a building acquires diplomatic status if the French State does not object (or if it gives its "implicit consent") to the designation made by the sending State and if the building is "actually assigned" for the purposes of the diplomatic mission. At the same time, as noted above, France contradicts itself in claiming that "prior official notification by a sending State of its intention to assign premises to the offices of its mission is generally sufficient for the Ministry to recognize that those premises benefit from the régime of the VCDR".

2.68. The major shifts in France's position on the conditions and procedures to be satisfied for a building to acquire diplomatic status attest to the arbitrary nature of its conduct. This conduct is also discriminatory, since France lacks predictable, transparent regulations which apply generally to all sending States in France, and no other State appears to have been subjected to the treatment received by Equatorial Guinea.

2.69. It is recalled that Article 47 of the VCDR codifies the general rule that:

> "1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.
>
> 2. However, discrimination shall not be regarded as taking place:
>
> *(a)* where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;

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[133] MEG, Ann. 35.

[134] *Ibid.*, Ann. 45.

50 *(b)* where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention".

2.70. To refute the discriminatory nature of its conduct, France refers in its Counter-Memorial to only two Notes Verbales from 2016 and 2017, in which it confirmed the diplomatic status of the buildings of two States[135]. However, these Notes Verbales do not alter Equatorial Guinea's conviction that it has been subjected to arbitrary and discriminatory treatment. They do not confirm the exact procedure followed by the French Ministry of Foreign Affairs in officially recognizing the buildings in question (if there was in fact any procedure other than the sending State's notification of assignment), and the information available raises questions. The Note Verbale of 24 June 2016, for example, states that the Ministry officially recognized the building's status on 26 October 2011, whereas the effective opening date of the consulate as notified was 9 July 2012. This differs significantly from France's conduct towards Equatorial Guinea and even appears to contradict France's arguments concerning the "two cumulative conditions".

2.71. Fourth, even if France disputed Equatorial Guinea's claim of diplomatic status for the building at 42 avenue Foch, the French authorities should not have rejected that claim under those circumstances without making any effort to engage in dialogue with Equatorial Guinea or to check the facts. International law, and diplomatic law in particular, requires more than that.

2.72. Finally, even if France considers in its Counter-Memorial that Equatorial Guinea has committed an abuse of rights (an argument tantamount to acceptance of Equatorial Guinea's claim in this case that it has the right to designate the premises of its diplomatic mission), this does not give it the right to act in a manner completely contrary to Equatorial Guinea's claim of diplomatic status and inviolability for the building. In other words, France should have availed itself of the means provided by diplomatic law for dealing with possible abuse. Yet it failed to do so.

51 2.73. As the Court has had occasion to explain:

> "The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this . . . régime . . . The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic

[135] CMF, pp. 61-62, fns. 159-163.

mission and of the premises, property and archives of the mission must be respected by the receiving State."[136]

2.74. In the present case, instead of having recourse to the remedies provided for in the VCDR to counter possible abuse by the sending State or, more generally, the procedures for the peaceful settlement of disputes, France decided not to comply with the absolute rule of inviolability of the premises of diplomatic missions. Consequently, its conduct is contrary to the VCDR.

IV. Conclusions

2.75. In light of the foregoing arguments, and to conclude this chapter, Equatorial Guinea reiterates that:

— the "two cumulative conditions" argument advanced by France is unfounded and must be rejected;

— the building at 42 avenue Foch in Paris acquired the status of premises of Equatorial Guinea's diplomatic mission in France on 4 October 2011, and the coercive measures against it constitute flagrant violations of Article 22 of the VCDR;

52 — even if France did enjoy discretion over the choice of the premises of Equatorial Guinea's diplomatic mission *(quod non)*, its conduct in this case is arbitrary and discriminatory, and thus contrary to the VCDR;

— even if France considers that Equatorial Guinea has committed an abuse of rights *(quod non)*, it has adopted coercive measures which are unacceptable under the VCDR and, in so doing, has acted in a manner contrary to that Convention.

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

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CHAPTER 3

EQUATORIAL GUINEA HAS NOT COMMITTED AN ABUSE OF RIGHTS

3.1. Having failed to convince the Court that Equatorial Guinea's recourse to it is an abuse of rights[137] or that Equatorial Guinea's conduct should render its Application inadmissible, France continues to maintain that Equatorial Guinea has committed an "abuse of rights" in requiring that the inviolability and immunity of its diplomatic mission in Paris be respected.

3.2. Equatorial Guinea rejects France's insinuations that it has acted in bad faith. As stated previously, "[s]uch assertions are not merely unexpected and inappropriate in diplomatic relations; they also run counter to the fundamental principle that bad faith is not to be presumed. In any event, they are blatantly contradicted by the facts"[138]. Beyond France's rhetoric, it is clear that the other Party's assertions are not corroborated by any evidence whatsoever and risk undermining the core principles of the peaceful settlement of disputes.

3.3. This chapter first makes clear that an abuse of rights is not to be lightly presumed (**I**). It then reiterates that Equatorial Guinea has acted reasonably and in good faith (**II**), and that, in any event, there can be no abuse of rights in the present case because France has quite simply prevented the exercise of the rights in question and has itself suffered no harm (**III**).

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I. An abuse of rights is not to be lightly presumed

3.4. As France itself seems to admit, the question of the nature and precise content of the abuse of rights "doctrine" in international law is controversial[139]. It is a doctrine that the Court, in a hundred years of jurisprudence, has never applied in a case. It is therefore not surprising that France is not even capable of ascertaining the precise source of this doctrine and that its arguments are largely based on the writings of a handful of authors and on a few examples specific to investment law[140].

3.5. The controversies surrounding this doctrine invite caution in its application in a case before the Court. What is clear, however, is that an abuse of rights is not to be lightly presumed, and that any finding of an abuse of rights can only be made in exceptional circumstances.

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[137] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 336 and 337, paras. 150 and 152. See also R. Kolb, *La Cour internationale de Justice*, Pedone, 2013, p. 975 ("Practice shows that the abuse of process argument was itself usually motivated by a very unwelcome attempt to prevent the Court from entertaining an application by asserting an inadmissibility *in limine litis*" *[translation by the Registry]*).

[138] WSEG, para. 1.68.

[139] CMF, paras. 4.9-4.11.

[140] *Ibid*., paras. 4.9-4.10. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018 (II)*, p. 559, para. 162.

3.6. Indeed, the Permanent Court of International Justice noted on a number of occasions that an abuse of rights cannot be presumed[141]. As this Court stated in its Judgment of 6 June 2018 "[o]n several occasions before the Permanent Court of International Justice, abuse of rights was pleaded and rejected at the merits phase for want of sufficient proof"[142]. The Court, like its predecessor, has never rejected a request on that basis.

3.7. That an abuse of rights cannot be presumed derives from the more general principle that bad faith on the part of a State is not to be presumed, especially if such a finding would be particularly offensive or odious. Indeed, "[i]nternationally, good faith is presumed and a State is
55 entitled to rely on the word of another State. Without such a presumption, international intercourse could not continue"[143].

3.8. For this reason, as the arbitral tribunal in the *Arbitration on the Tacna-Arica Question* explained, "[a] finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion"[144]. In the words of another tribunal quoted approvingly by France: "the threshold for finding of abuse . . . is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only 'in very exceptional circumstances'"[145].

3.9. Particular caution is called for when recourse is had to the doctrine of abuse of rights which seeks to limit the exercise of rights based on positive law, especially as this doctrine is itself capable of being abused. As Lauterpacht explained:

> "There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint"[146].

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[141] See *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 30 ("such misuse cannot be presumed, and it rests with the party who states that here has been such misuse to prove his statement"); *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12 ("as a reservation must be made as regards the case of abuses of a right, an abuse which however cannot be presumed by the Court"); *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167 ("A reservation must be made as regards the case of abuses of a right . . . But an abuse cannot be presumed by the Court").

[142] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 335, para. 147.

[143] G.D.S. Taylor, "The Content of the Rule Against Abuse of Rights in International Law", *BYIL*, Vol. 46 (1972-1973), p. 334. See also *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, separate opinion of Judge *ad hoc* Ečer, pp. 119-120 ("in international law there is a presumption in favour of every State, corresponding very nearly to the presumption in favour of the innocence of every individual in municipal law. There is a *presumptio juris* that a State behaves in conformity with international law. Therefore, a State which alleges a violation of international law by another State must prove that this presumption is not applicable in some special case; but it is not possible to combat a presumption of legal conduct by another presumption").

[144] *Tacna-Arica Question (Chile/Peru)*, Arbitral Award of 4 March 1925, *Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 930 (which also emphasized that "the *onus probandi* of such a charge should not be lighter where the honor of a Nation is involved than in a case where the reputation of a private individual is concerned").

[145] CMF, para. 4.9.

[146] H. Lauterpacht, *The Development of International Law by the International Court*, Grotius Publications, 1982, p. 164.

3.10. Similarly, Kolb explained that the fact that claims based on the doctrine of abuse of rights are generally not accepted in international law

> "should come as no surprise, since the doctrine of abuse of rights is merely a fire-brigade provided for extreme interventions when more specialized arguments are not available. It stands to reason that such a doctrine remains of limited application, lest the abuse of rights principle should itself become an avenue for abuse of rights"[147].

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3.11. Such caution is especially called for in the context of diplomatic law, where the assertion of an abuse can be particularly dangerous and threaten the very existence of recognized rights[148]. That is why this "self-contained régime" of basic rules for co-operation between States includes other specific means that can be used by the receiving State if it considers there has been a violation or an abuse of some kind. The receiving State can, for example, declare the head or any other member of staff of a diplomatic mission *persona non grata*, or even break off diplomatic relations with the sending State. However, it is not possible to take countermeasures that are not permitted, such as refusing to respect the inviolability and immunity of premises of diplomatic missions[149].

3.12. In view of the foregoing, the terse statement made by France, in its attempt to relax the conditions for a finding of abuse of rights, that "[m]alicious intent and bad faith on the part of a perpetrator . . . are [criteria that are] ill suited to public international law" and that "a more objective criterion is used"[150] must be rejected. The party alleging an abuse of rights must show evidence of bad faith or malicious intent[151].

3.13. For all these reasons, an abuse of rights on the part of a sovereign State is not to be lightly presumed, and care must be taken not to level or accept such an accusation without clear and definitive proof. As will be shown below, France has not provided that proof in this case.

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II. Equatorial Guinea has acted reasonably and in good faith

3.14. In its Counter-Memorial, France again gives a biased and distorted presentation of the facts. Even if its presentation is accepted as it stands (which, as explained in Chapter 1, the Court should not do), it provides no clear or conclusive evidence in respect of the allegations of abuse of rights.

3.15. Equatorial Guinea, which is aware of and can explain the facts, continues to maintain that it has not committed any reprehensible act, let alone an abuse of rights. It would not have

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[147] R. Kolb, *Good Faith in International Law*, Hart Publishing, 2017, p. 148 (referring to the *Iron Rhine Railway* arbitration (2005) as "[a]n example for a tribunal avoiding to enter into the arguments of the parties on abuse, preferring to speak of 'different perceptions that have occasioned ancillary contentions of absence of good faith and abuse of rights' and engaging into an exercise of interpretation of the relevant provisions"). See also J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., OUP, 2012, p. 563 ("Indeed it is doubtful if [the doctrine of abuse of rights] could be safely recognized as an ambulatory doctrine, since it would encourage doctrines as to the relativity of rights and would result, outside the judicial forum, in instability").

[148] See also WSEG, para. 1.78.

[149] See paras. 2.15, 2.72-2.74 above.

[150] CMF, para. 4.11.

[151] See also *The M/V "Norstar"* Case *(Panama* v. *Italy)*, ITLOS, Judgment of 10 April 2019, paras. 251, 258, 271.

brought these proceedings if it had done so. Before once again clarifying the facts surrounding its conduct in relation to the premises of its diplomatic mission at 42 avenue Foch, it believes it is worth making four general observations.

3.16. First, in its attempt to evade responsibility for the internationally wrongful acts it has committed in this case, France continues to contest and discredit the explanations of Equatorial Guinea and calls into question its good faith and dignity, in a manner that is unacceptable in international relations.

3.17. Second, as we have seen above, the arguments of France in respect of Equatorial Guinea's conduct are closely linked to the ongoing criminal proceedings against the Vice-President of Equatorial Guinea — proceedings which Equatorial Guinea considers contrary to international law. Moreover, these arguments are based on "facts" established by French courts in the course of those criminal proceedings, but they cannot be accepted as an objective truth. Equatorial Guinea rejects them[152].

3.18. Third, in alleging an abuse of rights, France refers not only to the assertion by Equatorial Guinea of rights under the VCDR, but also to its seisin of the Court to protect those rights. France is thus attempting to describe the present proceedings as an abuse of process and to resuscitate an argument already rejected by the Court. The fact that France is continuing to put
58 forward the argument that Equatorial Guinea is acting abusively by instituting proceedings based on the Optional Protocol, even though the Court has indicated provisional measures on that basis, is not only regrettable, but also illustrates the weakness of the other Party's position.

3.19. Finally, probably aware that its allegations are speculative, France suggests that no proof of malicious intent or bad faith on the part of Equatorial Guinea is required[153]. That has nonetheless not stopped France from arguing that Equatorial Guinea conceived a "strategy to use the principle of diplomatic immunities as a contrivance for the benefit of an individual who is not a diplomat, and thereby to obstruct the criminal proceedings initiated against him in France and avoid the potential confiscation of the personal property he has acquired there"[154]. In any event, France has not met the requirements of proof to establish an abuse of rights. Moreover, certain facts on which France bases its allegations do not in fact show any abuse of rights, but rather the legitimate efforts of Equatorial Guinea to ensure its rights are respected by peaceful means.

3.20. As before, France relies on a timeline of events which, in its view, is sufficient in itself to establish its allegations of abuse of rights[155]. However, this timeline does not demonstrate the existence of any abuse.

3.21. First, France neglects to mention that the building at 42 avenue Foch was legally acquired by Equatorial Guinea before the French authorities and courts took coercive measures against the building. At the time of the first searches, 28 September 2011, the building was no longer the property of Mr. Teodoro Nguema Obiang Mangue. As Equatorial Guinea has already

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[152] See paras. 1.7-1.10 above.

[153] CMF, paras. 4.10-4.11.

[154] CR 2018/2, p. 53, para. 21 (Pellet).

[155] CMF, para. 4.15.

clarified, it acquired the building because it meets all the requirements to serve as the premises of its diplomatic mission in Paris, both by way of its location and its design[156].

59 3.22. Nor does France acknowledge that on 17 October 2011, namely after the first searches on 28 September and 3 October 2011, the French tax authorities officially recorded and registered the acquisition by Equatorial Guinea of the shareholder rights in the five Swiss companies which co-owned the building at 42 avenue Foch[157]. Furthermore, they accepted the payment of taxes relating to this acquisition without demur[158]. The capital gains declaration registered by the French tax authorities on 20 October 2011 names the Republic of Equatorial Guinea as the "purchaser" of the securities of those five companies[159]. What is more, as shown above, on 22 October 2013 the Paris *Tribunal de grande instance* expressly identified Equatorial Guinea as the owner of the building[160]. Under these circumstances, it is extraordinary that France still claims that it has not recognized Equatorial Guinea's right of ownership of the property[161].

3.23. France also refers to the letter of February 2012 from the President of Equatorial Guinea to his French counterpart and contends that in that letter the President of Equatorial Guinea "explicitly acknowledged that the reason for selling the building to the Government of Equatorial Guinea and invoking its diplomatic nature was to protect the building from the criminal proceedings against his son"[162]. But France distorts the content and object of the letter. It does not contain an admission of any reprehensible act on the part of Equatorial Guinea, which did not act inappropriately in acquiring the building by means of an actual transfer against payment of a market price. The letter does, however, show that the Head of State of Equatorial Guinea was in no doubt about the legitimacy of his country's position and that he had no reservations in writing to his counterpart in this regard. It is surprising that, even though France emphasizes the authenticity of the statements made in this letter about the acquisition of the building, it will not accept that ownership of the building was also legally transferred as indicated.

60 3.24. What is equally remarkable is the fact that, having asked the Court not to rule on Equatorial Guinea's right of ownership of the building[163], France nevertheless suggests that this question "is of particular importance"[164]. In any event, as Equatorial Guinea explained above, the question of ownership is relevant in this case because it is the title which allows it to use the building for the purposes of its diplomatic mission, and because it was on (erroneously cited) grounds of ownership that France refused to recognize the diplomatic status of the building in October 2011.

3.25. In addition, France refers to some alleged inconsistencies in the diplomatic correspondence and the statements made by Equatorial Guinea with regard to the date on which the building at 42 avenue Foch was acquired and how it was used. Occasional use of old stationery is not sufficient to suggest, let alone establish, an abuse of rights. As Equatorial Guinea has already

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[156] MEG, para. 2.11. See also para. 1.19 above.

[157] MEG, para. 2.21.

[158] *Ibid*., paras. 2.23-2.24.

[159] *Ibid.*, para. 2.25.

[160] See para. 1.21 above.

[161] CMF, para. 4.31.

[162] *Ibid*., para. 4.39.

[163] *Ibid.*, para. 4.45.

[164] *Ibid*., para. 4.28.

explained, its position has been constant: it acquired the building on 15 September 2011, and the building acquired diplomatic status on 4 October 2011[165]. As regards the Note Verbale of 4 October 2011, Equatorial Guinea has had the opportunity to explain that at times, in the past, the building was used to house its diplomatic staff and other dignitaries on special mission[166]. But Equatorial Guinea does not claim that the building enjoyed diplomatic status in any way before that date.

3.26. To contend, as France has done[167], that Equatorial Guinea never protested that the searches conducted in the building impeded its diplomatic use is fallacious. Equatorial Guinea protested through its Ambassador on the spot the very first time the French authorities came to the building, that is on 28 September 2011[168]. It protested subsequently, for example, in the letter of 14 February 2012 from the President of Equatorial Guinea to his French counterpart[169], in the Note Verbale of 14 February 2012 from the Embassy of Equatorial Guinea[170], in the Note Verbale
61 of 14 February 2012 from the Ministry of Foreign Affairs of Equatorial Guinea[171] and in the letter of 9 March 2012 from the Ministry of Justice of Equatorial Guinea[172]. Moreover, it is precisely these concerns that obliged Equatorial Guinea to request the indication of provisional measures by the Court to ensure the uninterrupted functioning of its Embassy.

3.27. France's insinuation that Equatorial Guinea appointed Mr. Teodoro Nguema Obiang Mangue to the post of Second Vice-President with the aim of shielding him from the French courts is probably the most offensive element in the Respondent's Counter-Memorial[173]. As Equatorial Guinea explained in its Memorial[174], that appointment was announced as part of a broader government reshuffle following changes to the Basic Law of Equatorial Guinea, as approved by a referendum in 2011. This constitutional reform provides for the creation of several government institutions through which the State performs its functions. These include the Vice-President of the Republic, the Senate, the Chamber of Deputies, a Council of Ministers, an Accounts' Tribunal, and a National Council for Economic and Social Development. The day Mr. Teodoro Nguema Obiang Mangue was appointed Second Vice-President in charge of Defence and State Security, several other appointments were announced, including the Prime Minister (in charge of administrative co-ordination), the Vice-Prime Minister and the First Vice-President. To suggest, as France has done, that all these acts were orchestrated by Equatorial Guinea in the light of the criminal proceedings is completely baseless.

3.28. What is more, as Equatorial Guinea has already noted[175], France's position has not been consistent since the beginning of the dispute. While on the one hand it maintains that the building at 42 avenue Foch is neither the property of Equatorial Guinea nor the premises of its diplomatic mission, it nevertheless allows its authorities to go there to obtain visas and its tax

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[165] See paras. 1.19 and 2.48 above.

[166] See para. 1.33 above.

[167] CMF, para. 4.26.

[168] See para. 1.26 above.

[169] MEG, Ann. 39.

[170] *Ibid.*, Ann. 37.

[171] *Ibid.*, Ann. 38.

[172] *Ibid.*, Ann. 43.

[173] CMF, para. 4.19.

[174] MEG, para. 2.3.

[175] *Ibid.*, para. 2.13.

62 authorities to demand the payment of property taxes on it. When Equatorial Guinea transmitted to the French Ministry of Foreign Affairs the 2013 interim order recognizing the building as premises of the diplomatic mission of Equatorial Guinea, the Ministry made no protest[176]. During the hearings on the request for provisional measures, France also acknowledged, through its Agent and counsel, that it had afforded the building protection under the VCDR on 13 October 2015 on account of a demonstration and on 24 April 2016 on the occasion of the presidential elections in Equatorial Guinea[177]. Moreover, in more recent Notes Verbales, the French Ministry of Foreign Affairs addressed itself to the Embassy of Equatorial Guinea located at "42 avenue Foch".

3.29. To conclude, the alleged facts on which France seeks to base its arguments relating to abuse of rights are merely "disputable inferences"[178]. They do not provide a shred of credible evidence that the acts of Equatorial Guinea "can only be construed as Equatorial Guinea reacting to developments in the criminal proceedings" initiated unlawfully against the Vice-President of Equatorial Guinea[179], and France has already admitted that "the individual elements [it] has brought to [the] Court's attention" cannot justify the allegations of abuse of rights without the further biased interpretation it puts forward[180]. Evidently, the facts do not meet the requirements of proof necessary to establish an abuse of rights.

III. There can be no abuse of rights because France prevented the exercise of the rights in question and it has suffered no harm

3.30. From the very beginning France has refused to recognize the immunities claimed by Equatorial Guinea and, consequently, it has prevented Equatorial Guinea from exercising the rights that belong to it. Under these circumstances, and notwithstanding the fact that France's accusation of abuse of rights suggests that it acknowledges the existence of the right of Equatorial Guinea to 63 choose itself the premises of its diplomatic mission in Paris, it is clear that no abuse of rights can be found, for the simple reason that the rights in question have never been exercised.

3.31. France itself admits that no abuse of rights has been committed. Indeed, it refers to Equatorial Guinea's claims with regard to the immunity of the premises of its diplomatic mission as an "*attempt* . . . to abuse the rights and privileges afforded by international law"[181]. Similarly, it accuses Equatorial Guinea of "*seeking* to abuse its international rights and obligations"[182]. At the

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[176] Embassy of Equatorial Guinea, Note Verbale No. 863/13, 25 Oct. 2013, transmitting the order of the Paris *Tribunal de grande instance* of 22 Oct. 2013 (**Ann. 6**).

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

[178] See para. 3.8 above.

[179] CMF, para. 4.24.

[180] CR 2018/2, p. 53, para. 21 (Pellet).

[181] CMF, para. 4.3 (emphasis added).

[182] POF, para. 87 (emphasis added). See also POF, para. 79; CR 2018/2, p. 48, para. 10 ("The *attempt* to quickly dress the building up as diplomatic premises") (emphasis added); *ibid.*, p. 55, para. 27 ("[Equatorial Guinea] *s[ought]* to pass off 42 avenue Foch as diplomatic premises") (emphasis added); *ibid.*, p. 55, para. 30 ("Equatorial Guinea is *seeking* to abuse its international rights and obligations") (emphasis added).

same time, France accepts that the crucial element for an abuse of rights to have occurred is that "a State exercises a right"[183].

3.32. It is precisely because France did not allow Equatorial Guinea to exercise its rights under the VCDR that it cannot claim to have suffered any harm itself. Yet the existence of such harm has been described as a "fundamental element in the implementation of that principle [of abuse of rights]"[184]. As Judge Read said: "The doctrine of abuse of right cannot be invoked by one State against another unless the State which is admittedly exercising its rights under international law causes damage to the State invoking the doctrine"[185].

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3.33. Unfortunately, as France readily admits, neither its police nor its judicial organs were discouraged from entering the Embassy of Equatorial Guinea and directing its attachment and confiscation. No harm was caused to France by Equatorial Guinea's mere invocation of the VCDR in order to ensure respect for its rights under international law.

3.34. It goes without saying that the present proceedings cannot be considered as constituting harm to France. A sending State might sometimes disagree with a receiving State on the question of whether certain premises benefit from immunity under international law, and the fact that the sending State takes a position that is opposed to that of the receiving State does not constitute an abuse of right. The Court has already recognized this in rejecting France's arguments on an alleged abuse of process by Equatorial Guinea[186]. One might add, moreover, that the Optional Protocol exists precisely with a view to settling such disputes.

IV. Conclusions

3.35. As demonstrated above, France's arguments relating to an alleged abuse of rights by Equatorial Guinea are not only dangerous and controversial. They are also clearly unfounded in the

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[183] CMF, paras. 4.4 and 4.10. See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, declaration of Judge Keith, p. 279, para. 6 ("Those principles [good faith, abuse of rights and *détournement de pouvoir*] require the State agency in question to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors"); R. Kolb, *Good Faith in International Law*, Hart Publishing, 2017, pp. 133-134 ("The core point is that a subjective right or a competence is *exercised* in some way that the legal order disapproves"); B. O. Iluyomade, "The Scope and Content of a Complaint of Abuse of Right in International Law", *Harvard International Law Journal*, Vol. 16, 1975, p. 48 ("Since the principle involves the exercise of a right, it does presuppose an action"); A. Kiss, "Abuse of Rights", in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, 2006, para. 3 ("The concept [of abuse of rights] also implies a distinction between the existence of an individual right and the exercise of such a right"). In formulating the prohibition of abuse of right, the Appellate Body of the World Trade Organization also refers to "[a]n abusive *exercise* by a Member of its own treaty right", see *United States — Import Prohibition of certain Shrimp and Shrimp Products*, Report of the Appellate Body, AB-1998-4, 12 Oct. 1998, para. 158 (emphasis added).

[184] A. Kiss, *op. cit.*, para. 31. See also B. O. Iluyomade, *op. cit.*, p. 75 (referring to "The Presence of Injury" as an element to be taken into account in establishing an abuse of right). In any event, any abuse of right must be "of serious consequence" and "established by clear and convincing evidence". See *Trail Smelter* case *(United States, Canada)*, Award of 11 March 1941, *RIAA*, Vol. 3, p. 1965.

[185] *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, separate opinion of Judge Read, p. 37. See also separate opinion of Judge Klaestad, p. 31 ("For the purpose of the present case, it is unnecessary to express any views as to the possible applicability of the notion of abuse of right in international law. All I need say is that it would, if so applicable, in my view presuppose the infliction of some kind of injury upon the legitimate interests of Guatemala by the naturalization of Mr. Nottebohm. But it is not shown that an injury of any kind was thereby inflicted upon Guatemala, which at that time was a neutral State").

[186] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 336, para. 150.

present case. France's accusations are completely false, and the other Party has been unable to support its position with sufficient proof. For these reasons, those accusations must be dismissed.

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CHAPTER 4

FRANCE'S INTERNATIONAL RESPONSIBILITY

4.1. After some general comments (**I**), this chapter briefly responds to Chapter 5 of France's Counter-Memorial (**II**).

I. General comments

4.2. Chapter 9 of Equatorial Guinea's Memorial is devoted to the question of the international responsibility incurred by France as a result of the breach of its obligations to Equatorial Guinea. Equatorial Guinea maintains all its arguments in this regard.

4.3. Generally speaking, the Parties agree on the subject-matter of the dispute now before the Court. However, Equatorial Guinea does not believe that most of the harm mentioned in Chapter 9 of the Memorial is no longer relevant[187]; on the contrary, the harm caused to Equatorial Guinea's dignity and to the conduct of its diplomatic relations in France still exists, as do the associated financial losses.

4.4. Following the Court's Judgment on the preliminary objections, Equatorial Guinea's claims in this case are confined to France's violations of the VCDR. That said, those violations must be analysed in light of the unlawful criminal proceedings in relation to which they were committed, and in the context of France's refusal to take the necessary measures to ensure that its courts do not violate the immunity of Equatorial Guinea's diplomatic mission and property in France. A State cannot rely on the principle of the separation of powers to justify a breach of international law. Indeed, according to the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts, "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations"[188]. France's international responsibility in the present case is aggravated by its refusal to settle the dispute amicably.

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4.5. On the subject of its responsibility, France, no doubt aware of the internationally wrongful acts it has committed, endeavours to obscure a clear situation by putting forward a complex series of fallback positions. First, it states that it has not committed any violation of international law. Then it maintains that any breach is not of a continuing character; that Equatorial Guinea's contribution to the violations is such that no reparation is required; and, finally, that reparation consisting in a finding that France has violated the VCDR would suffice[189]. These arguments are addressed below.

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[187] CMF, para. 5.2.

[188] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 32 (Irrelevance of internal law).

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

4.6. Equatorial Guinea recalls what it stated in its Memorial regarding the various forms of reparation for harm caused by an internationally wrongful act. To summarize:

— France is under an obligation to lift the attachment of the premises of Equatorial Guinea's diplomatic mission at 42 avenue Foch[190]. It must also cancel the confiscation of the premises ordered on 27 October 2017.

— France must give satisfaction to Equatorial Guinea for the search, attachment and confiscation of the building, including guarantees of non-repetition[191].

67 — France is obliged to compensate the material and moral harm caused, and Equatorial Guinea reserves the right to request, at a later stage of the proceedings, that it be awarded an appropriate amount[192].

— France still has a duty to perform its obligations under the VCDR[193].

II. The content of France's international responsibility

4.7. In its Counter-Memorial, France divides its arguments into two parts. First, it contends that Equatorial Guinea has failed to demonstrate the existence of harm. Second, it asserts that even if the Court decides that France has committed an internationally wrongful act, no reparation is required.

4.8. France claims that "[t]he only harm mentioned in the Memorial which could be related to the VCDR is that which is said to have resulted from the searches carried out at the premises and from the non-recognition of the premises' diplomatic status"[194]. Such harm is certainly covered, but it is not the only harm. The attachment of the building at 42 avenue Foch, followed by its confiscation, have also harmed Equatorial Guinea.

4.9. To support its position, France seeks to make a distinction between the use of the premises at 42 avenue Foch for the purposes of Equatorial Guinea's diplomatic mission and the alienability of the property. On the basis of that distinction, France concludes that "[t]he alleged harm relating to the attachment of the building at 42 avenue Foch . . . falls outside the scope of the dispute over which the Court has jurisdiction pursuant to the Judgment of 6 June 2018"[195]. France contends in this regard that "the purpose of the VCDR is not to protect ownership of immovable
68 property, by a State or any other person, but to protect the use of premises for diplomatic purposes"[196].

4.10. As Equatorial Guinea explained in **Chapter 2**, the distinction made by France between the use of the premises of the diplomatic mission and their alienability is artificial and incompatible

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[190] MEG, para. 9.26.

[191] *Ibid*., paras. 9.31-9.33.

[192] *Ibid*., paras. 9.34-9.37.

[193] *Ibid*., para. 9.38.

[194] CMF, para. 5.4.

[195] *Ibid*., para. 5.3.

[196] *Ibid*.

with the VCDR[197]. A measure of execution adopted by the receiving State which affects the property of the sending State on the premises of its diplomatic mission is a flagrant violation of Article 22, paragraphs 2 and 3, of the Convention.

4.11. France then addresses Equatorial Guinea's arguments concerning "the searches carried out at 42 avenue Foch", which "infringed the inviolability of the premises of its diplomatic mission"[198]. Equatorial Guinea of course accepts that the circumstances in the case concerning *United States Diplomatic and Consular Staff in Tehran* were very particular, but the applicable principle is the same. In the present case, the representatives of the receiving State (France) ignored the requests of the sending State (Equatorial Guinea) and entered the premises of the diplomatic mission without authorization.

4.12. Equatorial Guinea no longer insists on the question of the searches of 28 September and 3 October 2011[199], the Court having decided that it does not have jurisdiction to decide the aspect of the dispute relating to France's violations of the immunity of State property. As regards the searches of 14 and 24 February, France maintains that Equatorial Guinea does not claim that the movable property seized belonged to its diplomatic mission[200]. That is correct, but the seizure of the property is nonetheless unlawful, since it is the result of the French authorities entering the building in breach of Article 22 of the VCDR.

4.13. France claims, surprisingly, that "[i]n the present proceedings, the dispute between the Parties concerns an act which took place at a specific point in time: France's refusal on 11 October 2011 to grant Equatorial Guinea's request of 4 October 2011 to consider the building at 42 avenue Foch as diplomatic premises"[201]. Equatorial Guinea's subsequent requests are, according to France, but a mere repetition, which does not give rise to a continuing unlawful act[202].

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4.14. The fact that a request is repeated does not affect the continuing character of the violation. On the contrary, it would be artificial to regard what happened after the refusal of 11 October 2011 as merely the effect of an instantaneous act, as France suggests. There is a continuing unlawful refusal to recognize the building at 42 avenue Foch as the premises of Equatorial Guinea's diplomatic mission, which will persist until recognition is granted in accordance with international law. In any event, there would at the very least be a series of unlawful refusals, each giving rise to an internationally wrongful act.

4.15. It is therefore appropriate for the Court to adjudge and declare that France must cease its unlawful non-recognition of the building at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission.

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[197] See paras. 2.53-2.56 above.

[198] CMF, para. 5.5.

[199] *Ibid*., para. 5.6.

[200] *Ibid*., para. 5.7.

[201] *Ibid*., para. 5.9.

[202] *Ibid*.

4.16. France's observation that "the Applicant offers no concrete evidence that any damage was caused by a breach of the security of the premises in question"[203] disregards the fact that France's non-recognition of the building's diplomatic status means that, legally speaking, the building is not inviolable and thus does not require special protection in the eyes of the French authorities. Its inviolability has not been respected on numerous occasions, and the threat of further breaches remains. The same holds as regards the lack of special protection, which leaves the diplomatic mission exposed to future intrusions. Indeed, in recent months in particular, there have been demonstrations in the building's vicinity with the potential to turn violent and cause damage to the mission. It is not necessary to demonstrate that incursions or material damage have actually occurred for Equatorial Guinea to suffer harm. Uncertainty is bound to affect the proper functioning of the diplomatic mission.

70 4.17. As Equatorial Guinea has already explained in its written pleadings, France's conduct in this case has harmed the dignity of Equatorial Guinea's diplomatic mission and, as a result, the dignity and honour of Equatorial Guinea[204]. The failure to respect the immunity and inviolability of the mission and the insulting (widely publicized) reasons given by France to justify its conduct have caused significant non-material harm to Equatorial Guinea[205]. As noted by the umpire in the *Lusitania* cases (and by this Court), non-material injuries:

> "are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages"[206].

4.18. The material harm suffered by Equatorial Guinea results from the fact that it cannot fully and safely use the building at 42 avenue Foch as premises of its diplomatic mission. The building was acquired by Equatorial Guinea to serve that purpose. A situation in which it cannot be used to that end brings with it financial losses, particularly in terms of acquisition and maintenance costs, and taxes paid.

4.19. France lists, as briefly as possible, the reasons why guarantees of non-repetition are not necessary in the circumstances of this case[207]. As has already been demonstrated in this Reply, none of those reasons is relevant. France then refers to the jurisprudence of the Court to argue that the ordering of such measures presupposes "special circumstances" and that "there is no reason to **71** suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed"[208].

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[203] CMF, para. 5.11.

[204] See, for example, RPMEG, paras. 13, 17; MEG, para. 9.36; WSEG, para. 1.49.

[205] The Court has stated that failure to respect immunity and inviolability may cause moral injury. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 31, para. 75; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 238, para. 174.

[206] *Opinion in the Lusitania Cases, Award of 1 November 1923, RIAA*, Vol. VII, p. 40. See also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, pp. 334-335, para. 24.

[207] CMF, para. 5.15 ("Guarantees of non-repetition . . . would not be appropriate in view of the circumstances, i.e. the small number of acts at issue, the fact that they are all connected to the same judicial proceedings, the inconsistencies in Equatorial Guinea's position regarding the assignment of the premises, and the numerous indications of an abuse of rights.").

[208] *Ibid*.

4.20. Equatorial Guinea believes that there are special circumstances in this case requiring France to give guarantees of non-repetition, taking into account, *inter alia*, the arbitrary and discriminatory nature of the other Party's conduct towards Equatorial Guinea. A further reason why it is necessary for guarantees of non-repetition to be ordered is that France has persistently sought refuge in the principle of the separation of powers, which, it claims, prevents it from acting while its justice system is seised of the matter. Equatorial Guinea is not questioning the independence of the French judiciary. However, France's recourse to this domestic law argument to avoid any possible or permissible intervention to ensure that international law is respected (as is the case in other States), coupled with its refusal to find an amicable solution to the dispute, make guarantees of non-repetition necessary. The fact that the Court indicated provisional measures attests to this. An order of non-repetition is the only effective way of ensuring that France will fulfil its obligations under the VCDR.

4.21. France also refers to Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts to suggest that Equatorial Guinea's actions and omissions must be taken into account in determining satisfaction and reparation[209]. Further, France contends (without developing this argument) that in this case the causal link between the internationally wrongful act and the injury is affected by Equatorial Guinea's conduct[210]. The other Party asserts that Equatorial Guinea created the situation of harm "by claiming to have transferred, as from 27 July 2012, certain activities to a building which it knew to be the subject of judicial proceedings"[211]. And it reiterates its argument relating to abuse of rights[212]. These arguments must be rejected.

72 4.22. Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts provides:

> "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."

4.23. France fails to refer to paragraph 5 of the commentary on that provision, which concerns the strict conditions in which account must be taken of the contribution to the injury:

> "Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights. While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being 'serious' or 'gross', the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case. The phrase 'account shall be taken' indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case."

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[209] CMF, paras. 5.16-5.17.

[210] *Ibid*., para. 5.16.

[211] *Ibid*., para. 5.17.

[212] *Ibid*.

4.24. As Equatorial Guinea has already explained, the acquisition of the building at 42 avenue Foch and its assignment for the purposes of Equatorial Guinea's diplomatic mission occurred well before the criminal proceedings were initiated and well before coercive measures were taken against the building. Equatorial Guinea has always acted reasonably and in good faith, and in accordance with its consistent position that the building constituted the premises of its diplomatic mission. France has therefore failed to demonstrate that, through intentional or negligent actions, Equatorial Guinea has contributed to the harm which has been caused to it.

4.25. Lastly, France addresses the forms of reparation claimed by Equatorial Guinea[213]. In this regard, the other Party contests the fact that Equatorial Guinea has reserved the right to specify the amount of reparation at a later stage of the proceedings. However, this is a normal and established practice before the Court. France further states that the building at 29 boulevard de Courcelles could readily serve as premises of Equatorial Guinea's diplomatic mission. This suggestion is symptomatic of the contempt with which France has treated Equatorial Guinea during the present proceedings. France, as the receiving State, cannot decide for Equatorial Guinea, the sending State, which premises are appropriate for Equatorial Guinea's diplomatic mission.

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[213] CMF, paras. 5.18-5.23.

SUBMISSIONS

75 For the reasons set out in its Memorial and in this Reply, the Republic of Equatorial Guinea respectfully requests the International Court of Justice to adjudge and declare that:

(i) by entering the building at 42 avenue Foch in Paris used for the purposes of the diplomatic mission of the Republic of Equatorial Guinea in Paris, and by searching, attaching and confiscating that building, its furnishings and other property therein, the French Republic is in breach of its obligations under the Vienna Convention on Diplomatic Relations;

(ii) the French Republic must recognize the status of the building at 42 avenue Foch in Paris as premises of the diplomatic mission of the Republic of Equatorial Guinea, and, accordingly, ensure its protection as required by the Vienna Convention on Diplomatic Relations;

(iii) the responsibility of the French Republic is engaged on account of the violations of its obligations under the Vienna Convention on Diplomatic Relations;

(iv) the French Republic has an obligation to make reparation for the harm suffered by the Republic of Equatorial Guinea, the amount of which will be determined at a later stage.

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76 Equatorial Guinea reserves the right to modify or amend these submissions, as appropriate, in accordance with the provisions of the Statute and the Rules of Court.

The Hague, 8 May 2019

(Signed) Mr. Carmelo NVONO NCA,
Ambassador of the Republic of Equatorial Guinea
to the Kingdom of Belgium and the Netherlands,
Agent of the Republic of Equatorial Guinea.

77

ATTESTATION

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

The Hague, 8 May 2019

(Signed) Mr. Carmelo NVONO NCA,
Ambassador of the Republic of Equatorial Guinea
to the Kingdom of Belgium and the Netherlands,
Agent of the Republic of Equatorial Guinea.

79

LIST OF ANNEXES

1 Paris *Tribunal de grande instance*, 32nd *Chambre correctionnelle*, judgment of 27 October 2017 (extracts)

2 Paris *Cour d'appel*, Notice of hearing, 2[6] February 2019

3 Professional lease, 5 June 1980

4 Letter from the Embassy of Equatorial Guinea to Mr. de Pesquidoux, 12 August 1999; letter from the Embassy of Equatorial Guinea to CDR Créances, 7 October 1999

5 Letter from Haussmania agency to the Ambassador of Equatorial Guinea, 1 April 2010

6 Embassy of Equatorial Guinea, Note Verbale No. 863/13, 25 October 2013, transmitting the interim order of the Paris *Tribunal de grande instance* of 22 October 2013

7 Attestation of the Minister for Foreign Affairs of the Republic of Equatorial Guinea, 30 April 2019